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MAR 12 2013

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DIVISION III
STATE OF WASHINGTON
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NO. 310175

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OF THE STATE OF WASHINGTON**

LISA A. VAN LEAR AND KEITH A. VAN LEAR,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

On July 23, 2008, Lisa and Keith Van Lear were injured when Jill Link failed to yield the right of way at the intersection of U.S. 2 (“Highway 2”) and Flint Road, near Spokane,¹ and collided with the motorcycle the Van Lears were riding. The Van Lears sued Ms. Link for negligent driving and the State of Washington alleging that the State had a duty to construct a right turn deceleration lane on Highway 2 which might have allowed Ms. Link to better see the approaching motorcycle. Ms. Link admitted liability. The trial court denied the State’s Motion for Summary Judgment based on lack of duty and proximate cause, but granted a subsequent motion for summary judgment based on discretionary immunity as expressed in *Avellaneda v. State*, 45 Wn. App. 82, 273 P.3d 477 (2012).

The State of Washington urges this Court to affirm summary judgment dismissing Keith and Lisa Van Lear’s complaint against the State and its Department of Transportation because summary judgment, based on discretionary immunity and violation of separation of powers was required when, according to the facts established by the record:

- Highway 2 has been in existence for many decades and there is no claim and no evidence that the highway was negligently designed

¹ Since this action began the intersection has been annexed and is now part of the City of Spokane.

or constructed when it was built without a right turn lane at the intersection with Flint Road;

- The decision whether to add a right turn lane at Highway 2 and Flint Road because of increased traffic was a program decision requiring funding for construction under the statutorily mandated priority budgeting process, not an operational decision, such as whether or not to install a warning sign, that would not require separate funding;
- There is no claim that there was a program decision to build a right turn lane that was negligently implemented by the Washington State Department of Transportation (“WSDOT”); and
- Construction of a right turn lane at Highway 2 and Flint Road was not funded under WSDOT’s statutorily mandated priority budgeting process.

In addition, summary judgment is required on the alternative grounds that the State had no duty to construct a right turn lane on Highway 2 at Flint Road and the absence of a right turn deceleration lane at the intersection was neither the cause in fact nor legal cause of the accident in which the Van Lears were injured.

II. STATEMENT OF THE ISSUES

1. Is summary judgment of dismissal required when Plaintiffs' negligent highway operation claim is based on failure to construct highway safety improvements, such as a right turn deceleration lane, that were not funded under the priority array budgeting process required by RCW Chapter 47.05?

2. Does trial on the issue of negligent highway operation violate separation of powers when the alleged negligence is failure to construct a capital highway safety improvement that was not recommended for funding by WSDOT, The Washington State Transportation Commission or the governor and was not funded by the legislature?

3. Was summary judgment of dismissal required when the State had no duty to construct a right turn deceleration lane as an allegedly necessary highway safety improvement and the absence of a right turn deceleration lane was neither the cause in fact nor legal cause of the accident in question?

III. STATEMENT OF THE CASE

A. The Accident

On July 23, 2008 at approximately 11:00 a.m. Jill Link took her half hour lunch break from her job at Triumph Composite Systems located

at the intersection of Highway 2 and Flint Road near Airway Heights, Washington. CP at 136-37. As she had done on numerous other occasions, Ms. Link turned her Jeep Cherokee left out of the Triumph parking lot, went one block north on Flint Road, moved into the left turn lane, and pulled to a stop at the stop sign. CP at 139-41, 159-62. Ms. Link then waited for traffic on Highway 2 to clear so she could make a left turn to head west on Highway 2 toward the nearby fast food restaurant where she intended to purchase lunch. CP at 136-40. As Ms. Link began her left turn, she was spotted by Keith Van Lear, who was riding his Harley Davidson motorcycle, with Lisa Van Lear on the back, eastbound on Highway 2 at approximately 50 miles per hour, approximately 140 feet² from what would be the point of impact with Ms. Link's Cherokee. CP at 97, 127-32. Ms. Link never saw the motorcycle until it struck the left front side of her Cherokee in the intersection, claiming that, when she looked to her left before starting her turn, all she saw was a pickup truck in the right hand eastbound lane of Highway 2 with its right turn signal on, slowing to make a right turn onto southbound Flint Road. CP at 129, 139-42. Mr. and Mrs. Van Lear both sustained serious injuries in the collision. CP at 23-24.

² It is undisputed that the motorcycle left 62 feet of skid mark on the roadway. CP 97, 127-132. Allowing a conservative one second perception/reaction time at 50 miles per hour, places the motorcycle 140 feet from the point of impact when he first saw the Cherokee. (50 mph equals approximately 73 feet per second)

B. The Intersection

The portion of Highway 2 located in the State of Washington was classified as State Route 2 in approximately 1970. RCW 47.17.005. Highway 2 is a Mainline National Highway System Route and is the major commuter link between Spokane, Washington and Fairchild Air Force Base. CP at 562. At the intersection with Flint Road, Highway 2 is a four lane highway, with two eastbound and two westbound lanes, and left turn channels to allow Highway 2 traffic to turn onto Flint. CP at 544. The speed limit on Highway 2 is 55 miles per hour. CP at 545.

Flint Road is a side road connected to Highway 2 and is a Spokane County Road. CP at 563. Until the 1980's, Flint was an unimproved two lane road with little traffic. CP at 563. Presently, as on the date of the accident, Northbound Flint Road is two lanes with a left turn channel for vehicles to turn onto westbound Highway 2. CP at 107. There is a stop sign for northbound Flint Road traffic. CP at 107. The intersection is located on a flat, straight stretch of the highway, and drivers at the stop bar on Flint have a clear view of Highway 2 for as far as they can see – well over a thousand feet. CP at 107, 111 and Appendix 1, a color copy of the intersection diagram appearing at CP 111.

WSDOT's Design Manual contains criteria referred to as "warrants" used in determining whether a traffic signal or other traffic

control device should be considered at a particular location. The Design Manual warrants for traffic signals are derived from the Manual of Uniform Traffic Control Devices (“MUTCD”) and are the minimum requirements for installation of a traffic signal. CP at 545, 564. As of July 23, 2008, the intersection of Highway 2 and Flint Road did not meet the warrants for a traffic signal. CP at 564. Edward Stevens, the Van Lears’ expert traffic engineer agreed, and testified in deposition: “I’m not saying there should have been a traffic signal at that intersection.” CP at 282. As of the end of 2011, the warrants for a traffic signal had not been met for the intersection. CP at 564.

