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State of Washington

NO. 310175

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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

Appellants,

v.

THE STATE OF WASHINGTON; and JILL LINK,

Respondents.

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

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APPELLANTS' REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

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**I. DEFENDANT STATE CONTINUES TO MISCHARACTERIZE THE VAN LEARS' CLAIM.**

Defendant State mischaracterizes the Van Lears' claim. The Van Lears assert only that the State breached its common law duty to maintain the intersection of SR 2 and Flint Road in a reasonably safe condition. Contrary to Defendant State's mischaracterization,<sup>1</sup> the Van Lears do not claim that the State's budgeting decisions or Priority Array calculations were negligent. The Van Lears do not challenge any high-level executive branch political decision. They are not asking the courts to require the State to budget funds for any particular highway project. They simply seek compensation for their injuries that were caused by the State's negligence in operating a dangerous intersection.

The trial court and the State ignore the significant difference between a claim that the State should have budgeted highway funds differently (as in *Avellaneda*<sup>2</sup> and *Jenson*<sup>3</sup>) and a claim that the State

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<sup>1</sup> See *Brief of Respondent/Cross-Appellant* at 28 ("the only issue before the Court here is whether the decision to not include Highway 2/Flint Road intersection safety improvements on the priority array is entitled to discretionary immunity"); *id.* at 36 ("Here, Plaintiffs seek to recover based on WSDOT's decision not to include construction of a traffic signal and/or right turn deceleration lane at Highway 2 and Flint Road in their budget requests for the 2005-2007 biennium or the 2007-2009 biennium.").

<sup>2</sup> *Avellaneda v. State*, 45 Wn. App. 82, 273 P.3d 477 (2012).

<sup>3</sup> *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990).

breached its common law duty to provide a reasonably safe road (as in *Stewart*<sup>4</sup> and *Riley*<sup>5</sup>). In *Avellaneda* and *Jenson*, the plaintiffs presented no evidence that the road locations at issue in those cases were unsafe. The plaintiffs simply challenged the State's Priority Array calculations and highway construction project budgeting decisions. In *Stewart*, *Riley*, and in this case, on the other hand, the plaintiffs presented substantial expert testimony that the road locations were unsafe. The basis for the plaintiffs' claims in *Stewart*, *Riley*, and in this case is completely different than the basis for the plaintiffs' claims in *Avellaneda* and *Jenson*.

Because the trial court's summary judgment in favor of Defendant State on the basis of discretionary immunity was premised on a mischaracterization of the Van Lears' claim<sup>6</sup> and inapplicable case law (*Avellaneda*), this Court should reverse.

## **II. LACK OF MONEY IS NOT A DEFENSE TO TORTIOUS CONDUCT.**

The trial court's summary judgment order transforms discretionary immunity from a limited exception to the general waiver of sovereign immunity into an absolute immunity for governmental entities in any tort action that would require spending money to correct an unsafe condition.

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<sup>4</sup> *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979).

<sup>5</sup> *Riley v. Burlington Northern, Inc.*, 27 Wn. App. 11, 615 P.2d 516, review denied, 94 Wn.2d 1021 (1980).

<sup>6</sup> See CP 719, 720.

The fact that the State (and the trial court) believe that discretionary immunity gives governmental entities an absolute poverty defense is clearly demonstrated by the State's response brief, which uses the terms funding/funds, budgeting/budget, and Priority Array no less than 78 times.<sup>7</sup>

The State and the trial court ignore the fact that *Riley v. Burlington Northern*, 27 Wn. App. 11, 16-17, 615 P.2d 516 (1980) and *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d 240 (1997), expressly rejected the defense of governmental lack of funds. In *Riley*, in response to a county's argument that it made decisions about road improvements based on a cost-benefit analysis similar to the Priority Array, this Court held that the fact that governmental entities have to decide how to allocate limited funds among various road locations is not the type of basic policy decision that falls within the scope of discretionary immunity. *Riley*, 27 Wn. App. at 15-16 ("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 policy type recognized in *Evangelical*."). Likewise, in *Bodin*, five justices of the Supreme Court held that a governmental entity cannot use an alleged lack of funds as a defense to tort liability. *Bodin*, 130 Wn.2d at 742, 743.

