The Honorable Grant Blinn

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

SKYLAR SEWARD, Plaintiff, v. THE STATE OF WASHINGTON and ALICIA McMULLEN, Defendants.	NO. 16-2-12788-1 **PLAINTIFF'S TRIAL BRIEF**

I. SYNOPSIS

As a fault-free passenger in a car that struck a hazardous unshielded overpass column, Skylar Seward became quadriplegic at age 15.

WSDOT had been expressly directed to install a proper protective barrier at the Center Drive Overpass columns along Interstate 5 at DuPont. The Legislature provided funding for the protective barrier. WSDOT doesn't know why this barrier was not installed, nor does it have any idea what happened to the money it was provided for the project. Had the barrier been installed on time and as directed, Skylar Seward would be walking today and enjoying life. She is instead wheelchair-bound, requiring 24/7 care for the rest of her life.

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II. LIABILITY

A. Defendant State of Washington's Duty

WPI 140.01 provides as follows:

> The *[state]* has a duty to exercise ordinary care in the *[design] [construction] [maintenance] [repair]* of its 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) ("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.").[1] The State's responsibility 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 condition. *Owen*, 153 Wn.2d at 787-788.

As recently explained by our Supreme Court, Defendant State of Washington's legal responsibility includes the duty to take reasonable steps to correct dangerous conditions that

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[1] This has been the law of Washington for the past 123 years. *See Wuthrich v. King County*, 185 Wn.2d 19, 27, 366 P.2d 926 (2016); *Owen v. Burlington Northern & Santa Fe Railroad Co.*, *supra*; *Keller v. City of Spokane*, *supra*; *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010); *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979); *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978); *Owens v. City of Seattle*, 49 Wn.2d 187, 299 P.2d 560, 61 A.L.R.2d 417 (1956); *Parker v. Skagit County*, 49 Wn.2d 33, 297 P.2d 620 (1956); *Berglund v. Spokane County*, 4 Wn. 2d 309, 103 P.2d 355 (1940); *Fritch v. King County*, 4 Wn.2d 87, 102 P. 2d 249 (1940); *Slattery v. Seattle*, 169 Wash. 144, 13 Pac. 464 (1932); *Boggess v. King County*, 150 Wash. 578, 274 Pac. 188 (1929); *Gabrielsen v. Seattle*, 150 Wash. 157, 272 Pac. 723 (1928); *Lewis v. Spokane*, 124 Wash. 684, 215 Pac. 36 (1928); *Swan v. Spokane*, 94 Wash. 616, 162 Pac. 991 (1917); *Murray v. Spokane*, 117 Wash. 401, 201 Pac. 745 (1914); *Kelly v. Spokane*, 83 Wash. 55, 145 Pac. 57 (1914); *Leber v. King County*, 69 Wash. 134, 124 Pac. 397 (1912); *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616 (1912); *Neel v. King County*, 53 Wash. 490, 102 Pac. 396 (1909); *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831 (1908); *Larsen v. Sedro-Woolley*, 49 Wash. 134, 94 Pac. 938 (1908); *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122 (1900); *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273 (1895).

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make a road unsafe for ordinary travel, including hazardous conditions that exist alongside the traveled portion of the road. *Wuthrich v. King County,* 185 Wn.2d 19, 27, 366 P.2d 926 (2016). In *Wuthrich,* the Supreme Court clarified that whether a roadway condition is inherently dangerous does ***not*** depend on whether the condition exists in the traveled portion of the roadway.

In *Wuthrich*, a motorcyclist was injured by a motorist who pulled out in front of him at an intersection maintained by King County. The motorcyclist filed suit against King County and the defendant-driver, alleging that the County was liable for his injuries because overgrown blackberry bushes along the side of the road had obstructed the defendant-driver's view of approaching traffic when she pulled out into the intersection. The trial court dismissed the action against the County on summary judgment. The Court of Appeals affirmed in a split decision.

In a unanimous opinion, the Supreme Court reversed. The court rejected the County's argument that it had no duty to address hazardous conditions created by naturally occurring roadside vegetation. *Wuthrich*, 185 Wn.2d at 25. Instead, the court emphasized that "[w]hether the roadway was reasonably safe and whether it was reasonable for the County to take (or not take) any corrective actions are questions of fact that must be answered in light of the totality of the circumstances." *Wuthrich,* 185 Wn.2d at 27 (citing *Owen,* 153 Wn.2d at 788-790; *Chen,* 153 Wn. App. at 901).

Guardrail cases also address the State's duty to correct inherently dangerous conditions that exist alongside the road. For example, *Raybell v. State,* 6 Wn. App. 795, 496 P.2d 559 (1972) involved a claim that the State had maintained an inherently dangerous highway with inadequate guardrails. There, a vehicle left the highway and tumbled off a cliff. The decedent's estate introduced engineering testimony that a guardrail would have deflected the vehicle back onto the

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highway at speeds as high as 48 miles per hour, and that the existing condition without guardrails was extremely hazardous. The plaintiff introduced engineering publications demonstrating that the objective in placing guardrails is to lessen the hazard to traffic. The State appealed from a verdict in favor of the plaintiff. The appellate court affirmed. The court held that where the condition in or along the highway is inherently dangerous, the municipality must reasonably and adequately warn of the hazard, and maintain adequate protective barriers when such barriers are shown to be practical and feasible.