C. Other Relevant History Of The Intersection

1. The Boeing Plant Improvements

In the late 1980’s, Boeing constructed a plant for manufacturing interior aircraft components at Flint Road and Highway 2. CP at 563. To accommodate increased traffic caused by the Boeing Plant, Spokane County widened Flint Road from two lanes to four and added a left turn channel to accommodate vehicles turning left from northbound Flint Road to Highway 2. CP at 563. In 1992, Boeing contacted WSDOT and requested that a traffic signal be installed at Highway 2 and Flint Road to decrease congestion and increase safety. Boeing offered to pay the cost of installing the signal. CP at 563. In response, WSDOT undertook a traffic

study and advised Boeing that the study showed the intersection did not meet WSDOT Design Manual warrants for installation of a signal at the intersection. CP at 563. WSDOT traffic studies showed that the congestion at the intersection Boeing complained about was short term, lasting several minutes during Boeing's afternoon shift change, and primarily consisted of a backup of northbound Flint Road vehicles lined up to turn right onto eastbound Highway 2. CP at 563. Because signal warrants were not met, WSDOT suggested alternatives to installing a traffic signal, including installation of a right turn acceleration lane for northbound traffic turning right from Flint Road, increased employee car/van pooling, and staggering employee hours to decrease concentrations of traffic. CP at 563.

2. The Development Of Northwest Technology Park

In 2002 Spokane County approved plans for development of The Pacific Northwest Technology Park, which included phased construction of ten commercial buildings/businesses in the vicinity of Flint Road and Highway 2. CP at 563. As part of Spokane County's approval process under the State Environmental Policy Act ("SEPA"), WSDOT identified roadway improvements that would be necessary in the future, to mitigate the impact of increased traffic expected to occur as the development progressed. CP at 563. Among the future improvements, proposed by the

project developer, recommended by WSDOT, and required by the county as a condition of approval of the project, was a traffic signal to be constructed at Highway 2 and Flint Road, during Phase One of the development, at such time as signal warrants were met and the signal was deemed needed by WSDOT. CP at 563-64. In addition, a right turn deceleration lane for eastbound Highway 2 traffic was proposed and approved for construction during Phase Two of the development, although it was noted that, in the interests of efficiency, convenience and economy, construction of the lane would most likely occur during Phase One, when the signal was constructed. CP at 563-64.

Because of economic circumstances, work on the development did not proceed as quickly as expected and traffic did not increase at the rate expected. By the end of 2011, Phase One of the Technology Park project was only 70 percent complete. CP at 546, 564. Periodic traffic studies, done by both WSDOT and the developers, showed signal warrants were not yet met in 2006 or 2007, and probably would not be met until 2012. CP at 564. Therefore, to date, neither the traffic signal nor the right turn lane have been constructed by the project developer. CP 547.

3. The Right Turn Deceleration Lane

In 2007, traffic counts showed that the number of vehicles turning right from Highway 2 onto southbound Flint Road had increased enough

to allow consideration of construction of a right turn deceleration lane. CP at 546. Meeting Design Manual traffic count criteria for construction of a right turn deceleration lane does not automatically require that the turn lane be installed. CP at 546. Other criteria must be considered and engineering judgment exercised to determine whether installation of a right turn lane should be proposed. CP at 546. The purpose of a right turn deceleration lane at the intersection would have been to improve the flow of eastbound Highway 2 traffic, and decrease the likelihood of rear end collisions caused when eastbound traffic slowed to make the right turn. CP at 545-46. The right turn deceleration lane would not have been considered as a means to eliminate sight obstruction caused by right turning vehicles. CP at 545-46. Regional Traffic Engineer Harold White did not recommend adding a right turn deceleration lane because installation of the lane, without contemporaneous installation of the traffic signal (which was not yet warranted according to traffic studies), would have caused a reconfiguration of the intersection that would not only have *decreased* visibility for most northbound drivers, but also would have increased the distance vehicles would be required to cover to cross the eastbound lanes of Highway 2. CP at 546. In turn, this would increase the time needed to safely cross or enter the highway and increase the risk of collisions. CP at 546. In addition, construction of a right turn lane in 2007 was not feasible

because no such project was included in Washington's 2007 transportation budget. CP at 546.

4. Accident History

The history of accidents involving vehicles turning left from Flint Road to Highway 2 was not significant. CP at 544-46. Between 1999 and the Van Lear/Link accident on July 23, 2008, there were 24 accidents at the intersection, four of which involved vehicles turning left from Flint Road to westbound Highway 2. CP at 544. Only two of those four accidents involved injuries. CP at 544.

D. WSDOT's Priority Array Budgeting Process

State law recognizes that while WSDOT is responsible for the operation of over 20,000 miles of State highway, the State does not have the money to address every roadway deficiency. RCW 47.05.010; CP at 473. Washington law therefore requires that WSDOT use a benefit/cost methodology to prioritize funding of projects to address roadway deficiencies. RCW 47.05.010.

WSDOT implements the policy set forth in RCW 47.05.010 by formulating a "priority array" of projects for which it seeks funding from the legislature. CP at 472-73. The priority array is developed by WSDOT's Capital Highway Construction Program, which uses a benefit/cost analysis to determine how projects are to be ranked in the

array. CP at 472-73. Limited funding by the legislature enables WSDOT to seek funding only for projects that, based on ranking in the priority array, have the best potential for improving safety performance based on benefit/cost ratio. CP at 473.

Washington State's Strategic Highway Safety Plan, "Target Zero," adopted by the Governor, established a goal of zero fatalities and serious injury collisions for transportation agencies that use state and federal dollars to improve highway safety. CP at 473. WSDOT's Highway Safety Executive Committee, acting on behalf of WSDOT's Secretary of Transportation, adopted Target Zero's goal and strategies as the basis of WSDOT's Safety Sub-Program within its Capital Highway Construction Program. CP at 473. The Highway Safety Executive Committee developed two objectives to achieve WSDOT's "Target Zero" goal – (1) reduce the risks for serious and fatal collisions at locations and corridors with collision history and (2) prevent collisions at locations and corridors without collision history by reducing risk factors. CP at 473. Therefore, WSDOT built its capital budget structure around two approaches, referred to as Collision Reduction and Collision Prevention. CP 473-74. To meet these goals, the Committee directed WSDOT's Capital Program Development and Management Office ("CPDM Office") to develop methodologies to identify and prioritize locations and corridors for

collision reduction and prevention, based on factual need. WSDOT used collision history data, recorded by law enforcement officers, and highway feature data, collected by WSDOT, in the development of these methodologies. The Committee adopted these methodologies and directed WSDOT to use them on a biennial basis to identify and list the corridors and locations with the greatest need. CP at 474.

In 2000, 2002, 2004, 2006 and 2008, the Flint Road Intersection on Highway 2 (Mile Post 280.22) did not appear within the limits of any locations or corridors on WSDOT's needs lists. CP at 474. The CPDM Office used these lists as the initial step in developing WSDOT's priority array for capital safety projects, sending the lists of needs to WSDOT's regions for the development of a scope of work that had the potential to improve safety performance. CP at 474. WSDOT regions then used licensed civil engineers to evaluate different proven strategies, endorsed by the Highway Safety Executive Committee, for improving the potential performance at each location. CP at 474. These evaluations included consulting with local communities to ensure a solution was workable, evaluating environmental impacts and calculating the cost benefit. Based on these evaluations, the regions recommended a preferred alternative for each need. CP at 474-75. These project proposals were then incorporated into WSDOT's priority array based on their cost-

effectiveness to improve performance. CP at 475. The Secretary of Transportation used the priority arrays, and their projects and performance benefits, in each of the budget categories of the Highway Construction Program to evaluate the amount of performance improvement that could be achieved for different investment levels in each category. CP at 475.

