

FILED

JAN 17 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 310175

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

LISA A. VAN LEAR and KEITH A. VAN LEAR,

Appellants,

v.

THE STATE OF WASHINGTON; and JILL LINK,

Respondents.

Appeal from Superior Court of Spokane County
Honorable Gregory D. Sypolt
No. 10-2-03280-5

APPELLANTS' OPENING BRIEF

STRITMATTER KESSLER WHELAN COLUCCIO

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I. INTRODUCTION

Plaintiffs Lisa and Keith Van Lear claim that the State of Washington failed to maintain the SR 2--Flint Road intersection in a reasonably safe condition, in violation of its common law duty to provide reasonably safe roads. The trial court dismissed their claim on the basis of discretionary immunity.

This Court and the Washington Supreme Court have held that discretionary immunity does not apply to claims that a governmental entity failed to provide reasonably safe roads. The Court of Appeals has only applied discretionary immunity in two cases involving claims against governmental entities involving roads, and in both cases the plaintiffs challenged the State's budgeting decisions, not whether the road was reasonably safe.

Here, Plaintiffs do not challenge the State's budgetary decisions. Plaintiffs simply claim that the State breached its common law duty to keep the SR 2--Flint Road intersection in a reasonably safe condition for ordinary travel. Washington courts have recognized unsafe road claims for decades. Other than the trial court in this case, no court has ever held that the fact that the State has to prioritize how transportation funds are spent immunizes it from liability for a breach of its duty to provide

reasonably safe roads. The trial court's decision is contrary to decades of Supreme Court precedent and should be reversed.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering the following orders:

1. Order Granting Defendant State of Washington's Motion for Summary Judgment Based on Discretionary Immunity (entered by Judge Sypolt on June 29, 2012);
2. Order Denying Plaintiff's Motion for Reconsideration (entered by Judge Sypolt on June 29, 2012); and
3. Oral ruling denying Plaintiffs' Motion to Strike the Declaration of Pat Morin (VRP 41).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. ISSUE: Is it error to grant summary judgment to the State on the basis of discretionary immunity when a plaintiff claims that the State failed to maintain a road in a reasonably safe condition, as opposed to claiming that the State was negligent in its budgetary decisions?**

ANSWER: Yes. Washington law imposes a duty upon governmental entities to provide reasonably safe roads. *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005). The limited availability of funds to pay for highway safety projects does not limit the scope of this duty. *Riley v. Burlington Northern, Inc.*, 27 Wn. App. 11, 16-17, 615 P.2d 516, *review denied*, 94 Wn.2d 1021 (1980).

Pursuant to our State's waiver of sovereign immunity, a governmental entity is liable for its tortious conduct "to the same extent as if it were a private person or corporation." RCW 4.92.090. Poverty has never been a defense to tort liability. See *Bodin v. City of Stanwood*, 130 Wn.2d 726, 742-743, 927 P.2d 240 (1996) (the concurring and dissenting Justices formed a majority of five on this issue).

The Priority Programming Act (Chapter 47.05 RCW) directs the Washington State Department of Transportation (WSDOT) to prioritize how highway construction funds are spent; it does not alter the State's common law duty to provide reasonably safe roadways or immunize the State from liability.

Consistent with its elimination of governmental immunity in 1961 (RCW 4.92.090), the Legislature made no provision for immunity in the Priority Programming Act, Chapter 47.05 RCW (enacted in 1963). If the Legislature had intended to immunize the State from liability when it enacted the Priority Programming Act, it could have easily done so -- but it did not. Recognizing that the Priority Programming Act did not immunize the State from liability for unsafe road claims, WSDOT tried to get an immunity provision added to the Priority Programming Act in 1991

(Substitute Senate Bill 5721).¹ But the Legislature rejected this proposal, thereby underscoring its intent that the State not be immune from liability for breaching its duty to provide reasonably safe roads.

In *Stewart v. State*, 92 Wn.2d 285, 292, 597 P.2d 101 (1979), our Supreme Court emphasized that “discretionary governmental immunity in this state is an extremely limited exception” to the waiver of sovereign immunity. The Supreme Court held that discretionary immunity only applies to high-level executive branch policy-making decisions, and does not shield the government from liability for operating an unsafe road. *Stewart*, 92 Wn.2d at 294-295 (discretionary immunity did not apply to claim that State’s design of a bridge and lighting system was negligent); *see also Riley*, 27 Wn. App. at 16 (1980) (discretionary immunity did not apply to claim alleging road location was hazardous, despite county’s budgetary concerns).

In granting the State’s motion for summary judgment, the trial court relied on *Avellaneda v. State*, 45 Wn. App. 82, 273 P.3d 477 (2012). But in that case, the plaintiffs did not contend that the State failed to provide a reasonably safe road, as Plaintiffs do here. Instead, the plaintiffs

¹ *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 15, 882 P.2d 157 (1994) (Brachtenbach, J., concurring in part, dissenting in part) (“In 1991, at the request of DOT, Substitute Senate Bill 5721 was introduced. It would have immunized the State from liability for highway design . . . if such conformed to current engineering or design standards.”).

in *Avellaneda* argued that the State was negligent in its budgeting process and use of the Priority Array. The court viewed this attack on the State's budgeting process as falling within the scope of discretionary immunity.

In stark contrast, the Van Lears are not challenging the Priority Array or the State's budgeting process. Instead, they simply contend that the SR 2--Flint Road intersection was unsafe, and that the State breached its longstanding common law duty to provide a reasonably safe road. *See* WPI 140.01.

If allowed to stand, the trial court's expansion of discretionary immunity to the State's common law duty to provide reasonably safe roads would allow the extremely limited exception of discretionary immunity to swallow the general rule of governmental liability for violations of common law duties, and for all practical purposes, discretionary immunity would immunize the State from any liability for negligent maintenance and design of roads, undoing 70 years of common law to the contrary.

B. ISSUE: Should the trial court have stricken the declaration of Pat Morin submitted by the State in support of its Motion for Summary Judgment Based on Discretionary Immunity because he was never disclosed as a witness?

ANSWER: Yes. Only 60 days before the scheduled trial date, and long after the court-ordered deadlines for disclosure of witnesses,

Defendant State submitted a declaration from Pat Morin in support of its Motion for Summary Judgment Based on Discretionary Immunity. Because the State never disclosed Morin as a witness, Plaintiffs had no way of knowing that the State would rely on his testimony in support of a dispositive motion, and had no opportunity to depose him before they were served with the motion. Defendant State had no reasonable excuse for failing to disclose Morin as a witness because it pleaded funding issues (the subject of Morin's declaration) and discretionary immunity as an affirmative defense in its Answer 19 months before it filed Morin's declaration and was well aware of its intent and its stable of potential witnesses, yet kept silent as to Morin. CP 41. A continuance of the State's motion for summary judgment was not a feasible option, because the hearing date for the motion was June 8, 2012 (VRP 34), just one month before the trial date. CP 655. Plaintiffs were severely prejudiced by the State's last-minute reliance on a surprise witness, as shown by the fact that the trial court granted the State's motion for summary judgment that relied on Morin's declaration. The trial court clearly erred in refusing to strike Morin's declaration.

IV. STATEMENT OF THE CASE

A. The State Route 2--Flint Road intersection

State Route 2 at Flint Road is a busy² five-lane highway near the Spokane Airport, with two eastbound lanes, two westbound lanes, and a center left-turn lane. The speed limit on SR 2 is 55 mph. There was no traffic signal at the intersection in 2008. Drivers intending to turn left (westbound) onto SR 2 from Flint Road had to wait for adequate gaps in the heavy, fast-moving flow of traffic.

