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WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

FLOR and ALVARO AVELLANEDA,
husband and wife, and the
marital community composed thereof

Appellants,

vs.

STATE OF WASHINGTON,

Respondent(s).

APPEAL FROM THE
SUPERIOR COURT FOR PIERCE COUNTY
THE HONORABLE RONALD E. CULPEPPER

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court committed error by failing to require the defendant to prove the absence of material facts before granting its motion for summary judgment.
2. The trial court committed error by granting summary judgment without requiring WSDOT to provide any facts regarding the reason for the delay, the decision-making process for the delay, or who made such decision(s).
3. The trial court committed error by granting summary judgment to the defendant without first requiring the State to produce sufficient discovery to “check the math” purportedly used by the State in ranking SR 512 on an installation list for median barriers.
4. The trial court committed error by declining to require the defendant to satisfy any of the evidentiary elements required to establish discretionary immunity as a matter of law.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did new mandates and policies enacted by the WSDOT beginning in 2001, create a legal duty for WSDOT to conform to those new mandates and policies?

2. How long must inexplicable delay occur in conforming with WSDOT safety policies, before it becomes actionable?
3. Must a defendant asserting a defense of discretionary immunity on summary judgment, provide factual evidence to support the *prima facie* elements of such a defense?
4. Is a defendant entitled to summary judgment without first providing sufficient discovery that might enable a plaintiff to verify any of the material facts upon which the motion is predicated?

III. STATEMENT OF THE CASE

A. INTRODUCTION

This is a complex case. It involves the legal duty owed to Flor Avellaneda by the State, following a series of mandates and policy changes announced by the Washington State Department of Transportation (WSDOT) beginning in June of 2001. Until 2001, WSDOT installed median barriers on a case-by-case basis, based on decisions by WSDOT's design engineers. A new mandate issued by WSDOT in the summer of 2001, however, *required* the installation of median barriers on specific highways with the greatest frequency of cross-median crashes---including SR 512 in Pierce County.

The installation of new median barriers obviously could not occur all at once. Dozens of highways across the state were ranked on a list for the installation of a median barrier, according to a cost-benefit ratio analysis (“BCR”). Highways with high rates of cross-median collisions were to have barriers installed first. The BCR ranking method developed by WSDOT was accomplished by a mathematical, cost-benefit formula that was specifically intended to prevent as many cross-median collisions as possible, during the installation phase of the median barriers.

SR 512 was originally ranked very high on the state-wide list at 13th. However, inexplicable delays occurred in the implementation of a median barrier on SR 512. More than five years after the WSDOT issued its mandates, SR 512 still did not have a median barrier. The result is that Flor Avellaneda, a totally faultless motorist, is now disabled for the rest of her life. She was very seriously injured in the summer of 2006 when her vehicle was struck head-on by a vehicle that crossed the SR 512 median. Her expert in the trial court, Dr. Denman Lee, testified that the collision would not have occurred if a cable barrier had been installed on the median of SR 512 – like the one that was installed six months after Flor Avellaneda’s collision.

The trial court dismissed the plaintiffs' complaint on the State's motion for summary judgment. The court did so primarily on the basis of the doctrine of discretionary immunity. The court also declined to first entertain a motion to compel the State to produce information or calculations that were used on its BCR (benefit/cost analysis), to rank SR 512 for the installation of a median barrier. WSDOT changed its ranking for SR 512 at least twice, and even took SR 512 off its list for at least two years. Why? No one will say. This prevented the plaintiff from even checking the State's math in the ranking process. Even if the State can produce a justifiable basis for its delay, dismissal should still be reversed because the State refused to produce any discovery material to the basis on which summary judgment was granted

The three central issues in this appeal are:

- 1) Did the WSDOT have a duty to install a median barrier on SR 512, in conformity with its May 2001 mandates and policies?
- 2) Is the WSDOT entitled to summary judgment in a case alleging at least two years of negligent delay, without first being required to provide any information about why the delay occurred?
- 3) Is the State entitled to summary judgment without first producing sufficient information or calculations to verify its ranking system, so that others can check WSDOT's math?

B. THE CROSS-MEDIAN COLLISION ON JULY 23, 2006

Flor and Alvaro Avellaneda are U.S. citizens who immigrated here from Columbia. They have two grown children and a young son who is now twelve years of age. Alvaro is partially disabled from an industrial accident years ago, but is able to drive a school bus part-time. Flor was trained as a nurse, both in Columbia and in the U.S. She has worked as nurse most of her adult life.

On Saturday evening, July 22, 2006, Flor left her late-shift job as a floor nurse/secretary at Tacoma General Hospital. Her usual route home to Orting included a segment of SR 512 east of I-5, where the speed limit is 60 mph. Flor was lawfully traveling in the far-right lane in her 1999 Ford Taurus, buckled in with her seat belt. The weather was unusually warm, dry and clear.

Just moments after driving under the Portland Avenue overpass, Flor saw something out of the left corner of her eye for just a split second. That is all she remembers about the collision that nearly killed her. Two cars from the westbound lanes of SR 512 had left the roadway, crossed the grassy median, and entered the eastbound lanes of traffic. One of the errant vehicles struck

Flor's Ford and nearly ripped its roof off the body of the car, nearly decapitating Flor.

The time of impact was about 12:20 a.m. on July 23. Other motorists stopped to render aid and notified the State Patrol. First responders found four cars when they arrived at the scene, three of which were destroyed. The debris field was spread over a large area in the eastbound lanes of SR 512. The combined velocity of the vehicles, traveling at approximately 60 mph in opposing lanes, was very likely over 100 mph at the moment of impact.