Until July 1, 2005, after safety improvement projects were prioritized and selected for funding/programming based on benefit-cost analysis by WSDOT, they were submitted to the Washington State Transportation Commission (the Executive Branch) as part of WSDOT's overall biennial budget request. CP at 475. The Commission was a separate agency with executive authority to review and modify the transportation budget, its programs and projects as it saw fit. Once approved by the Commission the proposed budget was submitted to the Legislature as the Transportation Budget. CP at 475-76. Since July 1, 2005, WSDOT's proposed transportation budget is submitted to the Governor for review, modification and approval before being forwarded to the Legislature for review, modification and approval. CP at 476.

It typically takes WSDOT at least a year to develop its capital budget proposal for an upcoming biennium. CP at 475. WSDOT began to formulate its budget for the 2005-07 biennium in the summer of

2003, and its budget for the 2007-09 biennium in the fall of 2005. CP at 475. WSDOT's budget for the 2005-07 and 2007-09 biennia did not include a funding request for improvements at Flint Road/US Highway 2 Intersection because after application of the criteria adopted by the Highway Safety Executive Committee, including warrants, accident history and benefit/cost analysis, neither the Highway 2/Flint Road intersection nor the corridor containing the intersection, had a high enough priority to be identified or included on the list of projects submitted to the legislature for funding through the Executive Branch. CP at 475.

IV. ARGUMENT

A. Standard Of Review

Summary judgment is reviewed de novo and the appellate court engages in the same inquiry as the trial court. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 692 n.17, 15 P.3d 115 (2000). Summary judgment should be granted when, after viewing the facts in the light most favorable to the non-moving party, the court finds that there is no issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). A material fact is a fact which will affect the outcome of the litigation. *Id.* at 703. The question of

discretionary immunity usually presents a question of law. *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965).

B. Summary Judgment Based On Discretionary Immunity Was Proper

“It is not a tort for the government to govern.” *Evangelical*, 67 Wn.2d at 253, (quoting *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) (Jackson, J., dissenting)). Funding for roadway safety improvements depends on the discretionary acts and decisions involved in determining whether roadway safety improvements should be included in the priority array budget mandated by RCW 47.05.010. Therefore discretionary immunity applies and the State may not be subjected to liability for failing to undertake construction of highway safety improvements, such as the right turn deceleration lane at Highway 2 and Flint Road, that lack sufficient funding priority under the program. *Evangelical United Brethren Church v. State*, 67 Wn.2d at 253-54, *Avellaneda v. State*, 167 Wn. App. 474, 273 P.3d 477 (2012). Accordingly, the trial court correctly granted summary judgment dismissing the Van Lears’ complaint against the State.

1. The General Waiver Of Sovereign Tort Immunity And The Preservation Of Discretionary Immunity

In 1963, RCW 4.92.090 was enacted, providing:

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.

While the waiver of sovereign immunity is broad, RCW 4.92.090 “does not render the state liable for every harm that may flow from governmental action, or constitute the state a surety for every governmental enterprise involving an element of risk.” *Evangelical*, 67 Wn.2d at 252-53. Discretionary immunity is a court-created exception to the general rule of governmental tort liability and applies to immunize discretionary acts and or decisions exercised at the executive level of government, “however unwise, unpopular, mistaken, or neglectful a particular decision or act might be.” *Id.*; *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 12, 882 P.2d 157 (1994). Under *Evangelical*, discretionary immunity applies to a decision by a government official or agency when the following four questions are answered in the affirmative:

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

Evangelical, 67 Wn.2d at 255.

The court developed the test to be applied in cases where it is necessary to distinguish between actionable tortious conduct and the enactment and implementation of basic governmental policy which should not be hampered by the threat of tort liability. *Evangelical*, 67 Wn.2d at 253. Highway liability cases, such as the instant case, based on the alleged failure to construct unfunded roadway improvements require the scrutiny of the *Evangelical* test. *McCluskey*, 125 Wn.2d at 12-13.

2. The Application Of The *Evangelical* Discretionary Immunity Test To Highway Liability Cases

Since *Evangelical*, Washington appellate courts have considered the discretionary immunity criteria in *McCluskey* and at least four other highway liability cases, including *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979); *Riley v. Burlington Northern, Inc.*, 27 Wn. App. 11, 615 P.2d 516 (1980); *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990); and *Avellana*, 167 Wn. App. 474. The following guidelines evolved from the cases:

- When the decision to make a roadway safety improvement is operational in nature, not requiring separate funding, such as the decision of whether to erect a warning sign, discretionary immunity does not apply. *E.g. McCluskey*, 125 Wn.2d at 10-11, 882 P.2d 161-162. .

- When the decision involves the negligent design or implementation of a funded roadway safety improvement, discretionary immunity does not apply. *E.g. Stewart*, 92 Wn.2d at 293, 597 P.2d at 106-107; *Riley*, 27 Wn. App. at 16-17, 615 P.2d at 519.
- When the decision involves whether a roadway safety improvement should be funded and/or constructed, discretionary immunity applies. *E.g. Jenson*, 57 Wn. App. at 480-483, 789 P.2d 307-309; *Avellaneda*, 167 Wn. App. at 482-485, 273 P.3d 481-482.

In *Stewart*, the Supreme Court applied the *Evangelical* test in a case involving claims that WSDOT was negligent in the design of the lighting on the I-5 bridge over the Snohomish River near Everett. *Stewart* offered expert testimony that the bridge was negligently designed because the design did not include lighting at the location of the accident. The trial court applied discretionary immunity to the negligent design claim, rejected *Stewart*'s theory, and instructed the jury that "the design of highway lighting system and the Snohomish River Bridge does not constitute negligence." The Supreme Court reversed, holding that the first two *Evangelical* criteria did not apply to the design of the bridge or the highway lighting system. The Court stated:

We believe that these facts do not justify discretionary immunity under tests 1 and 2 of *Evangelical* as refined in *King*.³ The decisions to build the freeway, to place it in this

³ In *King v. Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974), *overruled on other grounds by Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997), the court refined the *Evangelical* test stating, "to be entitled to discretionary immunity the State must make a showing that such a policy decision, consciously balancing risks and advantages, took place."

particular location so as to necessitate crossing the river, the number of lanes – these elements involve a basic governmental policy, program or objective. However, these are *not* the elements challenged by the appellant. Rather, appellant argues that once those governmental decisions were made they had to be carried out without negligent design of the bridge or of the lighting system. Negligent design was not essential to the accomplishment of the policy, program or objective.

Stewart, 92 Wn.2d at 294.

Stewart does not apply here. Here, the intersection, without a right turn lane, had been in place for many years. There is no evidence or allegation that the original design of the roadway was negligent because it did not include a right turn lane. On the contrary, the evidence establishes that for many years Flint Road was a little used side road and the traffic volume and number of turning movements at the intersection did not justify consideration of construction of a right turn deceleration lane until 2007. Here, there can be no argument that the turn lane was negligently designed or constructed because the lane has not yet been designed or constructed. Here, the Van Lears challenge the decision not to construct the additional lane. Under *Evangelical*, as explained in *Stewart*, the decision of whether or not to build the lane is not actionable.