Traffic volumes on both SR 2 and Flint Road have increased over the years. Businesses developed along Flint Road in the vicinity of the intersection, including manufacturing plants, restaurants, hotels, and banks. With the closure of nearby McFarlane Road as an access route to SR 2 from the airport, additional traffic was re-routed onto Flint Road, further increasing traffic volumes at the intersection. CP 274 (White Dep. at 14-16).

The year before the Van Lear collision, a WSDOT employee expressed concern that, with the closure of McFarlane Road, there was no longer a safe option for turning left onto westbound SR 2 (as Defendant Jill Link was trying to do at the time of the collision).³ Spokane Transit

² CP 158 (Link Dep. at 64).

³ CP 605-606 (White Dep. at 14-16).

also expressed concerns to WSDOT about the intersection being unsafe.⁴ Complaints that the intersection was dangerous had been going on for over 15 years. In fact, in 1992, Boeing, which operated a nearby manufacturing plant, actually offered to pay for a traffic signal because of safety concerns about the intersection. CP 452, 610.

A significant number of crashes involving drivers trying to merge into traffic on SR 2 (“entry at angle” collisions) have occurred at the intersection.⁵

Its seeming appearance as merely another intersection is deceiving. The stop bar on Flint Road for cars waiting to turn left onto SR 2 is set back quite a ways from the lane of travel. In combination with the heavy traffic, the location of the stop bar results in drivers who are stopped at the stop bar, waiting to turn left onto SR 2, having their view of cars

⁴ CP 275-276 (White Dep. at 16-17, 20-23).

⁵ CP 296 (Stevens Dep., Exhibit 7). One means of addressing the sight obstruction and making the intersection reasonably safe would be a right-turn deceleration lane that would move cars and trucks turning right into a right-turn lane of their own, allowing drivers trying to turn left from Flint Road onto SR 2 to see whether the eastbound lanes are clear for them to pull out. CP 278-279, 281-283 (Stevens Dep. at 30-31, 34-36). In fact, the State admits that its Design Standards called for the placement of a right-turn deceleration lane at this intersection, given its traffic volumes and the number of right-turning vehicles. CP 300 (Figg Dep. at 48-49).

approaching on the left in the inside lane of SR 2 blocked by traffic in the outside lane.⁶

B. The Collision

On July 23, 2008, at approximately 11:00 a.m., Jill Link left work at Triumph Composite Systems for a lunch break.⁷ She drove out of the parking lot and turned onto Flint Road, heading toward SR 2. It was her intent to turn left (westbound) onto SR 2 to pick up lunch at a nearby fast food restaurant.⁸ She waited at the stop bar for a gap in the two lanes of eastbound traffic.⁹ She looked left and saw a truck in the outside lane, signaling that it was going to turn right onto Flint Road. She looked to her right to check for westbound traffic, and then to her left again, and saw a second truck in the outside lane, also signaling a right turn.¹⁰ Seeing no through traffic approaching on her left, Link began her left turn, looking to her right at the traffic into which she was going to have to merge. As she entered the inside lane of eastbound traffic, the left front fender of her Jeep Cherokee was struck by a motorcycle that had been invisible to her up to

⁶ CP 312-313 (Tompkins Decl. at pp. 2-3).

⁷ CP 269 (Link Dep. at 36-37). Triumph Composite Systems is a manufacturing plant located in the southwest quadrant of the SR 2-Flint Road intersection.

⁸ CP 158-159 (Link Dep. at 64-65).

⁹ Ms. Link testified that it is her habit to stop at the stop sign, and that she stopped close to the painted stop bar. CP 161, CP 356.

¹⁰ CP 139-140.

that point. Due to the configuration of the intersection, the motorcycle had been hidden from her view by the trucks in the outside eastbound lane.¹¹

Keith Van Lear had been operating his motorcycle in the inside eastbound lane of SR 2, with Lisa (Spicer) Van Lear¹² as his passenger. All parties agree that Mr. Van Lear was operating his motorcycle within the posted speed limit and in a proper, lawful manner.¹³

As Link's Jeep Cherokee came into his field of vision, Keith Van Lear applied his brakes, leaving a skid mark.¹⁴ He then re-righted his motorcycle and again applied his brakes, skidding to the point of impact with the Link Jeep Cherokee. Keith's body was propelled into the driver's side of the Jeep, and he was knocked to the ground unconscious and with multiple life-threatening injuries. Lisa was ejected from the motorcycle and landed on the street. The Link Jeep then ran over her, crushing her and dragging her across the highway. Keith's medical bills exceeded \$635,000, and Lisa's medical bills exceeded \$230,000. CP 221-223.

Ms. Link has testified that, although she looked left twice before attempting her left turn, at no point was the motorcycle visible.¹⁵ Based

¹¹ CP 147, 173.

¹² Lisa's last name was Spicer at the time of the collision. She and Mr. Van Lear married after the collision. Her last name is now Van Lear.

¹³ CP 41 (¶8.1), CP 46 (¶ 17).

¹⁴ CP 304.

¹⁵ CP 139-140, 147, 173 (Link Dep. at 37-38, 45, 79).

upon her first-hand observations and hindsight, she testified that the Van Lear motorcycle was hidden by the right-turning trucks in the outside lane throughout the motorcycle's approach.¹⁶

C. Two engineers testified that the intersection was unsafe and that the unsafe condition of the intersection was a cause of the collision.

Mechanical engineer Larry Tompkins¹⁷ conducted an accident reconstruction analysis. He made the following findings:

The geometric layout of the State Route 2-Flint Road intersection consists in part of a left-turn lane on Flint Road for drivers intending to turn left onto SR 2. The sight lines for drivers waiting at that location are frequently blocked by traffic approaching from the left side of the waiting driver. As a result, the waiting driver's view of traffic approaching from the left in the inside lane is often blocked by traffic approaching in the outside lane. . . .

An intersection with a layout such as this, in which the presence of a car approaching in the inside lane is concealed by traffic in the outside lane, presents a dangerous condition for left-turning traffic, with a waiting driver deceived into believing what he or she sees – the absence of traffic in the inside lane – whereas in fact cars can be completely hidden from view throughout the approach. This sight hazard is often remedied through the use of a traffic signal or four-way stop.

¹⁶ CP 173 (Link Dep. at 79).

¹⁷ Mr. Tompkins is a Licensed Professional Engineer and is a member of the Society of Automotive Engineers and the Washington Association of Technical Accident Investigators. His automotive engineering and accident reconstruction work spans more than 41 years and includes engineering design, testing, and vehicle development services for Ford, General Motors, and Chrysler. Over the past 17 years, his forensic work has focused on accident reconstruction. CP 301-302.

CP 311-312. Based on eyewitness accounts and his analysis of the speed of the Van Lear motorcycle and the right-turning trucks, Mr. Tompkins determined that the right-turning truck blocked Link's view of the Van Lear motorcycle throughout its approach to the intersection until just before impact. CP 303-304.

Based on his assessment of the dynamics of traffic conditions at the intersection, as well as his reconstruction of the collision, Mr. Tompkins concluded that the unsafe condition of the intersection was a cause of the collision:

[A]lthough Ms. Link actively looked for any traffic approaching from her left in the inside lane, her location at or near the stop bar precluded her from seeing the approaching Van Lear motorcycle as the F-150 was slowing to make its turn. As a result, she proceeded based upon the absence of any visible traffic in the inside lane.

By providing a geometric setting in which what needed to be seen could not be seen for a driver in Ms. Link's position at or near the stop bar, the unsafe configuration of the intersection led directly to and was a proximate contributing cause of the Link-Van Lear collision.

[T]he stop bar was located at a point where a driver in Ms. Link's position would not have been able to see the Van Lear motorcycle until it was too late to avoid the crash.

...

