

NO. 41060-5

WASHINGTON STATE COURT OF APPEALS
DIVISION II

11/17/16 11:00 AM

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FLOR and ALVARO AVELLANEDA,
husband and wife, and the
marital community composed thereof

Appellants,

vs.

STATE OF WASHINGTON,

Respondent(s).

APPEAL FROM THE
SUPERIOR COURT FOR PIERCE COUNTY
THE HONORABLE RONALD E. CULPEPPER

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

In its brief, the State provides the Court with a very unfocused version of highway construction funding in Washington, which includes numerous mischaracterizations of fact and law. While conceding some essential facts, opposing counsel takes pains to avoid addressing the most glaring factual disputes in this appeal.

The salient facts are fairly simple. The State's Secretary of Transportation amended the Design Manual in 2001 by *requiring* the installation of median barriers on specific corridors of Washington highways that met specific criteria. SR 512, where the Avellaneda collision occurred, met the criteria. The Department of Transportation then enacted specific instructions for its regional offices to "*accelerate*" the installation of the barriers where they would be most effective: on the most dangerous and heavily traveled roadways. This was to be accomplished by creating a list comprised of Benefit/Cost ratios for each project, calculated by comparing the cost of the project to the savings in lives and injuries. Every single project therefore had a *positive* number greater than 1 as a Benefit/Cost ratio—it was impossible to arrive at B/C ratio of zero if actual data was used in the calculation. Of dozens of barrier

installation projects statewide, SR 512 was ranked #13 based on these instructions. Application for funding should have been made no later than WSDOT's 2003-2005 biennium budget submittal, or a subsequent supplemental appropriation, like other barrier median projects. But it was not.

Instead, WSDOT employees inexplicably reduced the Benefit/Cost ratio of *zero* to the project, which effectively took the SR 512 project off the priority list of barrier installations altogether. The State has *never* identified the employee who took this action. Nor has the State produced *any* calculation worksheets for the different B/C ratios assigned to SR 512. Nor has the State ever produced evidence of *why* this action was taken. Nor has the State been able to identify *when* the change occurred, or *when* the project was put *back* on the list with a new priority ranking of #9.

In short, the State has failed to produce *any* witness, or *any* testimony, or *any* document, or *any* legal authority, to support its 2-3 year delay for installing a median barrier on SR 512. The State, with all of its resources and experience in highway design and construction and funding matters, has merely offered vague and unfocused declarations in its defense which raise more questions than they answer. The State and its attorneys are nonetheless

confident that it will receive the benefit of the doubt in complicated highway cases, as it did in the trial court, even if it fails to provide a *bona fide* defense.

This is the kind of misconduct by the State which is uniquely suited for a jury trial. The actions of WSDOT employees were arbitrary, capricious, and wrong---because they clearly violated the Secretary's mandate and instructions, which left *no* discretion to anyone. This wrongful conduct therefore *subverted* the Secretary's intent, the Legislature's intent, the Governor's intent, and nearly cost Flor Avellaneda her life. The jury *must* be permitted to hear the plaintiffs' case, evaluate the State's witnesses, and evaluate their veracity in the absence of any *actual evidence* to support the State's claimed defenses. Based on all of these facts, it was error for the trial court to dismiss the plaintiffs' case on summary judgment and this Court must reverse.

II. FACTUAL MISSTATEMENTS BY THE STATE

The State's brief is saturated with factual misstatements and deceptive inferences, which seem to only become more obvious with each page. The errors of these factual assertions are summarized below:

1. **“The ‘priority array’ is a legislatively mandated objective program subject to discretionary immunity.”** (Page 1, par. 3, respondent’s brief).

WSDOT generally has the authority to assemble its budget package each biennium, which of course involves an exercise of discretion. WSDOT has no discretion, however, when it is carrying out a mandate issued by its Secretary of Transportation. Here, the Secretary of Transportation amended the State’s Design Manual with a mandate and specific instructions for prioritizing and “*accelerating*” a special safety program for inclusion in the Department’s budget. There were no exceptions. If a roadway met the criteria set out by the Secretary in the mandate, a median barrier *would* be installed under the mandate under and “*accelerated*” and systematic protocol.

