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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The trial court properly granted summary judgment in this case for four reasons.

First, the Washington State Department of Transportation (WSDOT) did not breach any duty owed to the appellants because the median on SR 512 met applicable design standards at the time it was originally constructed in 1968, and there is no duty to upgrade highways to present standards.

Second, appellants' contention that WSDOT had a duty to install a cable barrier on SR 512 prior to her collision is without merit. WSDOT's decision of when to design and construct a project is based on a prioritizing system or "priority array", subject to approval by the Legislature. The "priority array" is a legislatively mandated objective program subject to discretionary immunity. The trial court correctly concluded that the decision of when to fund installation of a median barrier is a decision entitled to discretionary immunity. Further, appellants have provided no evidence that once WSDOT received funding to install the barrier, the time it took to design and install the project was unreasonable.

Third, the trial court properly granted summary judgment because WSDOT is not the factual cause of the accident. The undisputed evidence before the trial court established a cable median barrier would not have prevented this accident.

Finally, summary judgment was appropriate because WSDOT is not the legal proximate cause of this accident. Appellants' theory posits liability on factors over which WSDOT has no control. Under appellants' theory, WSDOT would be liable anytime a safety improvement project was delayed due to an absence of legislative funding, a change in design standards, or delays caused by the permitting process, procurement of materials, weather, et cetera. Appellants' theory imposes unlimited liability on WSDOT with no attendant ability on WSDOT's part to control or limit that liability. Allowing such liability is inconsistent with common sense, public policy and well-established notions of legal causation.

Based on these reasons the trial court properly granted summary judgment and the ruling should be affirmed.

#### **I. COUNTER-STATEMENT OF THE ISSUES**

1. Whether the trial court properly granted WSDOT's motion for summary judgment when the construction of SR 512 met applicable engineering standards at the time, and there is no duty to upgrade highways?

2. Whether the trial court properly granted summary judgment on appellants' claim that a cable median barrier should have been installed earlier on the basis that the decision of when to fund a safety improvement is a discretionary decision which does not give rise to liability?
3. Whether the trial court properly granted summary judgment on the basis that the undisputed record before the court established that a cable median barrier would not have prevented appellants' injuries?
4. Whether legal causation precludes imposing liability on WSDOT because any delay in installing the cable barrier was a product of factors inherent in the design/construction process and over which WSDOT has no control?
5. Whether the appellants waived any objection to the trial court proceeding with summary judgment when the appellants failed to file a CR 56(f) motion and agreed to have the court proceed prior to addressing their motion to compel?

## **II. COUNTER-STATEMENT OF THE FACTS**

Early Sunday morning on July 23, 2006, two cars and a truck were racing westbound on SR 512 going well over the 60 mph limit. *See* CP at 323-25 (Decl. of Matt Baker). When one of the cars began to brake, the driver of the truck swerved to the left onto the shoulder to avoid the braking car. Overcorrecting, he lost control of his truck and hit the left

rear corner of one of the other cars. CP at 247 (Nathan Rose Decl., p. 2 ll. 6-7).

Due to the impact, both the car and the truck began rotating counter clockwise as they traveled through a 40-foot grassy median which separates the east and west bound lanes of traffic. CP at 247 (Rose Decl., p. 2 ll. 8-9). At approximately the location where a cable barrier was later installed, the truck and the car tripped and began rolling. CP at 261 (Rose Decl., p. 16 ll. 10-16). The truck continued to roll as it exited the median and hit a pickup travelling eastbound. CP at 247 (Rose Decl., p. 2 ll. 9-12). The truck rolled back onto its wheels and slid over the passenger side of a Ford Taurus driven by the appellant who was travelling eastbound in the far lane of travel. CP at 247.

SR 512 is a four-lane highway, with two westbound and two eastbound lanes. This area of SR 512 was designed and constructed in the late 1960s. CP at 370 (Berends Decl., p. 3 ll. 10-12). Applicable standards at the time did not require a median barrier. CP at 371 (Berends Decl., p. 4 ll. 1-2). WSDOT was in the process of accepting bids for a contract to install a cable median barrier along SR 512 when this accident occurred. *See generally* CP at 84-88 (McNutt Decl.).

**A. Cable Median Barrier Project Funding History**

In May 2001, a meeting of WSDOT's Highway Safety Issue Group was conducted for the purpose of discussing WSDOT's design policies concerning median barrier placement. CP at 382 (p. 2 ll. 19-26); CP at 383 (Morin Decl., p. 3 ll. 8-17). The Highway Safety Issue Group was a statewide committee made up of representatives from WSDOT's headquarters and region offices involved in highway safety. CP at 382 (p. 2 ll. 19-26). The committee's purpose was to recommend actions for WSDOT's development of policies, plans and programs for highway safety. CP at 382. The Highway Safety Issue Group, when addressing design criteria, guidelines, warrants, or other aspects of the WSDOT Design Manual, made recommendations to the Highway Safety Executive Group for consideration. CP at 382.

The pros and cons of any recommended changes were provided, together with the recommendations for their consideration, to the Executive Group. CP at 383 (Morin Decl., p. 3 ll. 1-7). The Highway Safety Executive Group was made up of the State Design Engineer, the State Traffic Engineer and the Director of Capital Program Development and Management for the Highway Construction Program and had the authority in matters of highway safety to make high-level policy decisions on behalf of the Secretary of Transportation. CP at 383.

In May 2001, the Washington State Design Manual criteria essentially mirrored national guidelines and provided very little instruction on when a median barrier was needed in a median less than fifty feet in width. CP at 383 (Morin Decl., p. 3 ll. 9-16). The Highway Safety Issue Group found that WSDOT's prioritization process ("priority array") followed criteria that was location driven based on collision history and did not directly allow funding to install median barriers for the sole purpose of reducing crossover accidents. CP at 383. The Highway Safety Issue Group also found WSDOT's Design Manual and its warrants for median barriers, which mirrored national design standards, did not warrant median barriers based on median crossover collision history. CP at 383 (Morin Decl., p. 3 ll. 17-22). As a result, there had been no past basis for developing a distinct prioritization process and funding source directly targeted for median barrier protection. CP at 383.

The Highway Safety Executive Group, acting on behalf of the Secretary, and pursuant to the Highway Safety Issue Group's recommendation, amended WSDOT's Design Manual in November 2001, to require median barriers in medians less than 50 feet in width for certain future highway construction projects. CP at 383 (Morin Decl., p. 3 ll. 22-26). Projects suited for this level of barrier design criteria were subject to the legislatively specified program for prioritization of safety

improvements based on limited funding available. RCW 47.05.010; CP at 384 (p. 4 ll. 1-4).

WSDOT also conducted a study of collision data to identify specific highway sections where installation of a barrier would be appropriate under the criteria that was to be adopted. CP at 384 (p. 4 ll. 5-16). The study developed a benefit/cost analysis for ranking/prioritizing barrier needs. CP at 384. The cost component was based on installation of stand-alone projects, build costs, and value of collision reduction among other factors required per RCW 47.05.051(2). CP at 384 (Morin Decl., p.4 ll. 9-15). The benefit was a product of the frequency or severity reduction, or both, to the motoring public that would potentially be avoided by the prospective installation.<sup>1</sup> CP at 384 (Morin Decl., p. 4 ll. 9-15).