Upon the basis of the foregoing accident reconstruction analysis, it is my firm opinion that the unsafe geometric layout of the SR 2-Flint Road intersection, as it existed on July 23, 2008, was a direct and proximate cause of the Link-Van Lear collision.

CP 312-313. Transportation Engineer Edward Stevens also testified that the intersection was unsafe for traffic turning left or going through the

intersection at Flint Road, due to the traffic volumes and the sight obstruction that traffic in the outside lane causes for vehicles stopped on Flint Road. CP 279-280, 283.

Mr. Tompkins also analyzed whether a right-turn deceleration lane (which would have moved the right-turning trucks out of the through lanes of traffic) and a stop bar closer to the highway would have allowed Ms. Link to see the approaching Van Lear motorcycle.¹⁸ Mr. Tompkins' analysis determined that Ms. Link would have been able to see the motorcycle under those conditions. CP 305-307.

D. Decisions in the trial court

The State first brought a motion for summary judgment contending that there was no evidence that any unsafe condition of the intersection caused the collision. The trial court denied the State's motion, finding that material questions of fact existed as to the State's negligence and proximate cause:

. . . Counsel, I see here that indeed the experts, reasonable experts disagree. And when considering the duty, as all counsel agree, there is one for the State to provide a reasonably safe road. It appears that there are yet genuine issues of material fact. And so I deny the motion for summary judgment by the State.

VRP 32 (2/10/12);CP 363-364.

¹⁸ The State's Eastern Region Traffic and Maintenance Engineer, Harold White (CP 106), agreed that a right-turn lane would improve visibility for drivers stopped at Flint Road waiting to turn left onto SR 2 by decreasing the chance that their view of a vehicle in the inside lane of SR 2 would be blocked by a vehicle in the outside lane. CP 352.

The State then brought a motion for summary judgment contending that it is immune from liability on the basis of discretionary immunity. The trial court issued a letter opinion granting the State's motion. CP 717-721. An order was entered two weeks later (CP 770), and the trial court denied Plaintiffs' motion for reconsideration at the same time. CP 777.¹⁹

V. ARGUMENT

A. Standard of review

This Court applies a *de novo* standard of review in reviewing an order granting summary judgment, engaging in the same inquiry as the trial court, including taking the facts and any reasonable inferences therefrom in the light most favorable to the non-moving party – here, the Plaintiffs. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 345, 3 P.3d 211 (2000); *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Summary judgment is proper only when no genuine issue of material fact exists. CR 56(c); *Scott Galvanizing*, 120 Wn.2d at 580.

B. The State has a common law duty to design and maintain its roads in a reasonably safe condition.

WPI 140.01 states as follows:

The [state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its

¹⁹ The trial court also certified the case under CR 54(b) as being appropriate for an immediate appeal and stayed the Plaintiffs' claim against Defendant Jill Link pending resolution of the appeal. CP 773.

public [*roads*] to keep them in a reasonably safe condition for ordinary travel.

The State's common law duty to provide reasonably safe roads for the traveling public is well-established. *See, e.g., Owen v. Burlington Northern*, 153 Wn.2d 780, 786-787, 108 P.3d 122 (2005); *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).²⁰ It includes a duty to anticipate foreseeable dangers. *Argus v. Peter Kiewit & Sons Co.*, 49 Wn.2d 853, 856, 307 P.2d 261 (1957); *Tanguma v. Yakima County*, 18 Wn. App. 555, 560-561, 569 P.2d 1225 (1977). Our Supreme Court has held that the overarching duty to provide reasonably safe roads includes a duty to eliminate an inherently dangerous or misleading condition. *Owen*, 153 Wn.2d at 787-788.

In *Owen*, the Supreme Court set forth a two-step analysis for determining whether a roadway was reasonably safe for ordinary travel:

[W]hether a condition is inherently dangerous or misleading is generally a question of fact. . . .

....

If the roadway is inherently dangerous or misleading, then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances. *E.g., Goodner vs. Chicago, Milwaukee,*

²⁰ “We therefore hold that a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.” *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

St. Paul & Pac. RR Co., 61 Wn.2d 12, 17-18, 377 P.2d 231 (1962). If the corrective actions are adequate, then the city has satisfied its duty to provide reasonably safe roads.

Owen, 153 Wn.2d at 788, 789-790.

It is important to note that a plaintiff's burden is to show that a roadway is not reasonably safe. It is for the governmental entity responsible for the roadway to decide what measures to take to correct unsafe conditions and comply with its duty to provide a safe road. Under the Supreme Court's two-step analysis in *Owen*, once the plaintiff shows that an inherently dangerous condition existed, the burden shifts to the State to prove that adequate corrective actions were undertaken to remedy the dangerous condition. Here, the evidence establishes that the SR 2--Flint Road intersection was exactly the same in 2008, at the time of the collision, as it was 20 years before, although traffic conditions had changed, with an increasing volume of motorists using the SR 2--Flint Road intersection over the years. The State failed to take any action to address the dangerous conditions that developed at the intersection, and the result was continuing intersection collisions (CP 296), like the one that occurred in this case.

C. The Legislature's waiver of sovereign immunity and adoption of the Priority Array budgeting process for highway funds

Not only does the trial court's ruling in this case conflict with decades of Washington law holding governmental entities responsible for unsafe roads, but it also judicially repeals the Legislature's waiver of sovereign immunity. The Legislature abolished sovereign immunity in 1961, with the enactment of RCW 4.92.090. CP 645. The waiver of sovereign immunity was a complete waiver.²¹ The Legislature created no exceptions to the waiver of sovereign immunity.

Two years later, in 1963, the Legislature adopted the Priority Programming Act, a system for prioritizing the use of highway funds.²² Nothing in the Priority Programming Act relieved the State of its duty to provide reasonably safe roadways or granted the State immunity for failing to maintain reasonably safe roads. Consistent with its elimination of governmental immunity in RCW 4.92.090, the Legislature made absolutely no provision for immunity in the Priority Programming Act. *See* Chapter 47.05 RCW (enacted 1963).

²¹ RCW 4.92.090 states that “[t]he state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.”

²² CP 650-651 (Session Laws 1963, Chapter 172).

The purpose underlying the Priority Programming Act is to allocate highway funds rationally. *See* RCW 47.05.010. The State cannot be held liable based on a claim that it should have allocated funds differently. But the State can be held liable for a road that is not reasonably safe, as established by 70 years of common law. During the five decades since the elimination of sovereign immunity, only two cases have applied discretionary immunity in cases involving a road,²³ and in both cases the plaintiffs claimed the State was negligent because of its budgeting decisions, not because a road was unsafe. The trial court's dismissal of Plaintiffs' claims in this case based on discretionary immunity effectively interprets the Priority Programming Act as implicitly repealing the Legislature's waiver of sovereign immunity with regard to highway design and maintenance claims. Interpreting a statute as implicitly repealing another statute is strongly disfavored. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 503 (1993).

²³ *Avellaneda v. State*, 45 Wn. App. 82, 273 P.3d 477 (2012); *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990).

D. The trial court’s dismissal of the Plaintiffs’ case based on discretionary immunity expands the narrow exception of discretionary immunity far beyond what any appellate court has ever done and improperly limits the Legislature’s waiver of sovereign immunity.

Discretionary immunity is a judicially created doctrine that has its basis in the constitutional principle of separation of powers. *See, e.g., Bender v. City of Seattle*, 99 Wn.2d 582, 588, 664 P.2d 492 (1983). A counterpart to the common law judicial and legislative immunities, it is a narrow doctrine that exists to assure that high-level executive branch policy decisions remain exempt from tort liability. *King v. Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974) (“Immunity for ‘discretionary’ activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.”). The main idea behind discretionary immunity is that “certain governmental activities are legislative or executive in nature and that any judicial control of those activities, in tort suits or otherwise, would disrupt the balanced separation of powers of the three branches of government.” *Prosser & Keeton on Torts*, § 131 at 1039 (5th ed. 1984).

