No. 96538-2

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; DANIEL A. SLIGH and SALLETTEE R. SLIGH, individually and the marital community composed thereof; BRYCE KENNING, a single person,

Respondents,

v.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof; SAXON ENERGY SERVICES, INC.; TAMMY J. DETRAY and GREGORY S. DETRAY, individually and the marital community composed thereof; G&T CRAWLERS SERVICE, a Washington business entity; MOTORWAYS TRANSPORT, LTD a Canadian corporation; AMANDEEP SIDHU and JANE DOE SIDHU, individually and the marital community composed thereof,

Appellants.

Appeal from the Court of Appeals, Division I
of the State of Washington
Cause No. 76310-5-I

PETITIONER MOTORWAYS TRANSPORT, LTD.'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

This Petition for Review is submitted on behalf of Petitioner Motorways Transport, Ltd. (hereinafter "Motorways").

B. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision is published as *Dep't of Transp. V. Mullen Trucking 2005, Ltd*., No. 76310-5-I, 2018 Wash. App. LEXIS 2369 (Div. 1, October 22, 2018). The Court of Appeals affirmed the trial court's summary judgment dismissal of Petitioners Mullen and Motorways' affirmative defenses of contributory negligence against the State. A true and correct copy of the Court of Appeals' decision is provided as Appendix A and is referred to herein as the "Opinion."

C. ISSUES PRESENTED FOR REVIEW

1. Should review be granted pursuant to RAP 13.4(b)(2) where the Court of Appeals' decision is contrary to its established legal precedent in *Ottis Holwegner Trucking v. Moser* and other Court of Appeals' cases? Answer: Yes.

2. Should review be granted pursuant to RAP 13.4(b)(1) where the Court's decision is contrary to legal precedent of the Washington Supreme Court in *Washburn v. Beatt Equipment Co.* and other Supreme Court cases? Answer: Yes.

3. Should review be granted pursuant to RAP 13.4(b)(4) where the nature and scope of private motorists' liability for damages to public highways under RCW 46.44.020 and RCW 46.44.110 presents issues of substantial public interest, including issues of driver safety? Answer: Yes.

4. Should review be granted pursuant to RAP 13.4(b)(4) where the Court's determination that RCW 46.44.020 also applies to motorists

who *do not* strike overhead structures constitutes an erroneous expansion of the scope of the statute and creates broad uncertainty as to its application? Answer: Yes.

5. Should review be granted based on the fact the Court of Appeals addressed claims under RCW 46.44.110 even though RCW 46.44.110 claims were not before the Court and were not raised at the trial court level? Answer: Yes.

D. STATEMENT OF THE CASE

This matter arises out of the Skagit River Bridge collapse that occurred on May 23, 2013, when Mullen's oversize load impacted the overhead trusses of the Bridge. The vertical clearance on the Bridge was approximately 15 feet 6 inches. Mullen's load exceeded that height. The matter before the Court of Appeals was whether the State's fault could be allocated when the State had immunity from liability under RCW 46.44.020. The statute provides in pertinent part:

> It is unlawful for any vehicle unladen or with load to exceed a height of fourteen feet above the level surface upon which the vehicle stands…No liability may attach to the state… by reason of any damage or injury to persons or property by reason of the existence of any structure over or across any public highway where the vertical clearance above the roadway is fourteen feet or more…

RCW 46.44.020 (a copy of RCW 46.44.020 is provided at Appendix B)

At the trial court, both Motorways and Mullen argued that RCW 46.44.020 does not preclude the State from being subject to defensive counterclaims and affirmative defenses such as contributory negligence.

Although RCW 46.44.020 grants the State immunity from liability, it was asserted that the statute does not prevent the State's fault from being allocated for purposes of determining the comparative fault of the parties. It was also argued that that the bridge height was not the sole cause of the accident and the State did not have immunity from those claims. CP 1073-1079. For example, Motorways argued that the State's failure to provide signage and warnings about the significant narrowing of the lanes on the Bridge was a contributing factor to the accident, but was not subject to RCW 46.44.020. CP 01077-8. The State has a common law duty to maintain roadways in a reasonably safe condition.

