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NO. 74999-4-I

**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,

Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

On April 23, 2011, Respondents Mine Her and Frank Willing engaged and escalated a fatal road rage battle on westbound State Route (SR) 18. In his final deadly act, Respondent Her steered off the highway, increased his speed, *and raced down the right shoulder* of the highway to pass Respondent Willing. He tried to cut in front of Willing and get back into the westbound lane, but Her's overly aggressive steering action caused his car to fishtail and rotate counterclockwise. Her's car crossed into the eastbound lane and struck Appellants' vehicle. The collision killed Trung D. Ngo and injured his wife, Cheuk Chhann.

On behalf of herself and her husband's estate, Ms. Chhann sued Willing and Her for the injuries they inflicted by their admittedly reckless actions. Ms. Chhann then filed a second suit against Respondent Washington State Department of Transportation (WSDOT) that claimed the highway itself was to blame for consequences of Her and Willing's road rage battle. WSDOT moved for summary judgment, which the trial court granted on two independent alternative grounds: (1) Ms. Chhann did not prove the breach or proximate elements of her negligence claim against WSDOT, and, (2) Discretionary immunity protects WSDOT from the claims advanced by Appellants. Report of Proceedings (RP) at 40; Clerk's Papers (CP) at 791-92. This Court should now affirm that order.

First, Ms. Chhann's limited appeal focuses exclusively on the trial court's discretionary immunity ruling. *See* Appellants' Brief (Appellants' Br.) at 5. But WSDOT also argued, and the trial court agreed, that Appellants did not prove the elements of her negligence claim. Appellants did not assign error or provide argument to this ruling in her opening brief, and thereby waived their ability to challenge the summary judgment order on appeal. RAP 10.3(a)(4); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986).

Second, even if the Court could reach the merits, the trial court correctly ruled that Appellants did not prove the elements of their negligence claim. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

Third, the trial court correctly ruled that discretionary immunity protects WSDOT from liability. *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1965); *Avellaneda v. State*, 167 Wn. App. 474, 481-82, 273 P.3d 477 (2012).

Fourth, it would violate the doctrine of separation of powers to permit the judicial branch to second guess and overrule the high-level policy

and funding decisions made by the executive and legislative branches of government. *Avellaneda*, 167 Wn. App. at 485-87.

For each of these reasons the Court should affirm the summary judgment order that dismissed WSDOT from this action.

II. COUNTERSTATEMENT OF THE ISSUES

1. WSDOT argued, and the trial court agreed, that Appellants did not prove the elements of their negligence claim. Appellants did not assign error or present any argument concerning this issue in their opening brief.

a. Did Appellants waive the ability to challenge this dispositive issue on appeal, and should the Court affirm on this basis alone?

b. Are Appellants' precluded from addressing this issue for the first time in their reply brief?

2. Did the trial court correctly grant summary judgment and dismiss WSDOT from this suit where Appellants failed to establish each element of their negligence claim?

3. Does discretionary immunity protect WSDOT from the claims advanced by Appellants here?

4. Does the separation of powers doctrine prevent the judicial branch from overturning the high-level executive and legislative policy and funding decisions?

III. COUNTERSTATEMENT OF THE CASE

A. The April 23, 2011 Her/Willing Collision

The Her/Willing collision took place at approximately 5:00 p.m. on a straight section of SR 18 at milepost 21.5. The weather was clear, there was good visibility in both directions of travel, and the roadway was bare and dry. CP at 420. Respondent Her entered westbound SR 18 at Tiger Mountain State Park. CP at 584. However, rather than pull into the slow lane until he reached highway speeds, Her pulled into the fast lane, directly in front of Respondent Willing, and drove slower than the flow of traffic. CP at 576 (Willing Deposition (Dep.) p. 74).

After tailgating Her for approximately two miles, Willing, who had his eight-year old son in his car, decided to pass Her. CP at 563, 587. Willing concedes he attempted this maneuver in a restricted no-pass zone. CP at 575 (Willing Dep. p. 72-73). Nevertheless, desperate to get in front of Her, Willing accelerated, illegally crossed the double yellow centerline, and, as eastbound vehicles swerved to avoid hitting him, finally passed Her. CP at 282-83, 563.

Then, mirroring Her's earlier action, Willing cut back into the

westbound lane directly in front of Her and immediately slowed down. CP at 565, 589. However rather than back away from Willing and his aggressive, dangerous and illegal driving actions, Her elevated the battle.

Her turned sharply to the right, drove onto the right shoulder, increased his speed to more than 70 mile per hour (MPH), and raced to retake the lead from Willing. CP at 461-62, 588-89. Although Her later suggested he was “forced” to swerve onto the shoulder to avoid rear ending Willing’s car, that “explanation” was inconsistent with the actions Her actually took. Once on the right shoulder and the “risk” of running into the back of Willing’s car ceased to exist, Her did not stop, slow down, or try to immediately re-enter the westbound lane. CP at 589. Instead, Her not only continued to drive on the shoulder, he increased his speed. CP at 284-85, 298-300, 461-62, 565-66.

Willing saw Her accelerate and start to pass him on the shoulder. Determined not to relinquish the lead, he too increased his speed, but was unable to stop Her from pulling ahead. CP at 459. In one final effort to retaliate against Willing, Her steered aggressively towards Willing’s car “as if to scare [Willing] or something.” CP at 453. The sudden and dramatic turn of the steering wheel caused Her’s vehicle to fishtail, and fall into a counterclockwise yaw from which it never recovered. CP at 453, 461-62. As his car spun out of control, Her lost his grip and let go of

the steering wheel. Her's uncontrolled car shot through the westbound lane, crossed the centerline, and struck the left front corner of Appellants' eastbound Honda Pilot. The force of the collision knocked the engine and transmission free from Her's car and launched both back into the westbound lane. Willing struck the debris from Her's car, lost control, flipped over, and came to rest upside down on the shoulder next to the eastbound lane. CP at 423, 462.

Willing and Her both pled guilty to reckless driving, and admitted their wanton and willful disregard for the safety of the others caused the injuries to Appellants. CP at 290-91, 307-10, 387.

B. The Consultant's 1992 Design Report

Appellants' action against WSDOT is constructed from, and intentionally limited to, a 1992 design report prepared by an independent private consultant, HNTB. Of course, because it was written almost two decades before the Her/Willing accident, the 1992 report could not possibly address the operation of SR 18 in 2011, much less whether SR 18 was reasonably safe for ordinary travel on April 23, 2011. Nevertheless, given Appellants' extensive focus on it in their opening brief, background concerning that report is provided here.

1. Purpose of the 1992 Report

The Legislature directed WSDOT to identify plans to improve

three sites: the First Avenue South Bridge, a section of the Spokane freeway, and SR 18. CP at 79, 777. The consultant was hired to analyze the twenty-mile section of SR 18 between mileposts 7.9 and 27.9, and suggested ways to improve different sections of that corridor within the parameters of an earlier project prospectus for which WSDOT had already been approved.¹ Approximately 10.221 million dollars was preliminarily budgeted for improvements to SR 18. CP at 44-45, 776.