Flor Avellaneda, who was totally faultless in the cross over collision, was by far the most seriously injured. Photographs taken of Flor's car by the State Patrol, and included in the State's own motion, clearly indicate that her survival was nothing short of miraculous. See CP 172–174; 179–185; 234–238; 240.

Flor sustained severe head trauma, including three skull fractures and cognitive head injuries; two cervical spine fractures at C1 and C7; respiratory failure; a lacerated pancreas; multiple facial lacerations and contusions; hemorrhagic shock; and a number of lesser injuries. After a long hospitalization, she was declared totally

disabled and has not been able to work or adequately care for her family without assistance since the collision.

The Washington State Patrol compiled an excellent, comprehensive report of the collision which was included as an exhibit in the State's motion for summary judgment. See CP 93-245. Experts on both sides agreed it was the work of dedicated professionals.

C. CROSS-MEDIAN CRASHES ARE A PROBLEM

In support of its motion for summary judgment, the State provided the declaration of Pat Morin, the most senior engineer to provide testimony in this case. CP 381-388. Mr. Morin's testimony was also supported by numerous exhibits. CP 390-448. Mr. Morin has been employed by WSDOT for forty-one (41) years. For the last seventeen (17) years, he has worked in the areas of budgeting, project prioritization and long-range planning for WSDOT's Highway Construction Program, which includes the building of all safety projects.

According to Mr. Morin's declaration and exhibits, WSDOT has long known that "[a]cross the median crashes are high severity, often fatal crashes occurring when errant vehicles cross the median and enter the opposing lanes of travel." CP 397. In fact, cross-

median crashes are a national problem that state and federal governments have been working to solve since at least the 1960's. CP 399-400. In 1998, North Carolina began installing median barriers for *all* new construction, reconstruction, and resurfacing projects on highways with medians of 75 feet or less. CP 401. California has adopted a similar program for the installation of more median barriers.

The WSDOT knows that the frequency of cross-median collisions on highways easily reveals where median barriers would be most effective in preventing crashes and resulting fatalities. However, the WSDOT pre-2001 *Design Manual* did not include the frequency of collisions as a factor in determining where to install median barriers. CP 383, par. 8. In fact, the *Design Manual* provided very little instruction on when, where, and what type of median barrier might be installed in any given circumstance. *Id.*

D. WSDOT'S MEDIAN BARRIER POLICY CHANGE IN 2001

In May of 2001, WSDOT's Highway Safety Issue Group (HSIG) met to discuss revisions to the WSDOT *Design Manual* concerning new, required median barriers and ways to fund them.

CP 382-383, pars. 5-7.¹ The HSIG concluded that WSDOT's existing process for determining the priority of funding highway projects (known as "the priority array") "did not directly allow funding to install median barriers for the sole purpose of reducing crossover accidents." CP 383, par. 7.

The HSIG makes recommendations to the Highway Safety Executive Group (HSEG), which consists of the State Design Engineer, the State Traffic Engineer, and the Director of Capital Program Development and Management for the Highway Construction Program. CP 383 at par. 6. The HSEG, in turn, has "authority in matters of highway safety to make high-level policy decisions on behalf of the Secretary of Transportation. *Id.*

Mr. Morin testified in his declaration:

The HSIG recommended and the Highway Safety Executive Group, acting on behalf of the Secretary, amended the WSDOT's Design Manual in November 2001 requiring median barriers in medians less than 50 feet in width for certain future highway construction projects. See Exhibit 1.

Emphasis added.

¹ Declaration of Pat Morin of the WSDOT, offered in support of the State's motion for summary judgment.

On June 1, 2001, WSDOT's State Design Engineer, Clifford E. Mansfield, issued a *Design Manual Supplement* entitled "Median Barrier Guidelines."² The Supplement stated:

Currently, guidelines for the use of median barrier on full access control, multilane highways are provided in Chapter 700 of the WSDOT *Design Manual*. These guidelines are essentially the same ones that were adopted in 1975 and were based on a study of California median crossovers performed in the late 1960's. The current WSDOT guidelines are also consistent with the AASHTO *Roadside Design Guide*.

...

Based on the accident history and practices of other states, this *Design Manual Supplement* changes the current median barrier policy. . .

...

These rules and procedures are effective on the date of this letter and will expire when the changes are incorporated in the referenced manual.

...

Replace 700.06 with the following.

...

Provide median barrier on full access control, multilane highways with median widths of 50' or less and posted speeds of 45 mph or more. . .

Emphasis added. CP. 488-490.

² In the trial court, the plaintiffs contended that the Supplement was issued on August 1, 2001. This was an error. The header on page 2 of the document indicates the correct date the Supplement was issued---June 1, 2001. It became effective, however, on August 1, 2001. CP. 489-490.

E. RANKING HIGHWAYS FOR NEW BARRIERS

WSDOT also developed a study to analyze collision data to rank specific highway sections where installation of a median barrier should occur. CP 384 at par. 11-12. During this process, specific criteria were developed for highways where median barriers would be most effective in reducing collisions and saving lives, employing a benefit/cost ratio (also referred to as the “BCR”). In March of 2002, WSDOT published the *Median Treatment Study on Washington State Highways* (CP 396-410), which provided a BCR for “ranking median barrier needs based on past crash history.” CP 397. A summary of the BCR and how it works, is also found in the plaintiffs’ memorandum in opposition to the State’s motion for summary judgment at pages 5-7. CP 471-473.