In *Riley v. Burlington Northern*, the plaintiff was injured in a collision at a county railroad crossing. By affidavit in response to the county's motion for summary judgment, Riley's engineer established that

because of the angle of the tracks to the road, the elevation of the tracks and the number and location of tracks, the standard advance warning sign and cross-buck sign were inadequate to alert motorists. Equating this with the negligent design of the freeway lighting in *Stewart*, the court reversed summary judgment in favor of the county, stating:

Mr. Cysewki's *affidavit* indicates a hazardous crossing was created by the angle at which the road approaches the railroad track. This was a design problem presenting a factual issue.

Riley, Inc., 27 Wn. App. at 17. In addition, the court noted that ordinary rules of negligence are "generally applied in cases involving the adequacy of road signs." *Id.* at 18 n.4.

Riley involved negligent design and signing of the railroad crossing and therefore does not apply here. Here, there is no claim that signs were inadequate and it is undisputed that the warrants for installation of a traffic signal at the intersection were not met until 2012. *See* CP at 282, Deposition of Edward Stevens, the Plaintiffs' traffic engineer who testified: "I'm not saying there should have been a traffic signal at that intersection." Stevens does not opine that the intersection was negligently designed.⁴ The Van Lears and engineer Stevens allege that WSDOT was

⁴ In their Opening Brief at 11-13, the Van Lears also improperly infer that because Mechanical Engineer Tompkins, an accident reconstruction specialist, uses the term "geometric layout," that it is his opinion the intersection was negligently designed. In fact, Tompkins was not identified as a highway design expert or traffic engineer and

negligent in failing to construct an additional lane for right turning vehicles in 2007, and the *Evangelical* test should be applied to this decision.

In *Jenson v. Scribner*, the plaintiff was traveling on SR 3 near Bremerton, Washington on May 6, 1983, when a vehicle traveling in the opposite direction crossed the highway and collided with his vehicle seriously injuring him. In 1981 WSDOT had proposed construction of a barrier between the lanes of SR 3 to help prevent such collisions. That year, the legislature authorized funding for design of the barrier project in the 1981-1983 biennium and authorized expenditures for construction in the 1983-1985 biennium. Design of the project was completed in January 1983 and WSDOT advertised for bids to construct the project in May 1983. Construction on the project began in June 1983, after the plaintiff's accident. Seeking to avoid summary judgment with *Stewart's* "negligent implementation" distinction, plaintiff argued that discretionary immunity did not apply and that WSDOT was negligent for not starting the project earlier, which would have prevented plaintiff's accident. The court applied the *Evangelical* test and affirmed summary judgment:

Contrary to the Jenson's assertion, funds for construction were not available in January of 1983. The Transportation Department's *budget*, which included funds for the

did not testify as such. Any comment he makes about the design of the roadway is superfluous, inadmissible and should not be considered.

construction of the barrier in question, was not even signed into law until May 23, 1983.

Jenson, 57 Wn. App. at 482.

The court also rejected Jenson's claim that the state was negligent in the untimely collection of accident data used to formulate the priority array stating, "data collection is merely a function of planning and is, thus, part of the decision-making process. It is not the implementation of a decision." *Id.* at 483. Here, as in *Jenson*, discretionary immunity applies because the turn lane Plaintiffs claim should have been constructed in 2007 was not part of the 2007 transportation budget. The decision of whether or not to fund and build the lane was a planning decision, not an implementation decision, and is therefore protected by discretionary immunity.

In *McCluskey*, the plaintiff's husband was killed when an out of control vehicle skidded across a highway median and struck the husband's car. Plaintiff alleged WSDOT was negligent for failing to resurface the allegedly slippery roadway surface and/or failing to construct a median barrier and/or failing to post "Slippery When Wet" warning signs. The trial court rejected WSDOT's discretionary immunity/priority array arguments, evidence and instructions, and the jury found WSDOT 50% liable. The Court of Appeals affirmed, rejecting the discretionary

immunity argument as applied to roadway improvement funding decisions.

While affirming on other grounds, the Supreme Court disagreed with the Court of Appeals' discretionary immunity analysis, recognizing that the State's waiver of tort immunity in RCW 4.92.100 et. seq. did not alter "the State's common law defenses regarding highways, which are unique to the State and not shared by private parties." *McCluskey*, 125 Wn.2d at 9. The court pointed out that proper analysis of state liability in highway cases would require examination of the availability of funding for roadway improvements through application of the *Evangelical* test. *McCluskey*, 125 Wn.2d at 11-13. The court pointed to other cases, overlooked in the Court of Appeals, that should have been considered in the discretionary immunity analysis:

[T]he Court of Appeals did not discuss case law from Washington and other jurisdictions of potential relevance to the argument that the State's failure to include SR 900 in its 1986 Priority Array and thus to allocate funds for its improvement may be protected by immunity afforded the decision-making process. *See, e.g., Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990) (parties concede that the State's decision concerning the installation of a barrier is subject to discretionary immunity); *Julius Rothschild & Co. v. State*, 66 Haw. 76, 655 P.2d 877 (1982) (the State's failure to repair or replace a bridge is covered by immunity); *Industrial Indem. Co. v. State*, 669 P.2d 561 (Alaska 1983) (the State's failure to install highway guardrail is protected by immunity).

McCluskey, 125 Wn.2d at 12-13.

The State abandoned the discretionary immunity argument in *McCluskey* because the basis of the jury's verdict included WSDOT's failure to erect a warning sign, and signage was not the kind of capital improvement that was subject to WSDOT's priority budgeting process. Therefore, the *McCluskey* Court did not rule on the immunity issue, stating:

While we can draw no conclusions about discretionary immunity in this case, because of the State's abandonment of the theory at trial, the above discussion outlines the analysis." Resolution of the immunity question in highway improvement decisions must await a case in which the issue has been preserved for review.

McCluskey, 125 Wn.2d at 13.

To date, the Supreme Court has not been confronted with the immunity issue reserved in *McCluskey*. Nevertheless, the analysis outlined in *McCluskey*, including the *Evangelical* test, applies to this case and the decision not to construct the right turn lane at Highway 2 and Flint Road should be afforded discretionary immunity.

In *Avellaneda v. State*, 167 Wn. App. 474, 273 P.3d 477 (2012), the Court of Appeals directly addressed the highway liability immunity issue reserved in *McCluskey*, and affirmed summary judgment dismissing a case where plaintiffs sued the state for failing to erect a cable median

barrier that would have prevented the accident that injured them. Mrs. Avellaneda was injured when another vehicle crossed the median on SR 512 and struck her car. WSDOT had recognized the need for the cable median barrier on the highway to prevent accidents like the one involving Mrs. Avellaneda and planned a project to install the barrier. However, WSDOT did not construct the barrier in time to prevent the Avellaneda accident because the project had not been high enough on WSDOT's Priority Array to receive funding for construction in time to prevent the accident. The Avellanedas sued WSDOT claiming the agency negligently delayed construction of the cable barrier. The trial court granted summary judgment on the grounds that the decision of whether and when to install the barrier were protected by discretionary immunity. *Avellaneda*, 167 Wn. App. at 478. The Court of Appeals affirmed, applying the *Evangelical* test to WSDOT's decision to initially exclude the barrier project from the priority array and holding the decision was entitled to discretionary immunity. *Avellaneda*, 167 Wn. App. at 481.