In accordance with that job prospectus, HNTB analyzed a wide variety of factors, including the ten-year accident history of the entire corridor (1980 to 1990), traffic volumes, and the physical characteristics of the different sections of SR 18. *See* CP at 42-206. As the 1992 report documents, there were unique differences and challenges presented by different sections of SR 18. For example, the average daily traffic west of SR 18 almost doubled the traffic on the east side of the SR 18, which included the Her/Willing collision site. CP at 51 (Table 5), 525 ¶ 4. The more highly traveled west side of the corridor had a significantly higher accident history. CP at 52-53. Although the consultant also determined there were pockets east of the Issaquah-Hobart Road that had a higher than average number of fatal accidents, the Her/Willing collision site was not

¹ It is undisputed the previously approved project prospectus did not reference, much less allocate funding for, any highway improvement to the site of the Her/Willing collision. CP at 82.

one of them. Significant factors that appeared to contribute to the pockets of accidents were “drunk drivers and ice and snow,” and not improper passing.² *See* CP at 54.

The 1992 report also reflects WSDOT’s Priority Array review of the entire SR 18 corridor. That review identified two “high accident locations” (“HALs”), both of which were located more than 10 miles from the place where the Her/Willing collision occurred.³ CP at 52.

The 1992 report evaluated a series of alternative highway improvement projects for the corridor. *See* CP at 57-60. In one alternative, the consultant looked at widening the highway between mileposts 20.4 and 26.3 and installing median barrier. However, the estimated 18.5 million dollar cost was almost twice the amount budgeted, and, thus, was not recommended. *Cf.* CP at 59, 79, 526 ¶ 6. Ultimately, the consultant recommended portions of two different alternatives, which included widening the highway and installing median barrier between mileposts 22

² As Appellants’ own expert concedes, the only portion of the Her/Willing collision site without a median barrier was mileposts 20.95 to 22.15. CP at 221 (Tuttman Dep. at 50, ll. 17-24). However, if limited to that section, Appellants could not produce the desired accident statistics. Accordingly, for the purpose of their argument here, Appellants manipulated the parameters of the Her/Willing collision site so they could include one additional fatality accident and significantly, if not artificially, inflate their accident history statistics. *See* Appellants’ Br. at 10, 13; CP at 703 ¶¶ 8-9. Importantly, not only did that additional accident occur 22 years before the Her/Willing collision, it took place on a section of SR 18 *that had median barrier in 2011*. CP at 703 ¶¶ 8-9. By definition, then, the various accident and fatality rates cited in Appellants’ Brief do not reflect the accident history of the Her/Willing collision site in 2011.

³ WSDOT’s Priority Array program is explained at length below. *See Infra*, at § V C(3)(a) at 38-41.

and 25. The consultant explained that the recommended approach provided “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.” CP at 60.

Although Appellants disagree with the consultant’s recommendations, they produced no evidence that WSDOT, much less the Transportation Commission and Legislature, were bound to accept those recommendations. On the contrary, it is undisputed that none of the projects referenced in the 1992 report could ever have begun construction “unless and until it was specifically approved and authorized by the Transportation Commission.” CP at 515 ¶ 13. The Transportation Commission selected the projects that were put forward for the Legislature’s approval and funding. Without legislative approval and funding “WSDOT could not undertake any highway improvement project, including those referenced in the 1992 design report.” CP at 515 ¶ 13.

As stated earlier, the 1992 report was limited by an earlier approved WSDOT project prospectus that called for, among other improvements to SR 18, installing median barrier where needed between mileposts 22 and 25. CP at 82. WSDOT prepared an estimated cost to complete those improvements and included it with the project prospectus. CP at 83. Again, this estimate did not provide any estimate to widen the

highway or add median barrier at the Her/Willing collision site. CP at 82-83.

More importantly, installing median barrier at the Her/Willing collision site would have cost significantly more than the amount budgeted for installing barrier between mileposts 22 and 25. All parties agree the Her/Willing collision site was too narrow, and would have to be widened before a concrete median barrier could be installed. *See* CP at 274-75 ¶¶ 7-9, 465 ¶ 6, 525 ¶ 5. Further, the unique configuration of the Her/Willing collision site made it more difficult and costly to accomplish this goal. For example, there are significant side slopes on both sides of this mountainous highway. Widening this site would require significant intrusion into the hillside, and approximately 2,600 linear feet of retaining wall (this is 830 linear feet more than what was necessary for mileposts 22 to 25), mitigation of three existing streams and fish passages, and additional steps to secure the already unstable slopes in the surrounding area. CP at 696-98 ¶ 3-7, 700-03 ¶ 6-7.

Appellants' forensic engineer, Michael Tuttman, agreed the widening project would require significant excavation into the hillside, but, without explanation, excluded that work from his cost estimate. Also excluded from his cost estimate was any allocation for the work required to mitigate the three fish barriers, provide required drainage and water

pollution control, and shore up the existing slopes that surround that section of highway. *Cf.* CP at 83, 653, 698; *see also* CP at 700-02 ¶¶ 6-7. When these factors are considered, it is undisputed the total amount budgeted for the SR 18 safety improvements in 1992 was not enough to widen the Her/Willing collision site and install a median barrier. CP at 700 ¶ 5.

IV. STANDARD OF REVIEW

As demonstrated below, review of this appeal is limited to the issues referenced in their assignments of error and argument provided in Appellants' opening brief. *Cowiche Canyon*, 118 Wn.2d at 809. Within this limitation, an appellate court's review of a summary judgment is generally the same as the one conducted by the trial court. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004). Summary judgment is properly granted where the admissible evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Civil Rule (CR) 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*,

131 Wn.2d 1, 9, 929 P.2d 396 (1997). If the party with the burden of proof at trial fails to establish the existence of an element essential to that party's case, summary judgment must be granted. *Young*, 112 Wn.2d at 225.

V. ARGUMENT

A. This Court Should Affirm on the Dispositive Ground That Appellants Did Not Assign Error to or Provide Argument for in Their Opening Brief

WSDOT moved for summary judgment on several alternative grounds below, one of which was Appellants' failure to prove the elements of their negligence claim.⁴ The trial court cited this as one of its alternative grounds for granting summary judgment and dismissing WSDOT from this action. RP at 40. However, Appellants did not assign error or present argument concerning this issue in their opening brief,⁵ and thereby waived their ability to challenge this dispositive issue on appeal. *Smith*, 106 Wn.2d at 451-52; *Cowiche Canyon*, 118 Wn.2d at 809 (plaintiffs waived assignment of error by failing to present argument in their opening brief); *McKee v. Am. Home Prod., Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) ("We will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument

⁴ WSDOT raised this issue in response to Appellants' motion for summary judgment (CP at 10), in its own motion for summary judgment (CP at 254-57), and in its reply (CP at 687-92). This was also WSDOT's lead argument at the summary judgment hearing (RP at 11-16), and was the only issue it addressed on rebuttal (RP at 34-36).