The State has offered no authority to support its claim that its employees, especially at field-level, had *any* discretion whatsoever in the execution of the median barrier mandate. In fact, the statute under which “priority array” funding was later obtained for the barrier projects, was designed to *eliminate* the random exercise of discretion in the field and bring *objective* and *systematic* methodologies to highway funding. See RCW 47.05, et seq. This

is precisely what the mandate and instructions accomplished. The statute provides in part:

It is the intent of the legislature that investment of state transportation funds to address deficiencies on the state highway system be based on a policy of priority programming having as its basis the rational selection of projects and services according to factual need and an evaluation of life cycle costs and benefits that are systematically scheduled to carry out defined objectives within available revenue. The state must develop analytic tools to use a common methodology to measure benefits and costs for all modes.

RCW 47.05.010, Declaration of Purpose (2002) (Emphasis added).

The Secretary's 2001 mandate requiring the installation of median barriers, and the instructions for prioritizing their installation, were therefore to be carried out in compliance with the very statute that the State now relies upon in this appeal. The Secretary of Transportation *intended* WSDOT employees to follow the mandate for barrier medians and to secure funding to "*accelerate*" their installation without delay. *No where* in the Secretary's mandate requiring median barriers, nor the subsequent instructions for prioritizing their installation, is any discretionary action authorized, permitted, or even addressed.

2. **"The *undisputed* evidence before the trial court established a cable median barrier would not have**

prevented this accident.” (Page 2, par. 1, respondent’s brief). (*Emphasis added*).¹

This assertion is so clearly and provably false that it should cause the Court to question the credibility of all other claims made by the State in its brief. And it is not inadvertent error on the part of the State: the same assertion is repeated twice again later in its brief. (See discussion *infra*). Here is the truth: the plaintiffs’ very-well qualified accident reconstructionist provided a detailed report² following his investigation and site visit, which was included in the plaintiffs’ opposition to the summary judgment in the trial court. In his ten-page report,³ Dr. Denman Lee⁴ concluded that:

. . . had a cable barrier been in place on the date of the accident, both vehicles would have been contained in the median, and they would not have passed into the oncoming lane.

CP 615.

Dr. Denman’s report outlined *numerous* fatal deficiencies in the analysis, opinions and conclusions of the State’s experts in the

¹ The same assertion is framed by the State as its first “counter-statement of the issues.” See page 2, item 1 of respondent’s brief.

² Dr. Lee’s report was incorporated and supported by an accompanying declaration which was provided to the trial court with his report. See CP 604-605.

³ CP 606- 616.

⁴ Dr. Lee is an Emeritus Professor of Physics at the Montana State University and has been retained as an accident reconstructionist in “more than 1,000 accidents” and testified in approximately 600 such cases. CP 617 -618.

trial court. In other words, *the appellants did indeed dispute the State's (ludicrous) claim that a cable barrier would have not have prevented the Avellaneda collision.* About this there can be no disagreement. That the State's attorney now attempts to mislead the Court on this record, should give the Court pause to consider all other assertions made in the State's brief. Dr. Denman's testimony so clearly presented a factual dispute that the trial court summarily disposed of this issue at oral argument in approximately 60 seconds. Instead the trial court focused on the basis on which it eventually granted the State's motion: the trial court believed that the State was protected by the discretionary immunity doctrine.

It also strains the credibility of State and WSDOT to claim that the very cable barriers they have consistently promoted to the Legislature and taxpayers as *very effective*,⁵ are suddenly *ineffective* for purposes of this litigation. Indeed, the State has apparently reconsidered the wisdom of this approach in a footnote

⁵ See discussion of WSDOT's promotion of cable barriers in the plaintiffs' brief in opposition in the trial court and supporting exhibits thereto.

in its brief, conceding that cable barriers are indeed effective *without exception*.⁶

3. **“. . . the decision of when to fund a safety improvement is a discretionary decision which does not give rise to liability.”** (Page 3, counter-issue 2, respondent’s brief).