On October 6, 2016, the trial court granted the State's Motion for Partial Summary Judgment, holding that no fault or liability could be attributed to the State for damages resulting from the Bridge strike. CP 1220-1224. In its subsequent Order on Defendant's Motion for Reconsideration, the trial court held:

> The Court interprets [RCW 46.44.020] to ensure that the State shall not be held liable for any of the proven damages in the event of a strike to a bridge over fourteen feet high regardless of whether its own fault contributed to the strike.

CP 1318.

The trial court concluded that RCW 46.44.020 precluded any finding of comparative fault that would shift financial responsibility for

the Bridge damage to the State. The matter was appealed to Division I of the Court of Appeals, which granted review on June 23, 2017.

In its Brief of Respondent, the State claimed, for the first time, that Motorways and Mullen are liable under RCW 46.44.110. The State never asserted a claim based on RCW 46.44.110 against the petitioners at the trial court level. RCW 46.44.110 creates a cause of action for the State to recover damages against drivers that cause damage to State property. "Any person operating any vehicle is liable for any damage to any public highway, bridge, elevated structure, or other state property sustained as the result of any negligent operation thereof." RCW 46.44.110 (a copy of RCW 46.44.110 is provided at Appendix C).

Oral argument was heard on September 27, 2018. In its October 22, 2018, published Opinion, the Court of Appeals affirmed the trial court's decision, holding that the State cannot be at fault for the collision with the Skagit River Bridge. The Court reasoned that under both RCW 46.44.110 and RCW 46.44.020, all financial responsibility for the damage to the Bridge must be borne by negligent motorists. In turn, the State was permitted to recoup the entire cost of the damages to the Bridge resulting from the accident.

"[W]e conclude that [RCW 46.44.020 and RCW 46.44.110] clearly express a legislative determination that the State is to bear no financial

responsibility for damages resulting from the collision of the Mullen truck with the Skagit River Bridge. The trial court did not err in interpreting RCW 46.44.020 to preclude any finding of comparative fault."

The Court of Appeals acknowledged (per cases like *Wuthrich v. King Cty.*, 185 Wn.2d 19, 25 (2016)) that the State has a common law duty to maintain roadways in a reasonably safe condition, and that when a motorist sues the State for a breach of this common law duty, proportionate liability (i.e. allocation of fault under RCW 4.22.070) generally applies. However, the Court held that RCW 46.44.110 and RCW 46.44.020 (hereinafter referred to collectively as the "Motorist Liability Statutes") conflict with RCW 4.22.070 and control in the present case because they are the more specific statutes. "[B]ecause the motorist liability statutes specifically relieve the State of liability under the factual circumstances of this case, and assign all liability to the negligent motorists, these statutes, and not RCW 4.22.070, govern." Opinion at 11.

The Court reasoned that under RCW 46.44.110, a negligent motorist on a public roadway is liable for "all damages," whereas a negligent motorist is not liable for "all damages" if fault can be apportioned to the State under RCW 4.22.070. In turn, the Court held that the statutes conflict and RCW 46.44.110 governs.

The Court also reasoned that RCW 46.44.020 displaces RCW 4.22.070 in the present case. Applying the Supreme Court's reasoning in *Smelser v. Paul*, 188 Wn.2d 648, 653-54 (2017), the Court held that under RCW 46.44.020, the State does not owe a tort duty to motorists in collisions involving overhead structures with over 14 feet of clearance. Without a duty, the Court reasoned, the State cannot be liable, at fault, or in any way responsible for the resulting damage. In turn, RCW 4.22.070 allocation of fault did not apply.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Motorways' Petition for Review should be accepted because the Court of Appeals' Opinion is in conflict with a published decision of the Court of Appeals (RAP 13.4(b)(2)), a decision the Supreme Court (RAP 13.4(b)(1)), and because the case presents issues of substantial public interest (RAP 13.4(b)(4)).