The sole purpose of discretionary immunity is to protect the independence of the executive branch of government by preventing courts from passing judgment on basic policy decisions that have been committed to the executive branch. As then-Attorney General Rob

McKenna wrote, “The effect of the new interpretation of discretionary immunity was to limit immunity to adoption of laws, regulations, and policies by legislative bodies, and elected or appointed officials.” *Tardif & McKenna, Washington State’s 45-Year Experiment in Government Liability*, 29 *Sea. U. L. Rev.* 1, 15-16 (2005).

Allowing a jury to determine whether a road is reasonably safe, when there are genuine issues of material fact in dispute,²⁴ does not violate separation of powers. Our Supreme Court has held for decades that juries should decide whether roads are reasonably safe in claims against governmental entities.²⁵ Consistent with decades of Washington common law, Plaintiffs are simply asking that a jury be allowed to decide whether the intersection involved in this case was reasonably safe – not to pass judgment on the reasonableness of the State’s budgetary decisions and Priority Array process. The jury is not being asked to decide whether any particular highway project should have been funded. They are simply being asked to decide whether the State breached its duty to maintain the SR 2--Flint Road intersection in a reasonably safe condition.

²⁴ The trial court specifically found that there are questions of material fact as to whether the intersection of SR 2 and Flint Road was reasonably safe. VRP 32.

²⁵ See, e.g., *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005); *Berglund v. Spokane County*, 4 Wn.2d 309, 314-316, 103 P.2d 355 (1940).

The competing constitutional principle is that Article II, Section 26 of the Washington Constitution gives the Legislature the power to “direct by law, in what manner, and in what courts, suits may be brought against the state.” The Legislature exercised its constitutional power in 1961 by enacting RCW 4.92.090, which abolished sovereign immunity and allowed citizens to sue the State and hold it accountable for its tortious conduct. Since waiving sovereign immunity, the Legislature has restored immunity for certain activities. *See, e.g.*, RCW 4.24.210 (recreational immunity); RCW 71.05.120 (immunity for actions related to treatment/commitment of mental health patients); RCW 38.40.025 (immunity for activities of state military forces). However, no form of immunity has been re-established for the State in highway design/maintenance cases.

Despite attempts to provide a form of immunity in highway design/maintenance cases over the years (*see, e.g.*, 1991 Senate Bill 5721; 1990 Senate Bill 6888; 1986 Proposed Substitute Senate Bill 4946/Proposed Substitute House Bill 2045 (Code Reviser Draft H-4285)), no attempt has been successful, and governmental entities remain fully liable in tort cases like this.²⁶ Any extension of discretionary immunity

²⁶ *See, e.g., Tardif & McKenna*, 29 *Sea. U. L. Rev.* at 52 (“The Legislature should clarify the law by limiting liability for governmental highway programs. While liability for ordinary maintenance and lack of

beyond the narrow confines required by constitutional separation of powers is at odds with the Legislature's broad and unequivocal waiver of sovereign immunity. The potential for misapplication of discretionary immunity is greatest when governmental entities seek immunity for operational decisions simply because they involve financial considerations such as budgeting limited funds. Misapplication of discretionary immunity to operational decisions – as occurred in this case -- violates separation of powers principles by usurping the Legislature's constitutional prerogative to define the scope of governmental tort liability pursuant to Art. II, Sec. 26.

The Supreme Court has stated that, in determining whether discretionary immunity applies, a court must “start with the proposition that discretionary governmental immunity in this state is an extremely limited exception” to the Legislature's waiver of sovereign immunity. *Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101 (1979); *see also Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 157, 744 P.2d 1032 (1987) (“Discretionary immunity is a narrow court-created exception to the Legislature's abolition of sovereign immunity.”);

required warnings should remain, there should be no liability for facilities that substantially comply with standards for design and signage, and there should not be liability for failure to fund capital improvements.”).

Bender v. Seattle, 99 Wn.2d 582, 587, 664 P.2d 492 (1983). Because discretionary immunity is a court-created exception to the general rule of governmental tort liability, application of discretionary immunity is limited to “those high level discretionary acts exercised at a truly executive level.” *Bender*, 99 Wn.2d at 588.

The trial court’s summary judgment ruling in favor of the State grants the State a broad exception to the Legislature’s waiver of sovereign immunity, contrary to the decisions of our Supreme Court, which have narrowed the scope of discretionary immunity since it was created in *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). See, e.g., *Taggart v. State*, 118 Wn.2d 195, 214, 822 P.2d 243 (1992) (“The exception has been narrowed in later decisions.”). Consistent with the Supreme Court’s repeated statements about the narrow scope of discretionary immunity, no Washington appellate court has ever applied discretionary immunity to a claim for negligent highway design/maintenance. The trial court’s summary judgment in favor of the State on the basis of discretionary immunity goes far beyond the limits that Washington courts have placed on the doctrine of discretionary immunity²⁷ and conflicts with *Stewart v. State*, 92 Wn.2d 285 (1979) and

²⁷ “The only significant governmental functions protected by discretionary immunity since *King [v. City of Seattle]*, 84 Wn.2d 239, 525 P.2d 228 (1974)] have been the Governor’s issuance of an executive order

Riley v. Burlington Northern, 27 Wn. App. 11, 615 P.2d 516 (1980). The trial court's letter opinion did not even mention *Stewart* or *Riley* (CP 717-721), both of which are controlling precedent in a negligent highway design/maintenance case like this that does not challenge the State's budgeting process under the Priority Array (as the plaintiffs in *Avellaneda* did).

The trial court erred in failing to follow *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979), which specifically held that the negligent design of a highway is *not* within the scope of discretionary immunity. In *Stewart*, the plaintiff presented expert testimony that the design of a bridge and its lighting system was defective in several respects. The Supreme Court emphasized that "discretionary governmental immunity in this state is an extremely limited exception." *Id.* at 292. The court acknowledged that, while the original decision to build a highway in the first place constituted a broad governmental policy decision, the details of designing the highway were ministerial and **not protected by discretionary immunity:**

on the Mount St. Helens volcano (*Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 647 P.2d 481 (1982); *Karr v. State*, 53 Wn. App. 1, 765 P.2d 316 (1988)), an agency director's decision to issue regulations (*Bergh v. State*, 21 Wn. App. 393, 585 P.2d 805 (1978)), and the Parole Board's decision to parole (*Noonan v. State*, 53 Wn. App. 558, 769 P.2d 313 (1989))." *Tardif & McKenna*, 29 Sea. U. L. Rev. at 16, fn. 85.

We believe that these facts do not justify discretionary immunity under tests 1 and 2 of *Evangelical* as refined in *King* [*v. Seattle*, 84 Wn. 2d 239, 246, 525 P.2d 228, 233 (1974)]. The decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, the number of lanes -- these elements involve a basic governmental policy, program or objective. However, these are not the elements which are challenged by appellant. Rather, appellant argues that once those governmental decisions were made they had to be carried out without negligent design of the bridge or of the lighting system. Negligent design was not essential to the accomplishment of the policy, program or objective.

Id. at 294.

The Supreme Court ruled in *Stewart* that the plaintiff's claims that the State negligently designed a bridge and lighting system did not fall within the scope of discretionary immunity because they did not involve high-level executive branch policy decisions. The Supreme Court distinguished *operational* decisions relating to the design of a highway from the *policy* decisions about whether to build the highway in the first place and where to build it. *Stewart*, 92 Wn.2d at 294.