Other examples of responsibility for dangerous roadside conditions include the location of poles along the roadway. In *Breivo v. Aberdeen*, 15 Wn. App. 520, 550 P.2d 1164 (1976), a vehicle traveling at an excessive rate of speed went out of control, jumped a curb and careened along the sidewalk for 66 feet, striking a solid immovable barrier 13 inches from the traveled roadway. The barrier had been erected by the city to protect a breakaway light standard. The court ruled that reasonable minds could not differ that "the City was palpably negligent in erecting a solid, immovable barrier in such a location. Any potential benefit which could be derived from erecting a breakaway light standard was entirely negated by such action. The City acted in total disregard for the safety of those using its public highways. . . ." *Breivo*, 15 Wn. App. at 527.

All of these cases recognize the duty of the governmental entity to provide a forgiving roadside in the placement of objects outside of the traveled portion of the roadway.[2]

B. Clear Zones

Here, as explained by WSDOT Engineer Scott Zeller, the Center Drive Overpass support columns – located in a "Clear Zone" – presented a hazard for motorists. Clear Zones exist along

[2] *See also Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013) (utility pole located too close to the roadway).

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the sides of freeways and highways as vehicle recovery areas. They are to be free of hazardous objects:

> Q. (By Mr. Kahler) Okay. Exhibit 9 is some excerpts from Chapter 1600 from the July 2013 WSDOT Design Manual.
>
> …what does the term "clear zone" refer to?
>
> A. Well, our design manual defines it as the total roadside border area available for vehicles.
>
> ….
>
> Q. Okay. And under section 1600.03 in Exhibit 9, the second sentence there indicates that the intent of providing a clear roadside border area is to provide as much clear traversable area for a vehicle to recover as practical, given the function of the roadway and the potential trade-offs; is that correct?
>
> A. Yes.
>
> ….
>
> Q. And the purpose for the clear zone, or zone 2, identified in this table is for errant vehicle recovery; is that correct?
>
> A. Yes.
>
> Q. Can you describe what that means, errant vehicle recovery?
>
> A. It would be a vehicle that departed the roadway for various reasons so that they can get the opportunity for them to recover, regain control.
>
> ….
>
> Q. Okay. Going on to K then, do you know what the distance of the face of the overpass columns is from the edge of traveled way?
>
> A. I believe it was measured 16 feet.
>
> Q. So **are those overpass columns that are involved in this case within the clear zone?**

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A. **Yes.**

Q. Okay. Going on to L, is the clear zone supposed to be free of hazards?

A. Clear of obstructions, yeah.

Q. And what are some examples of potential obstructions that could exist within the clear zone?

A. Fixed objects, critical slopes, water two feet or deeper.

Q. Okay. And an overpass column would be an example of a fixed object?

A. Yes.

CR 30(b)(6) Deposition of R. Scott Zeller 12-13, 15, 21 (emphasis added).

As acknowledged by Defendant State, the standards set forth in the American Association of State Highway and Transportation Officials (AASHTO) Roadside Design Guide provide that overpass columns in Clear Zones are to be shielded. *Zeller Deposition* at 24-25. Here, at the Center Drive Overpass, WSDOT failed to provide shielding, and instead used untested and ineffective earth berms, consisting of nothing more than compacted dirt, rather than a Jersey barrier or other protective shield.

C. Jersey Barrier

Concrete Jersey barrier was developed back in the 1950s to protect cars from contacting hazardous structures in the "clear zone", including overpass support pillars, and to prevent cross-over head-on collisions.

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This barrier protection has long been installed across our state highways, and is a standard, well-functioning re-directional appliance (as is the W-beam steel guardrail). Relatively shallow approach angles generally result in vehicle re-direction with slight impact.

D. Earth Berms – A Chronology

1971 -- A novel earth berm concept is tested by the Texas Transportation Institute, using a 1.2:1 dirt slope. Five tests are conducted at an approach angle of 15° and speeds of 20, 40 (two tests), 43 and 53 mph.

"In two of the five tests, the vehicle became unstable and rolled over (speeds of 40 and 53 mph)." NCHRP Project 20-7, Report No. 627-1 (February 1971).

1973 -- Notwithstanding these test results documenting the failure of the earth berm to reliably re-direct cars, a Washington Highway Department official orders his staff to use earth