Concerning *Evangelical* factor one – whether the decision to exclude the project from the priority array involved a basic governmental policy, program or objective – the court found this factor “unequivocally satisfied,” stating at 167 Wn. App. 482-483:

RCW 47.05.010 expresses the basic policy that highway funding decisions should be based on a rational selection of projects, evaluating the costs and benefits, leading to difficult trade offs. The decision determining the SR 512's priority was at least as basic as the decision to build a single freeway, recognized in *Stewart* as satisfying the first *Evangelical* factor.

The court found that *Evangelical* factor two - whether the decision was essential to the accomplishment of the policy - was satisfied. The court recognized that formulation of the priority array involved creating and following guidelines to systematically rank highway safety improvement projects according to benefit/cost ratios. The court concluded that this systematic ranking program was essential to compliance with the policy expressed in RCW 47.05.010, satisfying the second *Evangelical* factor. *Avellaneda*, 167 Wn. App. at 483.

The *Avellaneda* court found the third *Evangelical* factor satisfied because WSDOT collected data about accident history and the cost of projects and used it to create a system to analyze the data and rank potential projects. "This required a great deal of basic policy evaluation, judgment and expertise," satisfying the third factor. *Avellaneda*, 167 Wn. App at 483.

As to the fourth *Evangelical* factor – whether WSDOT had lawful authority to make the decision – the court found the factor was satisfied,

noting that it was undisputed that WSDOT had the authority to formulate the priority array. *Id.*

With all four *Evangelical* factors established, the court noted that the WSDOT priority array was submitted to the Transportation Commission budget for final review, modification and approval and was therefore a high-level executive body decision, not an operational-level decision. *Avellaneda*, 167 Wn. App. at 483. The court also concluded that actions such as assigning priority and the calculation of benefit/cost ratio were part of the decision making process in formulating the priority array and were therefore protected by discretionary immunity. *Id.*

3. Application of *Evangelical* Factors And *Avellaneda* To This Case

The argument for summary judgment is stronger here than in *Avellaneda* because, in *Avellaneda*, the project to remediate the allegedly dangerous condition eventually made it into the priority array. Here, after application of the benefit-cost methodology, Highway 2 and Flint Road did not even make the list of highway corridors or locations to be considered for inclusion in the priority array. It is undisputed that construction of Highway 2/Flint Road intersection safety improvements, such as construction of a right turn lane on Highway 2, never appeared on the Priority Array. Thus, there is no argument here that WSDOT

negligently designed the safety improvements or negligently implemented a decision to fund the improvements; therefore the only issue before the Court here is whether the decision to not include Highway 2/Flint Road intersection safety improvements on the priority array is entitled to discretionary immunity. Applying the four question *Evangelical* test, all four questions must be answered in the affirmative and discretionary immunity applied.

(1) **The Decision Necessarily Involved A Basic Governmental Policy, Program And Objective**

RCW 47.05.010 sets out the Legislature's intent in requiring the establishment of a priority system:

The legislature finds that solutions to state highway deficiencies have become increasingly complex and diverse and that anticipated transportation revenues will fall substantially short of the amount required to satisfy all transportation needs. Difficult investment trade-offs will be required. It is the intent of the legislature that investment of state transportation funds to address deficiencies on the state highway system be based on a policy of priority programming having as its basis the rational selection of projects and services according to factual need and an evaluation of life cycle costs and benefits and which are systematically scheduled to carry out defined objectives within available revenue.

To comply with chapter 47.05 RCW, WSDOT established the Priority Array. Under this program, every other year WSDOT considers highway safety improvement projects, directed at the goals of reducing

risks for serious and fatal collisions at locations and corridors with collision history and preventing collisions at locations and corridors without collision history, by reducing risk factors on all state roadways, utilizing criteria developed under WSDOT's "Target Zero" program. CP at 473-74. Applying these criteria, which include accident history, local community input, environmental impacts and benefit/cost calculation, WSDOT, through its Capital Program and Management Office, identified the locations and highway corridors most in need of safety improvement to be included in budgets for the biennia beginning in 2000, 2002, 2004, 2006 and 2008. CP at 474. The projects with the greatest benefit/cost rating calculated using these criteria were selected for funding/construction, then submitted to the Washington Transportation Commission (until 2005) or the governor (after 2005) as part of WSDOT's overall budget requests for those biennia.

As recognized in *Avellaneda*, this decision-making process unequivocally satisfies the first *Evangelical* factor because it is "based on the rational selection of projects, evaluating the costs and benefits leading to difficult trade offs," thus furthering the policy set forth in RCW 47.05.010. As such, the decision of whether to include the construction of a right turn deceleration lane at Highway 2 and Flint Road, "was at least as

basic as the decision to build a single freeway, recognized in *Stewart* as satisfying the first *Evangelical* factor.” *Avellaneda*, 167 Wn. App. at 483.

(2) **The Decision Was Essential To Accomplishment Of The State’s Policies, Programs And Objectives**

In order to meet the obligation to prioritize highway improvement projects based on benefit-cost analysis, WSDOT used accident history recorded by law enforcement agencies and highway feature data collected by WSDOT to identify and list highway corridors and locations with the greatest need for safety improvement on the priority array. The creation of the priority array and making the decisions concerning which projects to include on the array is essential to the accomplishment of the policy embodied in RCW 47.05.010. Without the systematic ranking of roadway improvement projects, using guidelines and benefit/cost methodology created by WSDOT, the priority budgeting process mandated in the statute could not have been carried out. This evaluation process satisfies the second factor in *Evangelical*. *Avellaneda*, 167 Wn. App. at 483.

(3) **The Decision Required The Exercise Of Basic Policy Evaluation, Judgment And Expertise**

There are more than 20,000 miles of state highway in Washington, and, as pointed out in RCW 47.05.010, not nearly enough money to construct all the improvements needed to remedy all the known

deficiencies in these roadways in any one biennium. In order to properly evaluate and rank projects aimed at addressing these deficiencies, WSDOT was required to collect data about accident history and the efficiency and cost of possible improvement projects. WSDOT used this information to develop a system to analyze the data collected and rank projects using a benefit/cost approach. As noted in *Avellaneda*, “this required a great deal of basic policy evaluation, judgment and expertise,” satisfying the third *Evangelical* factor. *Avellaneda*, 167 Wn. App. at 483.

(4) **WSDOT Possessed The Requisite Constitutional, Statutory Or Lawful Authority And Duty To Make The Decision**

Chapter 47.05 RCW requires that the State devise a priority programming system to address deficiencies in state highways. WSDOT is the state agency with the authority to “exercise all the powers and perform all the duties necessary, convenient or incidental to the planning, locating, designing, constructing, improving, repairing, operating and maintaining state highways. . .” RCW 47.01.260. See also RCW 46.01.031. There can be no dispute that WSDOT had the authority to decide whether to construct improvements at Highway 2 and Flint Road, satisfying the fourth *Evangelical* factor.