The initial list of locations was stratified by median bandwidths and arranged in descending benefit to cost ratio. CP at 1018 (Berends Supp. Decl., p. 3 ll. 1-8). Milepost 2.48 to 6.40, which encompasses the location of the appellant's collision, fell within the category of medians between 30-40 feet in width and an installation of a median barrier on this

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<sup>1</sup> The benefit/cost ratio is based on comparing costs to potential for reducing accident frequency and severity. So, for example, installation of a barrier on a section of roadway with a benefit/cost of 1 would have a greater potential for reduction than installation of a barrier on a section of roadway with a benefit/cost of zero.

section of roadway had a benefit/cost ratio of zero. CP at 1018 (Berends Supp. Decl., p. 3 ll. 8-11).

**B. SR 512 Median Barrier Funding History**

Capital Program Development and Management develops and delivers the Capital Highway Construction Program for WSDOT. CP at 384 (Morin Decl., p. 4 ll. 16-17. Capital Program Development and Management helps WSDOT effectively manage, preserve or improve performance of its assets on the highway network. CP at 384, p. 4 ll. 17-19.

In response to the November 2001 change in the Design Manual, Capital Program Development and Management prepared instructions for the regional offices on how the new median barrier guidelines may affect projects within the current Highway Construction Program for the 2001-2003 Biennium and the scoping of proposed projects for the 2003-2005 Biennium and future budgets. CP at 384 (Morin Decl., p. 4 ll.16-24). Included with the guidelines was the list of identified roadway segments by Region, and the preliminary benefit/cost (B/C) ratio for those segments. CP at 385 (Morin Decl., p. 5 ll. 1-3).

At the time, the State was divided into six administrative regions. CP at 385 (Morin Decl., p. 5 ll.16-22. SR 512 is located in the Olympic region. Each region was responsible for scoping/estimating a list of

project proposals to address safety improvements. CP at 385 (Morin Decl. p. 5 ll. 22-26). These potential projects were provided to WSDOT's Headquarters office to be considered as part of WSDOT's overall proposed budget to the Transportation Commission. CP at 385 (Morin Decl., p. 5 ll. 16-22). The Transportation Commission reviewed and modified the budget, projects and programs prior to Commission approval. CP at 385. The Commission's proposed program was then submitted to the Legislature for further review, modifications and final approval. CP at 385.

In formulating the 2003-2005 budget, the Olympic Region identified 26 in-progress safety improvement projects previously directed by the Legislature in the 2001-2003 budget. CP at 385 (Morin Decl., p. 5 ll. 23-26). The Region also had 12 new projects. CP at 385 (p. 5 ll. 25-26). These projects were submitted for consideration for funding during the 2003-2005 Biennium. The projects authorized by the Legislature for the Olympic Region in the 2003-2005 budget all had a benefit/cost ratio of 1 or greater. CP at 386 (p. 6 ll. 11-14).

At the time the 2003-2005 WSDOT budget proposal was being developed, installation of any barrier on SR 512 between Milepost 2.48 and Milepost 6.40 had a benefit cost of zero. CP at 386, (p. 6 ll. 12-14.) WSDOT had other safety improvement projects with a higher

priority/potential for collision frequency or severity reduction. CP at 386, (Morin Decl., p. 6 ll. 14-17.) Therefore, installation of a cable barrier on this section of roadway, did not qualify to be part of WSDOT's budget for 2003-2005. CP at 386.

It typically takes, at minimum, a year for WSDOT to develop a proposed budget for an upcoming biennium. CP at 386 (Morin Decl., p. 6 ll. 18-21). In the fall of 2003, WSDOT began formulating its proposed budget for the 2005-2007 Biennium. CP at 386.<sup>2</sup>

Based on recommendations of the Highway Safety Issue Group, and approval of the Highway Safety Executive Group, WSDOT sought funding for a systematic program of cable median barrier installations. CP at 386 (Morin Decl., p. 6 ll. 22-26). This change allowed for an increased number and length of highway segments to be evaluated, including SR 512 from Milepost 2.48 to Milepost 11.99. CP at 386.

The original list of roadway sections was revised to combine segments into contiguous locations, disregarding the median width bands. CP at 1018 (Berends Supp. Decl., p. 3 ll. 16-22). In this case, segments Milepost 2.48 to 6.4 and Milepost 6.4 to 11.99 of SR 512 were combined for prioritization purposes. CP at 1018. Because segment Milepost 6.4 to

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<sup>2</sup> State agencies typically submit their budget requests to the Governor's Office in the fall preceding the legislative session to allow the Governor time to develop the budget submitted to the Legislature. Thus, DOT submitted its budget request for the 2005-2007 Biennium to the Governor in the fall of 2004.

11.99 had a higher benefit/cost than segment Milepost 2.48 to 6.4, it increased the overall benefit/cost for the combined segment and resulted in a ranking of number 13 on the priority array. CP at 1018. In April 2004, additional collision data, among other things, was analyzed resulting in the SR 512 project being ranked number 9 on the priority array. CP at 1018 (Berends Supp. Decl., p. 3 l. 23 – p. 4 l. 2).

In September 2004, WSDOT submitted its proposed budget for the 2005-2007 Biennium to the Governor for review. CP 386 (Morin Decl., p. 6 ll. 19-21). The SR 512 project was part of a system wide safety initiative proposed by WSDOT to the Governor, and from the Governor to the Legislature.<sup>3</sup> The list of proposed projects included a request for funding the design and installation of a cable barrier on SR 512 from Milepost 2.48 to Milepost 11.99. CP at 436 (Morin Decl., Ex. 6). The Legislature passed its budget in April of 2005, including an appropriation for WSDOT to expend funds on the design and installation of a cable barrier on SR 512 with a tentative start of the project for January 2006. CP at 347 (Ron Landon Decl., p. 3 ll. 8-10).

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<sup>3</sup> The safety initiative was ultimately directed by the Governor and the Legislature through its appropriation of funds for this particular safety improvement project. CP at 388 (Morin Decl., p. 8).

Absent a budget appropriation by the Legislature, WSDOT does not have the authority to spend available transportation funding, whether it is state or federal monies. CP at 387 (Pat Morin Decl., p. 7 ll. 11-21). The appropriation authority granted by the Legislature to spend available transportation funding to address existing and new capital projects became effective July 1, 2005. CP at 387 (Pat Morin Decl., p. 7 ll. 5-9).

**C. Design Phase History**

In December 2005, WSDOT issued work orders to begin the design process for the installation of a cable median barrier on SR 512.<sup>4</sup> For efficiency purposes, the SR 512 project was combined with another cable barrier installation on US 101. CP at 347 (Landon Decl., p. 3 ll. 17-20). A tentative advertisement date announcing WSDOT was accepting bids from construction companies to install the barriers along US 101 and SR 512 was set for May 15, 2006. CP at 86 (McNutt Decl., p. 2 ll. 14-15).

During the design phase, it came to the attention of the design team that portions of the median along SR 512 and US 101 had a slope greater than 6 to 1. CP at 86 (McNutt Decl., p. 3 ll. 4-8). This presented a significant issue which needed to be addressed because if the slope was

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<sup>4</sup> Attached as Exhibit 4 (CP at 358-66) to Ron Landon's declaration is a list of legislatively approved projects for the 2005-2007 Biennium. Not all projects are tentatively slated to begin at the same time. CP at 347 (Landon Decl., p. 3 ll. 11-16). The tentative timeline for the design and construction phase of a project must be prioritized along with other projects in the region for efficient use of money and resources. CP at 347.

not flattened the cable barrier could potentially not operate correctly and could pose a safety risk. *See* CP at 84-88 (McNutt Decl.) and CP at 345-367 (Landon Decl.).