The Supreme Court made a similar distinction in *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984), which involved a claim of governmental negligence relating to the construction of a new sewage treatment plant. During the process of constructing a new sewage treatment facility, the City of Spokane discharged untreated sewage into the Spokane River over the course of four days. The owners of

downstream waterfront property sued the city for the impact of the discharge of untreated sewage on their enjoyment of their waterfront properties.

The Supreme Court rejected the city's argument that its decision to discharge untreated sewage was protected from tort liability by discretionary immunity. *Miotke*, 101 Wn.2d at 336-337. The Supreme Court noted that the decision to build a new sewage treatment plant was a high-level policy decision to which discretionary immunity would apply, but the city's exercise of technical engineering judgment in implementing that decision was subject to liability under ordinary negligence principles and not immune from liability. *Miotke*, 101 Wn.2d at 336-337.

Similar analysis applies here. Designing and maintaining the SR 2–Flint Road intersection in an unsafe condition involves operational decisions and engineering judgments that are beyond the narrow scope of discretionary immunity, as explained in *Stewart* and *Miotke*. The State's decisions about how to design and maintain the SR 2–Flint Road intersection involve the exercise of technical engineering judgment, not high-level executive branch decision-making.

As in *Stewart* and *Miotke*, Plaintiffs' claim in this case does not fall within the scope of discretionary immunity. While the original decision to build SR 2 may well have involved a basic governmental

policy decision, the subsequent design and operation of the SR 2--Flint Road intersection in an unsafe manner, with a geometric layout and traffic patterns that obstruct left-turning drivers' view of approaching traffic in the inside lane of SR 2, resulting in several collisions, constituted negligence and was "not essential to the accomplishment of the [original] policy program or objective." *Stewart*, 92 Wn.2d at 294 ("Negligent design was not essential to the accomplishment of the policy, program or objective.").

In *Riley v. Burlington Northern*, 27 Wn. App. 11, 615 P.2d 516 (1980), this Court rejected nearly the exact same argument that the trial court adopted in granting summary judgment to the State in this case. In *Riley*, the plaintiff sued Yakima County and Burlington Northern, claiming that a railroad crossing was negligently designed. The crossing was marked by a standard non-mechanical railroad approach sign and a standard sawbuck railroad warning sign. *Riley*, 27 Wn. App. at 12-13. In response to the county's motion for summary judgment, the plaintiff submitted a declaration from a civil engineer stating that several hazardous conditions existed at the crossing. *Riley*, 27 Wn. App. at 13. The plaintiff's expert stated that, because of the particular conditions at the crossing (which included sight distance concerns and a stop bar located 50 feet from some of the tracks), more sophisticated warning devices should

have been used to warn the public of the dangers present at the crossing. *Riley*, 27 Wn. App. at 13. The trial court granted summary judgment in favor of the county on the basis that the county's decision about whether a more sophisticated warning device was needed was protected by discretionary immunity. *Riley*, 27 Wn. App. at 14.

This Court reversed. *Riley*, 27 Wn. App. at 17. The substance of the county engineer's declaration relied upon by the county in support of its discretionary immunity defense in *Riley* was strikingly similar to the declaration of Pat Morin relied upon by the State in this case (CP 473-476):

Mr. Haff [the county engineer] stated that in 1974 his department was notified that the State Highway Commission had monies available to improve railroad grade crossings and it prepared a list of eligible crossings. The [crossing involved in the case] was not included on the list. Yakima County reviewed the accident histories of all crossings in the County and decided to seek funding of only those on the State's list. In reaching this decision, the County considered the amount of money to be allocated and determined not to improve the [crossing at issue] because other crossings had higher traffic counts, serious obstructions to view, serious accident histories and topographical problems. . . .

Riley, 27 Wn. App. at 15-16. This Court acknowledged that governmental entities have to allocate limited resources among various road locations but held that the county's decisions about how to operate the railroad crossing were not the type of basic policy decisions to which discretionary immunity applies. Because the plaintiff's expert stated that conditions at

the crossing were hazardous, the nature of the plaintiff's claim was properly characterized as negligent design, which under *Stewart* is not subject to discretionary immunity. *Riley*, 27 Wn. App. at 17.

No court has ever applied discretionary immunity in a negligent highway design/maintenance case as the trial court did here. Even before the Legislature waived sovereign immunity in 1961, our Supreme Court recognized common law liability of municipalities for negligent highway design/maintenance. *See, e.g., Berglund v. Spokane County*, 4 Wn.2d 309, 314-316, 103 P.2d 355 (1940); *Davison v. Snohomish County*, 149 Wash. 109, 111, 270 P. 422 (1928) (“It is undoubtedly the law that it is the duty of a municipality to keep its bridges in a reasonably safe condition for travel.”). For decades, the Supreme Court has decided cases involving questions of road design and maintenance under ordinary negligence law.²⁸ *Ibid.* Courts and juries do not pass judgment on executive branch decisions involving “the exercise of basic policy evaluation, judgment and expertise” in deciding such cases. *Stewart*, 92 Wn.2d at 293. They simply

²⁸ *See also Stephens & Harnetiaux, The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*, 30 *Sea. U. L. Rev.* 35, 51 (2006) (“[L]ater courts have held that government activity such as roadway design, maintenance, and signage is readily subject to ordinary negligence theories. Even before the waiver of sovereign immunity, courts recognized that liability in this area was amenable to traditional negligence analysis.”).

apply the basic law of negligence to the specific facts, as they have done for decades.

The Van Lears are not challenging the State's use of the Priority Array to allocate highway funds. Their claim relates solely to how the SR 2 – Flint Road intersection was designed and maintained. The Van Lears are challenging the State's operational decisions, not its budgeting process. *See, e.g.*, Complaint at ¶ 5.3 (“By its design and operation, State Route 2 at the Flint Road intersection is inherently dangerous for use by the traveling public.”). How the State designs and maintains specific road locations are operational decisions, not the kind of basic policy decisions to which discretionary immunity applies. *Stewart, supra; Riley, supra; see also Mason v. Bitton*, 85 Wn.2d 321, 328, 534 P.2d 1360 (1975) (“In *Evangelical* we held that negligent acts or omissions of state agents falling into the category of ‘operational’ or ‘ministerial’ functions -- not involving executive or administrative discretion -- to be performed pursuant to statutory direction gave rise to sovereign liability.”).

Not every governmental action involving discretion falls within the cloak of discretionary immunity. Only “high level discretionary acts exercised at a truly executive level” fall within the narrow scope of such immunity. *Bender v. City of Seattle*, 99 Wn.2d 582, 588, 664 P.2d 492 (1983). In *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975), the

State of Washington and City of Seattle argued that discretionary immunity should apply to the discretionary decisions of police officers in deciding how to conduct a vehicle pursuit of a suspect. The Supreme Court refused to apply discretionary immunity to the discretionary decisions of police officers in the field because “[i]f this type of conduct were immune from liability, the exception would surely engulf the rule, if not totally destroy it.” *Mason*, 85 Wn.2d at 329.

The Van Lears’ claims in this case relate to how the State operated the intersection of SR 2 and Flint Road, not the State’s budgeting process for allocating transportation funds. The trial court’s broad interpretation of the narrow court-created exception of discretionary immunity eviscerates the State’s common law duty to provide reasonably safe roads and the legislative waiver of sovereign immunity. Consistent with our Supreme Court’s decisions on discretionary immunity, this Court should reverse the trial court’s summary judgment ruling in favor of the State.

E. The trial court did not define the challenged “act, omission or decision” correctly.

An initial issue in determining whether discretionary immunity applies to a plaintiff’s claim is to define the “challenged act, omission, or decision” at issue. *See, e.g., Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101 (1979).

