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DIVISION ONE

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHEUK CHHANN and THOAI-HUONG NGO,
as Personal Representatives of the ESTATE OF
TRUNG D. NGO, Deceased, and CHEUK CHHANN,
an individual,

Appellants,

v.

THE STATE OF WASHINGTON,
FRANK JAMES WILLING, JR., an individual, and
MINE HER, an individual,

Respondent.

APPELLANTS' OPENING BRIEF

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A. INTRODUCTION

The trial court erred in dismissing this matter on summary judgment. Instead, the State's affirmative discretionary immunity defense should have been dismissed for three reasons. First, the defense of discretionary immunity does not apply to the group of state agents at fault in this case. Second, even if the engineers did qualify for discretionary immunity, the *Evangelical* factors weigh heavily against finding discretionary immunity in this case. Finally, the state's main argument for discretionary immunity in this case relies exclusively on a speculative opinion, based entirely upon yet another speculative opinion. Accordingly, this Court should remand and reverse, so a jury can determine the looming issues of fact in this case.

This is not a typical roadway design case. In this instance, WSDOT was on notice of the cross-over accident dangers posed by SR 18 and assigned three specific engineers, Gary L. McKee, Ronald Q. Anderson, R.D. Aye, and J.L. Lutz, to make the roadway safe. The 1992 Design Report documents the intent of the re-design effort to "reduce the

severity of accidents at . . . locations with histories of high accident rates.”¹

Under Washington law, the State is obligated to take reasonable steps to remedy roadways that pose a heightened level of risk. *See* WPI 140.02. These general tort principles were recently affirmed by the Supreme Court in *Authrich v. King County*, 186 Wn. App. 1023 (Jan. 28, 2016). In this regard, as of 1992, SR 18 was noted as being an exceptional danger for cross-over accidents. Based upon engineering level operational decisions about the design of SR 18, WSDOT failed to install a median barrier between MP 20.95-22.2.

This case does not involve high-level executive policy decision making. In support of the underlying motion for summary judgment, the State submitted the declarations of current WSDOT employees, entirely premised on speculation, opining that back in 1992: (1) the precise accident location did not qualify as a High Accident Location “HAL” under the Priority Array system, (2) installing median barriers would cost “\$18-25 million” and therefore (3) never would have been approved by the Legislature. All of these propositions are faulty and do support a discretionary immunity defense for the following reasons.

¹ CP at 60

First, in relation to HALs, the Priority Array process uses calculations to identify dangerous roadways for the WSDOT engineers to study and identify the need for roadway “*spot*” safety improvements. The qualification of a precise location as a “HAL” does *not* determine Legislative funding. It only flags areas for engineering “*spot*” study. In this case, the assigned engineers were charged with the responsibility evaluating *all* of SR 18, including MP 20.95-22.2. Therefore, any alleged “HAL” designation is irrelevant. This case involves a challenge to the engineer level decisions, which do not qualify for discretionary immunity, without regard to the HAL designation process.

Second, the State’s proposition that the installation of median would have cost “\$18-25 million” is speculative, and not supported by any evidence. The most expensive design alternative that was proposed (as documented in the 1992 Design Report) maxed out at \$18 million and included many more enhancements than just installing median barriers between MP 20.95-22.2. The 1992 Design Report itself reveals a cost-per-mile expense of only **\$978,000**. The Ngo family’s expert was prepared to explain that the installation of median barriers in 1992 would have been in line with these less expensive project expenditures.

Third, the State's discretionary immunity defense is premised upon a WSDOT employee's speculation that the Legislature allegedly would not have approved the median barrier project if the costs were an additional \$18-25 million. This speculative opinion about the Legislature is not relevant to these proceedings as discretionary immunity precludes re-litigating *actual* legislative decisions in the trial courts. Here, there is no legislative decision at issue being challenged. Moreover, the State's proposition that the Legislature would not have installed a median barrier relies upon the faulty and speculative "\$18-25 million" project calculation. The State has submitted *no* evidence about that the Legislature allegedly would or would not have funded is the project only cost **\$978,000** per mile.

This case does not violate separation of powers principles just as it does not involve the re-litigation of any *actual* legislative decisions. A jury would be presented a spirited debate between conflicting engineering judgments via the conflicting testimony of roadway experts. The evidence will prove that the engineering level decisions were negligent, and contributed to the accident that killed Troung Ngo and seriously injured Cheuk Chhann. For these reasons, this case should be decided by a jury and is not usurped by the discretionary immunity defense. The

discretionary immunity defense should have been dismissed and this matter permitted to proceed to trial.

B. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by granting a CR 56 motion regarding the State’s discretionary immunity defense.

Issue 1: Should this Court reverse the trial court’s dismissal of this claim based upon the discretionary immunity defense? **Yes.**

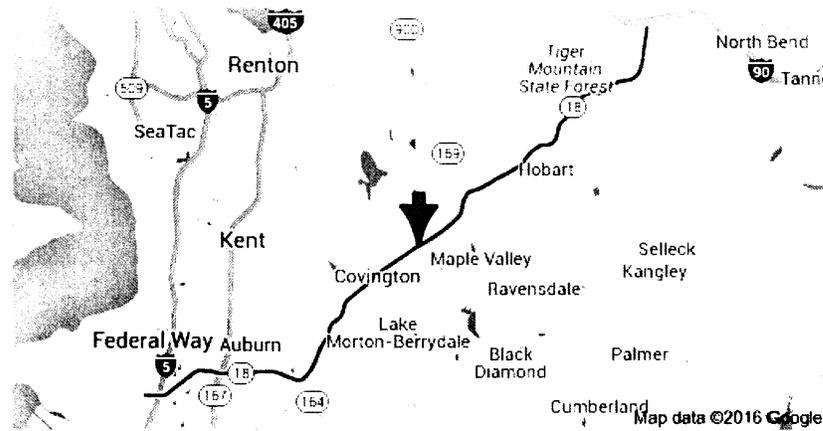
Assignment of Error 2: The trial court erred by denying the Ngo family’s motion regarding the State’s discretionary immunity defense.

Issue 2: Should this Court reverse the trial court’s denial of the motion to dismiss the State’s discretionary immunity defense? **Yes.**

C. STATEMENT OF THE CASE

State Route 18 (SR 18) is a 28.41-mile-long (45.72 km) state highway located in southwest King County. The highway travels northeast, primarily as a controlled-access freeway, from an intersection with SR 99 and an interchange with Interstate 5 (I-5) in Federal Way through the cities of Auburn, Kent, Covington, and Maple Valley. SR 18 becomes a two-lane rural highway near Tiger Mountain as it approaches

its eastern terminus, an interchange with I-90 near the cities of Snoqualmie and North Bend. A map of SR 18 reflects the following route:



SR 18 was established during the 1964 state highway renumbering as the successor to the Auburn–Federal Way branch of Primary State Highway 5 (PSH 5) and the Auburn–North Bend branch of PSH 2, which were created in 1931 and 1949, respectively. The initial two-lane highway, named the Echo Lake Cutoff, was completed in December 1964 after the opening of a section around Tiger Mountain, which would later be the site of over 170 accidents in the 1980s. SR 18 was gradually widened into a four-lane freeway beginning in Auburn in 1992 and most recently finishing in Federal Way in 2007. Expansion of SR 18 from a two-lane rural road to a four-lane controlled-access freeway began in 1992 response to multiple fatalities in over 170 accidents in a ten-year period, giving the highway a reputation of being a “dangerous roadway”.