The protection afforded the State under the Motorist Liability Statutes is based on immunity from liability, not a lack of duty. Furthermore, comparative fault applies to the State's recovery because the Motorist Liability Statutes do not conflict with RCW 4.22.070. Reading the statutes together, the State's *fault* as an immune party is still allocated but damages for that fault are not recoverable. In turn, the State's total recovery must be reduced by its proportionate wrongdoing.

1. The Court of Appeals' Decision is Contrary to Established Legal Precedent of the Washington State Court of Appeals.

The Court of Appeals' decision in the present case is contrary to its own established legal precedent in *Ottis Holwegner Trucking v. Moser*, 72 Wn. App. 114 (1993).

In the present case, the Court of Appeals concluded that the State has no duty under RCW 46.44.020. Without a duty, the Court reasoned, the State cannot be at fault or otherwise liable for the resulting damage. Therefore, comparative fault under RCW 4.22.070 does not apply.

But the Court of Appeals previously established that RCW 46.44.020 addresses immunity from liability, not a lack of duty.

> While we have some doubts that an additional vertical clearance sign on the face of the tunnel would have had an effect on Waymire's conduct, in light of our conclusion that the State has *immunity for its negligence, if any, pursuant to RCW 46.44.020*, we need not address that issue.

Ottis Holwegner Trucking v. Moser, 72 Wn. App. 114, 123 (1993) (*emphasis added*).

The Court in *Ottis* held that the State has a duty from which it is immune from liability under RCW 46.44.020. Yet in the present case, the Court holds that the State is not immune from liability, but rather lacks a duty to motorists under RCW 46.44.020. This directly contradicts the Court's prior interpretation of the statute in *Ottis*.

The Court instead bases its decision on the reasoning in *Smelser v. Paul*, 188 Wn.2d 648 (2017), where it was held that fault cannot be allocated under parental immunity doctrine. *Smelser* is distinguishable and the Court's reliance on that case is in error. In *Smelser*, the Court held that fault could not be apportioned to the child's father because parental immunity precluded recovery against a parent for negligent supervision. *Smelser* at 654-9. But the *Smelser* Court clarified that in Washington "parental immunity" is not a form of immunity at all. Rather, courts simply recognize that negligent supervision is not a valid cause of action against a parent.

> While cases have described the principle as a form of 'parental immunity,' what the cases establish is that no tort liability or tort duty is actionable against a parent for negligent supervision. Simply stated, it is not a tort to be a bad, or even neglectful, parent.

Smelser at 653-54.

The *Smelser* Court held that "parental immunity" is more accurately characterized as a doctrine that certain conduct is simply not tortious. *Id*. at 659.[1] This distinction is crucial for purposes of the present case.

[1] The *Smelser* Court also addressed the meaning of immunity from liability, noting that it does not equate to a lack of duty. In fact, the Court held that immunity is only determined *after* a duty has been established. "Under chapter 4.22 RCW, a determination of fault must precede any analysis of immunity." *Smelser*, 188 Wn.2d at 659.

Unlike the parental immunity statute, there is no case law or other authority that even remotely suggests that the State's protection under RCW 46.44.020 is based on a lack of duty, rather than immunity from liability. Furthermore, the only decision that has addressed this issue specifically recognized that the State's protection under RCW 46.44.020 is based on immunity from liability. See *Ottis*, supra.

In turn, the Court of Appeals' decision in the present case is contrary to its own established precedent. The State is capable of fault as an immune party under RCW 46.44.020 and its fault is allocated. Review should be granted under RAP 13.4(b)(2).