The trial court defined the “challenged act, omission, or decision” at issue in this case as:

- “WSDOT’s decision to prioritize projects from a specific listing of dangerous roadways,” (CP 719)
- “[t]he Priority Array Program,” (CP 720) and
- the “action of defendant State/WSDOT to not include [in the Priority Array] the modifications suggested by plaintiffs’ experts to ameliorate the asserted unreasonably dangerous character of SR 2 at Flint Road.” CP 720.

The trial court misapprehended the Van Lears’ claim. They are not challenging the State’s use of the Priority Array or the fact that specific projects were not funded in the Priority Array, as the plaintiffs in *Avellaneda* did. The Van Lears simply claim that the State breached its duty to design and maintain the intersection of SR 2 and Flint Road in a reasonably safe condition.

In *Stewart*, the Supreme Court distinguished between (1) a challenge to the State’s decision to build a freeway, to place it in a particular location where it would need a bridge to cross a river, and the number of lanes (none of which were challenged by the plaintiff in that case), and (2) a challenge to the State’s *design* of a bridge and the lighting system on the bridge. *Stewart*, 92 Wn.2d at 294. The Supreme Court held that discretionary immunity did not apply to the plaintiff’s claim that the State negligently designed the bridge because negligent road design “is not

essential to the accomplishment” of a basic governmental policy, program, or objective. *Stewart*, 92 Wn.2d at 294. The Plaintiffs’ claim in this case is similar to the plaintiff’s claim in *Stewart* – negligent highway design and maintenance. Looking at the fourth *Evangelical* factor,²⁹ it is absurd to say that the State possesses the “lawful authority and duty” to maintain the intersection of SR 2 and Flint Road in an *unsafe* manner. The trial court clearly erred in defining Plaintiffs’ claim as involving a challenge to the State’s prioritization of highway projects for budgeting purposes rather than a claim that the State failed to provide a reasonably safe intersection.

F. *Avellaneda* is distinguishable and should be limited to its facts.

In the only two cases that have applied the judicially-created doctrine of discretionary immunity to immunize a governmental entity from liability in a case involving a state highway, the plaintiffs claimed that the State was negligent in its budgetary decisions. *See Avellaneda v. State*, 45 Wn. App. 82, 273 P.3d 477 (2012); *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990). The plaintiffs in *Avellaneda* and *Jenson* did not present evidence that the roads were unsafe.³⁰

²⁹ *Evangelical*, 67 Wn.2d at 255 (“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?”).

³⁰ *See Avellaneda v. State of Washington*, No. 41060-5, *Brief of Respondent [State]* at 20 (“The Trial Court Properly Granted Summary

Here, the State argued in the trial court that it was entitled to immunity because one of the options for making the intersection safe was to install a right-turn deceleration lane, and funds had not been budgeted for that project. The State budgets transportation funds pursuant to a Priority Array, a computerized ranking of highway projects based on criteria established by the State. In *Avellaneda*, the plaintiff claimed that the State was negligent in its use of the Priority Array.³¹ Here, in contrast,

Judgment Because Appellants Failed to Submit Any Admissible Evidence SR 512 Was Unsafe For Ordinary Travel.”).

³¹ *Avellaneda*, 167 Wn. App. at 483 (“**[F]ormulating the priority array** here unequivocally satisfied all four Evangelical factors.”) (emphasis added); *Avellaneda*, 167 Wn. App. at 488 (“The Avellanedas ask us to invade the executive prerogative by permitting them to recover in tort **based on WSDOT’s decisions in drafting the budget proposal** that excluded funding for the SR 512 project.”) (emphasis added); *see also Avellaneda v. State of Washington*, No. 41060-5, *Appellant’s Opening Brief* at 12-13; 32 (CP 847-848, 867) (“The challenged act is . . . the removal of SR 512 from the list of highways to receive median barriers.”); *Avellaneda v. State of Washington*, No. 41060-5, *Appellant’s Reply Brief* at 19-20 (“The appellants did not bring suit on a claim that the State failed to maintain or update SR 512’s safety features continuously after it was first constructed in 1968. The appellants brought their suit on a claim that the State negligently delayed the installation of a median barrier on SR 512, in light of the Secretary’s mandate and instructions to WSDOT employees.”). The plaintiffs in *Avellaneda* conceded that their claim was “very similar” to *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990), the only other case that has granted summary judgment to a governmental entity in a case involving a highway. *See Avellaneda v. State of Washington*, No. 41060-5, *Appellant’s Opening Brief* at 24 (CP 859). The State acknowledged that the plaintiffs’ claim in *Avellaneda* involved a challenge to the State’s funding decisions, not a claim that a road was unsafe. *See Avellaneda v. State of Washington*, No. 41060-5, *Brief of Respondent [State]* at 1 (“The trial court correctly concluded that the decision of when to fund installation of a median barrier is a decision entitled to discretionary immunity.”).

the Plaintiffs never made any claim that the State was negligent in its budgeting process or use of the Priority Array.

Because the Van Lears are not challenging the State's use of the Priority Array, the trial court's reliance on *Avellaneda* was misplaced. In *Avellaneda*, the plaintiffs challenged the State's decision to exclude a median barrier project along SR 512 from the Priority Array. The trial court granted summary judgment to the State on the basis that the Priority Array constituted a basic governmental policy, and therefore could not be challenged, because of the discretionary immunity doctrine. *Avellaneda*, 167 Wn. App. at 480-484.

Unlike the plaintiffs in *Avellaneda*, the Van Lears do not allege that the State was negligent for failing to include the intersection of Highway 2 and Flint Road in the Priority Array. Instead, the Van Lears claim that the State failed to provide a reasonably safe road at the SR 2--Flint Road intersection – a breach of a common law duty that goes back over 70 years.³²

³² See, e.g., *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005) (hazardous railroad crossing); *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) (dangerous intersection); *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994) (warning signs); *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978) (low bridge); *Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957) (inherently dangerous roadway condition); *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940) (unsafe bridge); *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009) (unsafe crosswalk); *Raybell v. State*, 6 Wn. App. 795, 802, 496 P.2d 559 (1972)

Discretionary immunity applies only to high-level governmental policy decisions. As recognized in *Avellaneda*, it does not shield governmental entities from liability for the unsafe operation of roads:

Our Supreme Court addressed the *Evangelical* factors in *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979). There, the court addressed the claim that the State had negligently designed a section of freeway and the accompanying lighting system where an accident occurred. 92 Wn.2d at 292, 294. The court acknowledged that decisions such as those to build the freeway, to decide its location, and to decide the number of lanes, are essential to a basic government policy, program, or objective, satisfying the first and second *Evangelical* factors. 92 Wn.2d at 294. But the court held that negligently designing the freeway and its lighting system was not essential to such a basic policy, program, or objective. 92 Wn.2d at 294. In other words, while a decision may be protected by discretionary immunity, its negligent implementation will not be, as ***negligent implementation is never essential to a basic policy, program, or objective***. See also *Riley v. Burlington Northern Inc.*, *supra* (failing to place adequate signs at railroad crossing was analogous to negligent freeway design in *Stewart* and not protected by discretionary immunity).

Avellaneda, 167 Wn. App. at 482-483 (emphasis added).

Unlike *Stewart*, *Avellaneda* did not involve a highway design/maintenance claim. The plaintiffs in *Avellaneda* challenged the State's ***budgetary*** decisions related to the funding and installation of a median barrier at the accident location. *Avellaneda*, 167 Wn. App. at 478, 479. The challenged act, omission, or decision in *Avellaneda* was the

(guardrail).