SR 18 includes mileposts (MP) that extend from MP 1 to MP 27.9, the point at which SR 90 connects. According to the 1992 Design Report, the areas north of the Issaquah-Hobart Road (MP 20.02) to Interstate 90 were specifically designated for safety improvements.² The Design Report documented the areas of emphasis upon SR 18:

Accidents and Safety

The SR 18 corridor has been divided into two distinct areas for the purposes of evaluating existing accident and safety problems and determining appropriate safety improvements. Between S.E. 304th Street and Issaquah-Hobart Road, short-term improvements are desired

3

* * *

since construction of the ultimate highway improvement is scheduled to occur within the next ten years. This portion of the corridor is generally suburban in nature, particularly in the southwestern portions. The northeastern section, from Maple Valley to Issaquah-Hobart Road, is a transition area between the suburban areas to the southwest and rural areas to the north and east. From Issaquah-Hobart Road to Interstate 90, this project will need to provide safety improvements which are more long-term in nature, since future improvements to this section of the corridor are not expected to be completed until after the year 2003. This portion of the corridor is also different in that much of it is in mountainous, rural terrain.

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The designers considered multiple roadway alternatives that included widening the roadway and installing a median barrier at the locations that started at MP 20.04 and extended north to SR 90 at MP 27.9.⁵ This alternative was identified as B1.⁶ The designers considered

² CP at 52-53

³ CP at 52-53

⁴ CP at 52-53

⁵ CP at 52-53

⁶ CP at 52-53

another alternative, B2, which included widening the roadway but not installing any median barriers. The factors of consideration and associated reasoning behind the project are documented in the 1992 Design Report:

PROPOSAL

The main purpose of this project is to reduce the severity of accidents on the existing facility, particularly at locations with histories of high accident rates. Analyses of accident histories indicate that the biggest single problem is related to existing at-grade intersections, where accidents involving turning vehicles are common. Many of the fatalities on the existing facility are related to vehicles crossing the centerline and becoming involved in head-on collisions. These accidents often occur during snowy or icy conditions, most commonly above the 1000-foot elevation level on Tiger Mountain. A third concentration of accidents occur in the vicinity of bridges, where shoulders are narrowed in comparison to adjacent roadway sections. The selected alternative concentrates on improvements which address these three problems. 7

Ultimately, the 1992 Design Report documented an engineering decision to combine components of proposals B1 and B2, and to install median barriers at certain sections of SR 18, but not others:

Alternative B1, which would have provided a median barrier between Issaquah-Hobart Road and the Raging River Bridge, was reduced to cover only the area which commonly receives snowfall. This area, a three-mile stretch between mileposts 22.0 and 25.0, is above 1,000 feet in elevation. By reducing the length of barrier section, concerns with traffic operations, enforcement, and maintenance are minimized while providing separation for opposing traffic flows in the portion of the corridor with the highest incidence of crossover accidents which could be prevented with a median barrier. 8

The total estimated costs for the project as designed approximated \$10.2 million.⁹

The accident involving the Ngo family occurred north of the Issaquah-Hobart road (MP 20.02) and closer to Holder Creek at MP 21.05.

⁷ CP at 60

⁸ CP at 60

⁹ CP at 76

It is within this area, from MP 20.02 going north, that the assigned design team of engineers, reflected as Gary L. McKee (Project Manager), Ronald Q. Anderson, (District Administrator), R.D. Aye (Development Engineer), and J.L. Lutz, (Assistant Project Development Engineer), were charged, according to the 1992 Design Report, to make safe given the accident history.¹⁰

As reflected in the accident history, the location between MP 20.95-22.2 was subject to multiple accidents prior to the 1992 design effort.¹¹ For example, traveling westbound, on August 27, 1990, there was a crossover accident involving the death of three (3) citizens at nearly the same location as the accident involving the Ngo family, MP 20.95-22.2.¹² On December 18, 1987, there was a cross over accident at MP 21.50 that caused documented injuries.¹³ On August 7, 1988, at MP 22.18, there was another cross over accident resulting in documented injuries.¹⁴ Traveling eastbound, there were documented cross over accidents at on March 23, 1990 at MP 21.09, September 13, 1980 at MP 21.12, July 24, 1980 at MP 21.39 (may or may not have been a cross over), and on January 5, 1987 at

¹⁰ CP at 43

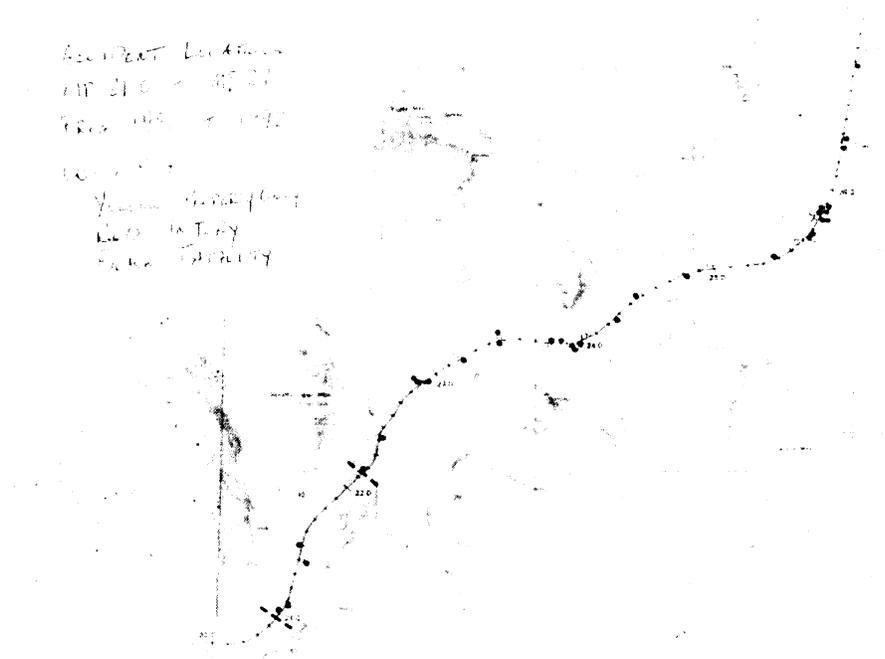
¹¹ CP at 147

¹² CP at 147

¹³ CP at 147

¹⁴ CP at 147

MP 21.4.¹⁵ The constellation of accidents is reflected in the schematic below:



In all, the accident history taken into account in the 1992 Design Report, documents 52 total accidents, 12 fatal accidents, with a fatality percentage of **23.1%** over the entire corridor. The accident history between MP 20.95-22.2 is actually higher than the entirety of SR 18 at **28.6%** with 7 accidents, 2 fatal accidents. Put succinctly, the fatality rate between MP 20.95-22.2 rendered a median barrier at that location *more justified* than at other points upon SR 18. However, a median barrier was not included within the design between MP 20.95-22.2. According to the

¹⁵ CP at 147

Ngo family's highway design expert, Michael J. Tuttmann, P.E., the decision to forego the median barrier at this location was unsound.

The 1992 Design Report documents the design related determinations and judgments that led to the decision not to install a median barrier between MP 20.95-22.2. In relation to median barrier, the 1992 Design Report documents the following design related determinations:

- **From approximately MP 22.0 to MP 25.0 the mainline will be widened to allow placement of a median barrier in a 6-foot wide median between the opposing lanes of traffic. An opening in the median barrier will be provided for the Tiger Mountain State Forest (TMSF) Tigergate entrance, an at-grade intersection.**

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In Dr. Tuttmann's professional opinion, these design related judgments are not justifiable to the extent that MP 20.95-22.2 were excluded. The accident history does not support the conclusion that the propensity for cross over accidents correlates with the 1000-foot elevation or necessarily weather related accident conditions. The accident history reflected in the attached summary report leads to the conclusion that cross over accidents were likely to occur throughout the span of SR 18, and not just above 1000-feet. To the extent that the design related judgments documented in the 1992 Design Report oscillated around these justifications, Mr. Tuttmann disagrees with these roadway-engineering conclusions. As a result of the

¹⁶ CP at 45

failure to install median barriers during the 1992 design effort, the Ngo family became victims of the same sort of injuries and tragic death as so many other citizens that traveled SR 18 in the past.