In addition, the record here shows the decision not to include Highway 2/Flint Road in the Priority Array was made after conscious

balancing of risks and advantages by WSDOT personnel in regional offices and the office of Capital Program Development and Management. The record establishes that WSDOT personnel involved in formulating the Priority Array evaluated, listed and ranked needs for collision reduction and prevention, after comparing and analyzing collision history and roadway data collected for Highway 2 and the other roadways in the state. CP at 473-76. This decision-making process satisfies the additional requirement set forth in *King v. Seattle*, 84 Wn.2d 239, 245, 525 P.2d 228 (1974), (City's arbitrary and capricious actions not protected by discretionary immunity), *overruled on other grounds by Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997).

Appellants seek to avoid the discretionary immunity analysis, arguing that once a highway is tagged as "unreasonably dangerous" by an expert witness, WSDOT has a duty to remedy the alleged defect, whether the remedy is installation of a sign or construction of an additional lane of highway. The appellants' argument disregards RCW 47.05.010 and the rule of *Evangelical* as analyzed in *McCluskey*, and applied in *Stewart*, *Riley*, *Jenson* and *Avellaneda*. The statute codifies that which is already well known: the State does not have enough money to fix every deficiency in the state highways or alleviate every dangerous condition.

WSDOT therefore devised a triage system for identifying and prioritizing remediation of unsafe roadway conditions within the financial means provided by the legislature. A court-imposed duty to expend funds to remedy roadway deficiencies other than those included in the Priority Array would render RCW 47.05.010, the Priority Array program, and the decision in *Evangelical* and its progeny meaningless. For that reason, the use of the Priority Array and the decisions as to which conditions receive funding priority must be protected by discretionary immunity and not subject to suit.

In addition, as noted in *McCluskey*, highway authorities have “no duty to replace every highway structure that does not conform to present day standards,” or to make allegedly necessary improvements without regard to cost. *McCluskey*, 125 Wn.2d at 10. In the instant case, it is undisputed that construction of the right turn lane, which Plaintiffs’ expert contends was necessary to minimize the danger at the intersection of Highway 2 and Flint Road, required funding that was, after application of the statutorily mandated priority budgeting process, not available. Because WSDOT does not have a duty to construct roadway improvements that are not funded and because the decision whether or not to fund is protected by discretionary immunity, the trial court’s grant of summary judgment of dismissal should be affirmed.

Finally, the Van Lears urge that to apply discretionary immunity in this and similar cases would be to allow a so called “poverty defense,” rejected by the Supreme Court in *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d 240 (1996). *Bodin* involved an evidence issue which does not apply here, and Appellants’ reliance on the case is misplaced. In *Bodin*, the court decided whether the City of Stanwood’s attempt to secure grant money to improve a dike system that failed and caused damage was admissible in a negligence case against the city based on failure to maintain the dike. The court specifically noted that it did not reach the issue of discretionary immunity, stating at 731:

Initially, we note that while the City cross-appealed the issues of discretionary immunity and public duty doctrine, it asks that these issues be addressed only if this court holds that the evidence of attempts to procure grant funds is inadmissible. Because we hold the evidence admissible on the question of negligence, we do not decide whether the City would be otherwise entitled to discretionary immunity. . . .

Bodin does not support Appellants’ “poverty defense” argument. Appellants’ “poverty” argument disregards the analysis adopted by the Supreme Court in *McCluskey*, 125 Wn.2d 8-9, where the court specifically rejected the arguments Appellants posit here:

The Court of Appeals rejected the State’s theory that lack of funds may be considered in determining whether the State has complied with its duty to use reasonable care. The court based this conclusion on the adoption of RCW

4.92.090, wherein the legislature waived sovereign immunity in all tort actions. According to the Court of Appeals, this waiver placed the State in the same position as any other defendant. However, we observe that beyond waiving the defense of immunity, nothing in this statute alters the State's common law defenses regarding highways, *which are unique to the State and not shared by private parties.* . . .

(Internal citations omitted, emphasis supplied.) The Court went on to note that proper analysis in highway negligence cases involving funding limitations requires application of the *Evangelical* criteria, just as the trial court did here. Making no argument to the contrary, Appellants here appear to concede that, *if Evangelical does apply*, WSDOT is immune under the *Evangelical* test. See Appellant's Opening Brief at p. 30.

C. Separation Of Powers

Funding for roadway safety improvements in Washington is provided by the legislature, which requires WSDOT to prioritize such projects so that limited funds may be properly allocated. RCW Chapter 47.05. Allowing the court or jury to decide whether WSDOT is liable for failing to construct unfunded safety improvements, such as a right turn deceleration lane at Highway 2 and Flint Road, invades the province of the executive and legislative branches of state government and violates the doctrine of separation of powers. *Avellaneda*, 167 Wn. App. at 485-487. Where a matter is committed to the Legislature, the court may not substitute

its judgment for that of the legislative branch. *Washington State Public Emps. Bd. v. Cook*, 88 Wn.2d 200, 559 P.2d 991 (1977), *adhered to on rehearing*, 90 Wn.2d 89, 579 P.2d 359 (1978). Only the legislative branch has authority to levy taxes and appropriate funds.

The decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative. We will not direct the Legislature to act in this regard unless creation of a program and/or funding thereof is constitutionally required.

Pannell v. Thompson, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979).

Here, Plaintiffs seek to recover based on WSDOT's decision not to include construction of a traffic signal and/or right turn deceleration lane at Highway 2 and Flint Road in their budget requests for the 2005-2007 biennium or the 2007-2009 biennium.⁵ To allow the action to proceed would improperly encroach on executive authority, as recognized in *Avellaneda*:

The Avellanedas ask us to invade the executive prerogative by permitting them to recover in tort based on the WSDOT's decisions in drafting the budget proposal that excluded funding for the SR 512 project. Such a result would violate the separation of powers by injecting our court into the budget process after the fact. We decline to commit such judicial overreach by assigning potential liability to a budgetary decision properly within the WSDOT's purview.

⁵ Even if this project had been included in the 2007-2009 budget, it is highly unlikely that the signal/ turn lane project would have been designed, bid and constructed before the date of the accident here (July 23, 2008). CP at 546.

Avellaneda, 167 Wn. App. at 487, citing *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 600, 229 P.3d 774 (2010). Since the funding/construction decision was made in combination by WSDOT, the Governor and the legislature, allowing the court or jury to second guess the wisdom of those decisions violates separation of powers, and summary judgment on this ground should be affirmed.

D. WSDOT Had No Duty To Construct A Right Turn Lane And Failure To Construct A Right Turn Lane Was Not A Proximate Cause Of The Accident In Question

The trial court erred in denying the State's motion for summary judgment based on lack of duty, lack evidence of negligence and/or lack of proximate cause. The Van Lears allege that the accident in question was caused by WSDOT's failure to construct a right turn lane that might have improved Jill Link's visibility and allowed her to see the Van Lear motorcycle. However, the record establishes that the purpose of installing a right turn lane at this intersection would have been to improve traffic flow on Highway 2 and reduce the likelihood of rear-end collisions involving through traffic and traffic slowing to make a right turn. CP at 547. Such lanes are not used to address the situation where a right turning vehicle might momentarily block the visibility of a vehicle in an adjacent lane. CP at 546-547. WSDOT therefore had no duty to install a right turn lane, for the purpose of possibly improving Ms. Link's visibility, and the

failure to install the right turn lane was neither the cause in fact nor legal cause of the collision between Ms. Link and the Van Lears. The State's motion for summary judgment should have been granted.