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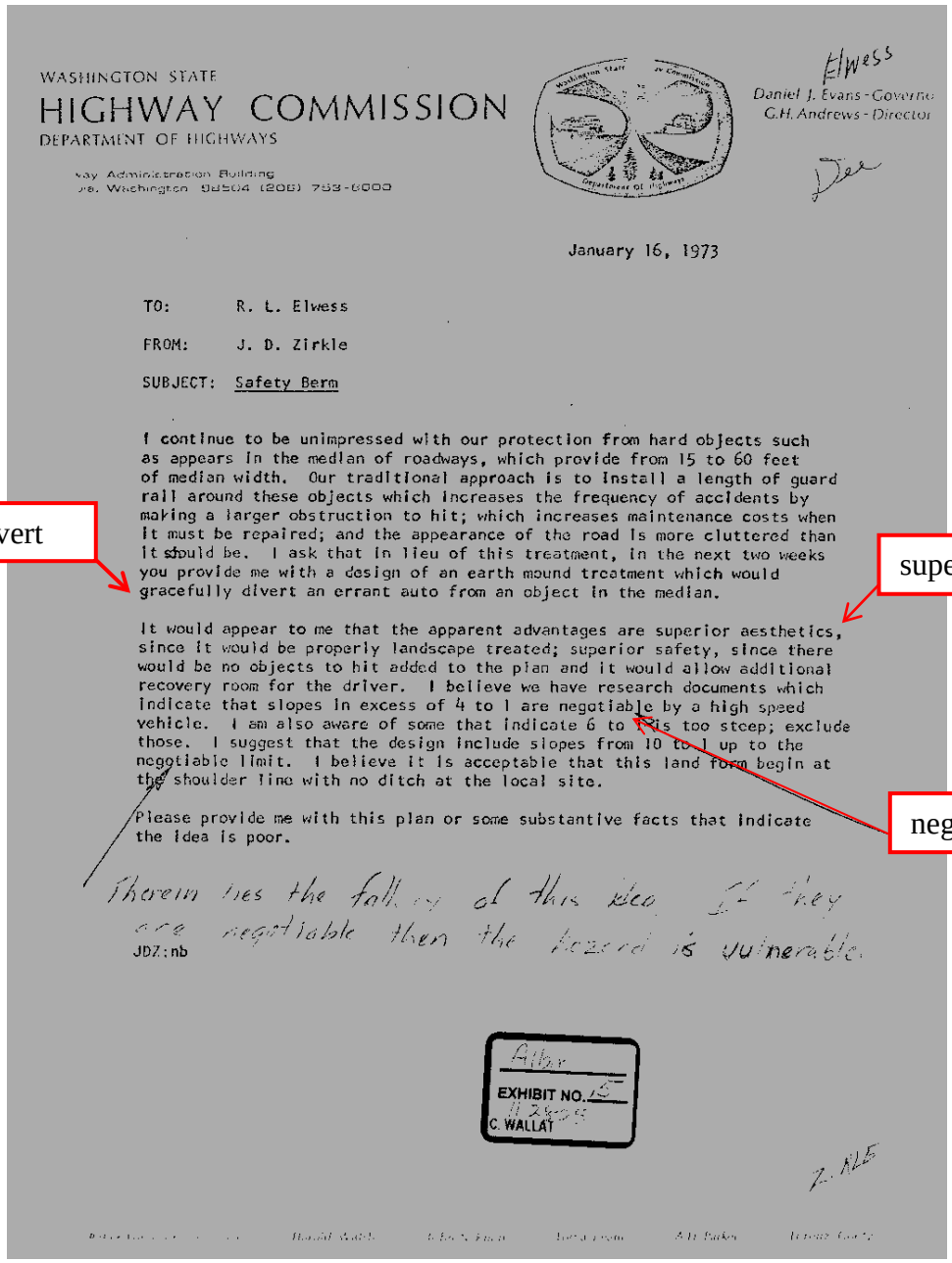
berms on our highways because they are aesthetically pleasing, and will "gracefully divert an errant auto". He gives them only two weeks to come up with a design:



WASHINGTON STATE
HIGHWAY COMMISSION
DEPARTMENT OF HIGHWAYS

Daniel J. Evans - Governor
G.H. Andrews - Director

January 16, 1973

TO: R. L. Elwess

FROM: J. D. Zirkle

SUBJECT: Safety Berm

I continue to be unimpressed with our protection from hard objects such as appears in the median of roadways, which provide from 15 to 60 feet of median width. Our traditional approach is to install a length of guard rail around these objects which increases the frequency of accidents by making a larger obstruction to hit; which increases maintenance costs when it must be repaired; and the appearance of the road is more cluttered than it should be. I ask that in lieu of this treatment, in the next two weeks you provide me with a design of an earth mound treatment which would gracefully divert an errant auto from an object in the median.

It would appear to me that the apparent advantages are superior aesthetics, since it would be properly landscape treated; superior safety, since there would be no objects to hit added to the plan and it would allow additional recovery room for the driver. I believe we have research documents which indicate that slopes in excess of 4 to 1 are negotiable by a high speed vehicle. I am also aware of some that indicate 6 to 1 is too steep; exclude those. I suggest that the design include slopes from 10 to 1 up to the negotiable limit. I believe it is acceptable that this land form begin at the shoulder line with no ditch at the local site.

Please provide me with this plan or some substantive facts that indicate the idea is poor.

JDZ:nb

EXHIBIT NO. 15
C. WALLAT

gracefully divert

superior aesthetics

negotiable

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Mr. Zirkle's memorandum demonstrates a fundamental misunderstanding of the earth berm concept as a re-directional device, as commented upon by his engineering staff: "Therein lies the fallacy of this idea. If they are negotiable then the hazard is vulnerable."

Complying with Mr. Zirkle's idea of a visually pleasing and graceful slope -- and in spite of its failure to conduct any re-directional testing of the experimental earth berm -- WSDOT installs earth berms at overpass columns from 1975 to 2003, and waits to see what happens. This procedure of human experimentation violates the well-established, national highway design protocols set forth in NCHRP Report No. 350.

1973 -- The Texas Transportation Institute again tests the earth berm. Speeds range from 20 to 60 mph. The approach angle ranges from 7° to 17°.

Four of the 13 vehicles sail over a 6.25-foot berm. Seven out of the 13 would have gone over a berm with the four-foot design height being used by the State of Washington for our highways. The earth berm concept and design again fail to reliably re-direct a car.

1989 – AASHTO Roadside Design Guide (1st Ed.) is published (shielding required for bridge piers; "barrier must be structurally able to contain and redirect design vehicle").

July 19, 1990 – FHWA adopts Roadside Design Guide

1993 – National Cooperative Highway Research Program Report 350 is published setting criteria for longitudinal barriers to protect against vehicle contact with fixed objects. Specifically, the criteria require the barrier to "contain and redirect the vehicle".