⁵ *See, for example*, Appellants' Br. at 5 (the assignments of error and issues are specifically limited to the trial court's discretionary immunity ruling).

and citation of authority.”); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845-46, 347 P.3d 487 (2015), *review denied*, 184 Wn.2d 1011 (2015) (an appellate court will not consider a claim of error that a party fails to support with legal argument in an opening brief). This renders the issues addressed in their opening brief moot, since, even if Appellants’ argument on those other issues had merit, summary judgment must still be affirmed on the dispositive ground Appellants did not address. *Id.*

This is not just the rule in Washington, but is followed by other jurisdictions that have confronted an appellant’s failure to challenge one of the alternative grounds for summary judgment. As one court explained, “When a decision is ‘based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds.’ ” *Andersen v. Prof’l Escrow Servs., Inc.*, 141 Idaho 743, 746, 118 P.3d 75, 78 (2005) (quoting *Macleod v Reed*, 126 Idaho 669, 671, 889 P.2d 103 (1995)). If the appellant fails “to challenge on appeal the [trial court’s] alternative grounds for granting summary judgment against them, the dismissal of their case must be affirmed.” *Id.* Even if the appellant obtains a reversal on the issue appealed, “the judgment based on the alternative grounds would be affirmed because those issues were not properly appealed.” *Andersen*, 141 Idaho at 746; *see also Campbell v. Kvamme*,

155 Idaho 692, 696, 316 P.3d 104 (2013) (“Where a trial court grants summary judgment on two independent grounds and the appellant challenges only one of those grounds on appeal, the judgment must be affirmed. We will not even consider the ground that is challenged on appeal.”); *Kellis v. Est. of Schnatz*, 983 So.2d 408, 413 (Ala.Civ.App.2007) (appellant’s failure to challenge the circuit court’s alternative holding constitutes a waiver and requires affirmance of the circuit court’s decision); *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482, 484 (1993) (the failure to challenge an alternative ground for a holding constitutes abandonment of the issue and precludes further review of that holding on appeal); *Johnson v. Com.*, 45 Va. App. 113, 609 S.E.2d 58, 60 (2005) (in situations in which there is one or more alternative holdings on an issue, the appellant’s failure to address one of the holdings results in a waiver of any claim of error with respect to the court’s decision on that issue); *Maher v. City of Chicago*, 547 F.3d 817, 821 (7th Cir. 2008) (“[I]n situations in which there is one or more alternative holdings on an issue, we have stated that failure to address one of the holdings results in a waiver of any claim of error with respect to the court’s decision on that issue.”); *Coronado v. Valleyview Pub. Sch. Dist.* 365-U, 537 F.3d 791, 797 (7th Cir. 2008) (appellant’s claim failed due to his “failure to confront the district court’s alternative holding”); *Utah v. United States*, 528 F.3d

712, 724 (10th Cir. 2008) (the failure to challenge the alternative holding of district court constitutes waiver).

One of the reasons the trial court granted summary judgment to WSDOT was Appellants' failure to prove the elements of their negligence claim. Appellants waived their appeal of this dispositive issue by failing to address it in their opening brief. *Id.* This renders the Appellants' remaining issues moot, since summary judgment must be affirmed on the unappealed dispositive issue. The Court should reject Appellants' invitation to render an advisory opinion in a case that no longer presents a justiciable controversy, and affirm the trial court order. *Id.*; *Bloome v. Haverly*, 154 Wn. App. 129, 140-41, 225 P.3d 330 (2010) (courts are generally prohibited from issuing advisory opinions on matters where there is no justiciable controversy).

1. Appellants Cannot Raise New Assignments of Error for the First Time in Their Reply Brief

It is well established that an appellant cannot raise a new issue for the first time in their reply brief. *Cowiche Canyon*, 118 Wn.2d at 809 (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”). Moreover, the Court should discourage the “strategy” of reserving issues only to reveal them for the first time in the reply brief. Not only does that practice violate RAP 10.3(c), it unfairly prevents the respondent from fully answering the appellant's claims, and

leads to an unbalanced and incomplete development of the issues for review. *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160, 167 (1994); *see also Wood v. Postelthwaite*, 82 Wn.2d 387, 389, 510 P.2d 1109 (1973); *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78, 322 P.3d 6 n.20 (2014). Here, Appellants limited their appeal to the trial court's discretionary immunity rulings, and disregarded all aspects of their negligence claim.⁶ The Court should strike any attempt by Appellants to raise this issue for the first time in their reply. *Hudson*, 124 Wn.2d at 120; *Wood*, 82 Wn.2d at 389; *Ainsworth*, 180 Wn. App. at 78.

B. Appellants Failed to Prove the Elements of Their Negligence Action

The trial court correctly ruled that Appellants failed to prove each element of their negligence claim against WSDOT. RP at 40; CP at 791-92. As set forth above, Appellants waived any challenge to that summary judgment order when they failed to assign error or provide argument concerning this dispositive issue in their opening brief. *See Cowiche Canyon*, 118 Wn.2d at 809. However, even if Appellants had preserved this issue, they did not prove the breach and proximate cause elements of their negligence claim, and the trial court correctly granted summary

⁶ This is consistent with how Appellants addressed the issue below. At the trial court, Appellants made a passing reference to their negligence claim in the "introduction" of their response to WSDOT's motion for summary judgment. Tellingly, Appellants titled that document "Plaintiffs Opposition to the State's Motion For Summary Judgment Re: Discretionary Immunity." CP at 530.

judgment and dismissed WSDOT for this reason. RP at 40.

1. Appellants Did Not Prove WSDOT Breached a Legal Duty

WSDOT has a legal duty to make sure the highways under its control are reasonably safe for ordinary travel. *Owen v. Burlington N. and Santa Fe R.R. Co.*, 153 Wn.2d 780, 786-87, 108 P.3d 1220 (2005); *Keller v. City of Spokane*, 146 Wn.2d 237, 259, 44 P.3d 845 (2002); *see also Wuthrich v. King Cty.*, 185 Wn.2d 19, 27, 366 P.3d 926 (2016).⁷ Accordingly, to establish a breach of this duty, Appellants had to prove the Her/Willing collision site was not reasonably safe for ordinary travel at the time of their April 23, 2011 accident. However, Appellants failed to introduce any evidence that their collision site was unsafe in 2011, and thus did not prove that WSDOT breached this duty. Accordingly, the trial court properly granted summary judgment and dismissed WSDOT.

It is undisputed there was nothing deceptive or unusual about the design or performance of SR 18 between mileposts 20.95 to 22.15

⁷ Erroneously relying on *Wuthrich*, 185 Wn.2d at 19; *Wright v. City of Kennewick*, 62 Wn.2d 163, 381 P.2d 620 (1963); *Niebarger v. City of Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958); and 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 140.02 (6th ed.), Appellants contend they are also required to prove that WSDOT had “notice” of the allegedly dangerous condition. Appellants’ Br. at 12-13. This additional “notice” element only applies to hazardous conditions that were not caused or controlled by WSDOT, like a sudden accumulation of snow/ice on a state highway or vegetation adjacent to the highway that impairs visibility. *See Wuthrich*, 185 Wn.2d at 19 (overgrown blackberry bushes impaired sightline at an intersection); *Wright*, 62 Wn.2d at 164 (car skidded on icy street and collided with train); *Niebarger*, 53 Wn.2d at 229 (plaintiff fell on icy sidewalk). Appellant was not required to prove the “notice” element in this highway design case. *Batten v. S. Seattle Water Co.*, 65 Wn.2d 547, 550-51, 398 P.2d 719 (1965).

(generally considered the “collision site” here) at the time of Her and Willing’s April 23, 2011 road rage battle. The collision occurred on a straight section of highway that provided unobstructed views for vehicles traveling in both directions. The asphalt was in good condition, the lanes and shoulders were properly striped, and the lane widths conformed with engineering design standards. CP at 273-74 ¶ 6, 464-65 ¶ 5; *see also* Appellants’ Br. at 34 (Appellants concede they do “not argue that the State failed to adhere to current design standards.”).