D. ARGUMENT

1. The discretionary immunity defense does not apply to the group of state agents at fault in this case.

The State of Washington is liable for the negligent design and/or maintenance of a dangerous highway. *See McCluskey v. State of Washington*, 125 Wn.2d 1, 882 P.2d 157 (1994). Before a governmental entity may be liable for an unsafe condition it did not create, it must have notice of the condition and a reasonable opportunity to correct it. *Wright v. City of Kennewick*, 62 Wn.2d 163, 381 P.2d 620 (1963); *Nibarger v. City of Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958). The notice required may be actual or constructive. *Id.* Constructive notice arises if the condition has existed for such a period of time that the governmental entity should have known of its existence by the exercise of ordinary care. *Nibarger v. Seattle, supra*; *Skaggs v. General Elec. Co.*, 52 Wn.2d 787, 328 P.2d 871 (1958). This duty is owed to all persons to build and maintain its roadways in reasonably safe condition. *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013). The relevant Pattern Jury Instruction encapsulates the applicable law:

WPI 140.02 Sidewalks, Streets, and Roads—Notice of Unsafe Condition

In order to find a [town] [city] [county] [state] liable for an unsafe condition of a [sidewalk] [street] [road] that was not created by its employees, [and that was not caused by negligence on its part,] [and that was not a condition which its employees or agents should have reasonably anticipated would develop,] you must find that the [town] [city] [county] [state] had notice of the condition and that it had a reasonable opportunity to correct the condition [or give proper warning of the condition's existence].

A [town] [city] [county] [state] is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

In this case, the State was aware as of 1992 that SR 18 posed an inherent and extraordinary danger for cross over accidents. A design team of engineers was delegated the responsibility for improving the roadway in such a way as to make it safe. The accident history reflects that there was a higher fatality rate between MP 20.95-22.2 as compared to the entire stretch of the roadway: a **23.1%** fatality rate for the entire roadway as compared to **28.5%** over the stretch at issue. According to the expert testimony of Mr. Tuttmann, this engineering decision-making and judgment was incorrect and unreasonable.¹⁷ The 1000-ft elevation threshold is arbitrary and does not correlate with the design risks. The area between

¹⁷ CP at 208-28

MP 20.95-22.2 posed an exceptional danger and the assigned engineers should have included a median barrier and corresponding 6-foot roadway widening between the entirety of MP 20.95 to the northern most end of SR 18. By failing to remedy this known, fatal, and dangerous roadway with a median barrier, the State, by way of its agents, breached the obligations set forth under WPI 140.02.

The Ngo family's case involves decisions and judgments that were design related and conducted at the operational level. *See e.g. Stewart*, 92 Wn.2d 285; 16 Wash. Prac., Tort Law And Practice § 15:6 (4th ed.).¹⁸ In

¹⁸ *See also Chambers-Castanes v. King Cy.*, 100 Wash.2d 275, 282, 669 P.2d 451, 39 A.L.R.4th 671 (1983) (the decision whether to dispatch a police officer to the scene of a crime was not protected under discretionary immunity because it was not a basic policy decision by a high-level executive); *Mason v. Bitton*, 85 Wash. 2d 321, 534 P.2d 1360 (1975) (here was no immunity where police officers decided to engage in a high speed chase; the decision was properly characterized as operational since it involved the type of discretion exercised at an everyday operational level.); *Emsley v. Army Nat. Guard*, 106 Wash. 2d 474, 722 P.2d 1299 (1986) (the act of firing a piece of artillery involved decisions requiring experience, care, and knowledge of proper procedures, and was not a discretionary policy decision); *Miotke v. City of Spokane*, 101 Wash. 2d 307, 678 P.2d 803, 21 Env't. Rep. Cas. (BNA) 1171 (1984) (a city's decision to discharge raw sewage into a river in order to complete a sewage treatment facility was an exercise of technical engineering and scientific judgment, and was not a truly discretionary decision on an executive level.); *Taggart v. State*, 118 Wn.2d 195, 223-24, 822 P.2d 243 (1992) and *Estate of Jones v. State*, 107 Wash. App. 510, 15 P.3d 180 (Div. 1 2000) (State was not entitled to discretionary immunity for placement decisions regarding juvenile offender). As unpublished decision employed nearly an analogous circumstance to that posed herein:

Thus, "discretion" is qualified by placing it within the framework of essential governmental processes. *Emsley v. Army Nat'l Guard*, 106 Wn.2d 474, 480, 722 P.2d 1299 (1986); *Miotke v. City of Spokane*, 101 Wn.2d 307, 336-37, 678 P.2d 803 (1984); *Mason v. Bitton*, 85 Wn.2d 321, 328, 534 P.2d 1360 (1975); *Riley v. Burlington N., Inc.*, 27 Wn. App. 11, 16-17, 615 P.2d 516, review denied, 94 Wn.2d 1021 (1980). Here, the City's argument places undue emphasis on Mr. Boesel's

Stewart, the Supreme Court observed the numerous cases from other jurisdictions that were in accord, and applied the test from *King v. Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974):

The State argues that adoption of a design necessarily involves a judgmental choice. The *King* test requires more. There was no showing by the State that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate. The issues arising from the evidence as to negligent design should have been submitted to the jury. *See generally Bohrsen & Ryan, Tort Law in Washington: A Legal Chameleon*, 11 Gonzaga L.Rev. 73, 80 (1975); *Peck, Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act*, 48 Wash.L.Rev. 391, 415-418 (1973).

position and the “discretionary” nature of engineering judgments. While involving Mr. Boesel's discretion and expert judgment, the decision itself was the result of exercising technical engineering and scientific judgment. As a decision “in the field” it is not an executive level decision entitled to immunity. The City also relies heavily on the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD) which makes the installation of a four-way stop discretionary. But even if discretionary, the MUTCD does not elevate a decision to being protected by governmental immunity. *See Miotke*, 101 Wn.2d at 336; *Emsley*, 106 Wn.2d at 481. Nor is the permissiveness of the MUTCD standard dispositive. Washington cases uniformly acknowledge that MUTCD standards may provide evidence of negligence. *Ottis Holwegner Trucking v. Moser*, 72 Wn. App. 114, 122, 863 P.2d 609 (1993). The manual provides standards for design and application of devices, but it is not a substitute for engineering judgment. Recognizing the need for particularized judgment in the selection of traffic control devices, the manual places responsibility on the engineers to decide which signs to erect. *Kitt v. Yakima County*, 23 Wn. App. 548, 552, 596 P.2d 314 (1979), rev'd on other grounds, 93 Wn.2d 670, 611 P.2d 1234 (1980). Thus, although much of the MUTCD language is advisory, a jury could find that the municipality was negligent in failing to properly sign an intersection. *Ottis Holwegner Trucking*, 72 Wn. App. at 122.

Keller v. City of Spokane, WL 460256 (1996).

Other jurisdictions have reached similar results. In *Lewis v. State*, 256 N.W.2d 181, 195 (Iowa 1977), the court said:

In the present case plaintiffs' claims do not focus on the decision to build Interstate 29, a discretionary function, but on the alleged negligence of the State in implementing that decision. Consequently, [the statute] is not preclusive of plaintiffs' right to relief.

A similar distinction was drawn in *Andrus v. State*, 541 P.2d 1117, 1120 (Utah 1975):

The decision to build the highway and specifying its general location were discretionary functions, but the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions.

State v. Webster, 88 Nev. 690, 693-694, 504 P.2d 1316, 1319 (1972):

Once the decision was made to construct a controlled-access freeway . . . the State was obligated to use due care to make certain that the freeway met the standard of reasonable safety for the traveling public. This is the type of operational function of government not exempt from liability if due care has not been exercised and an injury results.

Accord Breed v. Shaner, 57 Haw. 656, 667, 562 P.2d 436 (1977); *Indiana State Highway Comm'n v. Clark*, 371 N.E.2d 1323, 1327-1328 (Ind.App.1978); *Jones v. State Highway Comm'n*, 557 S.W.2d 225, 230 (Mo.1977).