1. Duty And Proximate Cause Elements Of A Highway Negligence Action

Washington law precludes recovery by a plaintiff who is unable to establish negligence or that a defendant proximately caused his or her injury. *Garcia v. Washington, Dept. of Trans.*, 161 Wn. App. 1, 270 P.3d 599 (2011). The mere fact of an accident and an injury does not necessarily lead to an inference of negligence. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999). The State's duty to maintain its roadways in reasonably safe condition does not require the state to update every road and roadway structure to present day standards⁶ nor does the duty require the State to anticipate and protect against all imaginable acts of negligent drivers. *Ruff v. County of King*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995). The jury is not permitted to speculate on how an accident or injury occurred. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 133 P.3d 944 (2006); *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001). No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have

⁶ In any event, there is no evidence that this intersection was not maintained in accord with present day standards.

happened that way, and without further showing that it could not reasonably have happened in any other way. *Gardner v. Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947).

2. Plaintiff Is Unable To Establish Duty/Breach of Duty

Here, there is no evidence that the condition that allegedly caused the accident was caused by a violation of applicable highway design or maintenance standards. Rather, the undisputed record viewed in the light most favorable to the Van Lears shows that Ms. Link did not see the Van Lear motorcycle because it was momentarily shielded from view by the right-turning pickup truck. It is not unusual or uncommon for one vehicle to momentarily block another vehicle from the view of a driver in an adjacent lane. To the contrary, “a similar condition may be found on practically every mile . . . of road in the state, and [t]he same hazard may be encountered a thousand times in every county of the state.” *Ruff*, 125 Wn.2d at 706. WSDOT has no duty to alleviate every such condition. *Id.*; see also *McCluskey*, 125 Wn.2d at 10, citing *Tanguma v. Yakima County*, 18 Wn. App. 555, 560, 569 P.2d 1225 (1977), review denied, 90 Wn.2d 1001 (1978); *Martinez v. Grant Cy. PUD No. 2*, 70 Wn. App. 134, 139, 851 P.2d 1248, review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993); *Bailey v. Town of Forks*, 108 Wn.2d 262, 271, 737 P.2d 1257 (1987).

Any argument that the totality of the circumstances required WSDOT to add a turn lane to increase visibility for drivers turning left from Flint Road to Highway 2 is not supported by the evidence in the record. Rather, the record here establishes that this intersection was situated on flat ground and that Ms. Link had an unobstructed view of Highway 2 for as far as the eye could see. CP at 544. In addition, accident records established that in the nine-and-a-half years between 1999 and the Van Lear/Link accident on July 23, 2008, there were 24 accidents at the intersection. Of those accidents, only four involved vehicles turning left from Flint Road onto Highway 2, and only two of those involved injuries to drivers. CP at 544. Accordingly, cases such as *Owen v. Burlington Northern & Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005); and *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), which involved high accident rates and extra hazardous conditions, are not relevant here. Here, summary judgment based on lack of duty and/or lack of evidence of breach of duty should have been granted because the record does not establish circumstances that created a duty to construct an additional turn lane, nor does the record establish that WSDOT's duty to maintain a reasonably safe roadway was breached.

3. Plaintiff Is Unable To Establish Proximate Cause

In *Garcia v. State Dep't of Transp.*, the court noted the following proximate cause rules applicable to summary judgment in highway negligence cases:

- “There are two elements of proximate cause: cause in fact and legal causation.” 161 Wn. App. at 15, citing *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985);
- “Cause in fact concerns the actual consequences of an act.” *Id.*;
- “On the other hand, legal causation is grounded in the determination of how far the consequences of a defendant’s act should extend and focuses on whether the connection between the defendant’s act and the result is too remote or inconsequential to impose liability.” *Id.*, citing *Hartley*, 103 Wn.2d at 778-79;
- “To defeat summary judgment, a showing of proximate cause must be based on more than mere conjecture or speculation.” *Id.*, citing *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001); and
- “[I]n order to hold a [government entity] liable for failure to provide a safe roadway, the plaintiff must establish ‘more than that the government’s breach of duty *might* have caused the injury.’” *Id.*, citing *Miller*, 109 Wn. App. at 145.

In *Garcia*, the plaintiff alleged that WSDOT’s failure to install features to activate warning lights intended to warn drivers about a pedestrian cross walk caused plaintiff to be struck by an inattentive driver. The plaintiff’s traffic engineering expert in *Garcia* testified that driver

inattention is foreseeable by WSDOT and that if the device had been installed and working properly, the inattentive driver would have become attentive and avoided the accident. Plaintiff's theory and the expert testimony it offered in *Garcia* were rejected by both the trial court and Court of Appeals. Applying, "logic, common sense, justice, policy and precedent" the trial judge found that WSDOT's failure, even if negligent, was not the legal cause of the accident. The Court of Appeals agreed:

The Estate's claim that WSDOT should have activated the roving eyes device sooner or installed different technology, and the argument that the roving eyes device would have prevented the collision, is based on speculation and as a matter of law is too attenuated to impose liability in this case.

Garcia, 161 Wn. App. at 16.

Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (2001), cited in *Garcia*, is instructive here. In *Miller*, a pedestrian walking along the shoulder of a city roadway was struck by an inattentive motorist. Recognizing that the accident might have been avoided if the city had installed the warning devices or taken other precautions prescribed by Plaintiff's expert, the court nevertheless held that evidence that the accident "*might* not have happened had the City installed additional safeguards" was nothing more than impermissible speculation, insufficient to establish the element of proximate cause. *Id.* at 147.

More recently, in *Moore v. Hagge*, 158 Wn. App. 137, 241 P.3d 787 (2010), the court relied on *Miller* in upholding summary judgment dismissing a pedestrian's claim that the City's failure to provide a sidewalk along a busy street frequented by pedestrians caused him to be hit by a car and seriously injured. Even though Plaintiff's expert in *Moore* opined that the roadway at the location of the accident was "inherently dangerous" due to traffic volumes and narrow lanes and shoulders and that the accident would "more probably than not" have been avoided if safeguards had been provided by the City, the court found these conclusions to be inadmissible speculation based on assumptions about how the accident happened. *Id.* at 156. With no evidence that the condition of the roadway was the cause in fact of the accident, the court upheld summary judgment finding:

As in *Miller*, the most that Moore can show is that the accident might not have happened if the City had installed additional safeguards.

Moore, 158 Wn. App. at 152.