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<sup>7</sup> The basis for the State's motion for summary judgment in the trial court, and its position on appeal, is that the Van Lears are challenging WSDOT's budgeting decisions. As discussed above, the State mischaracterizes the Van Lears' claim. The State repeats the mischaracterization over and over in its brief because the trial court's ruling and the State's position on appeal rely entirely on a false characterization of the Van Lears' claim.

The State's brief relies heavily on treating what is admittedly dicta in *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994), as the law. See *Bodin*, 130 Wn.2d at 738 (stating that the language cited by Defendant State in *McCluskey* is dicta); *Brief of Respondent* at p. 17.

Dicta is not the law, as Chief Justice Madsen recently explained:

[T]he lead opinion goes on to discuss the *Ishikawa* factors in an effort to explain how they should be applied *if* the open courts provision *were* implicated. Since the open courts provision is not at issue, however, this entire discussion is dicta. See *Pedersen v. Kinkert*, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960) (statements in an opinion that were “not necessary to the decision in [the] case” are dicta and do not control future cases); *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 289, 943 P.2d 1378 (1997) (Sanders, J., concurring) (dicta is not controlling precedent); *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992) (“[s]tatements in a case that do not relate to an issue before the court and are not necessary to decide the case constitute obiter dictum and need not be followed”).

*Bennett v. Smith Bundy*, 176 Wn.2d 303, 317-318, 291 P.3d 886 (2013) (Madsen, C.J., concurring) (emphasis in original); see also *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683, fn. 16, 964 P.2d 380 (1998). Justice Brachtenbach criticized the *McCluskey* majority's dicta discussing discretionary immunity for the same reasons expressed by Chief Justice Madsen in *Bennett*. *McCluskey*, 125 Wn.2d at 14 (Brachtenbach, J., concurring).

In addition to misrepresenting dicta in *McCluskey* as the law, Defendant State also ignores *Riley* and *Stewart*, which are controlling authorities holding that discretionary immunity does not apply in a

common law negligent highway maintenance case like this. *Riley* in particular held that the fact that a governmental entity has to make decisions about how to spend limited funds does not immunize the government from liability in a highway safety case. *Riley*, 27 Wn. App. at 15-16.

Further, a majority of the Supreme Court held in *Bodin* (three years after *McCluskey*) that a governmental entity's financial situation is not relevant in a tort case, and the Supreme Court reaffirmed governmental entities' duty to provide reasonably safe roads, which includes a duty to eliminate an inherently dangerous or misleading condition, in *Owen* (11 years after *McCluskey*). *Owen v. Burlington Northern*, 153 Wn.2d 780, 787-788, 108 P.3d 122 (2005). No case supports the State's contention that there is a different legal standard for governmental liability for unsafe roads where the unsafe condition may require funding to correct it, as opposed to an unsafe condition that can be fixed for little or no money.

Under the State's reasoning, the State could never be held liable in tort because any tort judgment is a court-imposed duty to expend funds.<sup>8</sup> What the State fails to recognize is that a tort judgment is not a court-imposed duty to expend funds on any particular road project or to fix any other specific unsafe condition or practice caused by the State's negligence. A tort judgment against the State in a case like this results from a jury finding that the State breached its common law duty to provide

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<sup>8</sup> *Brief of Respondent* at p. 33.

a reasonably safe road and caused harm to someone. A tort judgment simply compensates a plaintiff for his or her injuries caused by the State's negligence.<sup>9</sup> Plaintiffs Van Lear do not seek a judgment ordering the State to take any particular action at the SR 2/Flint Road intersection. They simply seek compensation for their injuries caused by the State's failure to provide a reasonably safe road.<sup>10</sup>

Under Defendant State's theory (and the new law created by the trial court's ruling), the State is only liable for an unsafe road if the condition that makes the road dangerous can be fixed by a sign, which is inexpensive.<sup>11</sup> No matter how many people are injured or killed at a particular road location, if the hazard requires money to make the road reasonably safe, the State claims that it is immune from liability under the discretionary immunity doctrine because the State has limited funds. The logical extension of this argument is that the State is immune in every type of tort case that requires spending money to exercise reasonable care. That is not the law in Washington, and Defendant State cites no authority to support that proposition.