F. DELAY IN INSTALLING BARRIERS ON SR 521

The concise purpose of installing median barriers on SR 512 was “to reduce cross-over accidents.” CP 366. The plaintiff therefore sought to discover at least sufficient information to verify WSDOT’s math calculations in the ranking of SR 512. See interrogatories and requests for production to the defendant. CP 666-686; CP 838-877. The defendant refused to produce any discovery relevant to its B/C analysis. The plaintiffs’ therefore filed a

motion to compel discovery, after the State refused to produce any information that related directly or indirectly to its BCR calculations. CP 661-738.

SR 512 was originally ranked 13th on the list of installations of median barriers.³ Declaration of Pat Morin, page 6. CP 386. However, SR 512 was inexplicably taken off the list altogether from 2003 to 2005. The only explanation offered by the State, is that “other proposed...projects with a higher potential for crash frequency” were moved ahead of the SR 512 project. Declaration of Pat Morin at page 6. CP 386.

The other “proposed projects” were never identified and neither were their BCR rankings. In fact, no information was ever provided that might enable one to confirm or verify any of WSDOT’s representations regarding its various ranking calculations for SR 512. The plaintiffs asserted the ranking calculations were suspect because the essential features and characteristics of SR 512 remained constant, while its ranking varied wildly for five years.

SR 512 was not added back to the installation list for three or four years. Declaration of Pat Morin at page 7. CP 387. By then,

³ For a list of rankings, see Pat Morin’s declaration and the exhibits attached thereto. CP 381-448.

several other projects with lower rankings went ahead of SR 512. Still WSDOT refused to provide any other information or discovery about changes on the ranking list, or why they occurred.

In November of 2004, after SR 512 was added back to the priority installation list, it was “ranked 9th on the state priority list” and was part of “the I 2 Safety Program.” CP 351. The budget for the project was \$945,000 for the installation of nearly four miles of cable barrier. *Id.* Construction was to begin in May 2006 and the project was to be completed in September of 2006. *Id.* In fact, installation of the median barrier on SR 512 did not begin until February of 2007. The project was completed less than two months later, on March 30, 2007. CP 17 at lines 8-9.

G. THE DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

The State noted its only motion for summary judgment for hearing on June 18, 2010---the last Friday it could do so under the case schedule. However, the motion was continued for two weeks by stipulation because plaintiffs’ counsel was in Denver, Colorado on June 18 taking depositions in two cases---including the instant

case.⁴ The June 18 hearing was therefore continued until June 25, 2010, less than one month before the trial date of July 20, 2010. (CP 450).

The state filed over 500 pages of material in support of its motion for summary judgment, including *nine* different declarations. In its brief, the State asserted that its motion for summary judgment was based on “four reasons:”⁵

1. The median for SR 512 “was built to applicable standards at the time it was originally constructed in 1968”⁶ which “did not require a median barrier to be placed in medians.”⁷ Therefore, the State argued that “WSDOT did not have a duty to upgrade SR 512 with cable median barriers.”⁸

2. The State also argued that WSDOT design and installation a cable barrier on SR 512 was “without merit” because “programming decisions by WSDOT are subject to discretionary immunity.”⁹

3. The State argued that it was “entirely speculative”¹⁰ that a cable barrier could have been installed by the time of plaintiff’s accident. And even if the barrier could have been

⁴ The deposition of one of the State’s accident reconstructionists, Nathan Rose, was taken in Denver on June 19, 2010, by agreement.

⁵ CP 19-20.

⁶ CP 21.

⁷ CP 18.

⁸ CP 19. The State cited *Ruff v. King County*, 125 Wn.2d 697, 705, 887 P2d 886 (1995) for support for this proposition, arguing that the State’s duty to keep public highways in reasonably safe condition, did not extend to “update every road and roadway design features [sic], such as median barriers, to current highway design standards.” CP 29.

⁹ CP 19.

¹⁰ CP 20.

installed before the accident, “it would not have stopped the rolling cars from entering into plaintiff’s lane of travel.”¹¹

4. The State argued that “Plaintiff has no evidence WSDOT’s actions during the design phase of the project was the proximate cause of her collision or somehow ‘negligently delayed’ the installation of the barrier.”¹²

These “four reasons” were supported by the declarations of nine witnesses.¹³

1. Lance Bullard

Mr. Bullard is a nationally recognized expert in highway safety research with an emphasis on designing, developing, and crash-testing roadway guardrails, barriers, and crash cushions. He also performs accident investigations and reconstructions. In fact, Mr. Bullard has been retained by WSDOT to validate the safety of specific median barriers the State has installed here.

Mr. Bullard executed a declaration in support of the State’s motion for summary judgment. CP 44-51. He also attached various exhibits to his declaration, the relevancy of which is uncertain.¹⁴ CP 54-83. Without the benefit of a visit to the scene of the collision, or an actual reconstruction of the events the collision, Mr. Bullard

¹¹ CP 20.

¹² CP 20.

¹³ Bullard, McNutt, Rose, Baker, Kelsey, Landon, Berends, Morin, and Dunn.

¹⁴ Besides Mr. Bullard’s own resume, the exhibits either pre-date the subject collision by more than a dozen years, or involve different median barriers installed or in use in the state of Texas.

endorses the conclusions of Nathan Rose (*infra*) that a median barrier would not have contained the two vehicles that crossed the median in the Avellaneda collision. CP 50-51.

No where in his declaration does Mr. Bullard address the two-year delay by WSDOT in installing a median barrier on SR 512.