As with other claims by the State, the language used by its lawyer conspicuously omits key words necessary to comprehend the meaning of the assertion. There are at least *four* different possible interpretations of this assertion. Who is exercising the discretion here? The Legislature or WSDOT? And when is the discretion exercised? Before or after Legislative approval of the funding appropriation? The facts of our case force just one of these four different alternative meanings, but the State’s counsel is reluctant to tell us which one it is.

The State is actually arguing that WSDOT employees have *absolute* discretion to *disregard* the Secretary’s mandate and instructions to obtain funding for median barriers. And the discretion is so *absolute*, that the State need not tell us who exercised it, or why the discretion was exercised, or when it was

⁶ See footnote 7 at page 22 of the respondent’s brief: “Cable barrier is a very effective barrier for containing and redirecting an errant passenger vehicle while imposing the lowest deceleration forces on the occupants of the vehicle. . .”, etc.

exercised. Nor must they produce *any other* evidence about the discretion which was purportedly exercised. *This is what this appeal is really about.* Can one or more unidentified WSDOT employees, acting without any legal authorization whatsoever, delay an important construction project for two or more years with internal gerrymandering, which subverts a mandate issued by the Secretary of Transportation? That is what happened here. And the State has been unable to produce any evidentiary or legal justification for what WSDOT did---even though the State was successful in obfuscating these key issues in the trial court. Clear legal error occurred in the trial court and this Court should reverse the granting of the State's motion for summary judgment.

Throughout its brief, the State hides behind the Legislature as though it was a wall. However, it was not the Legislature that subverted the Secretary's 2001 mandate for median barrier installations. Further, there is *no* evidence that the Legislature *ever* rejected a median barrier project for funding after the Secretary's 2001 mandate. It appears from the language of the actual appropriations from 2002-2007 that WSDOT received *all* of the funding it requested to install median barriers. We can therefore conclude that it is very likely that WSDOT would have received

funding for the SR 512 project from the Legislature, if it had simply *requested* such funding before the 2005-2007 Biennium. It did not.

All of the State's arguments about immunity for Legislative enactments are therefore false and misleading. We are *not* talking about Legislative immunity in this appeal: the issue is whether field-level WSDOT employees may assert the doctrine of discretionary immunity for burying an important highway safety project, for whatever reason, in contravention of a direct mandate from the State Secretary of Transportation to proceed with haste. Had the Secretary wished to provide discretionary or other authority for field-level employees in the installation of median barriers, it would have been provided in the language of the mandate, or the State's Design Manual, or perhaps even in a declaration from the Secretary himself *in this proceeding*. But none of these things occurred. The only persons who defend the actions of WSDOT employees in this case, are WSDOT employees themselves----and the State's attorney.

Permitting WSDOT employees to fast-track their favorite projects by leap-frogging over others on a priority list is wrong. It is doubly-wrong when projects with a higher priority ranking are indefinitely shelved. This is precisely the kind of bad behavior that

RCW 47.05 sought to end. In 1990, the Legislature directed WSDOT to perform a Programming and Prioritization Study (PAPS)⁷ to evaluate the agency's programming process, from both a technical and a policy perspective. This resulted in the State's passage of RCW 47.05. This legislation replaced the earlier budgeting process with one that required *more* justification, *more* rational selection of projects, and *more* accountability for decisions on project ranking and selection.