To mitigate the sloping issue, both SR 512 and US 101 had to be topographically surveyed to determine how much fill would be needed to flatten the slope to a 6:1 ratio. CP at 86 (McNutt Decl., p. 3 ll. 4-12). This information was also needed to apply for appropriate environmental permitting, meaning the project could not be placed for advertisement in May of 2006. CP at 328 (Stacie Kelsey Decl., p. 3 ll. 15-17). Based on the unforeseen design safety changes, and to facilitate obtaining the requisite environmental permits, the tentative date for advertisement for the acceptance of bids was reset from May to July 17, 2006. CP at 86 (McNutt Decl., p. 3 ll. 16-17).

Design information for the project was received by the environmental permitting team on April 7, 2006. CP at 328 (Kelsey Decl., p. 3 ll. 1-4). The permits were authorized on June 12, 2006 and the project went out to bid on July 17, 2006. CP at 328 (p. 3 ll. 9-14).

#### **D. Installation**

All bids were submitted to WSDOT on August 16, 2006. CP at 86 (McNutt Decl., p. 3 ll. 18-23). WSDOT has 45 days to review the bids. CP at 86. On August 21, 2006, the project was awarded to Peterson Bros.

Construction Company. CP at 86 (McNutt Decl., p. 3 ll. 20-22). Peterson Bros. had 20 days to execute the contract, which they did on September 8, 2006. CP at 86.

The installer had 90 days after the contract award to procure materials for the cable barrier system installation. CP at 86 (p. 3 ll. 24-25). This is necessary because cable barrier systems are not an “off the shelf” item. CP at 86 (McNutt Decl., p. 3 ll. 24-26).

The contract provided that the installer had the choice of where to begin the project. CP at 87 (McNutt Decl., p. 4 ll. 1-4). This is typical in highway construction contracts because allowing the contractor to determine the most efficient order of work reduces the cost of projects. CP at 87. Peterson Brothers began installing cable barrier on US 101 on approximately December 11, 2006. CP at 87 (p. 4 ll. 4-5). In early February 2007, they then turned their attention to began installing the system on SR 512. CP at 87 (p. 4 ll. 4-8). The entire project was completed on March 30, 2007. CP at 87.

**E. There Was No Two-Year Delay As Suggested By Appellants**

Throughout their brief appellants repeatedly, and incorrectly, assert that there is an inexplicable two-year period for which the SR 512 median barrier project was removed from the project list and thereby delayed.

Appellants introduce this fallacy on page 12 of their brief where they

assert:

SR 512 was originally ranked 13<sup>th</sup> on the list of installations of median barriers. Declaration of Pat Morin, page 6. CP 386. However, SR 512 was inexplicably taken off the list altogether from 2003 to 2005.

Whether the result of confusion, or intent, appellants' assertion that the project was "inexplicably removed from the list for two years" and implication that the priority array was not followed simply is not true in any respect. Appellants apparently believe that because the project was ranked number 13 in August of 2003,<sup>5</sup> and was not funded during the 2003-2005 Biennium, that means the project was "taken off the list altogether from 2003-2005". That is simply wrong.

As the court is aware, the State budget is approved by the Legislature, is biennial, and runs from July 1<sup>st</sup> of an odd numbered year to June 30<sup>th</sup> of the next odd numbered year. Further, the budget is approved in the legislative session preceding the two year budget period. Thus, the 2003-2005 budget was approved by the Legislature prior to the project being ranked as number 13 on the priority array in August of 2003. Put simply, the project could not have been included in the 2003-2005 budget based on a ranking that did not come into existence until after the budget

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<sup>5</sup> CP at 1018 (Berends Decl., p. 3).

was approved. Thus, there is no factual basis, nor truth, to appellants' assertion that there was an inexplicable two-year disappearance of the project or delay in funding.

**F. Procedural History**

On July 21, 2009, this lawsuit was filed. CP at 3-7 (Plaintiffs' Complaint). June 1, 2010 was the original discovery cutoff set by the court. CP at 1010. On May 20, 2010, WSDOT filed its motion for summary judgment. On June 7, 2010, the motion was reset to June 25<sup>th</sup>. CP at 1011-13.

On June 16, 2010, the appellants filed a motion to compel and noted the motion to be heard the same day as the summary judgment. CP 739. Appellants did not request the court to rule on the motion to compel prior to the summary judgment motion. VRP p. 3 ll. 15-22.

Appellants noted in the order granting summary judgment they were resetting their motion to compel to the day of the reconsideration motion. CP at 961-63. Appellants' motion to reconsider was denied. The court did not rule on the motion to compel. VRP p. 68 ll. 20–p. 69 ll. 21. *See* Order Granting Defendant's Motion for Summary Judgment (CP at 961-63) and Order Denying Plaintiffs' Motion for Reconsideration (CP at 994-95).

### III. ARGUMENT

#### A. **The Trial Court Correctly Granted Summary Judgment Because SR 512 Was Built To Standard When It Was Originally Constructed, And WSDOT Did Not Have A Duty To Upgrade SR 512 To Current Design Standards**

Appellants assert the trial court erred in granting summary judgment by arguing WSDOT had a duty to upgrade SR 512 to current design standards. This assertion is without merit.

A review of a trial court's ruling granting summary judgment is de novo. *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 993 P.2d 259 (2000). A trial court properly grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

##### 1. **The Trial Court Properly Granted Summary Judgment Because WSDOT Did Not Have A Duty To Upgrade The Road With A Cable Barrier**

With respect to its highways, the State has a duty to exercise ordinary care in the construction and maintenance of public highways to keep them in reasonably safe condition for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 254, 44 P.3d 845 (2002). This duty does not include an obligation to update every road and roadway design feature, such as median barriers, to current highway design standards. *Ruff v. King County*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995).

Ever changing standards, policies and guidelines do not create duties. *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990). Nor do changes in design standards make WSDOT an insurer against all accidents on the over 20,000 miles of highways maintained by WSDOT in Washington State. WSDOT is not required to “anticipate and protect against all imaginable acts of negligent drivers”. *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979).

The Supreme Court in *Ruff* rejected arguments similar to the ones raised by the appellants. *Ruff* was a passenger in a car that ran off a county road landing upside down in a streambed. *Ruff*, 125 Wn.2d at 700. *Ruff* sued King County, and his experts claimed that a guardrail should have been in place to redirect the car. *Id.* at 703. The accident occurred in May 1988. *Id.* at 699.

King County brought a motion for summary judgment arguing that it breached no duty owed to *Ruff*, that its conduct was not a proximate cause of *Ruff*'s injuries, and that it had discretionary immunity for its initial decision not to install a guardrail at the accident location. *Ruff*, 125 Wn.2d at 702. The trial court granted the motion for summary judgment, but this was reversed by the Court of Appeals. *Id.* The Supreme Court, in turn, reversed the Court of Appeals and reinstated the trial court's judgment in favor of the County.