2. John McNutt

The State submitted the four-page declaration from John McNutt, an engineer with thirty-one years of experience with the WSDOT. CP 84-87. Mr. McNutt served as the project manager for the SR 512 project. In his declaration, he described four months of delay on the SR 512 project *after* Peterson Bros. Construction won the bid on August 21, 2006.¹⁵ However, Mr. McNutt does not provide any explanation why the SR 512 project was taken off the priority list entirely for at least two years; or why its position changed when it was added back to the list; or why the lower-ranked U.S. 101 went ahead of the SR 512 project; or why other median barrier projects on the priority list also went ahead of the SR 512 project.

¹⁵ Two months of delay was caused by advancing the U.S. 101 project ahead of the SR 512 project; and another two months of delay was caused by a "sloping issue" not discovered until after the SR 512 project began.

3. Nathan Rose

Mr. Rose is an engineer and the State's chief accident reconstructionist in the Avellaneda incident. He authored a twenty (20) page declaration in support of the State's motion for summary judgment (CP 246 – 272), which included another fifty-five (55) pages of exhibits (CP 267-322). However, Mr. Rose did not address at all, the delay in installing a median barrier on SR 512.

4. Matthew Baker

Mr. Baker was a witness who was traveling westbound on SR 512 on the evening of the collision, behind the two vehicles that crossed the median. His declaration is silent regarding the delay in the installation of the median barrier on SR 512. CP 323-324.

5. Stacie Kelsey

Ms. Kelsey is a career employee with WSDOT and was the supervisor of the Olympic Region Environmental Permit and Documentation Team in 2006. She was responsible for planning, organizing and directing much of the environmental documentation and permit work related to the SR 512 project. Her declaration and attached exhibits address numerous environmental issues that arose during the SR 512 project. CP 326-344. However, Ms. Kelsey offers *no testimony* whatsoever, concerning the two-year

delay caused when SR 512 was taken off the priority list. CP 326-328.

6. Ron Landon

Like most other WSDOT employees who offered declarations in support of the State's motion for summary judgment, Ron Landon's declaration (CP 345 – 348) was supported by numerous documents attached as exhibits (CP 350 – 367). Mr. Landon testified that he has been employed by the WSDOT since 1983 and is the Olympic Region Programming and Planning Manager. In this capacity, Mr. Landon is responsible for overseeing transportation planning and budget issues for the Olympic Region. During the SR 512 project, he was also the Project Development engineer, responsible for overseeing the preliminary engineering and design phase of the project. He was John McNutt's supervisor on the project.

In his declaration, Mr. Landon addresses "scoping" the SR 512 project, which concerns cost, time and bid advertisement issues for projects. He also explains the filling of parts of the ditch in the middle of the median on SR 512, that was necessary in parts of the four-mile project. He also discusses generally how this affected the schedule, just like the weather and other unforeseen

circumstances. He then states that the SR 512 project was included in the legislative 2005-2007 biennium. Mr. Landon closed by generally addressing the desirability of making efficient use of money, time and resources in all highway projects in his Region.

Conspicuously absent from Mr. Landon's declaration is *any reference* to the two-year delay that occurred in the SR 512 median barrier project, when it was taken off the priority list entirely.

7. Terry Berends

Mr. Terry Berends also provided a declaration in support of the State's motion for summary judgment (CP 368-371) which was accompanied by various exhibits (CP 374-380). Mr. Berends is also an engineer and has been employed by WSDOT since 1991. Since 2005, Mr. Berends has worked as an Assistant State Design Engineer for WSDOT. In this capacity, Mr. Berends provides technical expertise and direction to the Region Project Development Offices and the Project Engineers. He also has approval authority for issues related to design documentation, plans, specifications, estimates and project summaries. He also acts as liaison between the WSDOT and the Federal Highway Administration (FHWA).

Mr. Berends was also the most senior WSDOT witness designated by the State in the Avellaneda action. However, Mr. Berends' testimony is also silent about why the SR 512 project was taken off the priority list for two years, which resulted in at least a two-year delay in installing a median barrier.

Instead, Mr. Berends explained the history of SR 512 since its construction in 1968. The declaration was offered in support of the State's (irrelevant) argument that it has no duty to continuously upgrade highways and roadways around the state---subject to several exceptions that apply here. Mr. Berends testified that “[i]n 1968, the installation of a median barrier was not required.”

8. Pat Morin

Mr. Morin is a career WSDOT employee. For the last seventeen (17) years, he has worked in the areas of budgeting, project prioritization, and long-range planning for WSDOT's highway construction program. He also provided a declaration in support of the State's motion for summary judgment (CP 381-388), supported by several exhibits (CP 390-448). However, neither Mr. Morin's testimony, nor the exhibits accompanying his declaration, provide any facts relevant to the delay in installing a median barrier on SR 512.

9. John Dunn

John Dunn has worked for WSDOT since 2004 and is the manager of the Statewide Travel and Collision Data Office. His seven (7) page declaration goes into great detail concerning the record-keeping functions of the State concerning accidents and collisions on its roadways. CP 792-798. The upshot of his testimony, is that *none* of the collision data collected and maintained by the State---*none of it*---is discoverable because it is all generated for federal purposes or in compliance with federal law.

Like all the other witnesses, Mr. Dunn does not even broach the subject of delay in installing median barriers on 512.

10. Other Testimony and Discovery

In addition to the declaration testimony of the State's witnesses, the plaintiffs took several depositions of State engineers involved in the development of the new median barrier policy, and the installation of the median barrier on SR 512. The plaintiffs also obtained substantial written discovery. See declaration of plaintiffs counsel dated June 11, 2010. CP 484-603. None of these witnesses and none of this discovery provided any explanation for why SR 512 was removed from the installation list for two years.