The State relies heavily upon *Weiss v. Fote*, 7 N.Y.2d 579, 589, 200 N.Y.S.2d 409, 416, 167 N.E.2d 63, 68 (1960), but even

that case recognizes that discretionary immunity in planning and execution is not absolute. It held:

[L]iability for injury arising out of the operation of a duly executed highway safety plan may only be predicated on proof that the plan either was evolved without adequate study or lacked reasonable basis.

Cf. Tomassi v. Town of Union, 46 N.Y.2d 91, 412 N.Y.S.2d 842, 844, 385 N.E.2d 581, 583 (1978), which refers to a duty to construct and maintain highways in a reasonably safe condition “taking into account such factors as the traffic conditions apprehended, the terrain encountered, fiscal practicality and a host of other criteria . . .”

See Note, State Liability for Highway Defects, 27 Emory L.J. 337 (1978).

Other cases are in accord.¹⁹

¹⁹ In a personal injury suit against the state for its alleged negligence in failing to build a median barrier on a highway, the court in *Lewis v State*, 256 NW2d 181, 95 ALR3d 1221 (1977, Iowa) (superseded by statute as stated in *Snyder v Davenport* (Iowa) 323 NW2d 225), affirming a denial of summary judgment for the state, held that the state's decision not to build a barrier was an operational function, and that therefore the state was not immune from liability. The state argued that the plaintiff's allegations of negligence based upon the design and construction of the highway were barred by the discretionary function exception to state liability contained in a statute which provided that the state would not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion was abused. The court, stating that the resolution of this issue would depend on whether the policy determination in question was "operational" rather than a "planning" function, said that in its opinion the better reasoned position was that the failure to erect median barriers was an operational function. The court stated that the decision whether or not to build a highway was a planning function immune from liability. Once a decision was made to construct a highway, however, the court stated, the state was obligated to use due care to make certain that the highway met the standard of reasonable safety for the traveling public. The plaintiff's claims, the court stated, did not focus on the decision to build the highway, a discretionary function, but on the alleged negligence of the state in implementing that decision. Consequently, the state was not immune from liability.

In this case, a design task force consisting of DOT operational level employees (Gary L. McKee, Project Manager, Ronald Q. Anderson, District Administrator, R.D. Aye Development Engineer, and J.L. Lutz, Assistant Project Development Engineer) was charged with the responsibility of remedying the exceedingly dangerous conditions of SR 18 north of MP 20.02.²⁰ The 1992 Design Report documents the factors that were considered, that included engineering judgments that also inherently include financial judgments:

Saying that the state had failed to show that the design of a highway median was reasonable, the court in *Levin v State of California*, 146 Cal App 3d 410, 194 Cal Rptr 223 (1983, 1st Dist), reversed a grant of summary judgment against the plaintiff where it was alleged that the state was liable for the death of a driver who was killed when another automobile crossed the double yellow line in the center of the highway and struck her vehicle. The decedent tried to avoid the collision by swerving to her right, but drove over a steep embankment into the channel from which the embankment had been excavated, where she died from drowning. One element of the design immunity defense argued by the state, the court stated, was substantial evidence of the reasonableness of the design. With regard to the absence of a median barrier in the design of the highway, the court stated that there was no evidence that reasonably inspired confidence or was of solid value. Further, the court added, the mere fact that an expert witness testifies that in his opinion, a design is reasonable, does not make it so. Here, the court stated, the record revealed a conflict between the plaintiffs' experts and the state's as to the reasonableness of the design.

In another personal-injury action against city in connection with accident that occurred at intersection that, allegedly, was defectively designed due to city's failure to have installed raised median, which would have prevented accident, city was potentially liable since determination whether to install raised median was not a discretionary function, as to which city would have been immune. *Lawton v City of Pocatello*, 886 P2d 330 (1994, Idaho).

²⁰ CP at 39

Alternatives

A number of interim widening and safety improvements have been considered for this project. These potential improvements have been grouped into two geographic regions with Issaquah-Hobart Road as the dividing line. Two general types of improvements were considered - those that would provide a median barrier and those which would not provide a barrier. Environmental, physical, and funding constraints were considered during development of these alternatives.

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According to the Ngo family's expert witness, Mr. Tuttmann, the related engineering decisions were faulty, and a median barrier was warranted between MP 20.95-22.2:

*"The roadway itself is narrow, and the traffic in each direction is unseparated. There's a yellow line-double yellow line with rumble strip. There are no countermeasures in place to try and guard against crossover accidents, yet the area itself, statistically speaking, has a larger-than-average rate of fatality, which is due to the crossover accidents that have occurred there."*²² *"It is my opinion, based on the 1992 design report, that the section of highway that remains without a barrier would have been no more difficult to widen than the section of highway that they did install a barrier on."*²³ *"As the roadway was in the design report, there were the travel lanes in each direction and the truck lane and the shoulders. In order to add a concrete median barrier, the concrete barriers, regardless of shape, are 2 foot wide at the bottom, and State specifications call for a 2-foot shoulder on either side of the barrier, separating their edge from traffic. So you would have to add 6 feet of width, typically."*²⁴ *"To expound further on it, the design report, from the engineering point of view, examined two alternates: One was put median barrier along the whole length, and one was to do nothing and no alternative. The design report itself pointed to -- as an engineering decision, to put barrier along the whole length, and then qualified it to examine that alternative with the*

²¹ CP at 57

²² CP at 217

²³ CP at 223

²⁴ CP at 220

*factors which included available funding. So, yes, at some point the calculus included available funding.”*²⁵

However, the claims at issue in this lawsuit do not involve any challenge and/or criticism of the Priority Array process. This case does not suffer from the fatal separation of power issues that arose in *Avellaneda*.²⁶ Therefore, the State’s discretionary immunity defense should have been dismissed as a matter of law.

Operational level employees, such as the engineer team in this case, are *not* afforded discretionary immunity from claims arising out of their negligence. See e.g. *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979); *Avellaneda v. State*, 167 Wn. App. 474, 480-81, 273 P.3d 477, 480 (2012). As noted in *Avellaneda*, “the decision whether to include a project on the priority array is entitled to discretionary immunity, negligent implementation of that decision may still be the basis for liability.” *Id.* at 483. Notably, the *Avellaneda* Court recognized that existing precedent has not held that discretionary immunity is an available defense in cases involving the precise placement of median barriers: “the parties did not address whether the design manual amendment created a duty for the State

²⁵ CP at 225

²⁶ The *Avellaneda* plaintiffs’ trial briefing in opposition to this motion for summary judgment is attached as an exhibit to this motion. In *Avellaneda*, the plaintiffs unabashedly assaulted the Priority Array process. This case does not involve any such policy level assault.

to exercise reasonable care in deciding where to place median barriers. The issue was not adequately briefed before us and we do not consider it.” *Id.* at 489 footnote 4.

This case is about the precise placement of median barriers along SR 18. In this respect, the Ngo family is *not* criticizing high level policy decisions by officials within the State government.²⁷ This case involves the 1992 engineering level decisions on the part of WSDOT employees that were charged with the obligation of making SR 18 safe. When deposed, WSDOT’s expert witness, Lance Bullard, Jr., agreed that the determinations at issue are matters of roadway design:

Q. Okay. Why wouldn't you limit your analysis to the entire roadway and the accidents on the entire section of mile markers?

A. When you look at evaluating a roadway, you would look at the -- if I was Washington's State DOT, I would look at the entire roadway and you look at identifying specific locations where you need improvements. You don't apply a one size fits all for an entire roadway when you have an isolated area that's having high accidents. So if it's one in particular intersection you're looking at fixing

²⁷ The State noted in its moving papers that Mr. Tuttmann expressed having basically no knowledge and/or understanding about the Priority Array process, which is true. Mr. Tuttmann was not provided any Priority Array materials and was deliberately insulated from any policy level information. In this regard, Mr. Tuttmann was asked to review and rely upon only the information and materials that were available to the assigned engineers in 1992. Based upon those materials, Mr. Tuttmann was able to confidently opine that a median barrier should have been included at MP 20.95-22.2, particularly given the existing design of the road and amplified fatality rate.

that intersection, not looking at applying the same thing across the entire roadway because of limited funding.