2. The Court of Appeals' Decision is Contrary to Established Legal Precedent of the Washington State Supreme Court

Because the present case addresses immunity, not a lack of tort duty, the Court of Appeals' decision also runs contrary to the Supreme Court's (and Court of Appeals') rulings regarding immune entities' allocation of fault.

a. RCW 46.44.020 Does Not Displace RCW 4.22.070 Proportionate Liability

The Court of Appeals holds that RCW 46.44.020 conflicts with RCW 4.22.070 and thus RCW 46.44.020 applies because it is the more specific statute. This reasoning is in error. Before applying the general-

specific rule of statutory construction, courts must identify a conflict between the relevant statutes that cannot be resolved or harmonized by reading the plain statutory language in context. *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 832-33 (2017). Only when a conflict is presented, does the more specific statute prevail. *Id*. Even if two statutes seem to conflict, "***it is the duty of the court to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used***." *State ex rel. Royal v. Bd. of Yakima County Comm'rs*, 123 Wn.2d 451, 459-60 (1994) (emphasis added).

There is no conflict between RCW 46.44.020 and RCW 4.22.070 and the general specific rule does not apply. RCW 4.22.070 provides that *fault* will be allocated to and between every entity and party that caused the damage, including immune parties.[2] The Washington Supreme Court has clarified that immune parties' fault is allocated but is not recoverable as damages (i.e. the immune party is not *liable*). *Washburn v. Beatt Equipment Co*., 120 Wn.2d 246, 294 (1992).[3]

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[2] "Immunity" is not specifically defined in the Tort Reform Act. For purposes of statutory construction, words are given their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *In re Estate of Blessing*, 174 Wn.2d 228, 231 (2012). When a statutory term is undefined, the court may look to a dictionary for its ordinary meaning. *Id.* "Immunity" is defined in relevant part as "[a]ny exemption from a duty, ***liability***, or service of process…" Black's Law Dictionary (10th ed. 2014) (emphasis added).

[3] "[RCW 4.22.070] evidences legislative intent that fault be apportioned and that generally an entity be required to pay that entity's proportionate share of damages only.

RCW 46.44.020 provides that "no *liability* may attach to the state…by reason of any damage or injury to persons or property by reason of the existence of any structure over or across any public highway…" RCW 46.44.020 (emphasis added). RCW 46.44.020 does not address fault.

The two statutes are easily harmonized. Both statutes preclude *liability* from attaching to immune parties. Under RCW 46.44.020, no liability may attach to the State as an immune party. Under RCW 4.22.070, fault can be allocated to immune parties, but liability cannot. Therefore, the State's fault can be allocated but damages for that fault are not recoverable

By holding that the State does not have a duty under RCW 46.44.020, the Court of Appeals ignores its own precedent in *Ottis*, supra, where it held that the State is an immune party (and thereby capable of fault) under the statute. In turn, the Court of Appeal's decision in the present case is also contrary to the Supreme Court's decision in *Washburn,* which makes clear that immune parties are capable of fault and that this fault is allocated.[4]

The statute also evidences legislative intent that certain entities' share of fault not be at all recoverable by a plaintiff; for example, the proportionate shares of immune parties." *Washburn*, 120 Wn.2d at 294.

[4] The Court of Appeals' decision on the allocation of fault issue regarding immune parties is also contrary to its own established precedent on this issue. In *Humes v. Fritz Companies, Inc*,

The Court of Appeals' decision is contrary to established legal precedent of the Washington State Supreme Court. Review should be granted under RAP 13.4(b)(1).

b. RCW 46.44.110 Does Not Displace RCW 4.22.070 Proportionate Liability

The Court of Appeals also erroneously holds that RCW 46.44.110 displaces RCW 4.22.070 in the present case because RCW 46.44.110 says that a person who operates a vehicle negligently on a public roadway is liable for "all damages." Opinion at 10-11.

This is an incomplete and inaccurate reading of the statute. The statute says that a motorist is liable for all damages *resulting from the motorist's negligence and/or illegal acts*. This does not include any portion of the damages that are attributable to the State's negligence. A motorist is liable for damages resulting from his/her own negligence, not for damages resulting from the negligence of others.

