

Potential Liability Associated with Unstable Slope Management Programs

NCHRP 20-06, Topic 24-02

Timothy R. Wyatt, Ph.D., P.E.
Greensboro, North Carolina



CONNER
GWYN
SCHENCK PLLC
ATTORNEYS AT LAW



State DOT Liability and Immunity

- State Tort Claims Acts waive immunity from liability for State DOT negligence
 - UNLESS performing a “discretionary function” that involves “balancing risks and advantages”
- Decreasing likelihood of discretionary immunity:
 - Planning
 - Design
 - Construction
 - Maintenance



State DOT Duty to Maintain

- Long-recognized duty to maintain highway reasonably safe for travel
 - Duty extends to slopes adjacent to highway
- Not required to ensure absolute safety at a prohibitive or impractical cost
 - BUT notice of dangerous condition may give rise to duty to warn or close



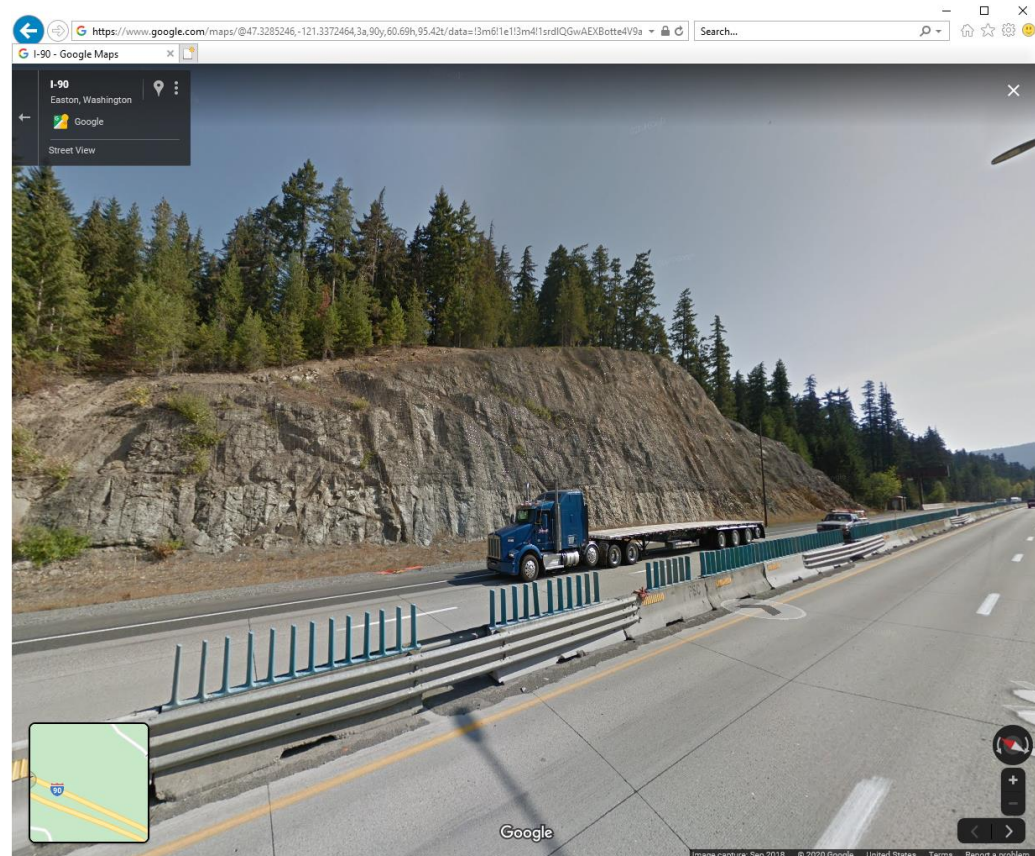
“Unstable Slope Management Programs”

- Slope Hazard Rating/Ranking Systems
 - Rockfall Hazard Rating System (RHRS) – Oregon DOT
 - Unstable Slope Management System (USMS) - WSDOT
 - GEM-15 Rock Slope Rating Procedure - NYSDOT
- Geotechnical Asset Management Programs
 - Unstable Slope Management Program (USMP) – Alaska DOT&PF
 - Rock Slope Asset Management Program (RAMP) – Montana DOT



Helm v. State, Dep't of Transportation (Washington Court of Appeals, 2014)

- Personal injury due to rockfall on I-90, milepost 58, through Snoqualmie Pass
- Slope scored slightly above threshold for full slope remediation in WSDOT USMS