No engineering standard required a median barrier at the collision site. CP at 273-74 ¶ 7, 464-65 ¶ 5. Indeed, installing a median barrier at that site would have made that section of highway less safe. Center median barriers are not designed to decrease the accident rate, and, it is undisputed that they actually increase accident rates. CP at 465 ¶7, 522.

As Lance Bullard⁸ explained:

Based on extensive research done by highway engineers, it is now readily accepted as fact by professionals in the community that the installation of median barrier actually tends to increase the accident rate, as, for example, the consequences for driver who stray outside their lane become much more severe when they contact a median barrier. Accordingly, 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

⁸ Mr. Bullard is a licensed professional engineer employed by the Texas A&M Transportation Institute. He has devoted his professional career to highway safety research, with an emphasis on designing, and developing and crash testing roadway guardrails, barriers and crash cushions. CP at 463.

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.

CP at 465 ¶ 7; *see also*, CP at 522.

It is undisputed the accident history at the Her/Willing collision site did not support the installation of a median barrier. CP at 465 ¶ 7.

Finally, WSDOT is “not [the] insurer[] against accidents nor the guarantors of public safety and [is] not required to ‘anticipate and protect against all imaginable acts of negligent drivers.’ ” *Keller*, 146 Wn.2d at 252 (citing with approval *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979)). The reasons for this are immediately obvious. WSDOT is required to exercise ordinary care; it cannot prevent every accident caused by the dangerous, illegal actions of drivers.⁹ CP at 273 ¶ 3.

⁹ As Catherine George, WSDOT’s Engineering Manager for the Northwest Region, explained:

It is not possible for transportation engineers to design roads and highways that prevent drivers from making poor decisions, or from undertaking inappropriate, unsafe and even illegal risks while driving. Nor is it possible or practical for highway engineers to design highways that eliminate the risk of collisions occurring. Transportation engineers must, and WSDOT does, rely on accepted, tested, well researched engineering standards in the design, construction and modification of roads and highways. These accepted engineering standards reflect not only decades of research and experience by WSDOT, but also take into consideration scientific research and experience of transportation agencies across the nation. WSDOT’s use and reliance on these standards not only advances the orderly and predictable movement of

Appellants failed to prove the Her/Willing collision site was unreasonably dangerous at the time of their April 23, 2011 collision. Accordingly, the trial court properly granted summary judgment and dismissed WSDOT from this action.

2. Appellants Failed to Prove Proximate Cause

Unable to prove breach, their negligence claim against WSDOT fails as a matter of law and it is unnecessary for this Court to address proximate cause. *Young*, 112 Wn.2d at 225 (“A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”). However, even if Appellants could prove breach, they did not establish proximate cause.

Proximate cause has two elements—cause in fact and legal causation. Cause in fact refers to the “but for” consequences of an act—the physical connection between an act and an injury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Cause in fact becomes a question of law for the Court “if the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion.” *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944, 946 (2006). Legal causation is grounded in the determination of how far the consequences of a defendant’s act should extend. Legal causation

traffic, they also provide a safer, more measured and reliable transportation system for drivers. CP at 273 ¶3.

presents a question of law. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013). Appellants did not establish either prong of proximate cause here.

a. Appellants Did Not Prove Cause in Fact

Again, Appellants intentionally limited their evidence and opening brief here to the 1992 design report. Indeed, Appellants specifically directed their forensic highway engineer, Michael Tuttmann, “to review and rely upon only the information and materials that were available to the assigned engineers in 1992” (Appellants’ Br. at 21 n.27), a restriction Mr. Tuttmann studiously adhered to. CP at 644 ¶ 3 (Tuttmann concedes he was hired to review the 1992 Design Report, and the accident data he reviewed was limited to the “10 years pre-dating 1992”), 218 p. 41 (his opinions are “based on what is written in the 1992 design report,” and on the accident history from 21-31 years before the Her/Willing collision), 223 pp. 59-60 (his opinions are based solely on the information in the 1992 design report and do not take into account any information about the collision site after 1992).

The Her/Willing collision took place on April 23, 2011, 19 years after HNTB prepared the 1992 design report, and two to three decades after the accident history referenced in that report. Appellants produced no evidence that the pre-1992 accident data reflected the conditions that

existed at the time of the April 23, 2011 collision, and they cannot bridge that 19-year gap with speculation and conjecture. *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (plaintiff's showing of proximate cause "must be based on more than mere conjecture or speculation"); *see also Cho v. City of Seattle*, 185 Wn. App. 10, 16, 341 P.3d 309 (2014), *review denied*, 183 Wn.2d 1007 (2015) (the occurrence of an accident does not necessarily give rise to an inference of negligence).

As Washington courts have repeatedly held, to hold a governmental body liable for an accident based upon its failure to provide a safe roadway, "the plaintiff must establish more than that the government's breach of duty *might* have caused the injury." *Cho v. City of Seattle*, 185 Wn. App. at 16 (emphasis in original; citations omitted); *see also Ma'ele v. Arrington*, 111 Wn. App. 557, 564, 45 P.3d 557 (2002) ("To offer testimony that something *could* have been a cause forces the jury to impermissibly speculate." (emphasis in original)); *Jankelson v. Sisters of Charity*, 17 Wn.2d 631, 643, 136 P.2d 720 (1943) ("The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another.").

Moreover, by limiting their evidence to information from 1992, Appellants ignore the subsequent improvements made to the Her/Willing

collision site and surrounding sections of SR 18, which included: new interchanges, widening of bridges and sections of highway, and the installation of median barrier and centerline rumble strips. More to the point, it is undisputed that the accident rate decreased at the Her/Willing collision site between 2000 and 2011, including a noticeable decrease after rumble strips were installed in the centerline of the Her/Willing collision site in 2007. CP at 514-15 ¶ 12. It is also undisputed the accident rate at the Her/Willing collision in 2011 site was lower than comparable highways across Washington. CP at 514-15 ¶ 12.

Appellants failed to show that whatever allegedly dangerous condition existed in 1992 was present and caused their April 23, 2011 collision, and, thus, failed to establish the cause in fact prong of proximate cause.

b. Appellants Failed to Show Legal Causation

Legal causation is grounded in policy determinations as to how far the consequences of a defendant's actions should extend. "Legal causation is a much more fluid concept [than cause in fact]. It is grounded 'in policy determinations as to how far the consequences of a defendant's acts should extend.'" *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283, 1289 (2001), *as amended* (Jan. 31, 2001) (quoting *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2008)).

The focus in legal causation analysis is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.’ This inquiry depends upon “mixed considerations of logic, common sense, justice, policy, and precedent.”” *Kim*, 143 Wn.2d at 204.

It defies logic and common sense to permit Appellants to pursue a claim against WSDOT for a 2011 collision based on an allegation that the highway was unsafe in 1992. Again, the undisputed evidence demonstrates that the physical characteristics and performance of the highway changed after 1992. Further, the accident data from 1980-90 that was considered in the 1992 report is far too removed from the April 2011 collision to be meaningful. As Mathew Neely explained, “There is no highway engineering standard or practice that would support the use of such outdated information to formulate an opinion about the condition of a section of highway in 2011, much less to render an opinion as to whether that section of highway was safe in 2011.”¹⁰ CP at 514 ¶ 12.