The Supreme Court ruled that King County had breached no duty owed to plaintiff Ruff. *Id.* at 704. The court concluded that “[s]ince there is no duty to make a safe road safer, the trial court correctly granted King County’s motion for summary judgment.” *Id.* at 707.

The court noted King County guidelines did not require its roadways be retrofitted with new design structures. *Ruff*, 125 Wn.2d at 705. Further, the court noted the road had a normal width, signing and striping was visible and appropriate, and that the road’s last major reconstruction had taken place in the early 1960s. *Id.* at 704. The court also noted that the county had a priority program, which it had begun in 1984, for guardrail installation based on ranking locations in the order of where guardrails were needed most. *Id.* at 702.

Here, the trial court properly granted summary judgment because WSDOT did not breach any duty owed to the appellants. As in *Ruff*, SR 512 was designed and built to applicable standards at the time, which did not require a median barrier. There is no admissible evidence in the record that SR 512 in the vicinity of the appellant’s collision was unsafe for ordinary travel. The roadway was smooth. All striping on the roadway was visible and the appropriate signage was in place on the road. Further, as in *Ruff*, WSDOT had a legislatively mandated priority array system through which WSDOT ranked and prioritized construction

funding for highway improvement projects incorporating more current highway design features.

Appellants make no attempt to distinguish *Ruff* other than to conclusorily state WSDOT's arguments based on *Ruff* are irrelevant. Appellants make no attempt to distinguish *Ruff* because it cannot be distinguished and, just as in *Ruff*, summary judgment should be affirmed.

Respondent anticipates appellant may attempt to argue the roadway was unsafe in their reply brief by relying on the Statement of Dr. Lee that the median did not allow for the safe recovery of vehicles leaving the paved surface. CP at 608 (Lee Decl., p. 5). WSDOT objected to the admissibility of Dr. Lee's opinions at the trial court because Dr. Lee's opinion does not establish the road was unsafe, nor does it establish a duty to construct a median barrier. CP at 781-82 (WSDOT's Reply, pp. 5-6).

**2. The Trial Court Properly Granted Summary Judgment Because Appellants Failed To Submit Any Admissible Evidence SR 512 Was Unsafe For Ordinary Travel**

In cases involving allegations a road is unsafe, summary judgment is proper where plaintiff fails to affirmatively produce admissible evidence of causation that rises beyond mere speculation. *Miller v. Likens*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001). Lee's opinion is based solely on speculation and conjecture. Dr. Lee provides no quantitative analysis to support his conclusory opinion the median did not allow for the safe

recovery of vehicles leaving the paved portion of the roadway. Nor is there any factual basis upon which to conclude that the truck which struck appellant's vehicle could have recovered and avoided the collision, particularly since it was tumbling through the median. The mere fact an accident occurred at this section of the highway does not create a question of fact whether the road was unsafe for ordinary travel.

Moreover, there is no admissible evidence in the record a cable median barrier would have prevented this collision.<sup>6</sup> As detailed in the declarations of Nathan Rose (CP at 246-322) and Lance Bullard (CP at 44-83), the cable median barrier system which was later installed in this section of the roadway was not designed to retain two vehicles almost simultaneously impacting the cable barrier system. CP at 51 (Bullard Decl., p. 8 ll. 1-10).

In contrast, Dr. Lee's opinion is based on a computer model of a lone car impacting a concrete barrier, not a cable barrier. CP at 612 (Lee Decl., p. 9). Lee provides no evidence concrete barriers interact with vehicles in the same manner as cable guardrail. The un-rebutted evidence is exactly the opposite. As noted in Lance Bullard's declaration, cable barrier interacts differently with errant vehicles than a concrete barrier.

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<sup>6</sup> Appellants also did not address in their opening brief the issue of proximate cause. However, they did make arguments at the trial court level concerning proximate cause so it is addressed here in anticipation they may attempt to address it in rebuttal.

CP at 49 (Bullard Decl. p. 6 ll. 15-20).<sup>7</sup> Further, Dr. Lee's model does not account for two vehicles impacting the cable barrier at approximately the same time as occurred in this case. CP at 612 (Lee Decl., p. 9).

Appellants' lawsuit is premised on the proposition that WSDOT had a duty to retrofit SR 512 with a cable median barrier. However, it is undisputed that construction of the median satisfied design guidelines when SR 512 was built and that the road was otherwise safe for ordinary travel. As a result, there was no duty to upgrade the highway and the trial court properly granted summary judgment based on the holding in *Ruff*.

**B. The Trial Court Properly Granted Summary Judgment Because WSDOT's Legislatively Mandated Prioritization Of Future Construction Projects Is Subject To Discretionary Immunity**

Appellants also assert the court erred in granting summary judgment claiming WSDOT negligently delayed the installation of a cable median barrier on SR 512. This argument is without merit. The trial court properly granted summary judgment because the design and construction of a median barrier along SR 512 was not funded by the Legislature prior to the 2005-2007 Biennium based on the priority array. WSDOT's use of the priority array to prioritize safety improvements is subject to

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<sup>7</sup> Cable barrier is a very effective barrier for containing and redirecting an errant passenger vehicle while imposing the lowest deceleration forces on the occupants of the vehicle and the probability of the errant vehicle being redirected back into the traffic stream is lower than other types of longitudinal barriers, such as W-beam guardrail and concrete safety shape barriers. CP at 49 (Bullard Decl. p., 6 ll. 15-20).

discretionary immunity and, as a result, the decision of whether or when to install a cable barrier on SR 512 cannot serve as a basis of liability. Further, there is no evidence in the record showing the time from when the project was funded to when it was completed was unreasonable.

The existence of a duty is a question of law for the court. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994). By the enactment of RCW 4.92.090, the Legislature intended to abolish on a broad basis the general doctrine of sovereign tort immunity in this state. See *Kelso v. City of Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964) and *Hosea v. City of Seattle*, 64 Wn.2d 678, 393 P.2d 967 (1964).

Discretionary immunity is a court-created exception to the general rule of governmental tort liability and applies to discretionary acts and or decisions exercised at the executive level of government. *Bender v. Seattle*, 99 Wn.2d 582, 588, 664 P.2d 492 (1983). The waiver of sovereign immunity renders the State liable for damages only when such damages arise out of tortious conduct to the same extent as a private person or corporation. *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 252, 407 P.2d 440 (1965).

The official conduct giving rise to liability must be tortious, and analogous to the chargeable misconduct and liability of a private person or corporation. *Evangelical* at 253. RCW 4.92.090 does not render the State

liable for every harm which may flow from governmental action, or constitute the State a surety for every governmental enterprise involving an element of risk. *Id.*

In *Evangelical* the Supreme Court outlined four questions which form the frame work for determining whether discretionary immunity applies to a particular governmental decision:

(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? (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 Church of Adna*, 67 Wn.2d 246 at 255.