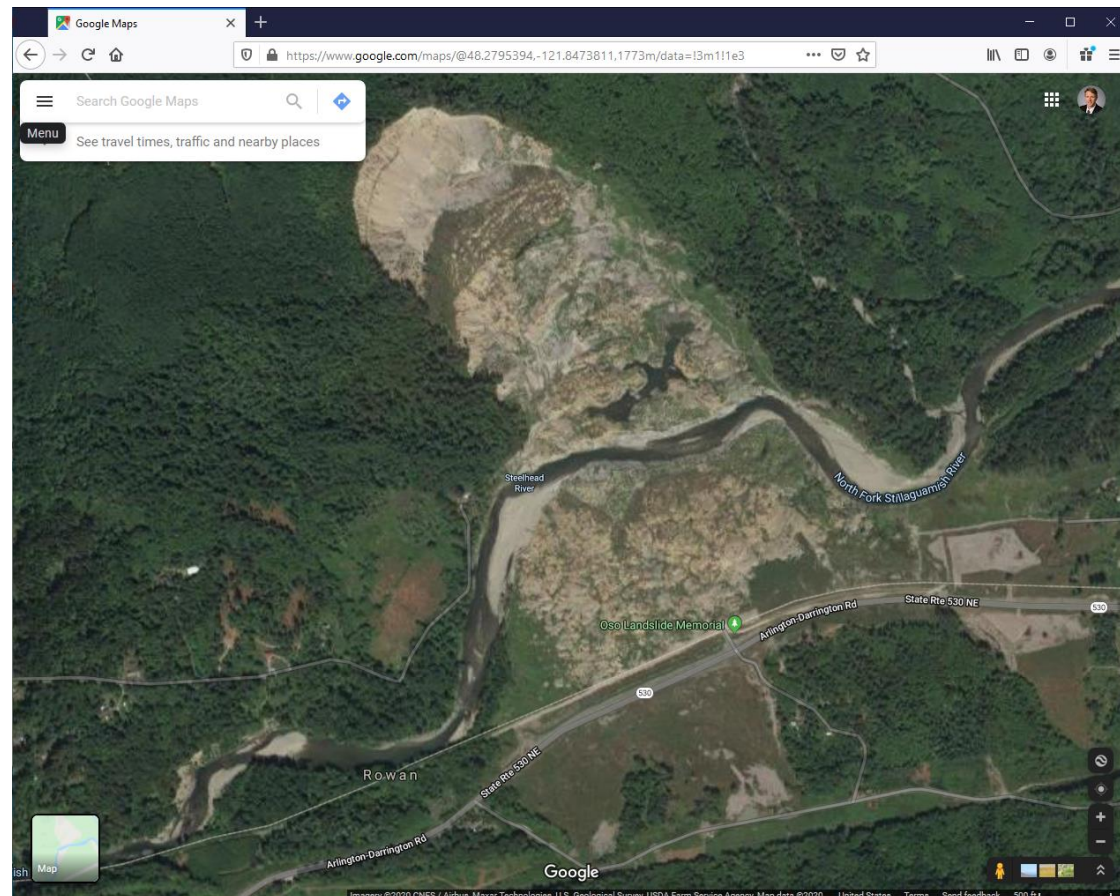
Helm v. State, Dep't of Transportation (Washington Court of Appeals, 2014)

- Pre-trial:
 - Court ruled USMS qualified for discretionary immunity
 - Left for jury to determine whether WSDOT balanced risks and advantages in deferring remediation
- At trial:
 - Court adopted broad definition of remediation to encompass “all work that relates to the slope”
 - Effectively immunized WSDOT for slope maintenance
- On appeal: Rulings within discretion of trial court



Pszonka v. Snohomish County (Washington Supreme Court, 2019)

- Oso landslide buried mile-long stretch of SR 530
- Slope was not in USMS inventory, and had never caused a highway maintenance problem