In the case at bar, the Van Lears' theory is even more tenuous and speculative than the claims in *Garcia*, *Miller* and *Moore*, and the expert testimony offered in support of the theory is, on its face, speculative. Right turn lanes are considered by WSDOT at locations where traffic volumes are such that the addition of a turn lane would avoid congestion

and keep traffic moving at the posted speed limit on the main part of the roadway. CP at 545. The purpose of adding a right turn lane is to improve traffic flow and avoid rear end collisions on the main part of the road. CP at 545-46. The lanes are *not* used to eliminate sight obstructions to motorists entering from the side street caused by traffic moving on the main highway. In fact, the roadway geometrics involved in installation of a turn lane - including increasing the distance side road traffic must traverse to cross the highway and sight obstruction caused by the need to move the side street stop bar back from the highway - are often a down side to installing right turn lanes because of the increased risk to drivers entering from the side road. CP at 546. Here, it is undisputed that, even though Ms. Link's view of the inside lane was blocked, she negligently assumed that there was no vehicle in the area momentarily blocked from view by the turning truck and she drove into the path of the motorcycle. Even if a right turn lane had been there, the chances are that the motorcycle, which was traveling slower than the speed limit, CP at 303, would have been in the outside lane, still adjacent to the turning truck, and still momentarily blocked from Ms. Link's view. Ironically, the addition of the turn lane would have created significant safety issues because it would have required the stop bar to be moved even further south to accommodate the increased width of Highway 2, and the need for

installation of an ADA compliant pedestrian crosswalk, thus increasing the distance Flint Road motorists would be required cross in order to enter the highway. CP at 546, 554-55.

Significantly, Appellant's traffic engineering expert could not testify that the addition of a right turn lane would have prevented the accident. Engineer Stevens testified in deposition: "Would I say it cannot occur if you had the right turn lane there, I can't say that. But, I can say the potential is greatly minimized." CP at 541. Stated more succinctly and relevantly, Mr. Stevens merely testified that if WSDOT had installed the turn lane, the accident "*might not have happened.*" It is well established that such evidence is not sufficient to establish cause in fact or legal cause. *See Garcia*, 161 Wn. App. at 8; *Moore*, 158 Wn. App. at 151; *Miller*, 109 Wn. App. at 147.

Given the speculative and equivocal opinion by Traffic Engineer Stevens, Appellants attempt to save their position by reliance on accident reconstructionist Larry Tompkins. However, Mr. Tompkins is not a traffic or transportation engineer and is not qualified to opine on roadway engineering issues. Appellants identified Tompkins as:

[A]n accident reconstruction engineer. He will reconstruct the collision to the extent that police investigative materials and photographs enable him to do so. Mr. Tompkins' opinions will be based upon his education, training, experience and review of relevant documents and materials.

He may also review deposition testimony and other evidence as appropriate.”

CP at 61.

The court should disregard any conclusory opinion of Mr. Tompkins concerning roadway engineering. In any event, expert testimony that Ms. Link would have seen the Van Lear motorcycle if a right turn lane had been in existence is nothing more than the same kind of impermissible speculation offered by the experts in *Garcia*, *Miller* and *Moore*. Any such testimony is inadmissible and should not be considered in response to a motion for summary judgment. There is therefore no evidence establishing that failure to install the right turn lane was the cause in fact or legal cause of the collision in question, and the trial court erred in denying summary judgment on this ground.

E. The Declaration Of Morin Should Not Be Stricken

In support of the motion for summary judgment based on discretionary immunity, the State supplied the Declaration of Pat Morin, a WSDOT employee who works in the Highway Construction Program. In his declaration Mr. Morin supplied facts about the formulation and implementation of the WSDOT priority budgeting process and its application to this case. Plaintiff moved to strike the declaration on the grounds Mr. Morin was not listed as a witness in the State’s witness

disclosure required by the Case Scheduling Order. Judge Sypolt denied the motion and considered the Morin Declaration.

The trial court's ruling on the motion to exclude a witness is reviewed for abuse of discretion. *Engstrom v. Goodman*, 166 Wn. App. 905, 909-10, 271 P.3d 959 (2012). Before excluding a witness not disclosed as required by a scheduling order, the court must find that disobedience was willful or deliberate and that it substantially prejudiced the opponent's ability to prepare for trial. *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 69-70, 155 P.3d 978 (2007).

There was no willful disobedience, no prejudice and no abuse of discretion here. The State supplied the declaration in support of a motion for summary judgment and was not planning on calling Mr. Morin at trial. Even so, there were two months until trial and a month before hearing on the motion for summary judgment – plenty of time to conduct a deposition and avoid any claimed prejudice. Nevertheless, appellants never sought to depose Mr. Morin. Before striking the testimony, the court would have had to consider these factors and even if the court determined the non-disclosure constituted willful disobedience of the scheduling order, would have had to impose a lesser sanction, such as requiring the deposition of Mr. Morin and continuing the summary judgment hearing, if one was available. *Peluso*, 138 Wn. App. at 70-71.

After argument and due consideration, Judge Sypolt correctly exercised his discretion, finding no disobedience and no prejudice and allowing the declaration.

Plaintiffs continue to claim surprise and “prejudice” but do not demonstrate how they were prejudiced. Notably, Counsel for the parties had, by agreement, conducted several depositions after the scheduling order discovery cutoff, in large part to accommodate the busy schedule of the Van Lears’ counsel. There is no reason appellants could not have scheduled the deposition of Mr. Morin if there was an actual need for it.

However, even after the declaration was filed, Appellants did not seek to depose Mr. Morin because there was no need to do so. Appellants’ counsel has been counsel in numerous highway liability cases, including *McCluskey v. Handorff-Sherman*, and was already fully aware of how WSDOT’s priority array budgeting operates. In addition, in their response to WSDOT’s Motion For Summary Judgment On The Issue Of Discretionary Immunity, Plaintiffs conceded that they found no fault with the budgeting process, arguing instead that the priority array budgeting program was irrelevant. Finally, Plaintiffs cannot demonstrate surprise since discretionary immunity was pleaded as an affirmative defense in Defendant’s answer, filed in 2010, as follows:

11.2 Funding for highway modifications is provided by the legislature and decisions to allocate funding constitute a reasonable exercise of judgment and discretion by authorized public officials made in the exercise of governmental authority entrusted to them by law and such decisions are neither tortious nor actionable.

CP at 41. Denial of the motion to strike the declaration of Mr. Morin was correct and was not an abuse of discretion.

V. CONCLUSION

For the reasons set forth above, the State requests that the Court affirm the trial court's order dismissing the Van Lears' complaint. In addition, the State requests that the Court reverse the trial court's order denying summary judgment due to lack of duty, negligence and/or proximate cause, and direct summary judgment of dismissal on those alternative grounds.

RESPECTFULLY SUBMITTED this 12 day of March, 2013.

ROBERT W. FERGUSON
Attorney General

A large, stylized handwritten signature in black ink, appearing to read 'J.P. Cartwright'. To the right of the signature, the number '2764' is handwritten.

for JAROLD P. CARTWRIGHT,
WSBA No. 9595
Assistant Attorney General
Attorney for State of Washington

PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12 day of March, 2013, at Spokane, Washington.



NIKKI GAMON

APPENDIX 1

**Color Copy of Intersection Diagram at
CP 111-112**

Van Lear v. State

Washington State Court Of Appeals, Division III 31017-5