RCW 46.44.110 does not entitle the State to the full amount of damages, only damages attributable to the fault of the driver. Hence, the State's comparative fault is determined. There is no conflict between RCW 46.44.110 and RCW 4.22.070 and proportionate liability applies.

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125 Wn.App. 477 (2005) the Court of Appeals held that sovereign immunity did not bar allocation of a Tribe's fault under RCW 4.22.070.

The State's fault can be allocated but damages for that fault are not recoverable.

The Court of Appeals' decision in the present case runs contrary to the Supreme Court's decisions regarding allocation of fault. Motorways Petition for Review should be granted pursuant to RAP 13.4(b)(1).

3. The Court of Appeals' Decision Raises Issues of Substantial Public Interest

An issue of substantial public interest is one that has the potential to affect a number of proceedings in the lower courts and where review will avoid unnecessary litigation and confusion on a common issue. See, e.g., *State v. Watson*, 155 Wn.2d 574, 577 (2005) (court decision regarding impropriety of ex parte communication concerning drug sentencing was of substantial public interest because it had potential to affect significant number of other drug offender sentencing proceedings).

The nature and scope of private motorists' liability for damage to public highways under RCW 46.44.110 and RCW 46.44.020 is an issue of substantial public interest. Motor vehicle accidents involving damage to public highways, bridges, elevated structures and other related property occur every day in Washington. The scope of private motorists' liability for such property damage under the Motorist Liability Statutes is an issue that will affect a significant number of proceedings, and one that courts

will encounter on a frequent basis. The Court should clarify whether the State's fault can be allocated in these situations. Motorways' Petition for Review should be granted on this basis alone.

a. Whether the State has a Tort Duty Under the Motorist Liability Statutes Raises Issues of Driver Safety and State Accountability that are of Substantial Public Interest

During oral argument, the Court questioned what purpose it would serve to allocate the State's fault under the Motorist Liability Statutes. Recognizing the State's fault under the Statutes promotes accountability for road maintenance and driver safety. The State has a common law duty to provide and maintain roadways in a reasonably safe condition.[5] This includes duties to maintain proper signage on public highways.

But the Court of Appeals' Opinion would protect the State from *any* adverse consequences in situations where there is damage to an overhanging structure with 14 or more feet of vertical clearance. This holds true even if the State fails to meet its duties in other respects completely unrelated to bridge height, such as failing to provide signage

[5] See, e.g., *Gunshows v. Vancouver Tours*, 77 Wn. App. 430 (1995) (State has a duty to maintain a highway in a reasonably safe condition for people exercising ordinary care for their own safety; foreseeability of negligence by a user of a road does not affect the scope of the State's duty); *Cramer v. Dep't of Highways*, 73 Wn. App. 516 (1994) (motorcycle operator who fell on a curve on a state highway claimed that the State was negligent in maintaining the highway and in not posting an advisory speed sign); *Grimsrud v. State*, 63 Wn. App. 546 (1991) (where motorcycle operator sued State for damages sustained from a motorcycle accident on a roadway, issue of whether signs provided an adequate warning of the hazardous condition was a question of fact for the jury).

warning of lane narrowing on the bridge. The State should not be permitted to avoid its duties to maintain safe roadways simply because those failures happen to occur in a situation involving a collision with an overhead structure with 14 or more feet of vertical clearance.

Recognizing the State's capacity for *fault* under the Motorist Liability Statutes incentivizes the State to ensure roadways are maintained in a reasonably safe condition while still protecting it from *liability* in situations where the Statutes apply.

Given the broad implications regarding the State's duty to maintain safe roadways, this matter is of substantial public interest and review should be granted under RAP 13.4(b)(4).

b. The Court's Interpretation of "Liability" Raises Issues of Substantial Public Interest for Which Review Should be Granted

The Court of Appeals' Opinion blurs the distinction between fault and liability. The Court reasons that allocating the State's fault would have the practical effect of "shifting a degree of liability to the State…" Opinion at 11. The Court reasons that because the cost of replacing the Skagit River Bridge has already been paid, the State's inability to obtain the entire amount would effectively render it "liable" in contravention of RCW 46.44.020.

