

FILED

MAR 05 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

vs.

THE STATE OF WASHINGTON; and JILL LINK,

Respondents.

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

BRIEF OF RESPONDENT LINK

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Attorneys for Respondent Jill Link

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I. LEGAL ARGUMENT

Respondent Link agrees with Appellants Van Lear that it was error to grant summary judgment to the State on the basis of discretionary immunity on the Van Lears' claim that the State failed to maintain a road in a reasonably safe condition.

The doctrine of discretionary immunity is an extremely limited exception to the State's liability for its tortious conduct under R.C.W. 4.92.090. *Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101 (1979). Discretionary immunity does not apply to claims of negligent highway design against the State. *Id.* at 294. In *Stewart* the court concluded that the negligent design claims against the State did not meet the first two of the four factors necessary for discretionary immunity set forth in *Evangelical Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). Similarly, the Van Lears' claim against the State that it breached its duty to provide a reasonably safe road does not involve a basic governmental policy, program or objective and is not essential to the realization or accomplishment of that policy, program or objective.

The trial court relied upon *Avellaneda v. State*, 167 Wn. App. 474, 273 P.3d 477 (2012). In *Avellaneda* the plaintiffs claimed the State took too long in budgeting and constructing a cable barrier on a highway which would have prevented the subject accident. The *Avellaneda* court distinguished that type of a claim from the negligent design and lighting claims made in *Stewart*, which are similar to the claims made by the Van Lears. Recognizing that distinction, *Avellaneda* ruled that a decision by the State whether to include a project on the priority array is entitled to discretionary immunity but that the State's negligence in designing and lighting the roadway was not essential to a basic policy, program or objective and therefore not entitled to discretionary immunity. *Id.* at 482.

II. CONCLUSION

The trial court's summary judgment in favor of the State should be reversed because the State is not entitled to discretionary immunity on the Van Lears' liability claims against it

for failing to maintain the subject intersection in a reasonably safe condition in violation of its duty to do so.

March 5, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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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