State's decision with regard to when to fund installation of a median barrier at this particular location and the timing of installing median barriers after funding was in place, not the State's design or maintenance of the highway. *Avellaneda*, 167 Wn. App. at 480 (characterizing the challenged decision as the State's decision "to exclude SR 512 from the budgetary priority array" – i.e., the decision whether or not to provide funding for the median barrier project); *id.* at 481 (characterizing the challenged decision as "determining the SR 512 project's priority"); *id.* at 481 (characterizing the challenged decision as "formulating the priority array" and "the funding of projects in the priority array"); *id.* at 483 (characterizing the challenged decision as WSDOT's "budget process" and "drafting the budget proposal that excluded funding for the SR 512 project").

There was no evidence presented in *Avellaneda* that the highway was unsafe as it existed at the time of the accident. In contrast, the plaintiff in *Stewart* presented expert testimony that the design of the bridge involved in that case was defective in several respects. *Stewart*, 92 Wn.2d at 293. Likewise, the Van Lears presented expert testimony that the intersection of SR 2 and Flint Road is dangerous. CP 311-313; CP 279-280, 283. Unlike *Avellaneda*, this case does not involve a challenge to the State's decision to fund a particular highway project. This case

involves a challenge to the State's design and maintenance of the SR 2–Flint Road intersection. This case therefore is beyond the narrow scope of discretionary immunity, and the trial court erred in granting summary judgment on that basis.

Whether or not a road is determined to be so unsafe under the State's criteria that it is ranked on the Priority Array is irrelevant and inadmissible on the issue of whether a given road location is reasonably safe or not. Allowing the State to evade liability for tortious conduct based on its use of Priority Array criteria that the State itself determines is letting the fox guard the hen house. The State could set its Priority Array criteria to require at least 50 fatalities at a road location before it would be considered unsafe and worthy of funding in the Priority Array. This is the rule of law adopted by the trial court, and it is contrary to Washington law. *See, e.g., Tanguma v. Yakima County*, 18 Wn. App. 555, 562, 569 P.2d 1225 (1977) (a governmental entity is “no more entitled to one free accident [at a road location] than a dog is entitled to one free bite”). The trial court's ruling erroneously lets the State be its own judge and jury.

G. *Jenson v. Scribner* is equally inapplicable.

As was the case in *Avellaneda*, the plaintiffs in *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d. 306 (1990), argued that a median barrier should have been funded and constructed sooner at a particular location.

The Court of Appeals focused on the funding process for the median barrier project, ultimately concluding that “construction funds were not available to the project until after the date of the accident.” *Jenson*, 57 Wn. App. at 482.³³

Not only is *Jenson* distinguishable on its face from this case, given that the Plaintiffs in this case are not challenging the State’s Priority Array-based funding decisions, but it is also distinguishable in that it was decided before the Washington Supreme Court’s opinion in *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d. 240 (1996), which clarified that a governmental entity cannot invoke lack of funds as a defense to a negligence claim. As discussed below, such alleged lack of funding cannot serve as a defense to the State’s negligent design and maintenance of a roadway.

Unlike the plaintiffs in *Jenson* and *Avellaneda*, who argued that the State should have calculated the priority of certain projects differently or budgeted funds differently, the Van Lears presented expert testimony and other evidence establishing questions of material fact as to whether the SR 2--Flint Road intersection was reasonably safe. The State’s common law

³³ Although the *Jenson* court stated that it was relying on “immunity” to dismiss the complaint, it in fact held that there was no breach of duty due to the delay in constructing the median barrier because funding for the project was available only months before the accident. *Jenson*, 57 Wn. App. at 481-482.

duty is to provide reasonably safe roads, not to budget transportation funds in a certain way. *Jenson* and *Avellaneda* have relevance only where a plaintiff is challenging the State's decision-making process with regard to funding (Priority Array). While that was the case in *Avellaneda* and *Jenson*, it is not the case here.

H. The fact that governmental entities (like private parties) have to balance fiscal considerations does not shield them from liability under the doctrine of discretionary immunity.

The trial court based its decision on the State's use of the Priority Array, which is a *procedure for allocating money*.³⁴ The trial court's ruling effectively allows the State to use lack of funds as a defense to a tort case and makes the State's duty to maintain roads in a reasonably safe condition contingent on the State's financial situation. Not only is such a defense improper under the facts of this particular case, because Boeing offered to pay for the installation of a traffic signal at the intersection years before the Van Lear collision (CP 452, 610), but lack of funds is simply not a defense in a tort case. The State's duty to maintain roads in a reasonably safe condition, like any party's duty to exercise reasonable care, is completely independent of the State's financial situation.

³⁴ *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994) ("Washington's priority programming act is, as RCW 47.05.010 states, a procedure providing for the rational allocation of finite resources").

The Legislature has provided that the State is liable for tortious conduct “to the same extent as if it were a private person or corporation.” RCW 4.92.090; *Owen*, 153 Wn.2d at 787 (“Today, governmental entities are held to the same negligence standards as private individuals.”). It has never been a defense for a private person to claim that he or she had insufficient funds to correct a hazardous situation. *See, e.g., Cramer v. Van Parys*, 7 Wn. App. 584, 593-594, 500 P.2d 1255 (1972) (landlord not allowed to present evidence of monthly income from apartment building to show that he could not afford to hire a manager). A driver who knows that his car needs new tires but cannot afford them, but drives in the snow anyway and causes a collision, is still liable for his negligence, despite his lack of funds.

The same is true for the State. In *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d 240 (1996), a majority of our Supreme Court held that a governmental entity’s lack of funds is not a defense in a tort action:

Evidence of the City of Stanwood’s efforts to obtain federal grant money to raise lagoon dikes was not relevant on the issue of the City’s negligence. This evidence, at the very least, is a close relative to poverty defense evidence and has no place in a negligence action.

Id. at 742 (Alexander, J., concurring).

Evidence of reasons or excuses for failure or delay in action is not relevant to the basic issues of duty and breach To admit this evidence in this case allowed the City, in

essence, to mount a poverty defense. Such a defense is not allowed in negligence actions because the duty of care owed to another does not change according to a party's financial situation.

Id. at 743 (Johnson, J., dissenting, with three justices concurring in the dissent).

The fact that governmental entities (like private individuals and corporations) must allocate limited funds does not create immunity from liability. In *Riley v. Burlington Northern, Inc.*, 27 Wn. App. 11, 615 P.2d 516 (1980), the plaintiffs sued Yakima County for the negligent design and maintenance of a railroad crossing. The county's defense was that it had chosen to allocate its limited funds to those crossings most needing repair. *Riley* at 15-16. Like the State in this case, the county argued that the decision to allocate "limited resources among a virtually unlimited array of needs" met the test in *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965), of a basic governmental policy, program, or objective. This Court rejected the argument:

This court fully appreciates the problem of allocating limited resources. However, under the facts of this case we do not find the decision to be of the basic type recognized in *Evangelical*.

Riley, 27 Wn. App. at 16.

As this Court recognized in *Riley*, discretionary immunity does not protect governmental entities from liability simply because they have

limited budgets. Discretionary immunity protects governmental entities from being held liable for high-level executive branch decisions. If discretionary immunity applied whenever the government has to make a budgetary decision, as the trial court ruled, the exception (discretionary immunity) would swallow the rule (legislative waiver of sovereign immunity).³⁵ The State would almost never be liable for unsafe roads because it could almost always claim it could not fix a dangerous condition due to lack of funds, which involves budgetary decisions.³⁶

Like *Bodin*, *Riley* teaches that the fact that governmental entities must allocate limited financial resources does not provide immunity from a claim that a road is not reasonably safe. The State is liable “to the same extent as if it were a private person or corporation.” RCW 4.92.090. A private person cannot defend a tort action by claiming poverty. Neither can the State.