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<sup>9</sup> The Legislature created a specific liability account to pay such tort claims against the State. RCW 4.92.130.

<sup>10</sup> See, e.g., *Berglund v. Spokane County*, 4 Wn.2d 309, 318, 103 P.2d 353 (1940) ("The vital question in this case is not whether the county was in any event required to build a sidewalk merely because it had constructed the bridge, but whether, under the circumstances, it exercised the required amount of care to maintain the bridge in a reasonably safe condition for pedestrians, particularly for children, who had been invited to use it.").

<sup>11</sup> *Brief of Respondent* at p.17.

Defendant State takes the position that, if the original design of the SR 2 – Flint Road intersection was reasonably safe, the State cannot be held liable if the intersection later became unsafe due to changed conditions, such as increased traffic volumes.<sup>12</sup> That is not the law. Design and maintenance of a road is an ongoing process, and changed conditions (such as increased traffic volumes) may require changes to a road to keep it in a reasonably safe condition.<sup>13</sup> The State’s common law duty is to “provide reasonably safe roads,” not merely to design roads that are reasonably safe at the time the road is originally built. *Owen v. Burlington Northern & Sante Fe Railroad*, 153 Wn.2d 780, 787-788, 108 P.3d 1220 (2005); *Owen* at 789 (recognizing increased traffic volumes as a factor that can render a road location unsafe; in *Owen*, heavy traffic caused back-ups that resulted in queuing of vehicles over busy railroad tracks). If there are questions of fact as to whether or not a road is reasonably safe, a jury must decide whether the governmental entity breached its duty to provide a reasonably safe road. *Owen*, 153 Wn.2d at 788, 789 (“If the roadway is inherently dangerous or misleading, then the trier of fact must determine the adequacy of corrective actions under all of

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<sup>12</sup> *Brief of Respondent* at p.19.

<sup>13</sup> *Berglund v. Spokane County*, 4 Wn.2d 309, 313, 103 P.2d 353 (1940) (“It may be conceded, as a general proposition, that cities and other municipalities are not required to build streets, sidewalks, or alleys. They may, in the first instance, leave such ways unopened, without liability for not having improved them. But if they choose to improve them, or in any other manner extend an invitation to the public to walk upon them, they must exercise reasonable care to keep them in a reasonably safe condition for travel.”).

the circumstances.”). The Supreme Court so held in *Owen*, even though one of the options for addressing the dangerous condition in *Owen* was to completely reconstruct the railroad/street intersection to separate vehicle and train traffic, which undoubtedly would have cost millions of dollars. *Owen*, 153 Wn.2d at 790.

The Priority Array is simply a budgeting tool. The Legislature could have provided the State with immunity in highway safety cases when it enacted the Priority Array statute, but it did not do so. The Priority Array statute does not say anything about governmental tort liability. It is irrelevant to the question of whether a road location is reasonably safe or not.<sup>14</sup> Whether or not a road is reasonably safe is determined according to the State’s common law duty to provide reasonably safe roads, and is generally a question of fact for a jury to decide. *Owen*, 153 Wn.2d at 788. Discretionary immunity does not immunize governmental entities for liability for failure to provide reasonably safe roads simply because they have limited funds and have to make budgeting decisions (just like private entities/persons).

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<sup>14</sup> The State’s financial condition is especially irrelevant in this case because Boeing offered to pay the cost of installing a traffic signal at the intersection in 1992. *Brief of Respondent* at p.6. There would have been no cost to the State.