Q. Right. And the sort of decision making you're describing, that's the design level decision; is that right?

A. Correct.²⁸

The Ngo family's highway design engineering expert, Mr. Tuttmann, disagrees with Ms. George and Mr. Bullard in multiple engineering respects.²⁹ For example, the State's expert, Mr. Bullard, further opined by way of declaration as to other engineering level determinations that are at issue:

...before an engineer recommends the installation of a median barrier at a particular site, that person must be reasonably certain the anticipated reduction in occurrence and severity of collisions at the site of the planned median barrier exceeds the additional dangers and risks the placement of the barrier would create. Highway engineers in Washington, and indeed around the country, rely on factors such as traffic volume and accident history at particular sections of highway to determine whether the benefits of the proposed barrier are greater than the risks they present.³⁰

On many of these points, Mr. Tuttmann has evaluated Mr. Bullard's assertions in relation to what was documented at the time within the 1992 Design Report. On the topic of median barriers and design standards, Mr. Tuttmann responds to Mr. Bullard, and opines:

²⁸ CP at 610

²⁹ See CP at 208-28

³⁰ CP at 607-08

“There is no national or state engineering design standards that required WSDOT to install a median barrier.” - This statement, while accurate, hinges on the word “required”. In fact, there are numerous national standards, pre-dating the WSDOT 1992 Design Report, that agree that the installation of barriers should be considered for roadways without a median, and with a total ADT (annual daily traffic) count of between 5,000 and 20,000 vehicles per day³¹. These national references include: Report 118 - Location, Selection and Maintenance of Highway Traffic Barriers, published in 1971 by the National Cooperative Highway Research Program (NCHRP) of the National Research Council; Highway Design and Operational Practices Related to Highway Safety, published in 1974 by the American Association of State Highway and Transportation Officials (AASHTO); and the Roadside Design Guide, published in 1989 by AASHTO.³²

On the ability to install a median barrier without widening the road, Mr.

Tuttman responds to Mr. Bullard, and opines:

“In its [SR 18’s] current configuration, it is not possible to install median barrier” without widening the roadway. - This statement ignores that the purpose of the construction project, outlined in the WSDOT 1992 Design Report, was Safety Improvements which were to be accomplished by the widening of the SR 18 roadway to allow for the installation of median barrier. It is precisely the condition of the roadway’s narrowness that the 1992 construction project was developed to correct.³³

On the topic of the accident history not supporting the installation of a median barrier, Mr. Tuttman responds to Mr. Bullard, and opines:

“The accident history for that section of highway [SR 18 between MP 21 and MP 22] did not support the installation of a median barrier.” - This assertion contradicts the WSDOT 1992 Design Report which states that, for the section of SR 10 between

³¹ CP at 128 shows a total ADT of 15,400 vehicles per day (as measured in 1990)

³² CP at 610

³³ CP at 610

Issaquah-Hobart Road and I-90, “The [accident] fatality rate is well above the statewide average for all rural highways” and “Centerline crossing accidents, usually head-on collisions or other opposite-direction accidents involving a crossing of the centerline, are the primary cause of fatalities between Issaquah-Hobart Road and SR 90 [sic].”³⁴

On the topic of median barriers increasing accidents, Mr. Tuttmann responds to Mr. Bullard, and opines:

“It is now readily accepted as fact ... that the installation of median barrier actually tends to increase the accident rate”. *This is misleading - As is stated in NCHRP Report 118, “The purpose of traffic barriers is to reduce accident fatalities and injuries by decreasing the severity of crashes” and, from AASHTO’s Highway Design and Operational Practices Related to Public Safety, “Installation of median barrier on an existing highway may actually increase the reported number of total accidents but at the same time significantly decrease the number of serious accidents.”³⁵*

It is these design issues to which the Ngo family takes issue and Mr. Tuttmann is critical.³⁶ Very importantly, this case does *not* involve high level policy decision-making.³⁷

The 1992 Design Report proves that the decision not to install a median barrier between MP 20.95-22.2 was negligently implemented at the design level by operational employees. The assigned engineers

³⁴ CP at 610

³⁵ CP at 610

³⁶ See CP at 208-28

³⁷ See CP at 208-28

employed professional judgments to decide which design alternative to select:

Alternative B1, which would have provided a median barrier between Issaquah-Hobart Road and the Raging River Bridge, was reduced to cover only the area which commonly receives snowfall. This area, a three-mile stretch between mileposts 22.0 and 25.0, is above 1,000 feet in elevation. By reducing the length of barrier section, concerns with traffic operations, enforcement, and maintenance are minimized while providing separation for opposing traffic flows in the portion of the corridor with the highest incidence of crossover accidents which could be prevented with a median barrier.

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As noted, the reasoning behind not installing a median barrier involved “*traffic operations, enforcement, and maintenance...*”³⁹ Policy makers within the Legislature, the Priority Array authorities (as in *Avellaneda*), and/or the Transportation Commission (as in *Jenson*) were *never* provided the opportunity to make policy decisions pertaining to the installation of this particular median barrier between MP 20.95-22.2. *Avellaneda v. State*, 167 Wn. App. 474, 273 P.3d 477 (2012); *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990). The assigned engineers never offered any such recommendations and/or solutions for consideration by the policy makers.

The current Priority Array manager, Michael J. Neely, was asked whether the implementation solutions to engineering problems were a part of the upper-level Priority Array process. Importantly, he answered that

³⁸ CP at 60

³⁹ CP at 60

cost benefit analysis, and other implementations decisions are “**not part of the priority array process.**”⁴⁰

According to Mr. Tuttmann, the engineers that were charged with the known hazard of exceptionally frequent cross over accidents on SR 18 unreasonably excluded a median barrier at MP 20.95-22.2.⁴¹ In contradiction of the duties embodied in WPI 140.02, the State was on notice of the unreasonable dangers posed by SR 18, and failed to make the dangerous roadway safe at MP 20.95-22.2 based upon flawed operational level engineering judgments.

2. The *Evangelical* factors weigh heavily against finding discretionary immunity in this case.

The Supreme Court set forth analytical factors for considering whether an act is discretionary, and therefore subject to immunity from liability in *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965); 16 Wash. Prac., Tort Law And Practice § 15:6 (4th ed.). These considerations, and corresponding answers for our case, are set forth below.

- 1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

⁴⁰ CP at 633-34

⁴¹ *See* CP at 208-28

ANSWER: The State has not put forth *any* evidence that the decision concerning where to install particular median barriers on SR 18 lends to an unequivocal “yes” simply because the cost of making the roadway safe was allegedly expensive; at some point the high level policy makers approved funding based upon the 1992 Design Report, but the installation of median barriers between MP 20.95-22.2 was not considered at a high level policy-maker stage. By contrast, the challenged decisions in *Avellaneda v. State* were protected, as they did involve policy level determinations of which projects to fund at all as a matter of legislative priority.

- 2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

ANSWER: The State has not put forth *any* evidence that the decision concerning where to install particular median barriers on SR 18 lends to an unequivocal “yes” simply because the cost of making the roadway safe would have been higher if median barriers were included between MP 20.95-22.2. Put another way, the State has failed to prove that installed a median barrier between MP 20.95-22.2 would have undermined high level policy objectives.

- 3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

ANSWER: The State has not put forth *any* evidence explaining how the policy evaluations concerning funding were weighed in this case. Instead, the State relies upon the after-the-fact declarations of Mr. Neely and Ms. George post-dating the actual engineering decisions from 20 years earlier.

- 4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision.

ANSWER: Admittedly, WSDOT did have the authority to design roadways.