The State's waiver of sovereign immunity does not preclude discretionary immunity for priority programming decisions of highway safety improvements. *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 4, 882 P.2d 157 (1994). *McCluskey* was a wrongful death action arising out of a crossover accident on SR 18. *Id.* at 3. In *McCluskey*, the decedent's widow sued the State alleging the State failed to properly maintain the roadway and failed to properly separate east and westbound traffic. *Id.*

The Washington State Supreme Court in *McCluskey* rejected the broad conclusion of the Court of Appeals that there was no immunity for programming decisions, and held that such decisions qualified for discretionary immunity if the government's actions meet the criteria of discretionary immunity set out in *Evangelical*. *McCluskey*, 125 Wn.2d at 11-13. Specifically, the court observed:

We note that the State Highway Commission, which is responsible for assembling the Priority Array and the proposed highway improvement budget, is the governing body of the Department of Transportation, and sets policy for the Department. *Legislative Report*, 45th Legislature, 1st Ex. Sess., at 179 (Final ed. 1977); RCW 47.01.071(2). There is no discussion by the Court of Appeals, however, of the *Evangelical Church* questions and whether assembly of the Priority Array represents a high-level discretionary decision.

*McCluskey*, 125 Wn.2d at 12.

Reviewing with approval numerous cases from Washington and other jurisdictions which found discretionary immunity based on highway funding decisions, the court made it clear that the defense was viable:

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* at 13.

One of the cases noted with approval by the *McCluskey* court was *Jenson v. Scribner* which found where upgrades to a highway are dependent upon an objective program, and funding has not been made available for a specific project, there is no liability for failure to construct the project. *Jenson v. Scribner*, 57 Wn. App. 478, 482, 789 P.2d 306 (1990). In *Jenson*, a drunk driver had lost control of his vehicle, crossed over the centerline of SR 3, and collided head-on with Jenson. *Jenson* at 480. Jenson sued the State alleging that the State should have protected him from the drunk driver by installing a median barrier on the highway. *Id.*

WSDOT was in the process of having a median barrier installed on the highway at the time of the collision. The design and construction of the barrier lasted approximately two years and spanned two budgetary cycles. The median barrier project for SR 3 was proposed to the Transportation Commission by the Department of Transportation in August of 1981. *Jenson* at 482. The project was then proposed to the Legislature. Funding for the initial design and the preliminary engineering of the barrier project occurred in August 1981. *Jenson* at 482. Expenditures for the construction of the project were authorized for the 1983-1985 Biennium. *Id.* In January 1983, design work for the project was completed. In May 1983, plaintiff's collision occurred. *Id.* Construction of the barrier began in June of 1983 and was in place by late August of that year. *Id.*

In finding WSDOT was entitled to discretionary immunity, the court recited the criteria of *Evangelical* and observed that the plaintiffs in their reply brief had conceded the decision to improve a highway by installation of a barrier was a discretionary decision. *Jenson*, 57 Wn. App. at 481. Funding for installation of the guardrail was not available prior to the plaintiff's collision and the court *rejected* plaintiff's argument that the decision to install the barrier, once made, was negligently delayed. *Jenson* at 482 (emphasis added).

Here, the trial court properly granted summary judgment because WSDOT's assembly of the priority array and budget is entitled to discretionary immunity. A review of the four questions posed in the *Evangelical* framework shows WSDOT's use of the priority array to prioritize the installation of safety improvements is subject to discretionary immunity and that WSDOT is not liable for not installing a median barrier on SR 512 prior to the Avellaneda collision.

First, WSDOT's use of the priority array to prioritize decisions concerning which projects are built involves a "basic government policy". *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101 (1979). WSDOT's use of the priority array is mandated by the Legislature and requires the prioritization of projects based on needs versus available resources. This policy is declared by the Legislature in RCW 47.05.010 which states:

The legislature finds that solutions to state highway deficiencies have become increasingly complex and diverse and that anticipated transportation *revenues will fall substantially short of the amount required to satisfy all transportation needs. Difficult investment trade-offs will be required.*

It is the intent of the legislature that investment of state transportation *funds to address deficiencies on the state highway system be based on a policy of priority programming* having as its basis the rational selection of projects and services according to factual need and an evaluation of life cycle costs and benefits and which are systematically scheduled to carry out defined objectives within available revenue.

(Emphasis added).

The declarations of Pat Morin (CP at 381-448), Terry Berends (CP at 1014-1047) and Ron Landon (CP at 345-367) show in detail how the priority array was used to develop, scope and prioritize projects for the installation of cable median barriers including the SR 512 project. Under the priority array, projects are ranked by a benefit/cost methodology, and it is undisputed that the SR 512 cable barrier project did not rank high enough on the priority array to be submitted to the Legislature for funding prior to the 2005-2007 biennial budget. The SR 512 project was included in WSDOT's budget request for the 2005-2007 Biennium and funded at that time by the Legislature. The Legislature's authorization for the expenditure of funds to begin the design phase of the SR 512 project was based on a tentative start date of January 2006.

Second, WSDOT's prioritization of projects based on the priority array is essential to the realization of the Legislative policy underlying the priority array. The purpose of the priority array is to implement the Legislative policy of applying the limited resources available to fund highway safety projects to their highest and best use. That purpose is achieved by using a system to select projects according to factual need, based on an evaluation of life cycle costs and benefits. Failing to follow that system would undermine the legislatively declared policy of applying highway safety dollars to their highest and best use.

Third, WSDOT's prioritization of projects through the use of the priority array requires the exercise of basic policy evaluation, judgment and expertise on the part of WSDOT. At the behest of the Highway Safety Executive Group, which had the authority in matters of highway safety to make high-level policy decisions on behalf of the Secretary of Transportation, WSDOT engaged in an extensive study to formulate a benefit/cost methodology to specifically assist it in formulating a priority array for median barrier projects. The benefit was a product of the frequency or severity reduction, or both, to the motoring public that would be potentially avoided by the prospective improvement. Morin Decl. (CP at 381-448), Berends Decl. (CP at 1014-1047) and Landon Decl. (CP at 345-367). The cost component was based on installation of stand-alone

projects, build costs, and value of collision reduction, among other factors, required per RCW 47.05.051(2).<sup>8</sup> CP at 384 (Morin Decl.). As noted by Pat Morin, the benefit/cost evaluation conducted by WSDOT helps it target which projects have the greatest potential to reduce collisions. The priority array requires WSDOT to analyze such factors as the condition or level of deterioration of pavement and bridges as well as collision histories on segments of all state highways during each biennium to rank or “prioritize” the spending of limited funds. CP at 381-448.

Fourth, WSDOT has the “authority” to use the priority array system to prioritize its projects. WSDOT has been legislatively mandated to use the priority array. Thus, all four elements of the *Evangelical* test are met, and WSDOT’s decision on whether and when to submit the SR 512 cable barrier project to the Legislature for funding is entitled to discretionary immunity. The trial court’s order granting summary judgment should be affirmed.

In attacking the trial court’s ruling, the appellants do not challenge WSDOT’s formulation of the benefit/cost analysis used to create the priority array. Instead, they claim WSDOT departed from the priority

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<sup>8</sup> The government’s consideration of risks and advantages of particular designs, balanced against alternatives, taking into account safety, adopted standards, recognized engineering practices, including economics and whatever is appropriate are all factors which must be considered when determining a governmental decision is subject to discretionary immunity. *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101 (1979).

array by “zeroing out” or “removing” SR 512 from the list of highways to receive funding. Appellants’ contention is based on the factually incorrect claim that the project was removed from the priority array for two years because it was not funded prior to the 2005-2007 Biennium. The unrebutted declarations of Pat Morin (CP at 381-448), Ron Landon (CP at 345-367) and Terry Berends (CP at 1014-1047) show SR 512 was never removed from the array. Rather, the installation of a median barrier where appellant’s collision occurred did not qualify for funding prior to the 2005-2007 budget because other projects had higher benefit/cost values.