1996 – WSDOT plan for installing overpass pillars in the narrow median center for the Center Drive Overpass – No provision is made for Jersey barrier or W-beam guardrail at milepost 117.96 for southbound traffic; instead, an earth berm leading up to the overpass pillar is used. Overpass is constructed in **1997**.

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1998 -- Deadline for Compliance with NCHRP Report No. 350 Barrier Criteria

2001 -- WSDOT asks the Texas Transportation Institute to test a variation of the earth berms that it has already installed along Washington's highways. On January 29, 2001, the Texas Transportation Institute tests the earth berm in accordance with NCHRP 350 criteria. The result:

> The earth berm barrier did not meet the requirement for structural adequacy for a TL-2 barrier. The earth berm barrier did not contain or redirect the 2000P vehicle. The vehicle rode over the top of the barrier and came to rest behind the installation.

Texas Transportation Institute, NCHRP Report 350 Test 2-11 (February 2001).

December 2003 – WSDOT Design Manual Revision – Use of the redirectional landform (earth berm) is discontinued; where earth berms currently exist, WSDOT personnel are to "ensure that the hazard they were intended to mitigate is removed, relocated, made crashworthy, or ***shielded with a barrier***" (emphasis added).

May 11, 2004 – WSDOT Inspection: Center Drive Overpass – Bridge columns lack protective barrier for southbound lanes.

2006 – Six-Year Plan to comply with Design Manual shielding requirements at all 198 earth berm locations.

WSDOT offered Jay Alexander as its CR 30(b)(6) designee to discuss earth berm mitigation and related issues. Mr. Alexander confirmed that the State, through the WSDOT Executive Highway Safety Committee, identified earth berms as a hazard to be mitigated with ***high priority***; secured funding from the Legislature in 2006 to mitigate all 198 earth berm locations in the State of Washington (including the Center Driver Overpass at issue in this case), and failed to perform that mitigation within the six-year window, though it cannot explain what happened:

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Q. I want to just make sure I have kind of an accurate understanding of the timeline here. In 2003 there was a change in the Design Manual, Section 1610.04, having to do with earth berms which basically discontinued their use, and I'm paraphrasing, but recommended that earth berms be mitigated. You're familiar with that?

A. Yes.

Q. Okay. You personally became involved in 2006 largely in conjunction with your work on the highway executive safety committee with an effort to identify lists and mitigate earth berms in the state of Washington, true?

A. Correct.

Q. One of those locations was the Center Drive overpass on I-5 in DuPont, true?

A. Correct.

Q. Okay. An effort was made to scope and fund earth berm mitigation in about 2006 on a six-year time frame that contemplated completion of all of those projects on the list no later than the middle of 2013, true?

A. Correct.

Q. That did not happen and, in fact, the Center Drive location was not mitigated as contemplated within that six-year window, true?

A. Correct.

Q. And speaking on behalf of the State of Washington, you cannot tell me why that did not happen within the six years as contemplated, true?

A. Correct.

Deposition of Jay Alexander (June 20, 2018), at 57-58. The project was not undertaken. The funds from the Legislature for shielding the Center Drive Overpass columns went missing.

May 15, 2008 – WSDOT Inventory -- Center Drive Overpass has no protective barrier for southbound lanes.

June 26, 2010 – WSDOT Inventory – Center Drive Overpass column hazard reported.

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October 2011 – Preliminary Design, Median Barrier Replacement Project – Jersey barrier running along northbound I-5 was to be replaced with pre-cast concrete segments. This included the area of the Center Drive Overpass columns. The Project Engineer (Nebergall) was aware that "earth berms were not considered to be effective mitigation". She saw first-hand that the west side of the Center Drive Overpass columns had no Jersey barrier, exposing them to southbound traffic. She admitted that she knew that overpass columns in the median here presented a ***"hazard"*** for southbound motorists; that, without a barrier on the west side, a southbound vehicle could enter the median and strike the overpass columns.

2012 Median Barrier Replacement Project – WSDOT inspection of Center Drive Overpass site: plans confirm Jersey barrier only on northbound side.

October 2012 – Median Barrier Replacement Project Completion

- Addresses only the east side of the Center Drive Overpass column hazard
- $32.90/linear foot for Jersey barrier, including installation; the 688 linear feet of Jersey barrier needed to shield the west side of the exposed Center Drive Overpass columns would have added only $22,635.20 to comply with NCHRP 350, Design Manual §1610.04(1), and WSDOT's 2006 Six-Year Plan
- WSDOT fails to address the hazard before July 1, 2013—the end of the six-year mitigation window for addressing all earth berms with funding provided by the Legislature on a high priority basis.

October 12, 2013 – Center Drive Overpass support column struck by Volkswagen Jetta traveling southbound on Interstate 5; vehicle enters the median and slides along the earth berm, striking the concrete overpass pillar. Skylar Seward is rendered quadriplegic.

Defendant State's breach of its duty to provide a reasonably safe road for the traveling public at this location resulted in the McMullen vehicle ramping up on the earth berm and heading directly into the overpass column, crashing and leaving Skylar Seward permanently paralyzed.

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III. FACTS

A. The Crash

On October 12, 2013, Plaintiff Skylar Seward was a back seat passenger in a Volkswagen Jetta being driven by Defendant Alicia McMullen. Ms. McMullen was traveling southbound on I-5 in the inside/left lane, approaching milepost 118. She intended to change to the outside right lane to take Exit 116 further south. She began moving right to change lanes and was surprised by the presence of a vehicle in her blind spot. She reacted by swerving sharply left, resulting in her losing control of the car. The car left the traveled portion of the roadway and entered the median area of I-5. It continued up and along the earth berm and struck the Center Drive Overpass support pillar.