IV. LAW AND ARGUMENT

A. THE STATE'S DUTY TO PROVIDE SAFE ROADS

Seventy years ago, our Supreme Court held that governmental entities could be held liable for damages proximately caused by unsafe road ways. See e.g., *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940). This was followed with the Washington Legislature's enactment of RCW 4.92.090 (1961), waiving sovereign immunity and holding state and local governments accountable for injuries and damages caused by their negligence.

The state has a "duty to provide reasonably safe roads and this duty includes the duty to safeguard against inherently dangerous or misleading conditions." This is "part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon." *Owen v. Burlington Northern and Santa Fe Railroad Company*, 153 Wn.2d 780, 787-788, 108 P.3d 1220 (2005).

One of the elements of this duty is the foreseeability of the risk of harm to the plaintiff. *King v. City of Seattle*, 84 Wn.2d 239, 248, 525 P.2d 228 (1974). The duty to provide safe roadways remains even in cases where the plaintiff is negligent. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

B. MEDIAN BARRIER CLAIMS BEFORE 2001

1. *Steele v. Bell*

In 1984, Division I of the Washington Court of Appeals decided *Steele v. Bell*, 37 Wn. App. 337, 679 P.2d 964. In *Steele*, two widows sued the City of Seattle after the deaths of their husbands in a collision on the Aurora Bridge. A driver who fell asleep at the wheel crossed the centerline and went into the opposing lane of traffic. His car struck another vehicle head-on, causing the deaths of two innocent men. Their widows contended that the City and State had negligently failed to construct a median barrier on the Aurora Bridge.

The City and State asserted two main defenses. First, they asserted that the two-year statute of limitations contained in the former RCW 4.16.130 applied. The statute provided a two-year limitation in actions where damages were “indirectly caused” by wrongful conduct, as opposed to wrongful conduct that “directly caused” damages, for which a three-year statute applied. Second, the City and State defended on the basis that the decision not to install a median barrier was a “discretionary” act which created immunity for the City and State. Although barriers were installed by the City and/or State on the Aurora Highway north and south of the

bridge, no barriers were on the bridge itself. This was the result of a study by a City engineer who concluded that median barriers were not feasible on the bridge itself. The Court of Appeals affirmed the trial court in finding that the “direct cause” of the collision was the negligent driver of the other car, and the absence of a median barrier was only an “indirect cause” of the collision and dismissed the case. Therefore, the court never reached the defense of discretionary immunity.¹⁶

2. *Jenson v. Scribner*

In 1990, Division II of the Court of Appeals decided *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306. This case is very similar to the instant case, because it involves a delay in the installation of a median barrier *after* the decision was made to install one. The plaintiff Jenson and a passenger were injured on SR 3 near Bremerton, when a drunk driver veered across the centerline into their lane of travel, resulting in a head-on collision. Jenson was seriously injured and filed suit against several defendants, including the State. Jenson alleged that the State negligently failed to install a median barrier between the north and

¹⁶ The *Steele* case was overruled in *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985)(The court abolished the distinction between “direct” and “indirect” causes of injury for purposes of determining whether an action was limited by a two or three year statute of limitations).

south bound lanes, which he believed would have prevented Scribner's vehicle from striking his.

The State defended on alternative grounds: that the actions of the State were not the proximate cause of the collision; but if they were, then the State was shielded by the doctrine of discretionary immunity. The trial court entertained hearing on the State's motion in 1987. Similar to the trial court in *Steele*, the trial court in *Jenson* ruled that the absence of a median barrier was not the proximate cause of Jenson's injuries. The trial court was therefore able to avoid the issue of discretionary immunity, as the trial court and appellate court did in *Steele*. The Court of Appeals, however, viewed the case differently and chose to address the issue of discretionary immunity.

The *Jenson* court emphasized that both parties had a "full and fair opportunity to develop facts" relevant to the case, citing *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976). The court also reiterated the corollary holding of *Bernal*: where there is no opportunity for a party to fully and fairly develop the facts of the case, then the correct resolution is to remand, *not* to affirm the trial court. In this case, Division II found that the issues of proximate cause and discretionary immunity

issues were “fully briefed and argued to the trial court by both parties.” *Id.* at 480.

The *Jenson* court then focused first on the State’s defense of discretionary immunity “because we believe it is determinative of this appeal.” *Id.* The court then recited the elements of discretionary immunity under *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965) and analyzed them under the facts in *Jenson*. The State’s defense of discretionary immunity was aided enormously by the plaintiffs’ concession in briefing that “the installation of a barrier is a discretionary decision.” *Id.* at 481. The Court carefully reviewed the facts and found that only twenty-three (23) months elapsed from the date the decision was made to install a median barrier, until work actually began on the project. The plaintiffs’ central claim was that “this operational failing subjects [the State] to liability.” *Id.* at 481.

The Jenson argued that twenty-three (23) months was an unreasonable delay, but the *Jenson* court found otherwise:

We conclude that reasonable minds could only find that there was no unreasonable delay. The undisputed record discloses that the median barrier project for the area of SR 3 in question was proposed to the Transportation Commission by the Department of Transportation in August of 1981. The project was then proposed to the Legislature. The

Legislature authorized expenditures for design and preliminary engineering for the 1981-83 biennium. Expenditures for construction were authorized for the 1983-85 biennium. In January 1983, design work for the project was completed and in May of 1983 the State advertised for bids. Construction of the median barrier was begun in June 1983 and it was in place by late August of that year.