### III. THE STATE IS NOT ENTITLED TO “FREE INJURIES AND DEATHS.”<sup>15</sup>

According to the State, it has no liability for dangerous roads unless a road location has resulted in the deaths of so many people that it becomes eligible for funding under the Priority Array. In other words, the State claims that if a road location is not funded for safety improvements under the Priority Array, the State is immune from liability for any injuries or deaths occurring at that location, no matter how dangerous it is.<sup>16</sup> The two cases cited by the State for this proposition, *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253-254, 407 P.2d 440 (1966), and *Avellaneda v. State*, 167 Wn. App. 474, 273 P.3d 477 (2012), do not come close to supporting the State’s claim. Again, the State misrepresents the law.

Under the State’s position (and the new law that would be created by the trial court’s ruling), the first one or two dozen people injured or killed at a dangerous road location would have no remedy for the State’s tortious conduct because there was not a severe enough collision history at the time of their injuries/deaths for the location to rise to the top of the

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<sup>15</sup> 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”).

<sup>16</sup> *Brief of Respondent* at 15 (“Funding for roadway safety improvements depends on the discretionary acts and decisions involved in determining whether roadway safety improvements should be included in the priority array budget mandated by RCW 47.05.010. Therefore discretionary immunity applies and the State may not be subjected to liability for failing to undertake construction of highway safety improvements, such as the right turn deceleration lane at Highway 2 and Flint Road, that lack sufficient funding priority under the program.”).

Priority Array and become eligible for funding. Regardless of how dangerous the location was and how foreseeable it was that people would be injured or killed, the State would have no liability if the road location lacked a severe enough collision history to qualify for funding under the Priority Array. The State's position would eliminate foreseeability as a factor in highway safety cases and replace it with a requirement of an actual history of severe injuries or deaths at a particular location. That is not the law,<sup>17</sup> nor should it be.<sup>18</sup>

#### **IV. THE *EVANGELICAL* FACTORS ARE NOT MET IN THIS CASE**

As *Stewart v. State* and *Riley v. Burlington Northern* held, the negligent design and/or maintenance of a road is not "essential to the accomplishment of any basic policy, program, or objective of the State." *Riley*, 27 Wn. App. at 15; *Stewart*, 92 Wn.2d at 294 (holding that the first two *Evangelical* factors are not satisfied in a common law negligent highway design case). Therefore, the *Evangelical* factors are not met, and the State is not immune from liability for its negligence in failing to provide a reasonably safe road at the intersection of SR 2 and Flint Road. *Riley*, 27 Wn. App. at 15 (only if all four *Evangelical* factors are clearly

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<sup>17</sup> See *Berglund v. Spokane County*, 4 Wn.2d 309, 319-320, 103 P.2d 355 (1940) ("The formula applicable to a finding of negligence is whether or not the general type of danger involved was foreseeable.").

<sup>18</sup> The determination of whether a road is or is not reasonably safe, subjecting the State to liability for harm caused by its negligence, is in all cases reserved by our Constitution for the jury, not WSDOT employees.

and unequivocally answered in the affirmative can the act, omission, or decision be classified as a discretionary governmental process).

As discussed below in response to the State's cross-appeal, the Van Lears' claim in this case is that the intersection of SR 2 and Flint Road was unsafe, both because of the geometric design of the intersection, including the location of the stop line on Flint Road, and because of negligence in how the intersection was maintained. Despite significantly increased traffic volumes over the years, nothing was done to the intersection to address the hazardous conditions that developed with the increased traffic.

#### **V. RESPONSE TO CROSS-APPEAL**

##### **A. There are issues of material fact for a jury to decide as to whether or not the intersection of SR 2 and Flint Road was reasonably safe.**

The facts of the collision and evidence relating to why the intersection of SR 2 and Flint Road was not reasonably safe at the time of the Van Lear/Link collision are set forth in Appellants' Opening Brief at pp. 7-13 and will not be repeated in detail here.