Id. at 255. Because these questions have not been clearly answered in the affirmative, a closer analysis of the particular facts and circumstances is required. *Id.*

This case is analogous to *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803, (1984) in which the Supreme Court held that engineering level judgments are not the proper types of professional decision making entitled to discretionary immunity. In *Miotke*, the owners of waterfront property sought to recover declaratory, injunctive and monetary relief against the city and the Department of Ecology for discharging raw sewage into a river. *Id.* The Department of Ecology claimed that the assigned engineers were protected by discretionary immunity. *Id.* The Supreme Court disagreed: “[w]e find, however, that although the decision to conduct the bypass involved the exercise of expert judgment, that decision was an exercise of technical engineering and scientific judgment.” *Id.* at 337.

Much as in *Miotke*, the State failed to prove, as a matter of law, that this lawsuit involves criticizing high level executive policy decisions that *are* entitled to discretionary immunity. At the trial court level, the State submitted conclusory declarations from current WSDOT employees generally discussing the Priority Array process and nakedly asserting that the costs, allegedly \$18-\$25 million, associated with installing median barrier, were the primary reason that the median barriers were not installed on the length of highway at issue. However, the State has failed to meet its burden of proof, as the party alleging discretionary immunity as a defense, that the actual decision back in 1992 not to design a median barrier was the type of decision that is supposed to be protected by discretionary immunity. The declarations of record only prove that, in the opinion of two *current* WSDOT employees, installing a median barrier as of the year 2016 would prove quite expensive. Additionally, it should be noted that Mr. Tuttmann disagrees with WSDOT'S speculative monetary calculations.⁴²

The actual cost per mile as computed in the 1992 Design Report was only **\$978,000** per mile.⁴³ According to Mr. Tuttmann, Appendix A of

⁴² CP at 608-28

⁴³ CP at 211

the 1992 WSDOT Design Reports contains a “Design Report Estimate”⁴⁴ worksheet calculating the “Total Estimated Cost” of the Selected Alternative, the scope of which includes Safety Improvements, such as the 6 foot widening of the roadway and the installation of concrete median barrier, for a 3.0 mile long portion of the roadway (between MP 22.0 and MP 25.0). An estimate of an Average Unit Cost Per Mile, for the Safety Improvement portion of the Total Estimate Cost, can be calculated by combining the given “Construction” item costs for “Walls”, “Full Depth Paving” and “Concrete Barrier” items, as used by the WSDOT in Section II of said estimate, dividing by the 3.0 mile length of Safety Improvements in the Selected Alternative and then adding in the factored costs for “Mobilization”, “Sales Tax”, “Construction Engineering”, “Contingencies” and “Preliminary Engineering” in the same manner as that used by the WSDOT.

Based on the WSDOT Design Report Estimate in Appendix A of the 1992 Design Report, the average cost for the Selected Alternate’s 3.0 miles of Safety Improvements is **\$2,934,554** and the Average Cost Per Unit Mile⁴⁵ is **\$978,000**. Using this figure, the cost for fully implementing

⁴⁴ CP at 82

⁴⁵ In Mr. Tuttmann’s engineering judgment, the calculation, and use, of an Average Unit Cost Per Mile is permissible given that the WSDOT 1992 Design Report did not specify

the Safety Improvement scope of Alternative B1 of the 1992 Design Report, for 6.1 miles (between MP 20.2 and MP 26.3), is **\$5,966,928**; therefore, the difference in the cost, for Safety Improvements, between the WSDOT Selected Alternative and the full implementation of the scope of work recommended in Alternative B1 is **\$3,032,374**.

The State failed to submit *any* particularized evidence identifying the decisions at issue *in this case* were components of the Priority Array policy level policy decision making. When deposed, the current Priority Array Delivery Manager, Matthew J. Neely, described the Priority Array process as a matter of organizational hierarchy:

Q Okay. So let's break it down. So what office does the actual priority array calculations?

A Program management.

Q And then who do they send that information to?

A They would send that to the region program managers.

Q And then what do the region program managers do with that information?

A They would distribute that to their traffic engineers.

Q And what would the traffic engineers do with the information?

A The traffic engineers would study those locations on the list.

any portion of the SR 18 roadway, between MP 20.2 and MP 26.3, that would present significantly different methods, or scope of construction, for widening.

Q And why would they do that?

A To determine if -- to determine what the issues are and the contributing circumstances to a collision.

Q And how would they do that?

A They would look at the collision history at a known location. They may pull the reports, the police reports.

Q Uh-huh.

A And they made [sic] develop a collision diagram, which would help them understand what the issues are.

Q So is it safe to say that the engineers as you described it, take the information from the priority array calculations that's distributed to them and they go down and evaluate those locations based on what is flagged by that data?

A Yes.

Q And then the engineers -- tell me if this is wrong -- would evaluate those locations and try and determine whether or not there needs to be safety improvements or work on that particular location; is that right?

A They may decide if modifications can be made that may address an issue.

Q Would it be possible, for example, for a location to be identified through the priority array process as a HAL and get down to the engineers and they take a look and say, it's just chance. I mean, there just happened to be some weird accident, but no action to take here; right?

A They could.

Q Would in making that evaluation the engineers exercise their own professional judgment in making those evaluations?

A Yes.⁴⁶

Mr. Neely admitted to not knowing whether or not the Priority Array process was even involved in the decision whether or to install median barricades at MP 20.95-22.2:

Q Okay. Do you know, or have reason to know, whether not the engineers involved in the 1992 design evaluations ever asked for the priority array information?

A I don't know. I wasn't around at that time.

Q So you don't have reason to know if the priority array processes and information influenced the decisions of the 1992 design report engineers? You can't say that firsthand?

A To know that the priority array was a consideration in this document?

Q Right.

A I cannot.⁴⁷

By contrast, the evidence of record in this case, namely the 1992 Design Report, reflects engineering level decisions at the operational level that concluded, incorrectly, that a median barrier was not necessary on SR 18 between MP 20.95-22.2 involving considering “*traffic operations, enforcement, and maintenance...*”⁴⁸ The State did not present any evidence indicating that the decision not to install median barrier at MP

⁴⁶ CP at 631-32

⁴⁷ CP at 632

⁴⁸ CP at 632

20.95-22.2 was *actually* rendered at a policy level. Based upon this failure of evidentiary proof on the part of the State, as a matter of law, the discretionary immunity defense should have been dismissed.

3. The Ngo family does not argue that the State failed to Adhere to Current Design Standards.

The assorted cases relied upon by the State, including *Jenson v. Scribner*, *Ruff v. King County*, and *Avellaneda v. State*, are not controlling or analogous. The Ngo family is *not* claiming that the State policy officials failed to fund SR 18 and/or that any policy level decisions by the Transportation Commission or the Legislature were negligent:

Jenson v. Scribner

The State argues that the Ngo family contends that the theory of liability at issue is akin mandating that the State update SR 18 to adhere to current design standards, as claimed in prior appellate case law such as *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990). In *Jenson*, the plaintiffs criticized the State for not installing a median barricade quickly enough *after* the engineers included the proposal and a request to allocate funds for the associated construction: “The undisputed record discloses that the median barrier project for the area of SR 3 in question was

proposed to the Transportation Commission by the Department of Transportation in August of 1981.” *Id.* at 482.