The Court's reasoning presents a significant departure from the established Washington jurisprudence on this issue and has the potential to cause confusion in a much broader range of legal proceedings addressing the distinction between fault and liability. Washington courts have long recognized that fault and liability are separate and distinct legal concepts. See, e.g., *Washburn*, supra. Since the passage of the Tort Reform Act, Courts have also recognized that a plaintiff's recovery is generally reduced by plaintiff's proportion of fault. The Court of Appeals' Opinion undermines these tenets by holding that a plaintiff's failure to obtain a specific portion of damages is itself a form of liability. This confuses the meaning of liability and fault and is at odds with established law.

Review of the Court of Appeals' interpretation of liability will help avoid confusion over this issue in the future. It is a matter of substantial public interest for which review should be granted under RAP 13.4(b)(4).

4. The Court of Appeal's Decision that RCW 46.44.020 Applies to Motorists Who Do Not Strike Overhead Structures with Over 14 Feet of Clearance is an Issue of Substantial Public Interest

The Court of Appeals held that RCW 46.44.020 can apply to entities like Motorways even though they are not themselves over 14 feet high and did not hit the Bridge.

> The State's claim is that Motorways drove its truck negligently by overtaking Mullen's truck on a narrow

> bridge, proximately causing Mullen to strike the overhead structures of the Skagit River Bridge. Because this claim concerns damage "by reason of the existence of any structure over or across any public highway," RCW 46.44.020 applies [to Motorways].

Opinion at 13.

The Court's interpretation of RCW 46.44.020 is in error and raises issues of substantial public interest for which review should be granted.

The statute is only intended to protect the State from damages from impacts caused by vehicles 14 feet tall or greater. The first sentence of the statute states: "It is unlawful for any vehicle unladen or with load to exceed a height of fourteen feet above the level surface upon which the vehicle stands." The Statute further provides that "no liability may attach to the state […] by reason of any damage or injury to persons or property by reason of the existence of any structure over or across any public highway where the vertical clearance above the roadway is fourteen feet or more…" RCW 46.44.020. The clear implication is that the State is not liable for damage caused by vehicles at least 14 feet tall that impact overhead structures with at least 14 feet of clearance.

However, the Court of Appeals reasoned that the language: "[damage] by reason of the existence of any structure over or across any public highway," means the statute can also apply to vehicles under 14

feet tall that did not themselves strike the bridge if their actions somehow contribute to the damage to the overhead structures.

The language of the RCW 46.44.020 clearly indicates that where the vertical clearance of the overhead structure is 14 feet or higher, "damage" is only that which is caused by vehicles 14 feet or higher.

It is undisputed that Motorways' vehicle was less than 14 feet tall and that Motorways did not impact the Skagit River Bridge. The statute does not apply to Motorways.

Furthermore, and as previously discussed, the State has a common law duty to maintain highways in a reasonably safe condition. As a vehicle under 14 feet tall that did not impact the Bridge, Motorways is entitled to assert that the State's failure to properly warn of the lane narrowing on the Bridge contributed to the accident, and that the State's fault can be allocated for that negligence. In turn, even if the Court finds that the State's fault cannot be allocated as to Mullen under RCW 46.44.020, the statute does not prevent the State's fault from being allocated as to Motorways.

The Court of Appeals' significant (and erroneous) broadening of the scope of RCW 46.44.020 to encompass all drivers, regardless of the height of their vehicle, unduly expands the scope of the statute, creating confusion and raising the likelihood it will affect a significant number of

future proceedings. This is an issue of substantial public interest for which review should be granted under RAP 13.4(b)(4).