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Twelve years earlier, earth berms were finally tested by WSDOT and shown to be virtually worthless in redirecting cars. Had Defendant State provided proper protective shielding here, as it is required to do, the McMullen vehicle would have been deflected and redirected, rather than crashing head-on into this concrete overpass column.

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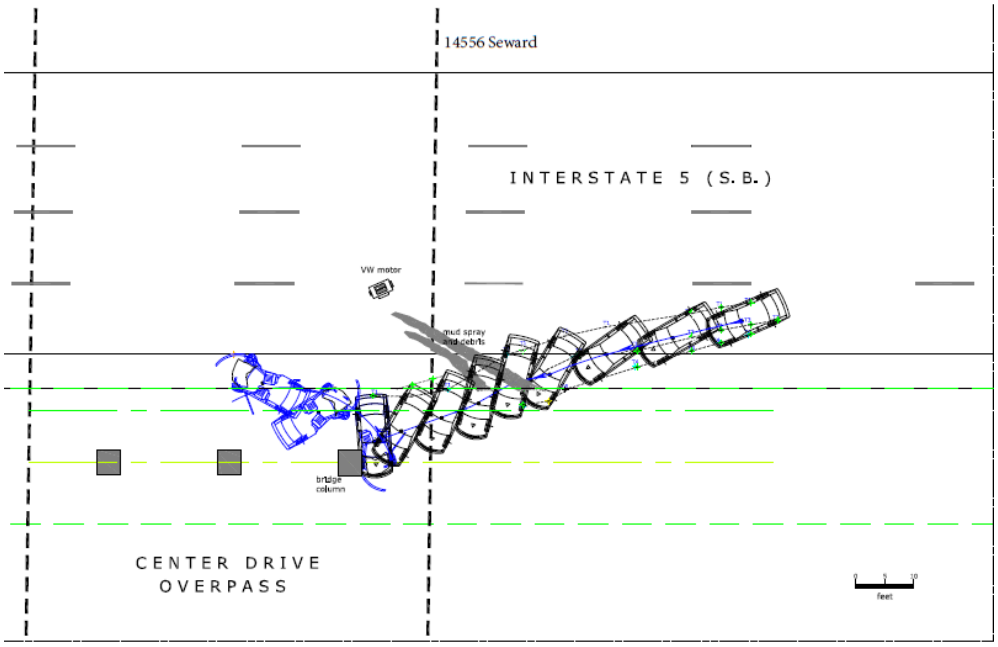
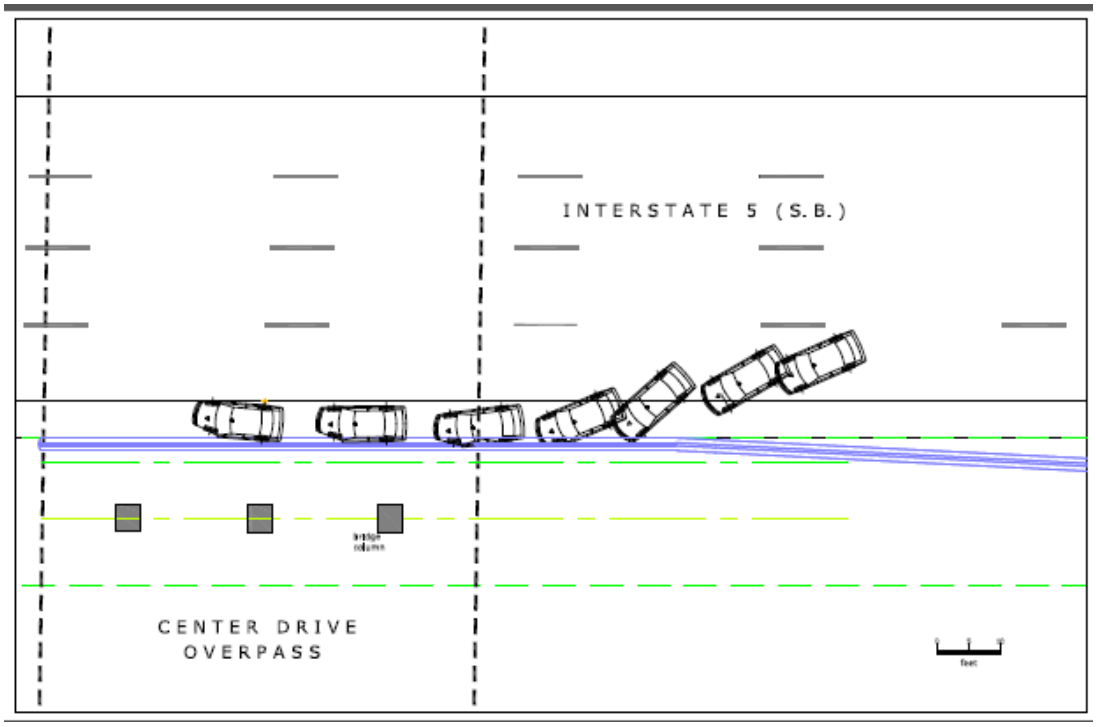
Reconstruction -- Earth Berm



Reconstruction – Jersey Barrier



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IV. CONTRIBUTORY FAULT

On September 22, 2017, Pierce County Superior Court Judge Jack Nevin issued an Order Granting Plaintiff Seward's Motion for Partial Summary Judgment Striking Affirmative Defense of Contributory Fault. Ms. Seward is fault-free and entitled to a full joint and several recovery for her damages, losses and needs.