Briefly, the evidence shows that:

- The intersection of SR 2 and Flint Road was not reasonably safe for drivers entering SR 2 from Flint Road because of (a) high traffic volumes, which caused excessive delay and as a result, foreseeable frustration on the part of drivers attempting to enter SR 2 from Flint Road due to the long wait times for gaps in traffic, leading them to take unnecessary risks to enter the highway due to the lack of gaps in traffic to safely enter the highway, and (b) visibility problems (described below). CP 614-615 (testimony of Transportation Engineer Edward Stevens).

- The sight lines for drivers waiting to enter SR 2 at the stop bar at Flint Road are frequently blocked by traffic approaching from the west (the waiting driver's left). CP 302-303. As a result, drivers waiting at Flint Road often have their view of vehicles in the inside lane on SR 2 blocked by right-turning vehicles approaching in the outside lane.<sup>19</sup> The sight obstruction problem is worsened by the fact that there is a significant amount of large truck traffic in the outside lane of SR 2 due to the industrial parks and airport traffic in the vicinity. CP 634-635.
- The intersection met warrants for a traffic signal based on crash history in November 2007.<sup>20</sup> CP 616. (The Van Lear collision was in July 2008.) However, the need for a traffic signal could have been mitigated by a right-turn lane to take right-turning traffic out of the through lanes on SR 2, thereby creating more gaps for traffic trying to enter SR 2 from Flint Road.<sup>21</sup> CP 616-618.

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<sup>19</sup> The State misleadingly describes the intersection as being "located on a flat, straight stretch of highway" where drivers at the stop bar on Flint Road "have a clear view of Highway 2 for as far as they can see – well over a thousand feet." *Brief of Respondent* at p.5. This statement may be correct if there is no traffic on SR 2, but under normal traffic conditions, there are in fact vehicles on the highway. In fact, SR 2 at this location is a busy highway, and the evidence shows that drivers waiting at the stop bar **do not** have a clear view of approaching traffic when there are vehicles on the highway.

<sup>20</sup> Defendant State mischaracterizes Transportation Engineer Edward Stevens' testimony in quoting in isolation his statement, "I'm not saying there should have been a traffic signal at that intersection," and claiming that Mr. Stevens agreed that the intersection did not meet the warrants for a traffic signal. *Brief of Respondent* at p.6. Mr. Stevens actually testified that the intersection did meet warrants for a traffic signal, based on crash history, in November 2007. CP 616. Mr. Stevens went on to testify about "some of the options that could have [been] done" to remedy the "obvious unsafe conditions that were created by the backing up of traffic eastbound coming to the intersection," including installing a right-turn lane. CP 616-617. His statement, "I'm not saying that there should have been a traffic signal at that intersection," was in the context of describing the options available to the State to remedy the unsafe condition of the intersection, one of which was a traffic signal. Mr. Stevens' fundamental opinion is simply that the intersection was not reasonably safe. CP 614.

<sup>21</sup> These solutions to the unsafe condition of the intersection are provided merely as background. It is not the Van Lears' burden to establish what

As set forth in Appellants' Opening Brief, State employees acknowledge receiving multiple complaints by local businesses (Boeing, Triumph Composite Systems) whose employees have had to use the SR 2-Flint Road intersection to get to and from work, as well as concerns expressed by Spokane Transit for the safety of its drivers and bus passengers.<sup>22</sup> These complaints that the intersection is dangerous go back more than 15 years.

The stop bar on Flint Road for cars waiting to turn left onto SR 2 is set back quite a ways from the outside lane of eastbound travel. The further back a stop bar is set from traffic on the highway, the worse the waiting driver's view becomes of cars approaching on the left in the inside lane, given that such cars are blocked out by traffic in the outside lane.<sup>23</sup>

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the State should have done to make the intersection reasonably safe. The Van Lears' burden is simply to prove that the intersection was not reasonably safe. See *WPI 140.01* ("The [State] has a duty to exercise ordinary care in the [design and maintenance] of its public [roads] to keep them in a reasonably safe condition for ordinary travel.").

<sup>22</sup> CP 274-276 (White Deposition at 13-18, 20-23); CP 563.