5. RCW 46.44.110 Was Not Properly Before the Court of Appeals and Should Not Have Been Considered

The State asserted in its appellate briefing that Motorways and Mullen are liable under RCW 46.44.110. *See* Respondent's Brief at 39. This was the first time the State made this claim against the petitioners at the appellate or the trial level. The State cannot assert an RCW 46.44.110 claim against Mullen and Motorways for the first time on appeal. In turn, the issue was not properly before the Court of Appeals and should not have been considered.

In its Amended Complaint, the State did assert an RCW 46.44.110 claim against co-defendant *Saxon*, the maker of the metal casing shed that was being hauled by Mullen at the time of the accident. CP 79-80.[6] The only claim the State has asserted against Motorways is a common law claim for negligence. CP 81.

Motorways raised the issue of the State's new RCW 46.44.110 claim in its briefing to the Court of Appeals, but the Court never addressed

[6] The State also asserts that Saxon is jointly and severally liable with Mullen for the damages caused by the collision under RCW 46.44.110. *Id.* It does not assert that Motorways is jointly and severally liable under the statute.

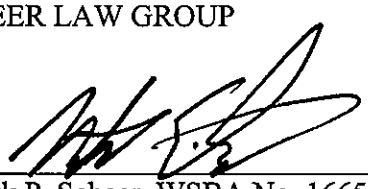
the matter. Because RCW 46.44.110 was not properly before the Court on appeal, the issue should not have been considered.

F. CONCLUSION

Petitioners have the right to argue at trial that if the State is at fault for the Skagit River Bridge accident, the State should not be able to recover for its portion of fault. Motorways respectfully requests that its Petition for Review be granted.

RESPECTFULLY SUBMITTED this 21st day of November, 2018.

SCHEER LAW GROUP



By_____
Mark P. Scheer, WSBA No. 16651
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Attorneys for Appellant Motorways Transport, LTD, and Amandeep Sidhu and Jane Doe Sidhu

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer Law Group LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

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DATED this 21th day of November, 2018, at Seattle, Washington.

Lisa Anderson Legal Secretary

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondents,

DANIEL A. SLIGH and SALLETTEE R. SLIGH, individually and the marital community composed thereof; BRYCE KENNING, a single person,

Plaintiffs,

v.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof,

Petitioners,

and

SAXON ENERGY SERVICES, INC., TAMMY J. DETRAY and GREGORY DETRAY, individually and the marital community composed thereof; G&T CRAWLERS SERVICE, a Washington business entity,

Defendants.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT and JANE

No. 76310-5-I

DIVISION ONE

PUBLISHED OPINION

DOE SCOTT, individually and the marital community composed thereof;

Petitioners,

v.

STATE OF WASHINGTON,

Respondent,

PATTY AUVIL d/b/a OLYMPIC PENINSULA PILOT SERVICE and JOHN DOE AUVIL, individually and the marital community composed thereof,

Defendants,

and

MOTORWAYS TRANSPORT, LTD, a Canadian corporation; AMANDEEP SIDHU and JANE DOE SIDHU, individually and the marital community composed thereof,

Petitioners.

FILED: October 22, 2018

ANDRUS, J. — William Scott, a truck driver employed by Mullen Trucking 2005 Ltd. (Mullen), was transporting an over-height load when his truck struck overhead supports on the Skagit River Bridge, causing the bridge to collapse. The Washington State Department of Transportation (State or WSDOT) sued Scott and Mullen Trucking for negligence. Mullen alleged that WSDOT and a second truck driver, Amandeep Sidhu and Sidhu's employer, Motorways Transport, Ltd., were contributorily liable for the bridge collapse. After WSDOT added Motorways to the lawsuit, Mullen and Motorways sought to reduce their liability by the percentage of fault they claimed was attributable to the State. The trial court dismissed Mullen's

and Motorways' contributory negligence affirmative defense and/or counterclaim on summary judgment, ruling that under RCW 46.44.020, no fault may be allocated to the State. We granted Mullen's motion for discretionary review, which Motorways joined.