Appellants also ask this court to question the timing of the Legislature’s decision to fund the SR 512 project. However, SR 512 did not qualify for priority programming funding prior to the 2005-2007 budget and, therefore, was foreclosed by legislative directive. Courts have consistently found where a matter is committed to the Legislature, the court may not substitute its judgment for that of the legislative branch. *Washington State Public Employees Board v. Cook*, 88 Wn.2d 200, 559 P.2d 991, *adhered to on rehearing*, 90 Wn.2d 89, 579 P.2d 359 (1978). Only the legislative branch has authority to levy taxes and appropriate funds.

The decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative. We will not direct the Legislature to act in this regard

unless creation of a program and/or funding thereof is constitutionally mandated.

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

Appellants assert they should be allowed to “check WSDOT’s math” concerning the formulation of the priority array, but this argument turns the purpose of discretionary immunity on its head. Discretionary immunity precludes the type of second-guessing about policy determinations of where and when projects are to be constructed which appellants ask this court to engage in.

The *Jenson* court rejected a very similar argument when ruling WSDOT was entitled to discretionary immunity. *Jenson v. Scribner*, 57 Wn. App. 478, 483, 789 P.2d 306 (1990). In *Jenson*, the plaintiffs, like the Avellanedas, attempted to question WSDOT’s ranking of the projects by arguing if WSDOT had collected collision data more frequently than every two years, the State may have ranked a safety project higher on the priority list. *Id.* The court rejected this argument and noted data collection is a function of planning and therefore is part of the State’s decision-making process, which is immune. *Id.* The same holds true here. Regardless of appellants’ unsubstantiated claims concerning the array, WSDOT’s formation of the array and the analysis of data is a function of planning and therefore immune.

Finally, any assertion by appellants in rebuttal that, after funding was appropriated for the SR 512 project, WSDOT “negligently delayed” the construction of the project should, as in *Jenson*, be rejected. WSDOT had no duty per *Ruff* to retrofit SR 512 and the Legislative decision to fund a safety improvement project did not create a duty for WSDOT to have the project completed within any particular time frame. Rather the duty was to not negligently install the barrier. *Stewart v. State*, 92 Wn.2d 285, 294-295, 597 P.2d 101 (1979).

Even if the Legislature’s decision to fund the project did create some sort of duty to install the SR 512 project within a particular time frame, the trial court properly granted summary judgment because appellants provided no evidence from which the court could conclude the design to project completion timeframe was unreasonable. The un-rebutted evidence is to the contrary. *See McNutt Decl.* (CP at 84-88).

Appellants provided no evidence the cable barrier would have been installed prior to the collision or that the project’s time line violated industry standards. The tentative start date for the project to begin the design phase was January 1, 2006. As John McNutt explains in his declaration, the advertisement date for the project had to be changed due to unforeseen changes in the design of the project. CP at 86. Once the project was placed for bid under standard advertisement and bidding practices for

WSDOT, the winning bidder had ninety days to procure the materials. After being awarded the contract on August 16, 2006, Peterson Bros. did not begin construction until December 11, 2006, on the US 101 portion of the contract. CP at 87 (McNutt Decl.).

Using the actual construction timeline as a guide, even if WSDOT had not changed the advertisement date due to design safety and permitting issues, and Peterson Brothers had chosen to begin installation of the barrier on SR 512 first, actual construction would not have started until approximately three and a half months after May 2006 when the project was originally scheduled to be advertised for bids. This is well after Ms. Avellaneda's collision on July 23, 2006.

The trial court properly granted summary judgment because WSDOT is entitled to discretionary immunity and the trial court's order should be affirmed on this basis as well.

**C. WSDOT Is Not The Proximate Cause Of Appellant's Collision**

The trial court also properly granted summary judgment because appellants cannot establish factual or legal proximate cause under the facts of this case. Actionable negligence requires that the breach of a duty be the proximate cause of the claimed injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Under Washington law, proximate cause consists of the twin elements of 1) cause in fact, and 2) legal causation.

*Hartley* at 777-79. In *Hartley*, the court explained that cause in fact refers to the “but for” consequence of an act, and the element can be framed in terms of whether the injury to plaintiff would have occurred but for the allegedly negligent act of the defendant. *Hartley*, 103 Wn.2d at 778.

### 1. Factual Proximate Cause

In cases involving allegedly unsafe roads, summary judgment on proximate cause is proper where plaintiff fails to affirmatively produce admissible evidence of causation that rises beyond mere speculation. *Miller v. Likens*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001). As stated in *Miller*:

Thus, to survive summary judgment, the plaintiff’s showing of proximate cause must be based on more than mere conjecture or speculation. Summary judgment is proper if the non-movant “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that a party will bear the burden of proof at trial.” Washington courts have repeatedly held that in order 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.

*Miller*, 109 Wn. App. at 145 (citations omitted).

Turning to the facts of this case, the trial court properly granted summary judgment because appellants cannot establish proximate cause.<sup>9</sup> As detailed in Nathan Rose’s declaration, the car and the truck began to trip and roll as they travelled through the median just before the area where the

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<sup>9</sup> Appellants do not address this issue in their opening brief, however they did address this issue at the trial court and it is expected they may address it in their rebuttal.

cable barrier was later installed. CP at 246-322 (Rose Decl., p. 17 ll. 4-7). Mr. Rose's opinion, which is un-rebutted by appellants, is that the cable barrier would have been unable to prevent the truck which struck the appellants from entering the oncoming lanes of travel as it did. CP at 262 (Rose Decl., p. 17). In addition, the high-tension barrier system installed by WSDOT was not designed to restrain two vehicles hitting it at almost the exact same time as they roll through the median as occurred in this case. CP at 44-83 (Bullard Decl., p. 8 ll. 1-10); CP at 262 (Rose Decl., p. 17 ll. 13-15).

Appellants' expert made no attempt to rebut Mr. Rose's opinion and appellants provided no evidence from which a trier of fact could conclude a cable barrier would have prevented this accident. Rather Dr. Lee's analysis was based on a sole car entering the median and making contact with a concrete barrier. CP at 612 (Lee Decl., p. 9). Dr. Lee's opinion is irrelevant to the issue of causation as it does not address the efficacy of a cable barrier in preventing this accident and is not based on the actual facts of the case. Furthermore, the suggestion that a concrete barrier may have prevented the accident amounts to the type of second-guessing the decision to install a cable barrier that is precluded by the discretionary immunity doctrine.

## **2. Legal Causation**

Legal causation is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley v. Pinch's*

*Deli Market*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). The focus 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. *Id.* A determination of legal liability will depend upon “mixed considerations of logic, common sense, justice, policy and precedent.” *Hartley*, 103 Wn.2d at 779.

In *Hartley*, the court held that the State was not liable to the estate of a person killed by a drunk driver whose license was renewed when there was clearly cause for revocation due to numerous drunk-driving arrests. *Id.* at 770. The court concluded that “the failure of the government to revoke Johnson’s license [was] too remote and insubstantial to impose liability for Johnson’s drunk driving.” *Hartley*, 103 Wn.2d at 784. The court went on to state:

While a license is necessary for anyone wishing to drive an automobile legally in this state, a license does not grant authority to disobey the law. [citations omitted.] The failure to revoke Johnson’s license (even assuming that Johnson would have honored the revocation and not driven) is simply too attenuated a causal connection to impose liability.