V. DAMAGES

A. Skylar Seward's Economic Damages

1. Medical Expenses

Ms. Seward's past medical expenses to date are $1,850,359.82. The necessity of this medical treatment and the reasonableness of the charges are not disputed. This undisputed amount for her past medical expenses is set forth in Plaintiff's proposed jury instructions and on the Verdict Form.

2. Future Medical Care Costs

Ms. Seward continues to see doctors and physical therapists for ongoing pain and ailments from being in a wheelchair. Her primary treating physician, Dr. Fuentes, will testify that she needs ongoing treatment for the rest of her life.

3. Lifetime Economic Loss

Economist Christina Tapia, Ph.D., has determined that the net present value of the lifetime economic loss to Skylar Seward ranges from $18,201,804 to $25,193,434.

B. Skylar Seward's Non-economic Damages

Plaintiff will present the testimony of two doctors. Fangyi Zhang, M.D. will testify regarding Skylar's past surgeries. Molly Fuentes, M.D., Skylar's primary treating physician and

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"quarterback" for her significant care needs going forward, will testify that with appropriate care and services as outlined in the Life Care Plan, Ms. Seward will have a normal life expectancy.

Given Ms. Seward's youth and normal life expectancy, the non-economic losses she sustained in this crash are immense. She has lost all use of her lower extremities and has limited use of her hands, which lack all meaningful dexterity. She will never walk again. She cannot feed or bathe herself, nor can she use a restroom without assistance. Her bowel and bladder programs require the services of a caregiver, currently her mother, who provides full services on a 24/7 basis.

1. Pain and Suffering

Ms. Seward has suffered, and continues to suffer, significant physical pain as a result of the injuries she sustained in the subject crash. Additionally, she suffers from frequent urinary tract infections that leave her sick, feeling nauseated and dizzy. She rarely sleeps well and gets a good night's sleep only once or twice a month.

2. Disability

Skylar Seward suffered serious permanent injuries, including: fracture dislocation at C5-C6, including jumped facets bilaterally at the C5-C6 interface and anterior translocation of C5 on C6 nearly the entire width of the vertebral body; epidural hematoma with severe spinal canal stenosis at C5-6; neurogenic bowel, requiring a bowel program; neurogenic bladder, requiring catheterization; recurrent urinary tract infections; loss of sexual function; incomplete tetraplegia due to spinal cord injury resulting in paralysis; and loss of significant sensation below the chest. She has very limited use of her hands; spasticity of the lower extremities; and autonomic

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dysreflexia, a clinical syndrome that develops in individuals with spinal cord injury, resulting in acute, uncontrolled and potentially life-threatening hypertension. She has lost her ability to sweat as a result of the neurological damages from this spinal cord injury. This means she cannot stay in the sun outdoors or in cold environments for long as it will trigger her autonomic dysreflexia.

3. Disfigurement

Ms. Seward does not have the simple luxury of walking like normal people. She is stuck in a wheelchair, the object of pity. She raises a glass to drink with dysfunctional hands.

Ms. Seward had surgery to repair her neck after this crash, which involved the placement of hardware to stabilize her. As a result, she has today an approximately seven-inch scar from the back of her spine to just above her hair line. Her fingers are deformed and she cannot move them as they are curled up; likewise, her feet are stiff and she cannot wear shoes anymore as a result. Ms. Seward loved wearing fashionable clothes before this crash. Now she can only wear skirts or shorts with a blanket draped on her lap, as nothing else allows the urine bags to drain from her catheter properly.

4. Loss of Enjoyment of Life

Instead of finishing high school and moving into adulthood as her peers have done, Ms. Seward has spent the past five years in surgeries, rehabilitation and efforts at recovery from a catastrophic spinal cord injury that has left her quadriplegic. She will not walk again, and she will require round-the-clock care for the rest of her life. As her peers continued through high school, participated in high school sports and activities, attended homecoming dances and proms, Ms. Seward was at home in bed or in a wheelchair recuperating and attempting to learn a new

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way of life while trapped in her own body. Her peers have now graduated from high school and are in college or in the work force, moving forward with their young lives. Ms. Seward remains at her parents' home, in a living room that the family has converted into a bedroom so she can remain on the main floor. She rarely sees anyone but her closest friend and even those visits are staid affairs at her home or somewhere nearby. She does not travel. She cannot drive. She rarely leaves her home. She may never marry and almost certainly will not bear children. Being wheelchair bound and with limited use of her upper extremities, it is difficult for her to give or receive even a normal hug from a loved one. She lacks access to many of the routine joys of life because of her physical limitations and she suffers a significant emotional toll knowing that her limitations are permanent and intractable.

VI. VOIR DIRE

A. Bias

RCW 4.44.120 provides in relevant part:

> A voir dire examination of the panel shall be conducted for the purpose of discovering any basis for challenge for cause and to permit the intelligent exercise of peremptory challenges.

The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct.[3] The purpose of voir dire is to enable each party to learn the state of mind of the prospective jurors, so that they can know whether or not any of the prospective

[3] *See Smith v. Kent*, 11 Wn. App. 439, 443, 523 P.2d 446 (1974), *overruled on other grounds, State v. Cho*, 108 Wn. App. 315, 30 P.3d 496 (2001).

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jurors may be subject to challenge for cause, and determine the advisability of interposing a peremptory challenge.[4]

If voir dire reveals unfitness of a panel member due to bias, the juror should be excused:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.[5]

A juror should be excused for cause if a particular belief will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[6]

B. Juror Rehabilitation

A frustrating circumstance results when a juror admits to having a bias, but the court then intervenes to rehabilitate the juror. Such jurors may then end up sitting on the impaneled jury by simply stating to the court that, despite having expressed prejudicial attitudes or having had experiences likely to give rise to such attitudes, they can be fair and impartial.