Moreover, it is undisputed that the accident rate was lower in 2011.

¹⁰ Mr. Neely continued:

Moreover, I am aware of no transportation agency that would ever use accident history from 1980-1990 to determine whether a safety improvement should be constructed on a highway at or near the time of [Appellants’] 2011 collision . . . an accident history that is 21-31 years old is unlikely to have any bearing on the present level of safety on the highway. And, again, from my research, I have independently confirmed that is the case here. CP at 514 ¶ 12.

CP at 513 ¶ 10, 514-15 ¶ 12. Also, it is undisputed this collision resulted from the criminal misconduct of two road rage combatants, one of whom intentionally drove onto the shoulder and accelerated to more than 70 MPH so he could pass the other combatant. Both intentionally violated the law, and both conceded their reckless and dangerous actions caused the April 23, 2011 collision. A median barrier would not have stopped Her from driving on the shoulder and would not have prevented some collision from taking place.

Finally, Appellants concede the collision site satisfied existing design standards, there was nothing deceptive or dangerous about the Her/Willing collision site in 2011, and, indeed, the highway was similar to highways across the state and nation. *See* Appellants' Br. at 34; CP at 273-74 ¶ 6, 464-65 ¶ 5. Appellants cannot show any logical, meaningful or legal connection between the 1992 design report and their own collision 19 years later in 2011. Appellants failed to establish legal causation, and the trial court correctly granted summary judgment and dismissed WSDOT from this action.

C. Discretionary Immunity Protects WSDOT From Liability

Appellants are dissatisfied with high-level planning decisions made 19 years before their collision, and seek to have a jury overrule those decisions in this action. The thrust of their argument is that WSDOT should

have installed a median barrier at their collision site sometime in the early 1990s, and failed to do so. Appellants' theory is premised on broad conclusory assertions that are not supported by the record, and, a fundamental misunderstanding about how highway improvement projects are funded generally, and the process that was actually followed in 1992. Put in its simplest terms, the Legislature never allocated the funding necessary to widen and install a barrier at the Her/Willing collision site, nor did that section ever qualify for funding under the statutorily required priority array process. RCW 47.05.010; CP at 526 ¶ 6, 512 ¶¶ 5 and 11, 700 ¶¶ 5-7. Moreover, as demonstrated below, Appellants' suggestion that a factfinder in a judicial proceeding can overrule the Legislature's funding prerogative is simply wrong. *Avellaneda*, 167 Wn. App. at 486-87.

Appellants also erroneously attempt to recast discretionary immunity as a "poverty" defense. Appellants' Br. at 34-38. But the purpose of discretionary immunity is not focused on the effect of individual legislative funding decisions. Rather, it protects and preserves the important public policy of allowing the government to govern "unhampered by the threat or fear of sovereign tort liability" every time a person concludes, rightly or wrongly, that they have been adversely affected by a high level government policy or decision. *Evangelical*, 67 Wn.2d at 255. As our Supreme Court observed, "it is not a tort for

government to govern.” *Evangelical*, 67 Wn.2d at 255 (quoting *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) (Jackson, J., dissenting)). To achieve this purpose, discretionary immunity is “limited to ‘discretionary’ acts, not ‘ministerial’ or ‘operational’ ones,” the decision must be “the outcome of a conscious balancing of risks and advantages,” and “the decision must be a basic policy decision by a high-level executive.” *Avellaneda*, 167 Wn. App. at 481 (citing *Taggart v. State*, 118 Wn.2d 195, 214-15, 822 P.2d 243 (1992)).

Here, all parties agree that WSDOT is statutorily required to prioritize the projects that are eligible for the funding provided by the Legislature in order to provide the greatest benefit possible to the people who utilize public roads.¹¹ RCW 47.05.010. Indeed, it is undisputed that most, if not every, transportation agency in the nation performs a similar function. CP at 329, 333-35. Funding for a significant highway improvement project, like the widening and barrier project Appellants propose here, is a discretionary act that is dependent on whether that project, (1) has been specifically earmarked and funded by the Legislature, or (2) satisfies the statutorily required priority array criteria for identifying and prioritizing highway safety improvement projects. RCW 47.05.010.

¹¹ Appellants’ forensic engineer conceded such prioritization decisions are outside his expertise, that he does not know what criteria WSDOT uses to prioritize highway improvement projects, much less whether the highway between mileposts 20.95 to 22.15 met that criteria. CP at 330-31, 336-37.

Here, even Mr. Tuttmann concedes the Legislature never included a budget proviso to widen SR 18 between mileposts 20.95 and 22.15 in 1992, nor has it funded such a project at any time since. CP at 332-33, 395 ¶ 12; *see also* CP at 396 ¶ 14, 526 ¶ 6. Equally important, it is undisputed such a widening/barrier project never satisfied the criteria for inclusion in the priority array programming system. CP at 394 ¶ 9. Thus, as a matter of law, discretionary immunity shields WSDOT from liability, and the trial court properly dismissed WSDOT from this case. CP at 791-92; *Evangelical*, 67 Wn.2d at 255; *Avellaneda*, 167 Wn. App. at 482-83.

1. The General Waiver of Sovereign Tort Immunity and the Preservation of Discretionary Immunity

RCW 4.92.090 provides:

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 this waiver of sovereign immunity is broad, it “does not render the state liable for every harm that may flow from governmental action, or constitute a state surety for every governmental enterprise involving an element of risk.” *Evangelical*, 67 Wn.2d at 253. Discretionary immunity is an exception to the general rule of tort liability and applies to immunize discretionary acts or decisions exercised at the executive level of the government, “however unwise, unpopular, mistaken,

or neglectful a particular decision or act might be.” *Evangelical*, 67 Wn.2d at 253; *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 12, 882 P.2d 157 (1994).

Under *Evangelical*, discretionary immunity applies to decisions 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.

This test is meant to help courts distinguish between actionable tortious conduct and the enactment and implementation of basic governmental policy, which is shielded from liability by discretionary immunity. *Evangelical*, 67 Wn.2d at 255.

Highway liability cases premised on the alleged failure to construct unfunded highway improvements require the scrutiny of the *Evangelical* test. *McCluskey*, 125 Wn.2d at 12-13. In the present case, all four of *Evangelical's* questions are answered in the affirmative, and WSDOT

made its decision about how it prioritized the potential highway improvement projects by balancing risks and advantages. As such, discretionary immunity applies and WSDOT is not subject to liability for failing to undertake the redesign and reconstruction project necessary to install a median barrier.

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 three other highway liability cases: *Riley v. Burlington N., Inc.*, 27 Wn. App. 11, 615 P.2d 516 (1980); *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990); and *Avellaneda*, 167 Wn. App. at 474. Those cases set forth the following guidelines for applying discretionary immunity to highway cases:

- When the decision to make a roadway safety improvement is operational in nature, 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.
- When the decision involves the negligent design of a funded roadway safety improvement, discretionary immunity does not

apply. *E.g.*, *Stewart*, 92 Wn.2d at 293; *Riley*, 27 Wn. App. at 16-17.

- 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 480-83; *Avellaneda*, 167 Wn. App. at 482-85.