. . . Public policy considerations also dictate against liability in this case. The government would be open to unlimited liability were we to hold potentially liable every decision by a prosecutor of the DOL to delay proceedings [to revoke a license].

*Id.* at 785.

The connection between the respondent's conduct in this case, the alleged "negligent delay of construction", and the appellants' injuries are simply too remote to impose liability as a matter of common sense or policy. As in *Jenson*, appellants have no evidence that the actions of WSDOT during the design and construction phase of the SR 512 and US 101 projects were somehow negligent. Any assertion a change in a construction project's advertisement date based on the discovery of a safety issue, which needed to be corrected so a safety improvement could be installed safely, somehow was a proximate cause of the appellant's collision is simply too attenuated a causal connection to impose liability.

Further, public policy considerations underscore why the trial court properly granted summary judgment. Appellants' case theory that 1) WSDOT should be liable for this collision because it did not install the cable barrier prior to the Legislature appropriating funds for the project, and 2) that WSDOT should be liable because it had to change its advertisement date due to unforeseen design issues opens WSDOT to unlimited liability. Every time a project has to be delayed as a result of design changes, work force issues, product supply issues, weather or other unforeseen circumstances, would subject WSDOT to unlimited liability under appellants' theory. This is not the law nor should it be.

Such unlimited liability is contrary to the policy announced in *Hartley*, and it is doubtful that the Legislature intended to place WSDOT in the role of being an insurer when it legislatively mandated WSDOT to use the priority array to prioritize the design and construction of construction projects based on limited available resources.

The trial court properly granted summary judgment because WSDOT does not have a duty to upgrade highways constructed to applicable standards at the time, and decisions as to whether and when to install safety upgrades are protected from liability by the discretionary immunity doctrine.

**D. Appellants' Brief Failed To Rebut The Fact WSDOT Is Entitled To Discretionary Immunity In This Case**

Just as in the trial court, appellants provide no evidence or analysis showing WSDOT had a duty to upgrade SR 512 or that discretionary decisions based on the priority array are not entitled to discretionary immunity. Rather, in perfunctory fashion, appellants, without any analysis, in sections IV C and D of their opening brief list a series of cases and questions which presumably are intended to show discretionary immunity does not apply in this case. A vast majority of the cases do not apply to the facts of this case or alternatively fail to address Washington law concerning discretionary immunity. Further, the questions listed by

appellants are irrelevant to this case and misinterpret the record before this court. As such, the questions and case law deserve being addressed here.

**1. Questions Posed In Appellants' Opening Brief Are Irrelevant To This Case And Misinterpret The Record Before This Court**

The questions posed in Section IV D of appellants opening brief are irrelevant to this case and misinterpret the record before this court. More important, they do not rebut the fact the trial court properly granted summary judgment.

Throughout appellants' brief, and underlying the questions listed by appellants, is the unspoken assertion the court precluded them from conducting discovery in this case. Appellants provided no explanation why they failed to timely complete discovery, nor did they move pursuant to CR 56(f) for a continuance of the summary judgment motion.<sup>10</sup> Thus, appellants waived their complaint in this regard, and in any event, it is irrelevant because the fundamental proposition underlying their questions is wrong.

Appellants' questions are premised on the erroneous assertion that SR 512 was removed from the priority array for two years. As explained at pages 14-15 of this brief, appellants' assertion is based on an apparent misunderstanding of the State budgetary process. Both Pat Morin and

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<sup>10</sup> This issue is discussed in full in section IV E of this brief.

Terry Berends outline the history of the formulation of the array and SR 512 rankings which show that, contrary to appellants' assertions, SR 512 was never removed from the array.

Appellants' question about who actually made the calculations forming the rankings is irrelevant. The benefit/cost methodology and subsequent rankings were based on policies determined by the Highway Safety Executive Group and requirements outlined by the Legislature. Based on these policies and methods, the Highway Safety Executive Group and Washington State Traffic Commission formulated budgets and sought funding from the Legislature.

There is no case law cited by the appellants which states executive policy decisions subject to discretionary immunity cannot be based on data provided to them by a subordinate. To suggest otherwise ignores the demands placed upon executives in government. Further, the adoption of a requirement that executives must personally perform every act underlying their discretionary decision as appellants tacitly suggest would render any discretionary decision by a government executive subject to liability.

Finally, appellants' suggestion WSDOT did not follow its own procedures regarding the installation of the barrier is not supported by the record before this court either. The record is clear WSDOT changed its

design policy in 2001 and formulated a priority array in order to seek funding for installation of median barriers in medians less than 50 feet. In 2005, WSDOT received authority from the Legislature to begin the design and ultimate construction of a median barrier on SR 512.

Prior to that time, the portion of SR 512 where appellant's collision occurred did not qualify for funding and was foreclosed by legislative directive. Appellants have never provided any evidence to rebut these facts. Equally, they never provided any evidence that, after WSDOT received authority to install the cable barrier, the time for the design and construction of the project was unreasonable.

**2. The Cases Which Appellants Claim Define Discretionary Immunity Do Not Apply Either To The Law Or To The Facts In This Case**

Appellants cite, beginning on page 36 of their brief, 27 cases they assert define the law concerning discretionary immunity applicable to this case. Appellants provide no analysis of these cases or explanation of how they apply in this case.

On page 36 of their brief, appellants cite five cases they assert define the respondent's burden when asserting the defense of discretionary immunity. The only case applicable here is *Evangelical* which WSDOT acknowledges defines the analytical framework for discretionary

immunity. *Dalehite*<sup>11</sup> is instructive only to the extent it provides a historical reference for the purpose of discretionary immunity, which is to immunize executive decisions establishing plans, specifications and schedules of operation.

*State ex rel. Ogden*<sup>12</sup> is irrelevant because it predates *Evangelical* and it does not include a discussion of the *Evangelical* factors. *Campbell*<sup>13</sup> is irrelevant because it analyses the public duty doctrine, not discretionary immunity. *King*<sup>14</sup> is instructive to the extent it acknowledges the purpose of discretionary immunity is to prevent courts from passing judgment on policy decisions, which are the outcome of a concise balancing of risks and advantages. The very thing appellants are asking the court to do in this case.

Appellants cite a series of cases, without analysis, beginning at page 37 of their opening brief which they claim define the prima facie elements of the defense of discretionary immunity. None of these cases apply in this case.

Two of the cases cited involve operational decisions made by police officers. *Mason*<sup>15</sup> involved a police officer's decision to continue a

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<sup>11</sup> *Dalehite v. United States*, 356 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953).

<sup>12</sup> *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954).

<sup>13</sup> *Campbell v. Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975).

<sup>14</sup> *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974).

<sup>15</sup> *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975).

high-speed chase and *Chambers*<sup>16</sup> involved a decision of whether to respond to a call for help. These operational level everyday decisions are completely different from the considered policy based decisions made in this case.

The next set of cases, *Estate of Jones*<sup>17</sup> and *Taggart*,<sup>18</sup> establish discretionary immunity does not apply in parole supervision cases. These cases are irrelevant because neither involves the priority array and both were decided before the Supreme Court in *McCluskey* specifically noted WSDOT priority programming decisions are subject to discretionary immunity when they satisfy the elements of *Evangelical*.