This case is distinguishable from *Jenson*. In *Jenson*, the plaintiff challenged the timing of the installation of a median barrier along the entirety of SR 3. In this case, unlike in *Jenson*, the State previously identified that SR 18 was an extremely dangerous roadway and employed engineers to offer design judgments to make the roadway safe.⁴⁹ At a design level, in 1992, the engineers involved rendered a determination that a median barrier was not necessary between MP 20.95-22.2.⁵⁰ In this regard, in relation to this particular design level judgment, the Ngo family is pursuing this claim against the State of Washington for failing to remedy a known and dangerous condition as required under WPI 140.02.⁵¹ According to the Ngo family’s expert, Michael Tuttmann, the obligation to make SR 18 safe included the installation of median barricades at MP 20.95-22.2.⁵²

⁴⁹ CP at 60

⁵⁰ CP at 60

⁵¹ CP at 208-28

⁵² CP at 208-28

Ruff v. King County

The State also alleges that *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995) is controlling: “Like *Ruff*, there is no extraordinary condition or unusual hazard associated with the straight stretch of clearly marked, properly designed highway where Plaintiffs’ collision, and, thus, this case is controlled by *Ruff*.”⁵³ The State’s assertion is not accurate. It is true that the plaintiff in *Ruff* alleged that the State should have installed a median barrier. *Id.* at 700-2. However, in *Ruff*, the plaintiff did not allege that the roadway was unreasonably dangerous (as had in fact been identified as to SR 18 by the 1992 Design Report in this case) and there was no dispute that the roadway in *Ruff* was generally agreed to be safely designed.

Ruff is not analogous nor is it controlling in that, by comparison, SR 18 had already been prioritized for safety modifications specifically premised upon the extremely high history of fatal cross over accidents.⁵⁴ According to Mr. Tuttmann, the engineers charged with remedying the noted dangers posed on SR 18 unreasonably failed to install a median barrier between MP 20.95-22.2.⁵⁵ This determination was rendered

⁵³ CP at 257

⁵⁴ CP at 60

⁵⁵ CP at 651

without regard to the Priority Array process. The assigned engineers unreasonably discounted the danger and therefore *never* elevated a proposal to install median barriers at MP 20.95-22.2 to the legislative level for funding consideration. Based upon the evidence of record, a jury must decide the issues in this case, specifically whether or not, in 1992, the assigned engineers took appropriate operational level measures to make SR 18 safe at MP 20.95-22.2.

Avellaneda v. State:

Another of the State's authorities, *Avellaneda v. State*, 167 Wn. App. 474, 480-81, 273 P.3d 477, 480 (2012), is also distinguishable. In *Avellaneda*, it was not disputed that the assigned engineers included the installation of a median barrier within the proposals for funding under WSDOT's Priority Array system: "Although the WSDOT had planned to install a cable barrier on that median, no barrier was in place at the time of the accident." *Id.* at 476. The plaintiff in *Avellaneda* sued the State for failing to prioritize the corresponding project quickly enough. In *Avellaneda*, the plaintiff challenged the State's failure to prioritize the installation of a median barrier over the entirety of SR 512. By comparison, in this case, the assigned engineers were charged with making SR 18 safer, and failed to include MP 20.95-22.2 within

the design upgrades.⁵⁶ It is this operational error which the Ngo family is challenging through this lawsuit.

4. The State’s main argument relies on mere speculation as to the actual cost of installing a barrier, as well as to the influence that this cost would have had on the Legislature. Even if these speculations proved true, the State would still not be immune.

Upon enactment of RCW 4.92.090 in 1965, the Legislature waived sovereign immunity and permitted government entities, such as the WSDOT, to be sued for negligent acts: “The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.” In this regard, the Supreme Court addressed similar cost related defense claims in a seminal highway design case, *McCluskey v. State of Washington*, 125 Wn.2d 1, 882 P.2d 157 (1994). In *McCluskey*:

The State wanted to argue, in the alternative, that it could not be held liable for failing to improve SR 900 because the Legislature did not authorize funding for improving this part of SR 900 before the McCluskey accident. To support this theory, the State offered the 1986 Priority Array, the 1987-89 Highway

⁵⁶ The Ngo family acknowledges that had the assigned engineers submitted a proposal that included SR 18 at MP 20.95-22.2 and it was not funded based upon policy determinations, then discretionary immunity might apply. However, that is not what occurred in this case. In this case, the assigned roadway engineers negligently failed to include a median barrier at MP 20.95-22.2 for installation to remedy the unusually high danger of cross-over accidents.

Construction Program, and the 1987-89 Transportation Appropriation Act. The Priority Array showed the status of each section of state highway in 1986 according to criteria specified by statute; the Highway Construction Program listed the cost of each project proposed for the next 2 years; and the transportation appropriation act listed the projects funded. Exs. 177, 178, 179. None listed the section of SR 900 at issue.

The court excluded these documents and also excluded evidence that SR 900 had not been selected for funding under the 1986 Priority Array. The court did allow the State to describe the priority-determining process in general. A state witness also explained the kinds of highway funds available to the State and the restrictions on them. **The State was not allowed to argue, however, that highway improvement funds were limited and that such a limitation affected the lack of improvements to SR 900.**

The State proposed lengthy jury instructions setting forth the law regarding priority programming for highway development and advising the jury that it could not find the State liable if it decided that the State acted in accordance with that law. The State also proposed an instruction on the theory of discretionary immunity, despite its earlier abandonment of that defense. The court declined to give these instructions.

Instead, the court instructed the jury that McCluskey claimed the State was negligent in maintaining an unsafe roadway, in failing to warn of the unsafe condition of the roadway, and in failing to properly separate the eastbound and westbound traffic by installing a median barrier. The court also instructed the jury that the State has a duty to exercise ordinary care in the maintenance of its public roads and that inherent in this duty “is the alternative duty either to eliminate a hazardous condition, or to adequately warn the traveling public of its presence”. Clerk’s Papers, at 719. The court further instructed that the jury’s verdict should be for McCluskey if she proved only that “one or both of the Defendants acted, or failed to act, in one of the ways claimed by Plaintiff.” Instruction 7; Clerk’s Papers, at 712. The State did not take exception to any of these instructions.

Id. at 4-5 (emphasis added).

In the same case, the Court of Appeals Division II explained that “[t]he State is required to act with the same degree of care as a private entity, notwithstanding limited resources.” *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 841 P.2d 1300 (1992) *aff’d*, 125 Wn.2d 1, 882 P.2d 157 (1994). Division II’s holding still stands even though the same issue was also reviewed and discussed by the Supreme Court, and affirmed. *Id.* In this case, the State has failed to prove that the Priority Array process was actually implicated in the decision not to install at median barrier between MP 20.95-22.2. For that reason, discretionary immunity does not apply. Moreover, this Court should follow *McCluskey*, and preclude the State from pleading budgetary limitations as a defense.

The Legislature has declared that the State of Washington can be liable for tortious conduct. *See* RCW 4.92.090. The Legislature enacted the Tort Revolving Fund codified RCW 4.92.130 to pay tort claims of this nature.⁵⁷ In any given case, a government agency could claim that the

⁵⁷ **RCW 4.92.130 Tortious conduct of state—Liability account—Purpose.**

A liability account in the custody of the treasurer is hereby created as a nonappropriated account to be used solely and exclusively for the payment of liability settlements and judgments against the state under 42 U.S.C. Sec. 1981 et seq. or for the tortious conduct of its officers, employees, and volunteers and all related legal defense costs.

(1) The purpose of the liability account is to: (a) Expediently pay legal liabilities and defense costs of the state resulting from tortious conduct; (b) promote risk control through a cost allocation system which recognizes agency loss experience, levels of self-retention, and levels of risk exposure; and (c) establish an actuarially sound system to pay incurred losses, within defined limits...

failure at issue was based upon a lack of funding. The Department of Transportation's reasoning, if accepted, would lead to a true "parade of horrors." Child Protective Services could always argue that the Legislature did not allocate enough money for more child abuse investigators, and would therefore be immune from liability. The Department of Corrections could argue that the Legislature did not allocate enough money for more probation officers, and would therefore be immune from liability. By waiving sovereign immunity and enacting a process by which to fund tort claims of this nature, the Legislature has spoken. As a matter of policy, tort claims of this nature are proper and have been designated for funding the State of Washington's elected officials.

The court erred by granting the State's motion for summary judgment. The party moving for summary judgment must identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact. *Seybold v. Neu*, 105 Wn. App. 666, 19 P.3d 1068 (2001). An affidavit submitted in support of, or in response to a motion for summary judgment does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, *i.e.*, information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion; likewise, ultimate

facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact. *Snohomish County v. Rugg*, 115 Wn. App. 218, 61 P.3d 1184 (2002). In accord with KCLR 56(e), the Ngo family moves to strike and/or have the Court disregard the speculative assertions of the State's witnesses, Ms. George and Mr. Neely.