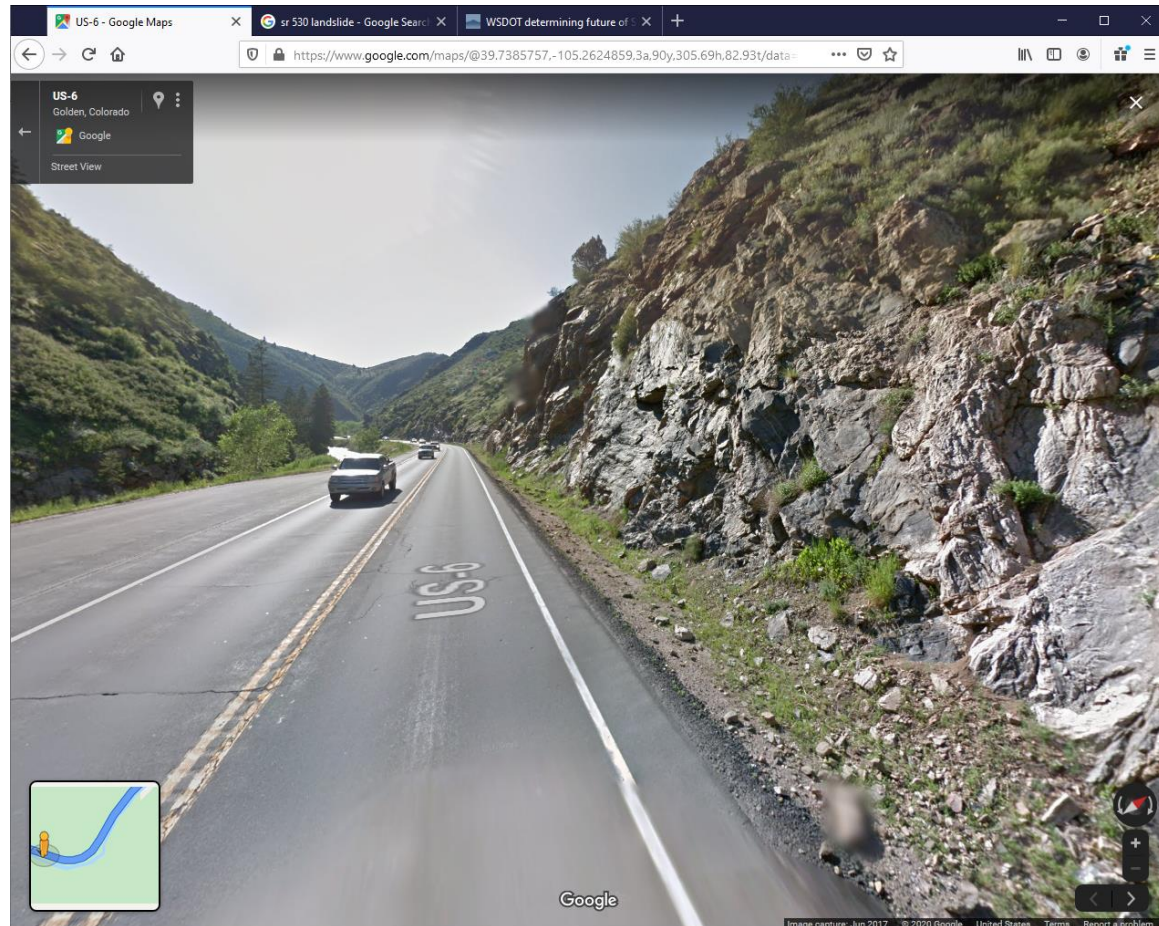
Pszonka v. Snohomish County (Washington Supreme Court, 2019)

- Pre-trial:
 - WSDOT moved to dismiss based on USMS discretionary immunity (duplicate *Helm* strategy)
 - **Plaintiff conceded that WSDOT did not negligently design or maintain highway**
 - Plaintiff argued that WSDOT had broader duty to proactively manage landslide risk (based on USMS)
- State of Washington consented to \$50M judgment to resolve all claims against State



Medina v. State (Colorado Supreme Court, 2001)

- Rockfall injured bus passengers on U.S. Hwy 6
- Slope ranked 381st out of 700 slopes in Colorado RHRS