Appellants cite a series of cases, *Rogers*,<sup>19</sup> *Radach*,<sup>20</sup> *Haslund*<sup>21</sup> and *Miotke*,<sup>22</sup> all of which are irrelevant because they involve ministerial decisions, not high-level policy making decisions. Appellants make no attempt to show how these cases apply to the facts of this case.

Appellants' reliance on *Algona*<sup>23</sup> and *Eldridge*<sup>24</sup> is misplaced because they involve the issue of sovereign immunity, not discretionary

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<sup>16</sup> *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983)

<sup>17</sup> *Estate of Jones v. State*, 107 Wn. App. 510, 15 P.3d 180 (2000).

<sup>18</sup> *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992).

<sup>19</sup> *Rogers v. Toppenish*, 23 Wn. App. 554, 596 P.2d 1096 (1979).

<sup>20</sup> *Radach v. Gunderson*, 39 Wn. App. 392, 695 P.2d 128 (1985).

<sup>21</sup> *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976).

<sup>22</sup> *Miotke v. Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984).

<sup>23</sup> *Algona v. Pacific*, 35 Wn. App. 517, 667 P.2d 1124 (1983).

<sup>24</sup> *Eldredge v. Kamp Kachess Youth Services*, 90 Wn.2d 402, 583 P.2d 626 (1978).

immunity. Similarly, *Roy*<sup>25</sup> is irrelevant because it involves the application of a statute to the police, not WSDOT. Finally, appellants' reliance on cases from California and Utah is misplaced because they do not analyze or apply discretionary immunity as it is applied in Washington.<sup>26</sup>

Most importantly, these cases fail to show the trial court erroneously granted summary judgment. As such, the trial court's granting of summary judgment should be affirmed.

**E. Appellants Waived Any Argument That The Trial Court Should Not Have Entered Summary Judgment Based On Their Failure To Timely Complete Discovery**

The appellants claim the trial court improperly granted summary judgment without granting their motion to compel. Presumably, this is some type of veiled assertion that the trial court should have continued the summary judgment motion to allow them to do discovery. The argument is without merit and does not provide a basis for reversing the ruling on summary judgment for several reasons.

First, the issue is not properly before this court because the trial court never ruled on the issue. Thus, there is no ruling to assign error to and nothing for this court to review. "It is well settled that a party's

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<sup>25</sup> *Roy v. Everett*, 118 Wn.2d 352, 823 P.2d 1084 (1992).

<sup>26</sup> *Winig v. California*, 37 Cal. App. 4th 1772, 44 Cal. Rptr.2d 652 (1995); *Trujillo v. Utah Dept. of Transportation*, 1999 UT App. 227, 986 P.2d 752 (1999).

failure to assign error or to provide argument and citation of authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” *Escude ex rel. Escude v. King County Pub. Hosp. Dist. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, n.4, 974 P.2d 836 (1999)); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, P.2d 549 (1992). The reason the court never ruled on the issue is that the appellants agreed to have it heard after the motion for summary judgment thereby waiving any argument that it was error not to hear the motion to compel.

Second, appellants’ argument is that the court should have continued, rather than granted, the summary judgment motion to allow them to conduct additional discovery based on the assumption that the court would have granted the motion to compel. However, appellants failed to file a motion to continue in accordance with the requirements of CR 56(f) thereby waiving any argument that the motion should have been continued.

Third, even assuming appellants’ motion to compel could be construed as a motion to continue, it does not meet the requirements of CR 56(f). The court may deny a CR 56(f) motion if (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2)

the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact. *Turner v. Kohler*, 54 Wn. App. 677, 693, 775 P.2d 474 (1989).

Appellants' motion did not expressly request a continuance and provided no explanation as to why they waited until after the summary judgment was filed to seek the discovery. Furthermore, the motion did not articulate how the discovery sought would create a genuine issue of material fact concerning the summary judgment motion. While appellants claim they needed the data in order to "check the math" of WSDOT concerning its placement of SR 512 on the priority array, they did not seek production of data for all the projects which would be needed to conduct such an inquiry.<sup>27</sup> CP at 663 (Plaintiff's Motion to Compel, p. 3). More to the point, the discovery requested was irrelevant to the summary judgment motion because the defense of discretionary immunity precludes the type of second-guessing or "math checking" appellants were attempting to engage in. The analysis of collection data by WSDOT is a function of planning and a part of WSDOT's decision-making process, which is immune.

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<sup>27</sup> Plaintiffs originally asked for all collision data for every project on the array. The defendant objected. CP at 666-86 and 688-727 (Plaintiffs' Motion to Compel, Ex. 1 and Ex. 2). Plaintiffs voluntarily tailored their request to only seek collision data specific to SR 512. CR at 729-31 (Plaintiffs' Motion to Compel, Ex. 3).

Finally, the motion to compel is moot and irrelevant because the discovery sought by the appellants is not discoverable. The collision data sought by appellants was collected and compiled by the State of Washington for the purpose of complying with Federal Highway Administration data reporting requirements, as part of the Federal Highway Administration Hazard Elimination Program (23 U.S.C. § 152) and the Federal Highway Safety Improvement Program (23 U.S.C. § 148). CP at 792-800 (Dunn Decl.). The data is protected from disclosure in discovery, admission at trial or consideration for any other purpose in a tort action involving the location by the provisions of 23 U.S.C. § 409 and 23 U.S.C. § 148(g)(4). *See Pierce County v. Guillen*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).<sup>28</sup> Thus, appellants could not use it to oppose the summary judgment motion.

So, in sum, the effect of appellants' (1) failure to comply with CR 56(f), (2) agreeing to have the motion to compel heard after the court ruled on summary judgment, (3) not obtaining a ruling on the issue from the trial court, and (4) providing no case law to support the contention the court erred amounts to a waiver of any appeal on this issue.

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<sup>28</sup> The collision data requested by the plaintiff from WSDOT was during the course of litigation. *Gendler v. Batiste*, which was decided after the trial court's ruling in this case, involves the denial of a public disclosure request for collision data from the Washington State Patrol. *Gendler v. Batiste*, \_\_\_ Wn. App. \_\_\_, 242 P.3d 947 (2010).

#### IV. CONCLUSION

This court should affirm the trial court's dismissal of the appellants' claims. The trial court properly granted summary judgment because the law in the State of Washington imposes no duty on the part of the State, or any other public agency responsible for maintaining roads, to upgrade their roads to conform to ever-changing highway design standards. Further, liability cannot be imposed against WSDOT for not building a cable barrier sooner because programming of roadway upgrades are a discretionary function subject to discretionary immunity.

Appellants have not presented any admissible evidence to overcome WSDOT's discretionary immunity or establish that WSDOT's actions were the legal or factual proximate cause of the appellant's collision. As such, respondent State asks the court to affirm the trial court granting of summary judgment.

RESPECTFULLY SUBMITTED this 3 day of March, 2011.

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**PROOF OF SERVICE**

I certify that I served a copy of the *Brief of Respondent* on appellants' counsel of record on the date below via e-mail and UPS Ground service with guaranteed delivery by Friday, March 3, 2011, as follows:

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

DATED this 3<sup>rd</sup> day of March, 2011, at Olympia, WA.

  
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CORIE SKAU, Legal Assistant

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