In *Jenson*, 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. *Jenson*, 57 Wn. App. at 479. Two years earlier in 1981, WSDOT proposed construction of a barrier between the lanes of SR 3 to help prevent such collisions. *Id.* at 482. That year, the Legislature authorized funding for design of the barrier project in the 1981-83 biennium and authorized expenditures for construction in the 1983-85 biennium. *Id.* Design of the project was completed in January 1983 and WSDOT advertised for bids to construct the project in May 1983. *Id.* at 479. Construction on the project began in June 1983, one month after the plaintiff's accident. *Id.* Seeking to avoid summary judgment, plaintiff argued that discretionary immunity did not apply, and that WSDOT was negligent for not starting the project earlier. *Id.* Applying the *Evangelical* elements, the Court of Appeals affirmed the dismissal on summary judgment, noting that funds had not

yet been available for the construction until after the collision. *Jenson*, 57 Wn. App at 482.

The court also rejected Jensen's claim that the state was negligent in the untimely collection of accident data used to formulate the priority array, stating, "[D]ata 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 protects WSDOT from liability for declining to undertake a substantial redesign of SR 18 that not only had not risen to the top of the prioritization ranking, the median barrier project advanced by Appellants never satisfied the minimum criteria necessary to be considered for funding. CP at 394 ¶ 9. Furthermore, the decision whether or not to fund the highway widening/median barrier project Appellants advocate was, by definition, a planning decision, and, under *Jensen*, is 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. *McCluskey*, 125 Wn.2d at 4. Plaintiff alleged WSDOT negligently failed to resurface the allegedly slippery roadway surface, and/or failed to construct a median barrier, and/or failed to post "Slippery When Wet" warning signs. *Id.* The trial court rejected WSDOT's discretionary

immunity/priority array arguments, evidence and instructions, and the jury found WSDOT 50 percent liable. *McCluskey*, 125 Wn.2d at 5. The Court of Appeals affirmed, rejecting the discretionary immunity argument as applied to roadway improvement funding decisions. *Id.*

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 did not alter its "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 instructed that proper analysis of state liability in highway cases requires an examination of the availability of funding for roadway improvements through application of the *Evangelical* test. *Id.* 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. *Id.* at 12-13 (citing *Jensen*, 57 Wn. App. at 478 (parties concede that the State's decision concerning the installation of a barrier is subject to discretionary immunity); *Julius Rothschild & Co. v. Hawaii*, 66 Haw. 76, 655 P.2d 877 (1982) (the State's failure to repair or replace a bridge is covered by immunity); *Indus. Indem. Co. v. Alaska*, 669 P.2d 561 (1983) (the State's failure to install highway guardrail is protected by immunity)).

The State did not prevail on the discretionary immunity argument in *McCluskey* because the basis of the jury's verdict also 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. *McCluskey*, 125 Wn.2d at 11 ("We cannot now dissect the jury's general verdict, nor can we disregard it."). Therefore, the *McCluskey* court did not rule on the immunity issue, but did provide the framework for courts to analyze the immunity question in future highway cases.

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.

The opportunity for that further analysis arose in 2012 in *Avellaneda*. Applying the *Evangelical* factors, the *Avellaneda* court held that WSDOT was immune from liability, and affirmed the trial court's dismissal of plaintiff's suit on summary judgment. *Avellaneda*, 167 Wn. App. at 476.

The *Avellaneda* plaintiff was injured when another vehicle crossed the median on SR 512 and struck her car. *Id.* WSDOT had previously recognized a need for the cable median barrier at that site to prevent accidents like that one, and planned a project to install the barrier. *Id.*

However, WSDOT did not construct the barrier in time to prevent the plaintiff's accident because the project had not risen high enough on WSDOT's Priority Array system for ranking projects to receive funding for construction. *Avellaneda*, 167 Wn. App. at 477. The plaintiff sued WSDOT, claiming the agency negligently delayed construction of the cable barrier. *Id.* at 478. The trial court granted summary judgment to WSDOT and the plaintiff appealed.

Affirming the grant of summary judgment, the Court of Appeals held that decisions about whether and when to install a median barrier were protected by discretionary immunity. The court determined that each of the *Evangelical* elements was satisfied. *Avellaneda*, 167 Wn. App. at 481. Concerning the first *Evangelical* factor—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.” *Id.* at 482. The court recognized that, “RCW 47.05.010 expresses the basic policy that highway funding decisions should be based on the rational selection of projects, evaluating the costs and benefits, leading to difficult tradeoffs.” *Id.* Decisions determining the priority of specific projects are “at least as basic as the decision to build a single freeway, recognized in *Stewart* as satisfying the first *Evangelical* factor.” *Id.* at 483 (citing *Stewart*, 92 Wn.2d at 294).

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

The *Avellaneda* court agreed the third *Evangelical* factor—whether the act, omission, or decision required the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved—was also satisfied because WSDOT collected data about accident history and the cost of projects, and used that information to create a system to analyze the data and identify and rank potential projects, which “required a great deal of basic policy evaluation, judgment and expertise.” *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 easily met based on WSDOT’s undisputed statutory 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 Commission¹² 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 the *Evangelical* Factors and *Avellaneda* to This Case

a. WSDOT's Decision Necessarily Involved a Basic Governmental Policy, Program and Objective

WSDOT's Priority Array system identifies and prioritizes safety improvement projects on state highways using pre-established, approved criteria that ensures that the limited funds allocated by the Legislature are directed to the highway improvement projects that provide the greatest benefit to Washington motorists. CP at 510-12 ¶¶ 3-7. This fundamental governmental policy and objective is specifically required by the Legislature. The statute establishing the priority array begins with a legislative finding that solutions to state highway deficiencies are complex, requiring that priorities be established for apportioning limited

¹² The accident location in *Avellaneda*, like the 1992 design report at issue here, was controlled by this same approval process. CP at 510 ¶ 4, 515 ¶ 13.

resources. RCW 47.05.010. The Legislature directed WSDOT to set priorities based on “the rational selection of projects and services according to factual need and an evaluation of life cycle costs and benefits that are systematically scheduled to carry out defined objectives within available revenue. The state must develop analytic tools to use a common methodology to measure benefits and costs for all modes.” *Id.*

This statutory system “expresses the basic policy that highway funding decisions should be based on the rational selection of projects, evaluating the costs and benefits, leading to difficult tradeoffs.” *Avellaneda*, 167 Wn. App. at 482. To comply with the “priority programming” policy required by RCW 47.05.010, WSDOT developed the State Highway Priority Array in 1985.¹³ CP at 398-415.

The priority array system has two components. First, it identifies potentially deficient sections of state highway under WSDOT’s control. This initial step is critical. As this case illustrates, traffic collisions occur at random times and for unpredictable reasons that have nothing to do with the design, construction or maintenance of the highway itself. CP at 512 ¶ 8 (noting that causes of some collisions include “intoxication or other illegal conduct by one or more drivers, or simple driver inattention”). A

¹³ The State Highway Priority Array has been amended several times over the years. The April 1985 version controlled the decisions made at the time of the 1992 design report. CP at 392 ¶ 5.

collision caused by “poor judgments by individual drivers does not mean there is something wrong with the highway itself.” CP at 512 ¶ 8.