The State's declaration of Catherine M. George:

The State's engineering manager, Ms. George, alleged that it would cost "*between \$18 million and \$25 million*" to install a median barrier between MP 20.95-22.2.⁵⁸ Ms. George's monetary assertions should be stricken for multiple reasons. First and foremost, Ms. George fails to explain the foundation supporting this monetary conclusion. For example, Ms. George did not clarify at what point in time (the year 2016 perhaps?) that the costs would have be \$18-25 million and with what design specifications. Ms. George's assertion is conclusory with no correlating computational analysis.⁵⁹ Additionally, Ms. George fails to

⁵⁸ CP at 275

⁵⁹ The most expensive Cadillac level of design alternatives documented in the 1992 Design Report (Alternative B1) had an estimated cost of \$18.5 million:

The construction cost of this alternative is estimated to be \$18.5 million with a construction period of 12 months. No right-of-way would be acquired as a part of the project. This work would require an Environmental Assessment and would possibly require an Army Corps Permit.

It is impossible to comprehend how Ms. George came up with \$25 million, which is more than the assigned engineers calculated themselves. Based upon the lack of foundation contained within Ms. George's declaration, it appears as though the \$18-25 million calculation was just made-up by the defense lawyers for litigation purposes because it sounds like a huge amount of money.

explain what the cost for the median barrier would have been in 1992, versus a figure that is presumably based upon current and/or future construction calculations and bidding.⁶⁰ By comparison, based upon the data included within the 1992 Design Report, Mr. Tuttmann was able to calculate a per mile cost of \$978,000.⁶¹

Moreover, the Supreme Court has held that “the action of decision at issue must **actually** have been considered and reasoned in order to be entitled to immunity.” *McCluskey*, 125 Wn.2d at 12 (emphasis added); *see also King v. Seattle*, 84 Wn.2d 239, 245, 525 P.2d 228 (1974). Ms. George failed to offer any first-hand knowledge alleging that the purported \$18-\$25 million construction costs *actually* played a high level policy making role in the decision not to install a median barrier between MP 20.95-22.2. For these reasons, based upon an absence of foundation and relevance, Ms. George’s assertion regarding the costs of installing a median barrier between MP 20.95-22.2 does not support a discretionary immunity defense.

⁶⁰ It is important to keep in mind that the Ngo family is not alleging that the State failed to timely install a median barrier. Instead, the Ngo family is alleging that the assigned engineers failed to identify MP 20.95-22.2 as included in the hazardous portions of SR 18 and include median barriers within the Design Report. The cost of installing a median barrier in present day dollars is irrelevant.

⁶¹ CP at 651

The State's declaration of Matthew J. Neely:

Similarly, Mr. Neely alleged, without analysis and/or proper foundation, that “*even if the section of SR 18 where Plaintiffs’ collision occurred qualified as a HAL, an \$18-25 million dollar widening and median barrier installation project would not have satisfied the benefits/cost element of the priority array system of programming because the costs would outweigh the expected benefits.*”⁶² Mr. Neely appeared to rely upon the same speculative “\$18-25 million” assertion on the part of Ms. George. In essence, without a proper foundation, the State is attempted to have Mr. Neely opine that *if* the assigned engineers had actually attempted to include median barriers at MP 20.95-22.2 (which they did not do) the higher level policy makers would not have funded the project. This is not a proper application of discretionary immunity in that the State is effectively arguing what policy level determinations that the executive decision makers *might* have made whereas the discretionary immunity defense only protects policy decisions that were actually rendered. For these reasons, Mr. Neely’s presumptions about the decisions that policy makers *might* have made does not support a discretionary immunity defense. The declarations and accompanying argument relied upon by the State is a present tense attempt to suggest that

⁶² CP at 395

the Priority Array process and/or legislative determinations were involved in the decision not to install median barriers between MP 20.95-22.2. That proposition has never been true. Mr. Neely perused the available legislative histories, and confirmed that no legislative provisos applicable to MP 20.95-22.2 were ever evaluated by the Legislature for funding:

Q Okay. Did you ever see whether or not a corridor study was produced to the legislature that included improvements to milepost 20.95 to 22.2?

A That included improvements?

Q Right.

A No.

Q Okay. So to your knowledge -- and you couldn't find anyplace where the legislature had evaluated a proposal to improve milepost to 20.95 to 22.2 and decided not to?

A No.⁶³

In truth, Mr. Neely and Ms. George are simply providing after-the-fact and inaccurate recreations of a decision making process that *might* qualify for discretionary immunity. However, these after-the-fact justifications were not the same reasons that the assigned engineers elected not to install a median barrier as documented in the 1992 Design Report. Discretionary immunity serves as a shield to protect actual policy decisions and not as a sword just to extinguish lawsuits. In this regard, the conclusory and speculative declarations of Mr. Neely and Ms. George are

⁶³ CP at 640

irrelevant and do not prove anything in relation to the reasons why the WSDOT failed to install median barriers at the precise location at issue.

E. CONCLUSION

The State submitted declarations from current WSDOT employees alleging that, as of 2016, the installation of median barriers at MP 20.95-22.2 never would have been funded if ever proposed by the assigned engineers. In this regard, the State neglected to explain the extent to which high level policy decisions were *actually* the basis, or not, for the engineering determination to not include a barricade between MP 20.95-22.2. The 1992 Design Report indicates that a design team of engineers was charged with the responsibility of remedying the known cross-over accident dangers posed by SR 18 based upon the history of accidents and current design of the roadway. Those engineers decided, at an implementation level, not to include MP 20.95-22.2 based upon considerations such as “*traffic operations, enforcement, and maintenance...*”⁶⁴ The Ngo family’s expert takes issues with these engineering decisions, particularly given the exceptionally high fatality rate between MP 20.95-22.2. At an implementation level, the assigned engineers decided not to install the median barrier at issue, at a relatively

⁶⁴ See CP at 60

nominal cost per mile of only \$978,000. This decision was never elevated for consideration to the higher levels. So, high level policy determinations are not being challenged in violation of separation of powers principles.

In sum, summary judgement was wrong for three reasons. First, the group of engineers who ultimately made the decision not to install a barrier do not qualify for discretionary immunity. *See e.g. Stewart*, 92 Wn.2d 285 (1979). Second, the *Evangelical* factors for considering whether a decision is afforded discretionary immunity weigh in favor of the answer in this case being: “no.” Finally, the State’s argument that the decision to forego the installation of the barrier based on the high cost fails because: (1) this argument is a speculative opinion (that cost actually is the reason the State made the decision it did), based on another speculative opinion (that it would cost \$18-25 million), neither of which are based in fact, and (2) a defense based upon budgetary limitations in this case is precluded. Accordingly, this court should reverse and remand.

This case involves a difference of opinions as between dueling highway design experts without regard to the Priority Array process and/or a challenge to policy decisions by the Legislature. For these reasons, the State’s discretionary immunity defense should have been dismissed as a matter of law.

DATED this 20th day of July, 2016.

Respectfully submitted

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CHEUK CHHANN and THOAI-HUONG
NGO, as Personal Representatives of the
ESTATE OF TRUNG D. NGO, Deceased,
and CHEUK CHHANN, an individual,

Plaintiffs/Appellants,

v.

THE STATE OF WASHINGTON, and,
FRANK JAMES WILLING, JR., an
individual, and MINE HER, an individual,

Defendant/Respondent.

No. 74999-4-I

DECLARATION OF SERVICE
FOR OPENING BRIEF OF APPELLANT

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Appellants' Opening Brief

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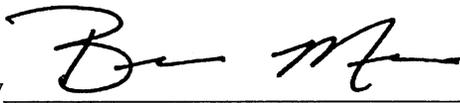
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