Given that people are often unaware of cognitive facts affecting their biases, it is logical that jurors would be unqualified to render an opinion as to their own ability to be fair. After all, they are placed in a position where they are asked to perform a task with which they are generally inexperienced, by following rules that they have not yet been given, while applying those rules to a set of facts yet unknown to them. The unique nature of jury service argues that

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[4] *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953); *see also Robinson v. Safeway Stores, Inc*., 113 Wn.2d 154, 159, 776 P.2d 676 (1989) (voir dire examination enables a litigant to determine whether or not to exercise his statutory right to challenge a juror for cause or to exercise a peremptory challenge).

[5] RCW 2.36.110.

[6] *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

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prospective jurors may not be accurate judges of their own ability to set aside experiences and attitudes in order to judge the facts of a case fairly and impartially.

Because seating a biased juror may have a destructive impact on justice, Plaintiff urges the Court to avoid juror "rehabilitation".

C. **Employee of a Party**

Although courts may exercise discretion in dismissing jurors during the jury selection process, a court does not have such discretion when a prospective juror is employed by a party in the case. Under RCW 4.44.180(2), a prospective juror who is an employee of a party in the case may be challenged for cause in a civil case. In *Martini ex rel. Dussault v. State*, 121 Wn. App. 150, 168, 89 P.3d 250, 259 (2004), the court held that the statute applied to employees of the State and that the trial court committed reversible error in that case by denying the plaintiff's challenge to a juror who was employed by the State because it was a party to the action.

VII. PEREMPTORY CHALLENGES

A. Defendants are Collectively Entitled to Three Peremptory Challenges.

Plaintiff is entitled to three peremptory challenges, and Defendants collectively are entitled to three peremptory challenges:

> Each party shall be entitled to three peremptory challenges. When there is more than one party on either side, the parties need not join in challenge for cause; but, they *shall join in a peremptory challenge before it can be made. If the court finds that there is a conflict of interest between parties on the same side, the court may allow each conflicting party up to three peremptory challenges.*

RCW 4.44.130 (emphasis added); *see also State v. Pettilla*, 116 Wn. 589, 91-92, 200 P. 332 (1921) ("The overwhelming weight of authority . . . requires codefendants to join in the

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peremptory challenges, and we are satisfied that this is the correct and better rule."); *Colfax National Bank v. Davis Implement Co.*, 50 Wn. 92, 93, 96 P. 823 (1908) ("Either party may challenge the jurors, but when there are several parties on either side, they shall join in the challenge before it can be made.").

Here, the Defendants' interests are essentially aligned. But even when defendants are antagonistic to one another, they are still entitled to only three peremptory challenges collectively. In *Crandall v. Puget Sound Traction Light & Power Co.*, 77 Wn. 37, 137 P. 319 (1913), a single plaintiff brought suit against multiple defendants alleging concurrent negligence. *Id.* at 38. The court allowed the defendants, collectively, three peremptory challenges. *Id.* at 39. The defendants were unable to agree on how to use the third peremptory challenge, and claimed a right to additional peremptory challenges, arguing that because "the interests of the defendants in the result of the trial are, in substance, antagonistic to each other" the defendants "should be regarded as separate parties for the purpose of exercising peremptory challenges." *Id.* at 39-40. The *Crandall* court, noting that the right to peremptory challenges "is wholly a creature of statute," held that "it was not error to deny the right of a separate peremptory challenge to the defendants." *Id.* at 40.

It is typical in a tort case involving multiple defendants for the defendants' interests to be somewhat antagonistic; however, occasionally inconsistent positions are insufficient to warrant additional peremptory challenges. According to the rule laid out in *Crandall*, and the requirements of RCW 4.44.130, a court allows only three peremptory challenges per side. If the court exercises its discretion to permit more than three peremptory challenges per side, the number of peremptory challenges allowed to the plaintiffs and to the defendants collectively

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should be equal. The consequence of allowing the defendants more peremptory challenges than the plaintiff is allowed would be a jury that is prejudicially biased in the defendants' favor.

The notions of fair play and substantial justice that underlie our legal system dictate that RCW 4.44.130 be construed in a manner that collectively gives each side in a lawsuit the same number of peremptory challenges. *See, e.g., U.S. Oil & Ref. Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329 (1981) (courts have a general duty to construe and apply statutes in a manner that furthers justice).

VIII. POWERPOINT

Plaintiff's counsel will use a PowerPoint presentation during opening statement and closing argument. The actual photographs and images will have already been shown to defense counsel prior to commencement of trial. The precise configuration of photographs and visuals will not have been disclosed, neither will labels or language.

IX. PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

A. In general

Most of Plaintiff's proposed jury instructions are based on the Washington Pattern Jury Instructions. However, in some instances Plaintiff's proposed instructions either modify the pattern instructions or depart from them so that they apply more directly to this case. Most of these modifications or departures are based on counsel's past trial experiences or on discussions about particular instructions that have occurred during meetings of the Washington Pattern Jury Instructions Committee (both Keith Kessler and Garth Jones serve as members of the WPI Committee). Contrary to the belief of some, the pattern instructions are not approved by the

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Supreme Court. The Court has made clear that the WPI instructions are merely a guide for trial judges and counsel:

> We recommend the use of these pattern instructions. Trial lawyers should use them as a guide in preparing instructions which are an accurate statement of the law in the particular case.