By 2000, the State was still plagued with WSDOT project delays. The Governor therefore appointed a Blue Ribbon Commission to evaluate whether transportation benchmarks would be effective for evaluating and improving transportation system performance.⁸ Within 18 months the committee identified a \$50

⁷ See generally *Budget Methodologies Study*, prepared for the State of Washington Joint Transportation Committee by Cambridge Systematics, Inc. (2006), which contains a summary of these events in the Executive Summary at p. ES-1. The document is posted on the State's website at http://www.leg.wa.gov/JTC/Documents/Budget_Methodologies_Study_FINAL_REPORT_Exec_Summary_0706.pdf

⁸ See *WSDOT/WSTC Summary of Transportation Benchmarks Implementation*, August 2003, on the implementation of transportation benchmarks codified in RCW 47.01.012. The summary was published in *The Gray Notebook*, August 2003, published by WSDOT and the Washington State Transportation Commission. The Summary is also available at the State's website: http://www.wsdot.wa.gov/NR/rdonlyres/957F4C88-FA0F-4FAA-A51D-E8D941D5147D/0/BenchmarksEx_summary.pdf

billion project backlog caused by unnecessary delays, mostly occurring at the field-level.

These executive and legislative changes have reduced the backlog of project delays and received recognition from the Federal Highway Administration.⁹ Part of this recognition flows from the elimination of unbridled discretion which WSDOT employees practiced prior to 2002, which often resulted unnecessary delay.

4. **“ . . . any delay in installing the cable barrier was a product of factors inherent in the design/construction process and over which WSDOT has no control.”** (Page 3, counter-issue 4, respondent’s brief).

This “counter-issue” distorts the truth by ignoring the appellants’ central arguments concerning the 2-3 year delay---for which no evidence, explanation, or rationale has ever been provided by the State. The State simply ignores the issue because of the multiple factual disputes it spawns.

5. **“There was no two-year delay as suggested by appellants.”** (Page 14, Section E, respondent’s brief).

There was at least a two year delay in the installation of the SR 512 median barrier. The SR 512 project was not funded in the

⁹ See generally, *Comprehensive Transportation Asset Management – The Washington State Experience*, by the U.S. Department of Transportation Federal Highway Administration (2007), posted online at <http://www.fhwa.dot.gov/infrastructure/asstmgmt/cswa07.pdf>.

2003-2005 Biennium because *WSDOT did not ask that it be funded*. The State claims this was because the SR 512 project was originally ranked at 13---implying that the first 12 were funded and everything lower on the list was not funded. This is not what happened. WSDOT requested funding in the 2003-2005 Biennium for many median barrier installation projects lower on the installation list than SR 512. *Funding for SR 512 was not requested because WSDOT employees gave the project a Benefit/Cost ratio of zero*, which effectively took it out of WSDOT's budget package submitted to the Legislature during the 2003-2005 Biennium.

This is another example of the State's lack of candor regarding the factual disputes surrounding this issue. The State insists that WSDOT is blameless because the SR 512 project was not funded in time to complete the project before the Avellaneda collision on July 23, 2006. However, the State refuses to provide any explanation or evidence that might explain *when* or *how* the Benefit/Cost ratio for SR 512 was originally developed, and *when* or *how* the ratio was then changed to zero. How can a project with a high priority ranking be given a zero rating without explanation? Who made the decision? What caused WSDOT field-level

employees to make this decision? How many other projects were zeroed out and what were the reasons for taking them off the list?

The State's view of discretionary immunity is even more sweeping than the doctrine of sovereign immunity which it replaced in 1961 in Washington. In a throwback to Blackstone's England, the State apparently believes that "the King can do no wrong." Or in this case, "WSDOT can do no wrong." It is *totally and absolutely* immune from any attack of any kind relating to SR 512, despite the plethora of factual disputes and unanswered questions that pervade this appeal.

Simply by internal tampering of a Benefit/Cost ratio, a WSDOT employee can single-handedly delay an important safety project for years---without any accountability. Put differently, *any* WSDOT employee, at *any* level, for *any* reason, can subvert the intent of the Legislature and the mandate of the Secretary of Transportation, without *any* accountability. In fact, the State need not even worry about providing an explanation of how or why this occurred. This is the State's view of "discretionary immunity."