<sup>23</sup> CP 312 ("[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.") (Declaration of Larry Tompkins). Defendant State objects to Mr. Tompkins' testimony regarding the unsafe geometric layout of the intersection. *Brief of Respondent* at 20, n.4. Mr. Tompkins is an accident reconstruction engineer – an expert in determining the causes of collisions. Assessing the role of the geometric layout of an intersection in causing a collision is clearly within the scope of Mr. Tompkins' expertise. In addition to his own training and experience, Mr. Tompkins also reviewed and relied upon the analysis of Transportation Engineer Edward Stevens. CP 313. In any event, Defendant State has waived any objection to Mr. Tompkins' testimony. Defendant State made no objection to Mr. Tompkins' testimony in the trial court and did not move to strike his declarations.

A significant number of crashes have occurred at the intersection over the years where drivers have tried unsuccessfully to merge into traffic on SR 2 (“entry at angle” collisions).<sup>24</sup>

Transportation Engineer Edward Stevens concluded that the intersection was “not reasonably safe” due to these problems. CP 279.

One of the options identified by Mr. Stevens for addressing the unsafe and misleading conditions at the intersection is to provide a right-turn deceleration lane for right-turning eastbound traffic on SR 2. Providing a right-turn deceleration lane would improve traffic flow on SR 2 by taking slower, right-turning vehicles out of the flow of highway traffic, and would open up the view of drivers waiting to enter SR 2 from Flint Road, allowing them to see through traffic in both lanes of SR 2 and thereby determine if it is safe for them to enter the highway.<sup>25</sup> As Defendant State admits, the Washington State Department of Transportation’s *Design Manual* called for the placement of a right-turn deceleration lane at this intersection in 2007, given its traffic volumes and the number of right-turning vehicles.<sup>26</sup> While not determinative, this is a

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<sup>24</sup> CP 296 (Stevens Deposition, Exhibit 7).

<sup>25</sup> Accident reconstruction engineer Larry Tompkins determined that a right-turn deceleration lane would have allowed Ms. Link to see the Van Lear motorcycle as it approached the intersection, because the right-turning trucks would have been in the right-turn lane rather than the outside lane on SR 2, where they blocked her view of the Van Lear motorcycle. CP 305-307. Defendant State’s Eastern Region Traffic and Maintenance Engineer (CP 106) admits that a right-turn deceleration lane would improve visibility at the intersection. CP 352.

<sup>26</sup> CP 300 (Figg Deposition at 48-49); *see also Brief of Respondent* at pp.8-9; CP 546.

factor for a jury to consider in determining whether or not the intersection was reasonably safe.

As set forth in Appellants' Opening Brief, Defendant State of Washington has a common law duty to provide reasonably safe roads for use by the traveling public. *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).<sup>27</sup> Our Supreme Court has held that governmental entities have a duty to eliminate an inherently dangerous or misleading condition at a road location as part of the overarching duty to provide reasonably safe roads for the people of this state. *Owen*, 153 Wn.2d at 787-788.

The determination of whether or not a street or intersection is reasonably safe depends on the totality of the circumstances present at the street or intersection:

A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel. Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway... A trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence.

*Chen v. City of Seattle*, 153 Wn. App. 890, 894, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010). It is not necessary to prove a

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<sup>27</sup> "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).

violation of the Manual on Uniform Traffic Control Devices or any other statute or regulation to establish that a road location is not reasonably safe. *Chen*, 153 Wn. App. at 901 (“In effect, the city argues that the scope of its duty to Liu extended only to eliminating actual physical defects or to taking action expressly required by a statute, ordinance, or regulation. The city is incorrect on both accounts.”).

Whether or not a road location is reasonably safe is virtually always a question of fact for a jury to decide. *See, e.g., Owen v. Burlington Northern Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005); *Chen v. City of Seattle* 153 Wn. App. 890, 900, 223 P.3d 1230 (2009). As the trial court earlier ruled, there are questions of fact as to whether the intersection of SR 2 and Flint Road was reasonably safe at the time of the collision involved in this case. VRP 32 (2/10/12). Because there are questions of fact for a jury to decide as to whether or not Defendant State breached its common law duty to provide a reasonably safe road, this Court should deny Defendant State’s cross-appeal, and remand this case for trial.