Washington Pattern Jury Instructions – Civil, 6 Washington Practice at v, Supreme Court Letter from Washington Supreme Court to Members of the Washington Bench and Bar (January 1989).

Plaintiff counsel wish to make the Court aware of the reasons why they have proposed the following instructions.

B. Jury instructions based on "fault"

RCW 4.22.070 requires the jury to apportion "fault" between all entities that caused the plaintiff's injury. *See also* RCW 4.22.005. The word "fault" is defined in RCW 4.22.015 as including:

> acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

The WPI instructions do not as yet contain instructions that incorporate this statutory concept or language, although such instructions are under discussion at this time. Plaintiff's proposed instructions are based on the concept of "fault". It has been counsel's experience that jurors have an easier time apportioning fault in the verdict form when the concept of fault as set forth in our statutes is explained to them in jury instructions.

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For example, the Plaintiff's proposed instructions tell the jury that "more than one party may be at fault for the injury or damage complained of." This dovetails with the instruction on causation that states that there can be more than one cause of an injury. This also corresponds with the questions that the jury must answer in the verdict form.

C. Determining the degree of fault

Included among the Plaintiff's proposed jury instructions is an instruction on determining the degree of fault. The purpose behind this proposed instruction is to explain to jurors that they can apportion fault to both Defendants should they find both at fault. Here, Defendant McMullen has admitted that she is at fault and bears some responsibility for the Plaintiff's injuries and losses. The jury must therefore determine whether Defendant State is also at fault, and then apportion their respective degrees of fault. WPI 41.04[7]. *See Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 25-26, 864 P.2d 921(1993); *Washburn v. Beatt Equipment Company*, 120 Wn.2d 246, 840 P.2d 860 (1992).

D. Purpose of tort law

A number of cases have for years recognized that the law of torts serves two basic functions: (1) it seeks to prevent future harm through the deterring effect of potential liability, and (2) it provides a remedy for damages suffered. *See Babcock v. State*, 112 Wn.2d 83, 113, 768 P.2d 481 (1989) (Utter dissent); *Barr v. Interbay Citizen's Bank of Tampa, Fla.*, 96 Wn.2d 698, 699, 635 P.2d 441 (1981); and *Stanton v. Bayliner Marine Corp.*, 68 Wn. App. 125,132, 844 P.2d 1019 (1992) *rev'd on other grounds*, 123 Wn.2d 64, 866 P.2d 15 (1993).

[7] "If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the [injury][damage] to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any."

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In *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 922 P.2d 115 (1996), the court held that it is absolutely proper to give an instruction on a statutory policy statement or purpose of the law:

> Finally, Boise contends it was error for the court to advise the jury of the legislative policy statement contained in RCW 90.48.010. See instruction 13 supra. It cites *Food Servs. of Am. v. Royal Heights, Inc.*, 123 Wn.2d 779, 788, 871 P.2d 590 (1994). That case observed that while a statutory declaration of policy has no operative effect, it is useful in helping the court determine the interpretation the Legislature intended. Neither the foregoing case nor any other cited by Boise forbids the use of such statements in jury instructions. See *Dillon v. State*, 277 Md. 571, 357 A.2d 360 (1976), in which the court approved that use, reasoning that if policy statements are helpful to a court in interpreting a statute they are likewise helpful to a jury. *Dillon 's* rationale is persuasive.
>
> The instructions were proper.

Tiegs at 419-420.

It is well-recognized that in civil cases, a jury represents the conscience of the community. In fact, on September 12, 2007, the United States Postal Service issued a postage stamp celebrating jury service. In the publicity release that accompanied the issuance of this stamp, the USPS noted that "[i]n civil cases, a jury represents the conscience of the larger community …" In serving as the conscience of the larger community, it is absolutely proper that the jury be informed of the two-fold policy underlying tort law.

E. Plaintiff's proposed verdict form

The Verdict Form prepared by Plaintiff reflects the fact that Defendant McMullen is at fault for Plaintiff's injuries and losses, given that she admitted fault in her Answer to Plaintiff's Complaint.

This Verdict Form also lists Plaintiff's medical bills as $1,850,359.82 based on the agreement of the parties.

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Plaintiff's proposed verdict form sets forth each element of damage as a separate line on the verdict form. It has been a long-standing rule that a damages instruction must include all elements that are supported by the evidence. *See Lofgren v. Western Washington Corp. of Seventh Day Adventists*, 65 Wn.2d 144, 151, 396 P.2d 139 (1964). The failure to include an element of damage in a jury instruction is reversible error when there is sufficient evidence to support it. *Lofgren, supra*.

In addition, our courts have warned about the duplication of damages by jurors. *See, e.g., Brink v. Griffith*, 65 Wn.2d 253, 259, 396 P.2d 793 (1964) (plaintiff not entitled to twice recover under defamation and invasion of privacy claims for same elements of damage growing out of same occurrence). One court has warned that "instructions must be drafted to avoid duplication of damages." *Schonauer v. DCR Entertainment, Inc.*, 79 Wn. App. 808, 827 n. 28, 905 P.2d 392 (1995). There therefore is a separate line for each element of damage on the verdict form to allow separate awards for the distinct elements of damage and to avoid duplication.

DATED: September 26, 2018.

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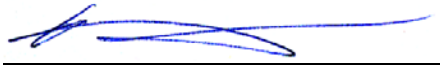

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CERTIFICATE OF SERVICE

I declare that I caused service of a copy of this document on all counsel of record on the date below as follows:

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