Id. at 482.

Further, the *Jenson* court concluded that “construction funds were not available to the project until after the date of the accident.”¹⁷ *Id.* On these facts, the *Jenson* court held: “We conclude that reasonable minds could only find that there was no unreasonable delay.”

3. *McCluskey v. Handorff-Sherman*

In 1994, our Supreme Court decided *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157. *McCluskey* was the third case involving a claim that the State should have installed a median barrier before an accident occurred. It was the first time that our Supreme Court addressed the issue of discretionary immunity in the specific context of the installation of median barriers.

In January of 1989, a 16 year-old teenager shared several pipes of marijuana with his friends, who then all got into his car in

¹⁷ The *Jenson* accident took place on May 6, 1983. The Transportation Department’s budget, which included funds for the construction of the barrier in question, was not even signed into law until May 23, 1983. *Id.* at 482.

snowy weather. Shortly thereafter, the 16 year-old lost control of his car on SR 900 in King County, and slid across the median into the on-coming lanes. His car struck a vehicle driven by Wallace McCluskey, who was thrown from his vehicle by the force of the impact and died at the scene. Mr. McCluskey's widow then filed suit against the State, alleging that the road surface was unreasonably dangerous because it was unusually slippery when wet. She further alleged that signs should have been posted to warn motorists of the unusually slippery surface, or a median barrier should have been installed.

A Thurston County jury agreed that the State was negligent in failing to make the roadway safer and awarded the plaintiff-widow damages of \$1,682,984 on a general verdict form. The Court of Appeals affirmed,¹⁸ as did the Supreme Court. The issue before the Supreme Court was "whether the trial court erred in refusing to allow the State of Washington to defend its failure to improve a section of State Route (SR) 900 by fully explaining the considerations relevant to highway improvement under RCW 47.05, Washington's priority programming law." *Id.* at 3.

¹⁸ 68 Wn. App. 96, 841 P.2d 1300 (Div. II 1992).

The State wanted to introduce the 1986 “priority array,” the 1987-89 Highway Construction Program, and the 1987-89 Transportation Appropriation Act, all of which focused on the State budget, competing projects, and appropriations. The court denied the admission of these documents and “[t]he State was not allowed to argue . . . that highway improvement funds were limited and that such a limitation affected the lack of improvements to SR 900.” *Id.* at 5. The trial court also declined to give an instruction on discretionary immunity, or other instructions favorable to the State’s defense.

The essence of the State’s defense in McCluskey was the same as it is in the instant appeal: that the legislative funding process, the “priority array,” and the competition among projects for limited funds, “has, in effect, supplanted its common law duty to provide safe highways for its citizens [and] absolves it of liability for the absence of improvements to a highway not included in the Priority Array.” *Id.* at 7.

The Court of Appeals held that the State could not use evidence of the priority process to argue immunity from, or limits on, liability due to a lack of funds allocated to highway maintenance. The Court further indicated that “[t]he State cannot

avoid responsibility for its fiscal decisions by stating that those decisions have assumed the status of law and thus are unassailable". 68 Wn.App. at 109.

The State sought discretionary review, arguing that it should not have been limited in explaining Washington's priority programming law and the financial restrictions it places on highway maintenance and improvement. The Supreme Court granted the State's motion for discretionary review.

The Supreme Court began its analysis by citing a number of Washington cases which hold that the State has a duty to exercise ordinary care in the repair and maintenance of its public highways, keeping them in such a condition that they are reasonably safe for ordinary travel. The court found that a duty is created when, among other reasons, warning signs are *required by law*. *Id.* at 7.¹⁹ The Court also cited the *Restatement (Second) of Torts* § 286 (1965), *Hansen v. Friend*, 118 Wn.2d 476, 480, 824 P.2d 483 (1992), and *Young v. Caravan Corp.*, 99 Wn.2d 655, 659, 663 P.2d 834, 672 P.2d 1267 (1983), in its analysis and conclusion that the State owed a common law duty to the plaintiff. *Id.* at 8.

¹⁹ WAC 468-51-090(4) requires that "[a]ll construction and/or maintenance within department right of way shall conform to the provisions of . . . the department's current 'Design Manual'. . . "

The State argued that it could not deviate from the legislative priority array and initiate safety improvements on its own. In other words, if safety improvements to SR 900 were not included in the priority array, or otherwise funded by the legislature, then the State's hands were tied. The Supreme Court was not persuaded by this defense. At page 8, the Court observed:

. . . Washington's priority programming law is, as RCW 47.05.010 states, a procedure providing for the rational allocation of finite resources. While such allocation is undoubtedly intended to further highway safety, we cannot see how failing to adhere to prioritizing procedures set forth in RCW 47.05 violates a standard of care owed to highway users.

Even though the State abandoned its claim of discretionary immunity at trial, both the Court of Appeals and the Supreme Court chose to address this issue in their decisions. The Court of Appeals analyzed the priority programming issue in the context of the State's claim of immunity. The Court of Appeals stated that because the State waived sovereign immunity in 1961 and because the Legislature did not include an express grant of immunity in RCW 47.05, there was no immunity for priority programming decisions.

The Supreme Court also held (at page 12) that:

Under *Evangelical Church* . . . a narrow category of discretionary governmental immunity exists as a court-created exception to the general rule of governmental tort liability. *Bender v. Seattle*, 99 Wn.2d 582, 588, 664 P.2d 492 (1983).²⁰ Its applicability is limited to high-level discretionary acts exercised at a truly executive level. *Bender*, at 588.