**B. There are issues of material fact for a jury to decide as to whether the unsafe condition of the SR 2 -- Flint Road intersection was a proximate cause of the collision.**

As with the question of whether or not a road is reasonably safe, proximate cause is virtually always a question of fact for a jury to resolve. *Moyer v. Clark*, 75 Wn.2d 800, 804, 454 P.2d 374 (1969); *Klossner v. San Juan County*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978).

The issue of proximate cause was evaluated by accident reconstruction expert Larry Tompkins, a mechanical engineer. Mr. Tompkins' analysis of the intersection characteristics and traffic patterns is that the sight obstruction caused by traffic in the outside lane of SR 2 blocking waiting drivers' view of traffic in the inside lane of SR 2 causes waiting drivers to be misled into thinking that they are clear to enter SR 2 when they see right-turning drivers in the outside lane and an apparent absence of vehicles in the inside lane. CP 635. Mr. Tompkins testified that this is exactly what happened to Defendant Jill Link – she actively looked for traffic on SR 2 before entering the highway from Flint Road, but her location near the stop bar on Flint Road<sup>28</sup> prevented her from seeing the Van Lear motorcycle in the inside lane of SR 2, due to two right-turning trucks in the outside lane blocking her view. CP 635. Mr. Tompkins' reconstruction of the collision determined that Ms. Link's view

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<sup>28</sup> CP 356. Drivers are required to stop at stop bars. RCW 46.61.190(2) (“every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line”); WAC 468-95-220 (“In the absence of a marked crosswalk, the stop line . . . should be placed at the desired stopping . . . point . . .”).

of the Van Lear motorcycle throughout its approach to the intersection was blocked until the point at which there existed little or no time for her to avoid the collision. CP 304. Mr. Tompkins concluded that the unsafe configuration of the intersection was a proximate cause of the collision. CP 635; CP 636 (“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.”).

In her deposition, Ms. Link testified that she looked to her left, looked to her right, looked left again, and then looked right once more as she entered the intersection:

I remember being up with my blinker on and I *looked left* and there was -- and I don't remember if there was other traffic in front of it that I was waiting for. Because then I saw the first truck with his blinker on and I checked right, and I *checked left again* and noticed that the truck behind him had his blinker on also. And looked right and then looked -- just glanced again and started going and then looked right and then bam.

CP 269 (emphasis added). Despite actively looking, Ms. Link was never able to see the motorcycle. CP 147, 173.

With a properly configured intersection, Ms. Link would have been able to see the Van Lear motorcycle approaching in the inside lane as she waited to turn left. CP 305-307.

Because there are questions of fact for a jury to decide as to whether Defendant State's operation of the intersection in an unsafe

condition was a proximate cause of Ms. Link's July 23, 2008 collision with the previously unseen Van Lear motorcycle, this Court should deny Defendant State's cross-appeal.

**C. *Garcia v. State Dept. of Transportation* and *Miller v. Likins* do not apply in this case.**

The State relies heavily on *Garcia v. State Dept. of Transportation*, 161 Wn. App. 1, 270 P.3d 599 (2011), and *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001), in support of its argument that there are no material questions of fact as to proximate cause, but neither case applies here. In *Garcia*, the defendant driver admitted that, immediately prior to hitting a pedestrian in a crosswalk, she was looking at her son in the passenger's seat and was not paying attention to traffic conditions. Here, in contrast, the sole evidence is that Jill Link was actively looking for traffic coming at her from all sides, and, based on that visual information, attempting to make a decision about when it was safe to make a left turn. CP 269.