³⁵ Indeed, the State would be immune from liability for car crashes caused by its failure to fix the brakes or replace bald tires on its fleet of vehicles, because it is expensive to maintain a large fleet of vehicles and requires budgeting decisions. The State would be immune from premises liability claims for unsafe surfaces in State office buildings because it could claim that it could not afford to hire janitorial staff. The examples could go on and on.

³⁶ The basis for the State’s discretionary immunity argument in this case was that the State has to decide which highway improvements to fund. VRP 55. Counsel for the State argued that this case is “just really about whether the funding was available to take the corrective actions that the plaintiffs claim.” VRP 56. The trial court adopted the State’s mischaracterization of the case as being about funding issues. This case is actually about whether the intersection where the collision occurred was reasonably safe, not about funding issues.

I. The declaration of Pat Morin should have been stricken because he was never disclosed as a witness.

Defendant State's deadline for disclosing witnesses was March 19, 2012. CP 665. The discovery cutoff date was May 7, 2012. CP 665. At the last possible opportunity for filing a dispositive motion (CP 665), Defendant State noted a motion for summary judgment based on discretionary immunity for June 8, 2012 (VRP 34) and filed a declaration from Pat Morin with its motion. Defendant State admits that it failed to disclose Morin in any of its witness disclosures. CP 687; *see also* CP 67-69 and 71-75 (State's initial witness disclosures, identifying 19 witnesses from the Department of Transportation, but not Pat Morin).

A trial court may exclude a witness for nondisclosure if the failure to disclose the witness in a timely manner was (1) willful, (2) the failure to disclose substantially prejudiced the opponent, and (3) the court explicitly considered less severe sanctions.³⁷ *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). A party's violation of a court order is deemed willful if it was without reasonable excuse. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009). Defendant State's failure to disclose Morin as a witness in compliance with the case scheduling order lacks any reasonable excuse and was therefore willful. Defendant State

³⁷ In addition, Spokane County local rule LAR 0.4.1(g) authorizes the imposition of sanctions for failure to comply with a case schedule order.

pleaded funding issues and discretionary immunity as an affirmative defense in its answer (CP 41) 19 months before it filed Morin's declaration (CP 471-477), which described the State's budgeting process for transportation funds. The State had the burden of proof on its affirmative defenses and had an obligation to disclose witnesses it intended to rely upon to prove its affirmative defenses.

The second factor is also clearly satisfied. Defendant State relied extensively on Morin's declaration in its motion for summary judgment, citing it numerous times and telling the trial court that consideration of Morin's declaration was "necessary" for the court to rule on the State's motion. VRP 38; CP 453, 454, 455, 456, 461, 462, 464, 465, 668, 669. The trial court relied on Morin's declaration in its written decision granting the State's motion for summary judgment. CP 718, 719. Plaintiffs were substantially prejudiced by the State's reliance on a declaration from a previously undisclosed witness in support of a dispositive motion. There was no way for Plaintiffs to have known that the State would be relying on testimony from Morin in support of a dispositive motion. There was no way for Plaintiffs to anticipate the need to depose Morin to prepare for responding to a dispositive motion when Plaintiffs did not even know of his existence until the State filed its motion for summary judgment.

A continuance to allow time to prepare for and conduct a deposition of Morin was not an appropriate remedy, because the trial date was only 60 days away at the time the State filed its motion for summary judgment. CP 665; VRP 41. It was not possible to prepare for and take Morin's deposition during the two weeks that Plaintiffs had to respond to the State's motion.

The trial court denied Plaintiffs' motion to strike Morin's declaration. VRP 41. Because Defendant State sprung Morin on the Plaintiffs as a surprise witness when it filed its Motion for Summary Judgment Based on Discretionary Immunity only 60 days before trial, the trial court erred in refusing to strike Morin's declaration. The factors required to exclude a witness for nondisclosure were satisfied here. No remedy other than exclusion was adequate under the circumstances of this case. Defendant State's use of an undisclosed witness's declaration in support of a dispositive motion two months before the trial date was unfair and extremely prejudicial to the Plaintiffs. This Court should reverse the trial court and strike Morin's declaration.

VI. CONCLUSION

Our Constitution specifically grants to the Legislature the power to decide "in what manner . . . suit may be brought against [governmental entities]." Wash. Const., Art. II, §26. Rather than upholding the doctrine

of separation of powers (the purpose of discretionary immunity), the trial court's use of discretionary immunity to immunize the State from liability for breach of its common law duty to provide reasonably safe roads contravenes the Legislature's waiver of sovereign immunity and refusal to grant immunity to governmental entities in actions based on negligent highway design/maintenance.

The Priority Programming Act does not eliminate the State's duty to provide reasonably safe roads. It simply provides a mechanism for allocating money among highway construction projects.

The gravamen of the plaintiffs' claims in *Jenson* and *Avellaneda* was that the State was negligent in its use of the Priority Array. They did not claim that the highways where the collisions occurred were unsafe. Here, Plaintiffs do not claim that any decision the State made with regard to the Priority Array or its budgeting process was negligent. Plaintiffs simply claim that the State maintained the SR 2–Flint Road intersection in a condition that was not reasonably safe, and that a jury should be allowed to decide whether the State breached its duty to provide a reasonably safe road and whether that breach of duty was a proximate cause of the collision. Unlike the plaintiffs in *Avellaneda*, the Van Lears presented substantial evidence showing that the SR 2--Flint Road intersection was not reasonably safe. This Court should reverse the trial court because

Plaintiffs' claims in this case do not fall within the limited scope of discretionary immunity.

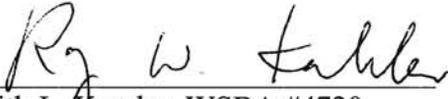
Under the trial court's analysis, any governmental entity that makes budgetary choices (i.e., every governmental entity) would be entitled to discretionary immunity because budgetary decisions always involve discretion and a balancing of options. The notion that a negligent act or omission can be excused by showing that the tortfeasor had an internal process for allocating limited funds is completely foreign to tort law. The alleged negligence in this case is that the State designed and maintained the SR 2 – Flint Road intersection in a dangerous condition. If true, the State delayed correcting the dangerous conditions at its peril. No tortfeasor should be able to avoid liability based upon a claim that "I was going to get to that as soon as I got the money." Economic choices are implicated at all levels of decision-making, both public and private. Washington courts do not permit private tortfeasors to defend their failure to correct unsafe conditions based on financial limitations. Such a defense is equally invalid when made by a governmental entity.

A governmental entity's failure to correct an inherently dangerous condition of a highway on the basis that there had not been enough fatalities for the highway location to rise to the top of the Priority Array, or on the basis that funding was not available for safety improvements,

does not give rise to discretionary immunity. As with all tortfeasors, a governmental entity delays correction of an inherently dangerous condition at its peril.

The trial court's extension of discretionary immunity to the State's operational decisions about how to design and maintain the SR 2 – Flint Road intersection offends separation of powers principles by restoring, through the common law, the broad-based immunity for routine governmental acts that the Legislature unequivocally abolished. The trial court's application of discretionary immunity to Plaintiffs' negligent highway design and maintenance claims in this case effectively immunizes the State from all claims of negligent highway design and maintenance, despite the fact that our Supreme Court has clearly held that discretionary immunity does not apply to such claims. The trial court erroneously transformed discretionary immunity into an extremely broad exception to the waiver of sovereign immunity, contrary to the decisions of our Supreme Court holding that it is an "extremely limited exception" to government liability. For these reasons, the Van Lears respectfully request that this Court reverse the summary judgment order in favor of the State and remand this case for trial.

Respectfully submitted this 16th day of January, 2013.


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CERTIFICATION

I hereby certify that on January 16, 2013, I provided a copy of the document to which this certification is attached for delivery to all counsel of record as follows:

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