6. **"Put simply, the [SR 512] project could not have been included in the 2003-2005 budget based on a ranking that did not come into existence until after the budget was approved. Thus, there is no factual basis, nor truth, to appellants' assertion that there**

was an inexplicable two-year disappearance of the project or delay in funding.” (Pages 15-16, respondent’s brief).

This is the *first time* the State has claimed that the ranking of SR 512 did not come into existence until after the 2003-2005 Biennium budget was approved. Further, the claim is at best a factual dispute and at worst, false. The State’s attorney cites one and *only one* source in the record for a date when Benefit/Cost ratios were made or changed for the SR 512 project: *CP 1018*.¹⁰ However, CP 1018 is a one-paragraph declaration by opposing counsel himself, which makes no reference to a date on which the B/C ratios for SR 512 were made or changed.

In fact, the State had at least *three*, and more likely *four*, opportunities to obtain funding for the SR 512 project after the 2001 mandate was issued by the Secretary of Transportation. First, a 2002 Supplemental transportation appropriation¹¹ was passed by the Legislature and signed into law by the Governor on March 27, 2002. Second, the 2003-2005 Biennium *and* 2003 Supplemental transportation appropriation¹² was passed by the Legislature and

¹⁰ See page 15, footnote 5 of respondent’s brief.

¹¹ Engrossed Substitute Senate Bill 6347

¹² Engrossed Substitute House Bill 1163

signed into law by the Governor on May 19, 2003. Third, the 2004 Supplemental transportation appropriation¹³ was passed by the Legislature and signed into law by the Governor on March 31, 2004. None of these three transportation appropriation bills contained a WSDOT request for funding the median barrier installation project on SR 512.

It was *also* possible to obtain funding for the SR 521 yet a *fourth* time before the Avellaneda collision in July of 2006. The 2005-07 Biennium and 2005 Supplemental transportation appropriation¹⁴ was approved by the Legislature and signed into law by the Governor on May 9, 2005. Installation of the SR 512 barriers could have still occurred if the State had promptly issued work orders after the appropriation. This would have been only reasonable since SR 512 had already been delayed so long. SR 512 should therefore have gone to the top of the list of those barrier projects for which funding was requested in the 2005-2007 Biennium.

¹³ Engrossed Substitute House Bill 2474

¹⁴ Engrossed Substitute Senate Bill 6091

The 2005 – 2007 Biennium appropriation very likely would have permitted construction of the SR 512 project before Flor Avellaneda's collision on July 23, 2006, fifteen months later¹⁵ ---- if the State had done more to control numerous and unreasonable delays after the SR 512 project finally got underway.¹⁶

WSDOT's delay in asking the Legislature for funding for the SR 512 project until the 2005-2007 Biennium, occurred *four* years after the Secretary required median barriers to be installed and *three* years after WSDOT established SR 512 as #13 on the list. Even then, the SR 512 barrier installation was one of the *last* barrier projects installed in the Biennium and not completed until March 30, 2007----nearly *six years* after the Secretary's mandate and *five years* after SR 512 was assigned a ranking of #13. Instead of issuing work orders for SR 512 as soon as the 2005 – 2007 Biennium transportation budget was approved, WSDOT waited seven months. Then a comedy of errors began as one delay after the next consumed 16 months to complete a project that was

¹⁵ Fourteen months elapsed from the date WSDOT issued work orders were issued in December of 2005 to begin the design process on SR 512, until it was completed on March 30, 2007. However, the project was scheduled to be completed months earlier.

¹⁶ Four separate and substantial delays are cataloged in the respondent's brief at pps. 12 – 14.

originally scheduled to be completed in less than a year, from start to finish.

Meanwhile, a dozen or more other median barrier projects lower on the installation list went *ahead* of the SR 512 project. This is apparent from the WSDOT's *Gray Notebook*, a quarterly report to the Legislature and the public posted online for review by all. *Dozens* of median barrier projects ranked lower than 13 on the original list went ahead of SR 512, and we still do not know why.