Likewise, in *Miller v. Likins*, there was no testimony as to what the defendant driver saw or did not see, or what he did or did not do, because the driver was deceased. There was no testimony by the driver or the pedestrian that addressed the relationship between the alleged unsafe road condition and the crash. Because of this, the court found that there was no evidence of causation to connect the unsafe road condition and the injury to the pedestrian. Here, by contrast, Jill Link has testified unequivocally that she was actively looking for traffic, and saw no vehicle in the inside

lane because, as it turned out, her view of the motorcycle was blocked by a truck that was turning right. Here, in contrast to *Garcia* and *Miller*, both Ms. Link's testimony and the expert testimony establishes a direct causal connection between the unsafe conditions at the intersection (the sight obstruction, the difficulty finding an opportunity to enter SR 2 from Flint Road caused by the high traffic volumes, and the geometric configuration of the intersection, including the stop line location on Flint Road) and the collision: Ms. Link could not see the Van Lear motorcycle as it approached the intersection. CP 539; CP 304; CP 311-313.

**D. The Declaration of Pat Morin should be stricken.**

Defendant State facetiously claims that there was no prejudice to Plaintiffs as a result of Defendant State's surprise use of a declaration from Pat Morin shortly before Defendant State's motion for summary judgment based on discretionary immunity was scheduled to be heard.<sup>29</sup> *Brief of Respondent* at p.47. A little over two weeks is insufficient time to take the deposition of a new witness on a topic as complex as the State's transportation budgeting/Priority Array process, while at the same time facing a summary judgment briefing deadline and fulfilling counsel's responsibilities to litigate numerous other cases at the same time.

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<sup>29</sup> As with any summary judgment motion, Plaintiffs' response to the State's motion was due 11 days before the hearing date. CR 56(c). The hearing date was June 8, 2012. VRP (6/8/12) at 34. The State filed Morin's declaration on May 11, 2012 (CP 471), less than a month before the summary judgment hearing date and less than three weeks before Plaintiffs' response brief was due.

While it is true that Defendant State pleaded discretionary immunity as an affirmative defense in its answer, the unfair surprise resulting from Mr. Morin's declaration was the testimony of a previously undisclosed witness, not the mere assertion of discretionary immunity as a defense. Plaintiffs were clearly prejudiced by the State's reliance on a declaration from a previously undisclosed witness in its motion for summary judgment. Defendant State admits that Mr. Morin was not disclosed as a witness until his declaration was provided to Plaintiffs one month before a dispositive summary judgment motion was scheduled to be heard, and only two months before trial was to begin. *Brief of Respondent* at 47. Because no remedy other than exclusion would be sufficient to remedy the prejudice caused by Defendant State's surprise disclosure of Pat Morin as a witness whose declaration it relied on heavily in its motion for summary judgment, the trial court erred in refusing to strike Mr. Morin's declaration.

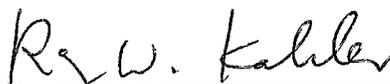
## VI. CONCLUSION

The trial court's summary judgment ruling in favor of Defendant State on the basis of discretionary immunity was based on a significant mischaracterization of Plaintiffs' claim in this case, and on the trial court's misunderstanding of the applicable law. This Court should reverse and remand this case for trial.

In ruling on Defendant State's first motion for summary judgment, the trial court correctly found that there are questions of fact as to whether Defendant State breached its duty to provide a reasonably safe road and as

to whether Defendant State's breach of its duty was a proximate cause of the Van Lear/Link collision. This Court should therefore reject Defendant State's cross-appeal and remand this case for trial to allow a jury to decide the disputed questions of fact.

Respectfully submitted this 10<sup>th</sup> day of April, 2013.



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CERTIFICATION

I hereby certify that on April 10, 2013, I served the foregoing via JIS to the Clerk's Office of the Court of Appeals Division III and provided a copy of the document via email to all counsel of record as follows:

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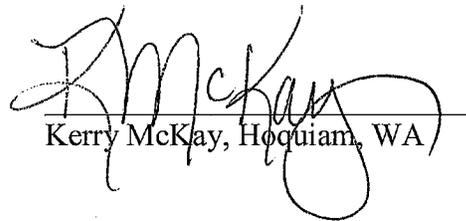
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