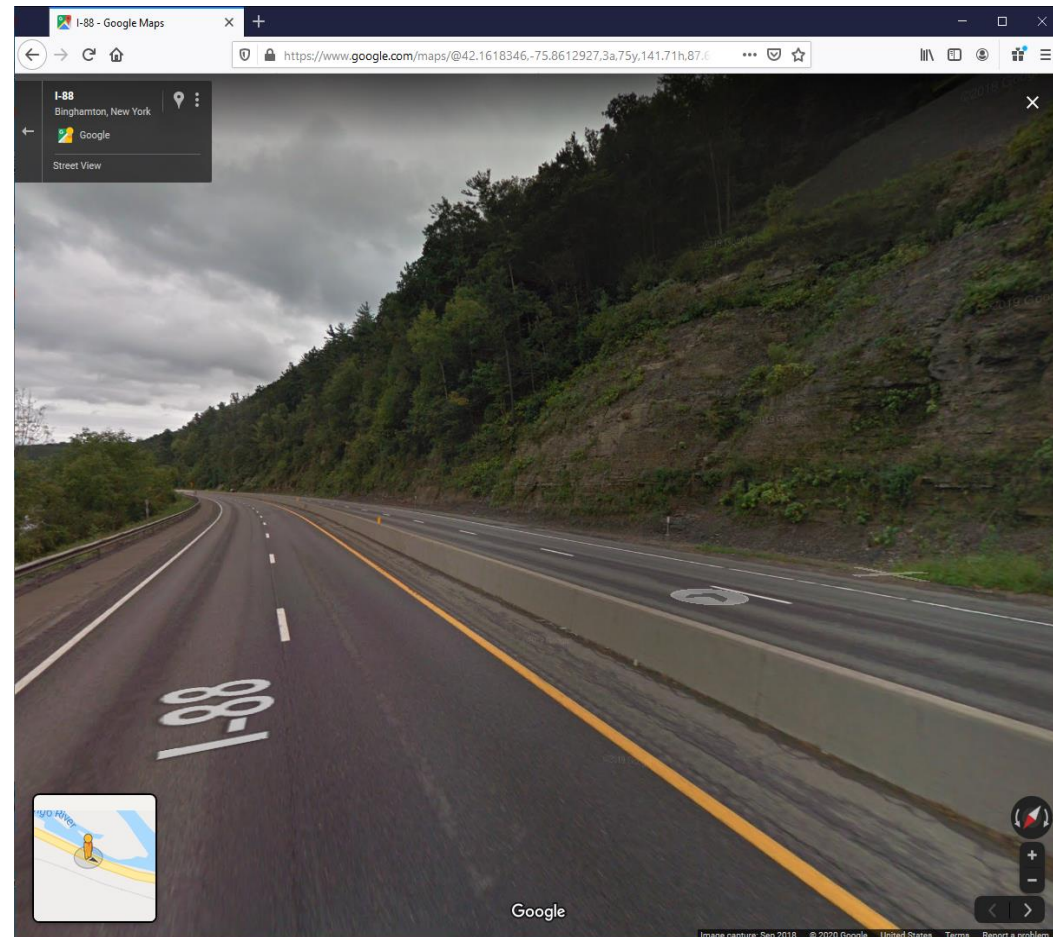
Medina v. State (Colorado Supreme Court, 2001)

- Pre-trial:
 - RHRS program manager testified that highway was designed in a dangerous condition—no duty to install protective measures not included in design
 - Trial court disagreed: Injuries resulted from CDOT’s failure to maintain highway
- Colorado Supreme Court remanded:
 - CDOT only has a duty to maintain slope in the as-designed “state of repair”
 - But failure to warn could be a design defect



Gray v. State (New York Court of Appeals, 2018)

- Mudslide injured travelers on I-88
- Slope ranked 361st in NYSDOT rockfall hazard ranking





Gray v. State (New York Court of Appeals, 2018)

- Plaintiffs argued:
 - Rockfall hazard rating put NYSDOT on notice of dangerous slope
 - NYSDOT failed to perform routine rockfall maintenance
- NYSDOT argued:
 - Rockfall hazard rating did not provide notice of “soil veneer failure”
 - Rockfall mitigation measures would not prevent mudslide
- Court: Plaintiffs failed to show that NYSDOT had notice of soil slope failure hazard



O'Grady v. State (Hawai`i Supreme Court, 2017)

- Personal injury due to rockfall on Route 11
- Injury site was “Class A” in RHRS
- “Minimal integration” between State RHRS program and maintenance district





O'Grady v. State (Hawai`i Supreme Court, 2017)

- Trial court :
 - Using RHRS to decide on large-scale rockfall projects could be subject to discretionary immunity
 - Does not excuse maintenance district's failure to undertake "routine rockfall mitigation at operational level"
 - BUT plaintiffs failed to prove resources available for rockfall mitigation
- Supreme Court remanded:
 - Rockfall mitigation at the operational level is not a discretionary function



Conclusions

- As project ranking tools, unstable slope management programs may be entitled to discretionary immunity for decisions re: capital-intensive slope remediation projects
- Not true immunity:
 - State DOT must demonstrate that discretion was actually employed—“balancing of risks and advantages” given limited funds



Conclusions (cont'd)

- Unstable slope management program will not excuse failure to perform routine maintenance
- State DOT has a duty to maintain highway—and slopes—reasonably safe for travel
 - Same general state of repair (safety) as designed
- Geotechnical asset management programs that consider a range of maintenance measures can help demonstrate the State DOT is not negligent

Questions?

Timothy R. Wyatt, Ph.D., P.E.
Greensboro, North Carolina



CONNER
GWYN
SCHENCK PLLC
ATTORNEYS AT LAW