Adding unnecessary additions to existing highways not only misdirects scarce resources away from needed safety improvement projects, they can make the highway less safe. CP at 512 ¶ 8. Accordingly, WSDOT’s Priority Array program identifies specific sections of highway that evidence statistically significant patterns of accidents, referred to as HALs. A HAL is a specific location that has experienced a higher than average rate of severe accidents during the previous two-year period. In identifying a HAL, “[a]dded weight is given to fatal and serious injury collisions.”¹⁴ CP at 393.

By analyzing individual segments of highway, as opposed to the entire highway, WSDOT can more precisely identify, prioritize, and ultimately fix the sections of highway that actually present a safety

¹⁴ The criteria used to identify a HAL are more fully discussed in the records:

[W]hile each accident is assigned points pursuant to a graduated scale of one to ten based on the severity of the injury, a fatal accident is assigned ten points. The lowest category, a property damage only accident, is assigned one point. To be a HAL there must be at least three accidents and ten severity points at a spot location (measured in tenth of a mile increments) during the applicable two-year period and the location must be higher than the critical severity rate. The critical severity rate is a method of determining if the difference between the location’s severity rate and the average severity rate for that roadway category is statistically significant. CP at 393.

concern.¹⁵ CP at 512 ¶ 8. “This, too, helps ensure that the limited funding allocated by the legislature is directed to the projects that will provide the greatest benefit to motorists.”¹⁶ CP at 393-94 ¶ 8.

Unless a section of highway qualifies as a HAL, it cannot be considered for safety improvement under WSDOT’s Priority Array program. CP at 394 ¶ 9. This is critical here because it is undisputed that the collision site between mileposts 20.95 and 22.15 never qualified as a HAL in 1992 or at any time leading up to the April 23, 2011 collision, and thus, never qualified for funding under the Priority Array program. CP at 394 ¶ 9.

The second component of the Priority Array system uses a benefit/cost assessment to rank/prioritize the highway improvement projects identified. CP at 392 ¶¶ 5 and 10-12. The benefit/cost ratio yields a specific number which is then compared to other projects that are competing for the same funding. CP at 394 ¶ 10.¹⁷

¹⁵ State highways typically span considerable distances, must accommodate considerably different needs, and present much different challenges to both motorists and highway engineers. Thus, a safety “fix” on one section of the highway may be unnecessary or even inappropriate on a neighboring section of the same highway. CP at 393-94.

¹⁶ “Moreover, through spot correction of specific sections of highway that present concerns, WSDOT can stretch the limited funding allocated by the legislature to more prioritized projects.” CP at 394 ¶ 10.

¹⁷ As Mr. Neely explained this mathematical formula:

The numerator, or benefit, is determined by measuring the estimated social good the project would accomplish through reductions in injuries, deaths and property damage over a given period of time. The benefit is a product of the frequency and/or severity reduction of collisions that would potentially be avoided by the prospective highway improvement project.

Then, based on consultation with the Legislative Transportation Committee, a range of dollars is anticipated for use. Using the priority array list, a project list is compiled from the highest rated project to the lowest rated project until all of the projected funds are spent. CP at 395 ¶13. That project list is then provided to the State Transportation Commission for discussion, modification, and approval. The final proposed budget as adopted by the Transportation Commission is then sent to the Legislature, which, too, can change/modify the projects included in the final budget appropriations. CP at 396 ¶¶ 13-14.

Appellants mischaracterize this process and appear to misunderstand what occurred in 1992. They suggest that because engineers scoped the proposed project (e.g., what the cost and it would take to improve one or more sections of SR 18), it was not a high-level government decision entitled to discretionary immunity. *See* Appellants' Br. at 13-26. Generally speaking, high level executive officers and legislators are not licensed civil engineers, and do not possess the required education, training or experience to analyze highways, identify safety concerns, and engineer improvements that are consistent with state and

The denominator of the equation, or "costs," is the estimated dollar cost of the project. When determining the cost of a project, all true costs associated with it are considered, including preliminary scoping and engineering, design work, mobilization, labor and materials, inspection, and applicable sales tax. The cost component of this equation is based, in part, on estimated build costs and the value of collision reduction. CP at 394-95 ¶ 11.

nationally accepted design standards. Accordingly, as described above, that task is delegated to the experts with profound knowledge in civil engineering, environmental factors, geological and other technical matters. CP at 394-95 ¶ 11.

Similarly, in 1992 there was approximately 10.2 million dollars budgeted to improve sections of SR 18. CP at 79. The SR 18 corridor was evaluated in accordance with a previously approved project prospectus, proposals were identified, and recommendations were made. *See* CP at 44-45. However, contrary to Appellants' unsupported conclusion, the consultant's report was not the final decision.

No highway project identified under any of WSDOT's priority array systems, including the design alternatives referenced in the 1992 design report, could have begun construction unless and until it was specifically approved and authorized by the Transportation Commission. The Transportation Commission selected the projects that were put forward for the Legislature's approval and funding. Without legislative approval and funding, WSDOT could not undertake any highway improvement project, including those referenced in the 1992 Design Report.

CP at 515 ¶ 13.

Appellants also cite a host of cases from Washington and other jurisdictions that stand for the unremarkable proposition that discretionary immunity does not apply to the negligent design of the highway. Appellants' Br. at 15-17. But Appellants do not claim that WSDOT's improvements were negligently designed or implemented. Rather, they

object to the decision of which section of highway should have been recommended by the 1992 design report. The analysis conducted in the 1992 report was part of the decision making process, not the actual implementation, making it an act that is protected by discretionary immunity. *Avellaneda*, 167 Wn. App. at 484. Further, *Avellaneda* has already determined this is a basic policy, program or objective that satisfies the first and second *Evangelical* factors. *Id.* at 482.

Again, the Her/Willing collision site between mileposts 20.95 and 22.15 never qualified as a HAL. CP at 394 ¶ 9. Moreover, the objective criteria used in 1992 considered the costs and benefits of different alternatives, used a standardized means to weigh competing factors, and arrived at recommended proposals for improving SR 18. *See* CP at 39-80. Accordingly, the first *Evangelical* element is met.

b. The Decision Was Essential to Accomplish the State's Policies, Programs and Objectives

The creation of the Priority Array for identifying and ranking which sections of highway to improve is essential to the accomplishment of the policy embodied in RCW 47.05.010, and satisfies the second factor in *Evangelical*. *Avellaneda*, 167 Wn. App. at 483. Again, the Legislature never directed WSDOT to widen and install barrier at the Her/Willing collision site. CP at 332-43, 396 ¶ 14. And the section of SR 18 where Appellants' collision occurred never qualified as a HAL, and, thus, never

satisfied the priority array criteria which were utilized in the 1992 study. CP at 52-54, 394 ¶ 9. The record establishes that WSDOT promulgated and followed engineering guidelines for systematically identifying and ranking state highway safety improvement projects according to need and benefit-cost ratios. As the court stated in *Avellaneda*, 167 Wn. App. at 483, this “systematic ranking was indispensable for the State to comply with RCW 47.05.010.”

c. The Decision Required the Exercise of Basic Policy Evaluation, Judgment and Expertise