Thus, it is necessary to determine where, in the area of governmental processes, orthodox tort liability stops and the protected act of governing begins. *Evangelical Church*, at 253. This court has set out four questions to help determine whether an act is a discretionary governmental process and therefore nontortious...

The four questions are reproduced below, with responses under the facts of the instant action:

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

The challenged act here is not the 2001 mandate, nor the benefit/cost analysis developed by WSDOT to rank projects for the installation of median barriers. The challenged act is the *departure* from the mandate, and the *removal* of SR 512 from the list of highways to receive median barriers. Then the question becomes: does a 5.5

²⁰ See also *Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101 (1979)(Discretionary immunity is an "extremely limited exception" to the State's broad waiver of sovereign immunity).

year delay in installing a median barrier on SR 512, contrary to WSDOT mandates and policies, involve a basic governmental policy, program or objective? The answer is obviously no. There is no basic governmental policy which supports a departure from WSDOT mandates and policies. Nor is there a basic governmental policy that supports inexplicable five-year delays in essential safety improvements.

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

Deviation from WSDOT mandates and policies are not essential for any reason. Similarly, inexplicable delay---in and of itself---is not an act or decision essential to any policy.

(3) Does the act . . . require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

No one knows why the SR 512 project was delayed for more than five years. We do not know who made the decision(s), or even if a decision was actually made. The

delay could have been the result of benign neglect, oversight, or misconduct. Whatever the reason for the delay, it does not involve “policy evaluation, judgment or expertise” on the part of WSDOT.

(4) *Does the governmental agency involved possess the requisite . . . authority . . . ?*

Once the mandate and implementation policies were enacted on behalf of Washington’s Secretary of Transportation, subordinates in WSDOT did not have the “requisite authority” to undo the executive-level decisions.

The evidentiary elements necessary to prove the exception of discretionary immunity must be “clearly and unequivocally answered in the affirmative...” *Stewart v. State*, 92 Wn.2d 285, 293 (1979).

Under *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974), the action or decision at issue must actually have been *considered* and *reasoned* in order to be entitled to immunity. *Id.* at 246.

The accompanying concurring and dissenting opinion by Justice Bractenbach in *McCluskey*, goes even further than the

majority.²¹ For example, Justice Brachtenbach asserts that the majority's discussion of discretionary immunity is "erroneous analysis." *Id.* at 15. He also asserts that it "defies reason to suggest, as does the majority, that failure to resurface a curve or install a short median barrier might fall within discretionary immunity." *Id.* Justice Brachtenbach concluded his separate opinion by stating:

In summary, discretionary immunity is not an issue in this case. It should not be discussed. If it were an issue, the conduct here involved does not fall within the extremely narrow exception created by discretionary immunity. The absence of funding for these minor repairs to a specific location is not a defense. Upon this record, there was no reason to admit testimony of the absence of funding nor to instruct that such was a complete defense as requested by the State.

Id. at 23.

C. CASE LAW IN DISCRETIONARY IMMUNITY

The plaintiffs provided the trial court with numerous citations to case law concerning a defendant's burden in establishing discretionary immunity as a matter of law. They included the following:

²¹ Justices Utter and Johnson joined Justice Brachtenbach in his concurring and dissenting opinion.

Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) (Judicial creation of doctrine of discretionary immunity).

State ex rel. Ogden v. Bellevue, 45 Wn.2d 492, 275 P.2d 899 (1954) (In a zoning ordinance case, the court found that administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom, and were therefore not immune from suit).

Evangelical United Brethren Church v. State, 67 Wn.2d 246, 407 P.2d 440 (1965) (Washington adopts doctrine of discretionary immunity but excludes “ministerial” or “operational” acts from protection).

King v. Seattle, 84 Wn.2d 239, 525 P.2d 228 (1974) (Arbitrary administrative actions by nonelected officials are not entitled to discretionary immunity where employees do not render a considered decision).

Campbell v. Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975) (A city utility’s actions were not discretionary because it was carrying out an ordinance-mandated ministerial or operational duty that did not involve executive or administrative discretion).

The plaintiffs provided the trial court with numerous cases showing that the defendant had failed to meet its burden of proving the *prima facie* elements of discretionary immunity. They included the following cases.

Mason v. Bitton, 85 Wn. 2d 321, 534 P.2d 1360 (1975)
(Decision by police officers of whether or not to give chase and continue pursuit of a suspect were operational decisions and not protected by discretionary immunity).

Haslund v. Seattle, 86 Wn.2d 607, 547 P.2d 1221 (1976)
(The city was properly held liable for damages resulting from issuance of an invalid building permit because the issuance of a building permit meets none of the criteria for the discretionary function exception).

Stewart v. State, 92 Wn. 2d 285, 293, 597 P.2d 101, citing *Haslund v. Seattle*, 86 Wn.2d 607, 619, 547 P. 2d 1221 (1976)
(Discretionary governmental immunity in this state is an extremely limited exception).

Eldredge v. Kamp Kachess Youth Services, 90 Wn.2d 402, 583 P.2d 626 (1978) (A youth camp that contracted with DSHS to provide care for children referred by courts or DSHS, could not assert discretionary immunity for its alleged negligence).

Rogers v. Toppenish, 23 Wn. App. 554, 596 P.2d 1096 (1979) (Administrator in a city land use office exercised ministerial duties responding to zoning questions from people interested in purchasing property and city therefore could not assert discretionary immunity defense).