The entire purpose of the Secretary's mandate, and the accompanying instructions for prioritizing the projects that qualified for installation of a median barrier, was summarized by Pat Morin in his declaration, provided by the State in support of its motion for summary judgment:

This project was part of a system wide (sic) safety initiative proposed by WSDOT to the Governor, and from the Governor to the Legislature. The purpose of the cable median barrier safety initiative was to reduce the frequency and severity of cross-median collisions and accelerate the installation of cable median barriers statewide. This was ultimately directed by the Governor and the Legislature through its appropriation of funds for this particular safety improvement project.

CP 388, par. 26. (Emphasis added).

The intent of the Secretary of Transportation, and the intent of the Governor, and the intent of the Legislature, was to “*accelerate*” the installation of the new median barriers for the specific purpose of “*reducing the frequency and severity of cross-median barriers statewide*” as soon as possible. Two branches of the State’s government were foiled in accomplishing this objective by perhaps a single, rogue, WSDOT employee. This Court is the appellants’ last avenue for relief in their attempt to see that the intent of the Executive and Legislative branches is fulfilled in this lawsuit. If the State erred, then the intent of the Governor and the Legislature was to make WSDOT accountable. That is all the appellants seek herein – accountability: their day in court.

7. **SR 512 “was originally constructed in 1968 and there is no duty to upgrade highways to present standards.”** (Page 1, par. 2, respondent’s brief).¹⁷

This claim attempts to mischaracterize the appellants’ claims in this suit. The appellants did *not* bring suit on a claim that the State failed to maintain or update SR 512’s safety features continuously after it was first constructed in 1968. The appellants brought their suit on a claim that the State negligently *delayed* the

¹⁷ This argument is also framed as the issue of the State’s brief at page 2;

installation of a median barrier on SR 512, in light of the Secretary's mandate and instructions to WSDOT employees.

There is no provision in the mandate issued by the Secretary of Transportation in 2001, to delay installations of barriers until other, routine maintenance is performed on a roadway. If this were so, Mr. Morin would not have characterized the installation as an "accelerated" installation in his declaration of May 19, 2010. CP 381 – 388. The express intent of the "accelerated" installation of the barriers was to save lives and injuries by installing barriers on the most dangerous roadways first. It is WSDOT's failure to adhere to its own mandate and policies that proximately caused the near-death of Flor Avellaneda.

8. "Appellants' theory posits liability on factors over which WSDOT has no control." (Page 2, par. 2, respondent's brief).

Everything alleged in this lawsuit respecting the negligent delay in the installation of a median barrier on SR 512 was exclusively within the control of WSDOT. The agency was given a mandate to follow and it failed to do so. Even though SR 512 qualified for the list of "accelerated" installations, WSDOT waited at least two, and likely three, years before it ever requested funding to even begin the project. WSDOT cannot blame the Legislature, the

Governor, or even the appellants for its own, unreasonable delay. The appellants seek only to hold WSDOT to the standards which the agency itself enacted and mandated for itself. Had WSDOT employees followed their employer's own mandate and instructions, Flor Avellaneda would not have been injured.

9. **“Appellant’s theory imposes unlimited liability on WSDOT with no attendant ability on WSDOT’s part to control or limit that liability.”** (Page 2, par. 2, respondent’s brief).

This is another example of a misstatement of material facts. The plaintiffs seek damages only for the unlawful and actionable negligence of WSDOT for failing to comply with its own clear mandate. The State has never offered any rational explanation for its negligence, much less identified the employee(s) who committed the negligence. This is tantamount to a cover-up.

10. **“It is undisputed that the SR 512 cable barrier project did not rank high enough on the priority array to be submitted to the Legislature for funding prior to the 2005-2007 biennial budget.”** (P. 28, par. 3)

This is another example of a gross distortion of fact. Every single project on the original list for the installation of a median barrier was to receive the benefit of a calculation of a Benefit/Cost ratio. Since every single project on the list had an installation cost,

and since every single project on the list had a crash history, it was impossible to have a B/C ratio of zero. The only way a project could have a B/C ratio of zero, is if zero was randomly assigned as the ratio.