The third *Evangelical* factor is also satisfied. Identifying and prioritizing highway improvement projects necessarily involved the exercise of policy level judgment. WSDOT manages more than 20,000 lane miles of state highway that present vastly different characteristics. The priority array system takes into account this variation. Sections of highway that warrant inclusion, are evaluated according to a cost/benefit analysis that ensures that the limited funds available will be directed to those projects, thereby providing the greatest benefit to the public. CP at 393-94 ¶¶ 6-9. In order to properly identify, evaluate, and rank projects aimed at addressing actual deficiencies, WSDOT collected data about accident history and the efficiency and cost of possible improvement projects. CP at 393-94 ¶¶ 6-9. These evaluations and judgments are the very type of decisions entrusted to the government by the people of

Washington, and are protected by discretionary immunity. *Avellaneda*, 167 Wn. App. at 484-85; *Jensen*, 57 Wn. App. at 482-83. As noted in *Avellaneda*, which is virtually identical to the present case in this regard, WSDOT's Priority Array "required a great deal of basic policy evaluation, judgment and expertise," which satisfied the third *Evangelical* factor. *Id.* at 483.

d. WSDOT Has the Legal Authority to Identify and Prioritize Highway Improvement Projects

Finally, the fourth criterion is satisfied because WSDOT has the legal authority to identify and prioritize highway improvement projects. RCW 47.05.010 requires the State to devise a priority programming system to address deficiencies in state highways. WSDOT is the State agency vested with 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 47.01.031. There can be no dispute that WSDOT is the agency charged with identifying and prioritizing highway safety improvement projects.

Finally, WSDOT's Priority Array criteria that existed at the time of the 1992 design report were approved by the Transportation Commission. CP at 392 ¶ 4. The Commission, as the *Avellaneda* court held, was a "high-level executive body" that satisfies the *Evangelical* requirements.

Avellaneda, 167 Wn. App. at 483. Similarly, as the court also held in *Avellaneda*, WSDOT's use and application of the Priority Array criteria to identify and rank necessary safety improvement projects constitutes a conscious balancing of risks and advantages of the projects that received the limited funding provided by the Legislature. *Id.* at 483-84; *see also King v. City of Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974).

Therefore, the 4-part *Evangelical* test is satisfied, and discretionary immunity protects WSDOT from liability for not undertaking the unfunded, highway widening project to install a median barrier at the site of Appellants' collision. The trial court correctly applied the doctrine of discretionary immunity and dismissed WSDOT from this lawsuit, and this Court should affirm that order.

D. Submitting the Case for Trial Violates the Separation of Powers Doctrine

As discussed at length above, the Legislature recognizes that highway funding is limited. As a result, it directed WSDOT to engage in benefit-cost priority budgeting to assure that the most needed projects receive funding. RCW 47.05.010. Allowing a court or jury to second-guess WSDOT's decisions concerning which highway improvement projects to prioritize would constitute an impermissible judicial invasion of the province of the executive and legislative branches of state government and violate separation of powers. *Avellaneda*, 167 Wn. App. at 485-87. Where a matter

is committed to the Legislature, the court must be cautious that it does not substitute its judgment for that of the legislative branch. *Wash. State Pub. Emp. Bd. v. Cook*, 88 Wn. 2d 200, 206, 559 P.2d 991 (1977), *adhered to on rehearing*, 90 Wn.2d 89, 579 P.2d 359 (1978). The decision to create a program (such as one to identify and prioritize potential highway improvement projects), “as well as whether and to what extent to fund it,” is strictly a legislative prerogative. *Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979).

In the instant case, Appellants seek to impose liability on WSDOT for complying with the legislative directive and RCW 47.05.010. According to Appellants, a factfinder should be able to disregard and/or overrule high-level executive and legislative policy and funding decisions. However, allowing a court or jury to make such a determination would seriously undermine both executive and legislative authority, resulting in uncertainty and dysfunction in the process of highway funding. As the Court of Appeals in *Avellaneda* observed, “it is poor public policy for courts to extend their influence into matters beyond their institutional competence. We are not equipped with the resources or expertise to second-guess the legislature’s funding decisions or the minutiae of the WSDOT’s planning decisions.” *Avellaneda*, 167 Wn. App. at 486. For the court to second guess legislative decisions would be to invade the executive prerogative

by permitting a tort recovery “based on the WSDOT’s decisions in drafting the budget proposal that excluded funding for the” the specific project at issue. *Avellaneda*, 167 Wn. App. at 487. “Such a result would violate the separation of powers by injecting [the] court into the budget process after the fact.” *Id.* Courts should refrain from such “judicial overreach.” *Id.*

The Court should follow Washington precedent and not impermissibly second guess executive and legislative budget allocations. For this reason as well, the Court should affirm the order that granted summary judgment and dismissed WSDOT from this action.

E. Appellants’ Motion to Strike Lacks Merit and Should Be Denied

Appellants ask this Court to strike assertions made by Cathy George and Matthew Neeley “in accord with KCLR 56(e).” Appellants’ Br. at 42. Their request should be denied.

First, Appellants ask the Court to ignore the cost estimates prepared by Ms. George. Ms. George is a licensed civil engineer and Engineering Manager for WSDOT’s Northwest Region, which includes SR 18 between mileposts 21-22. CP at 272 ¶¶ 1-2. Appellants’ argument is one they raised in response to Ms. George’s first declaration below. However, she provided a second declaration that contained a detailed breakdown of her cost that estimate. Appellants did not object to that

second declaration below. CP at 696-98. There is no basis for striking any portion of Ms. George's opinions.

Appellants objection to Mr. Neely's opinions concerning the Priority Array process to the 1992 decision making process is even more confounding. Mr. Neely manages WSDOT's Priority Array program, and is accountable for the prioritization, oversight, delivery, and reporting of all WSDOT capital projects. CP at 391-92 ¶ 2. Mr. Neely's undisputed testimony establishes that, (1) only HALs (high accident locations) qualify for safety improvements under WSDOT's Priority Array program, and (2) the Her/Willing collision site never qualified as a HAL. CP at 394 ¶ 9. Even if it could satisfy this critically important first step, it still never satisfied the second step of the priority array process. CP at 395 ¶ 12. These opinions are relevant, admissible, and should be considered by the Court here.

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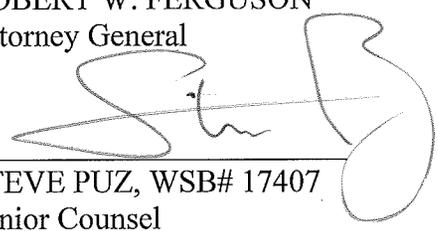
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VI. CONCLUSION

For each of the reasons stated, WSDOT asks this Court to affirm the trial court's summary judgment order that dismissed WSDOT from this action.

RESPECTFULLY SUBMITTED this 16th day of September, 2016.

ROBERT W. FERGUSON
Attorney General



STEVE PUZ, WSB# 17407
Senior Counsel
Attorneys for Respondent State

CERTIFICATE OF FILING AND SERVICE

I certify under penalty of perjury in accordance with the laws of the state of Washington that on the undersigned date the original of the preceding document was filed in the Washington State Court of Appeals, Division I according to the Court's Protocols for Electronic filing.

That a copy of the preceding document was served on Petitioners and their counsel of record via the Court's Electronic filing system to the following:

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DATED this 16th day of September, 2016, at Tumwater, WA.

/s/Amanda Trittin
Amanda Trittin, Legal Assistant