Bender v. Seattle, 99 Wn.2d 582, 588, 664 P.2d 492, 9 Media L. Rep. 2101 (1983) (Discretionary immunity is limited to high-level discretionary acts exercised at a truly executive level).

Algona v. Pacific, 35 Wn. App. 517, 667 P.2d 1124 (1983) (In a suit alleging a failure to provide sewer services, a municipality was functioning in proprietary capacity was not immune to suit).

Chambers-Castanes v. King County, 100 Wn.2d 275, 669 P.2d 451 (1983) (The decision of whether a police department should or should not dispatch an officer to the scene of a crime or to investigate a crime, did not involve basic policy decisions and was not entitled to immunity).

Petersen v. State, 100 Wn.2d 421, 434, 671 P.2d 230 (1983) (“The scope of discretionary immunity ‘should be no greater than is required to give the legislature and executive policymakers sufficient breathing space in which to perform their vital

policymaking functions,' " quoting *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 445, 131 Cal. Rptr. 14, 551 P. 2d 334 (1976).

Miotke v. Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984) (Violations of DOE's own regulations were not basic policy decisions protected by discretionary immunity because the decisions were based on technical engineering and scientific judgment).

Radach v. Gunderson, 39 Wn. App. 392, 695 P.2d 128 (1985) (The actions of a city that negligently allowed a house to be built in violation of a zoning code, were entirely ministerial and therefore not protected by discretionary immunity).

Taggart v. State, 118 Wn.2d 195, 214, 822 P. 2d 243 (1992) (The trend since *Evangelical Church* has been to narrow the exception of discretionary immunity even further).

Roy v. Everett, 118 Wn.2d 352, 823 P.2d 1084 (1992) (Law enforcement agencies were not immune from suit for their decisions not to enforce a domestic violence law).

Savage v. State, 127 Wn.2d 434, 899 P.2d 1270 (1995) (Guidelines and procedures for the supervision of parolees executed at the agency-level are decision making processes which do not enjoy discretionary immunity).

Estate of Jones v. State, 107 Wn. App. 510, 15 P.3d 180 (2000) (Discretionary immunity does not extend to the negligent supervision of parolee by parole officer).

Winig v. California, 37 Cal. App. 4th 1772, 45 Cal. Rptr. 2d 652 (1995) (Where it is unclear whether the immunity statute is applicable, the parties injured by the negligent acts are entitled to the benefit of the doubt).

Trujillo v. Utah Department of Transportation, 1999 UT App 227, 986 P. 2d 752 (1999) (Summary judgment reversed because the DOT failed to show decisions were made at policy level rather than operational level).

D. FACTUAL DISPUTES REMAINING AT SUMMARY JUDGMENT

The following questions were unanswered by the State in its briefing and in oral argument:

1. Who calculated the first BCR for the SR 512 project that made it #13 on the list for the installation of a median barrier, and why is that calculation shielded from discovery?
2. Who calculated the second BCR of zero for the SR 512 project that took the project off the installation list

altogether, and why is that calculation shielded from discovery?

3. Who calculated the third BCR for the SR 512 project that put it back on the installation list as #9, and why is that calculation shielded from discovery?
4. If the numbers included in WSDOT's calculation of the BCR were never produced in discovery (even though it was specifically requested), how can anyone check WSDOT's math?²²
5. What were the *reasons* for assigning *three* different BCRs to the SR 512 project when nothing about the roadway changed?
6. Was the SR 512 project taken *off* the priority installation list for some other reason other than the BCR changes? And if so, why is this shielded by discretionary immunity?
7. Were there other reasons for the *delay* of the installation of the median barrier project on SR 512, other than the BCR changes? And if so, why is this shielded by discretionary immunity?

²² One recent example of a simple math error is WSDOT's mistaken installation of a *two-lane* off-ramp, instead of a required *three-lane* off-ramp, to Sprague Street from SR 16 in Tacoma. The story was reported by local media during the last week of June, 2010.

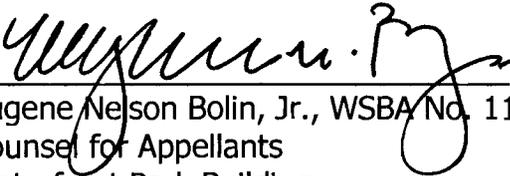
8. WSDOT failed to follow its own policies and procedures regarding the installation of a median barrier on SR 512--
--why are these inexplicable deviations shielded by discretionary immunity?
9. Who actually exercised discretionary immunity at any stage of these events and how did they do it?
10. Does the discretionary immunity that was purportedly exercised by the State, satisfy the evidentiary elements of *Evangelical Church* and its progeny, which the State specifically relied upon in its motion for summary judgment?
11. How many of projects ranked lower than 13 on the priority installation list, leap-frogged ahead of the SR 512 project after it was assigned a BCR of zero and apparently taken off the priority installation list?

The State did not supply *any* of these essential facts in discovery, nor in its motion for summary judgment, nor in its argument before the Court. Plaintiffs therefore assert that summary judgment was granted in error. A review of the chronology of key dates is necessary to appreciate the *relevance* of these unanswered questions.

V. CONCLUSION

The trial court erroneously granted summary judgment to the defendant. The appellants respectfully request that the court reverse the trial court and remand for trial.

RESPECTFULLY SUBMITTED this 17th day of December, 2010, at
Edmonds, Washington.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I electronically transmitted and mailed *via* United States Postal Service a true and accurate copy of Appellants' Opening Brief to counsel for respondents.

DATED this 17th day of December, 2010, at Edmonds, Washington.



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