This conclusion is buttressed by the ratios assigned to the SR 512 project before and after the zero ratio. There were *no* significant changes in the crash history of SR 512 and no significant changes in the project cost between the #13 and # 9 rankings. How, then, could SR 512 have possibly received a zero B/C ratio for a period of at least two years? Appellants respectfully assert that the zero ratio was improperly assigned for one and only one reason: so WSDOT could manipulate the Secretary's mandate and install barriers on SR 512 on WSDOT's schedule, and not the Secretary's schedule.

11. **“Appellants’ question, about who actually made the calculations forming the rankings is irrelevant.”** (p. 41, par. 2).

The State admits that the holding of *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965) apply to the facts of this case. The holding in *Evangelical* cannot be applied unless one knows who performed the allegedly discretionary act and the purpose for which it was performed. See

Evangelical at p. 255, in which the Court recites the four essential elements that must be proven before a defendant can avail itself of the discretionary immunity doctrine. It is therefore impossible to apply the *Evangelical* test to the conduct at issue here, in the absence of these material facts. Since the State has failed to produce such material facts, or eliminate the disputes around them, its motion for summary judgment in the trial court should have been denied.

III. CONCLUSION

The Secretary of Transportation's 2001 mandate, followed by specific installation instructions the following year, *required* median barriers to be installed on specific Washington roadways on an "accelerated" basis to save lives. Median barriers then assumed the same status as stop signs and other required traffic signals and devices.

However, WSDOT field-level employees manipulated a key calculation for SR 512 that determined its placement on a priority list for barrier installation. With the stroke of a pen, SR 512 was "disqualified" for funding the installation of a median barrier. At the same time, the intent of the Transportation Secretary, the Governor, and the Legislature was subverted. The appellants

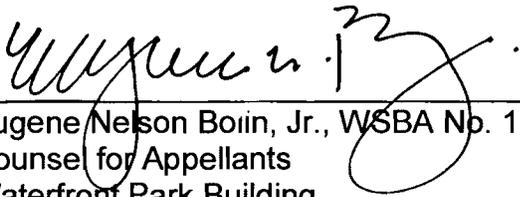
asserted that WSDOT employees' manipulation of the calculation was part of an effort to deliberately delay a barrier installation of SR 512.

Five years after the Secretary first ordered the installation of median barriers, Flor Avellaneda's vehicle was struck by a vehicle which crossed over the grassy SR 512 median. No median barrier had been installed. The force of the resulting collision nearly killed Flor and she remains disabled and unable to work five years later. Had WSDOT employees complied with their Secretary's mandate and instruction, the Avellaneda collision would have never occurred.

The State has *never* provided any evidence to explain why WSDOT employees deliberately disqualified SR 512 from receiving funding. The State has also failed to provide any factual or legal support for its claim that WSDOT employees may indefinitely delay the installation of a *required* safety feature on a roadway, much less the required median barrier on SR 512. Can the State indefinitely delay the installation of required stop signs at a particular location without liability? No. WSDOT's negligent failure to timely install median barriers on SR 512, proximately caused one motorist, Flor Avellaneda, to become severely disabled for life.

The trial court committed error by granting the States motion for summary judgment despite numerous factual disputes. This Court should reverse and remand the case for trial, instead of rewarding the State and WSDOT for the misconduct of their employees.

RESPECTFULLY SUBMITTED this 4th day of May, 2011, at
Edmonds, Washington.

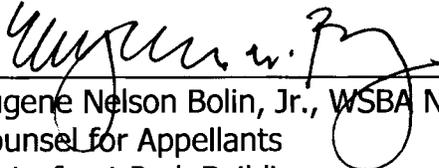


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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I electronically transmitted and mailed *via* United States Postal Service a true and accurate copy of Appellants' Reply Brief to counsel for respondents.

DATED this 4th day of May, 2011, at Edmonds, Washington.



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