Under Washington's motor vehicle code, a person who operates a vehicle in any negligent or illegal manner is liable for "all damages" to a public highway or bridge. RCW 46.44.110. The legislature passed a statute explicitly providing that "no liability" may attach to the State for damages that occur by reason of the existence of an overhead structure where, as here, the State provides at least 14 feet of vertical clearance. RCW 46.44.020. We conclude that these statutes unambiguously express a legislative determination that all financial responsibility for damage to the Skagit River Bridge must be borne by negligent motorists and none may be shifted to the State. An allocation of fault under RCW 4.22.070 would shift a portion of financial responsibility to the State in contravention of RCW 46.44.020. We affirm the trial court.

FACTS

The Skagit River Bridge is located on Interstate 5 between Burlington and Mount Vernon. The bridge has two lanes in each direction with a concrete barrier separating northbound and southbound traffic. Before its collapse, the bridge was a "through truss structure," meaning that it had trusses, or supports, above the roadway. Several of the bridge's steel parts were in tension ("fracture critical") so that if one failed, a portion of the bridge could collapse. The bridge's supports formed an arch so that vertical clearance was highest in the center and lowest on

the sides of the roadway. The left southbound lane had a clearance of 17 feet 6 inches and the right lane had a clearance of 15 feet 6 inches. The right shoulder had a clearance of 14 feet 8 inches.

The traffic lanes were narrower on the bridge than on the roadway approaching the bridge. The bridge was signed with what is known as an "object marker," which indicates a variety of road conditions, but it did not specifically identify vertical clearance or lane width.

On May 23, 2013, Scott was transporting a metal casing shed from Canada to Washington State for his employer, Mullen Trucking. Before crossing the border, Scott obtained an online permit from WSDOT to transport an over-width and over-height load from Valemount, British Columbia, to Vancouver, Washington. Online permits are self-issued and require the user to supply load and route information. Mullen's permit listed the load as having a maximum width of 11 feet 6 inches and a maximum height of 15 feet 9 inches. The permit warned that WSDOT did not guarantee height clearances. Scott acknowledged that the driver is responsible for researching the route and ensuring clearance.

Because of the height of Scott's load, he was required to use a pilot car with a height pole. The pilot car driver is expected to know road clearances and inform the truck driver of any obstacles. Scott hired a local pilot car driver, Tammy DeTray, for her knowledge and experience of the local roads. DeTray did not research Scott's route or give him any information about the Skagit River Bridge.

As DeTray and Scott approached the bridge, they were both in the right hand lane, with DeTray a few seconds ahead of Scott. Scott observed a semi-

truck approaching quickly from behind. This second truck belonged to Motorways Transport and was driven by Sidhu. Sidhu moved into the left lane and began passing Scott before they entered the bridge.

DeTray, the pilot car driver, crossed the bridge. She was on the phone with her husband as she drove. Although DeTray testified that her height pole did not strike the bridge, a witness stated that DeTray's height pole struck the bridge's overhead spans several times.

When Scott entered the bridge, Sidhu was pulling ahead of him in the left lane. Sidhu's truck was extremely close to Scott, forcing Scott to the right and partially onto the shoulder. Scott heard a huge bang, his truck began to shake, and he felt some of the truck's tires come off the ground. Scott did not know what had happened. He coasted across the bridge, regained control, and pulled over. When Scott walked back to the bridge, he saw that the north section had collapsed and was in the water.

Three passenger vehicles had entered the bridge behind Scott and Sidhu. The first, driven by David Ruiz, managed to cross the bridge. The next two vehicles, driven by Daniel Sligh and Bryce Kenning, crashed into the river as the bridge collapsed. The occupants suffered non-life threatening injuries.

An investigation later determined that Scott's load had an actual maximum height of 15 feet 11 inches, two inches above his permit allowance, and that the load struck 11 of the bridge's braces. The investigation report stated that Scott's load could only have cleared the bridge if it straddled the right and left lanes. Scott could not straddle the lanes because Sidhu's truck was in the left lane. The

investigation concluded that Scott caused the collision by failing to ensure his load height was proper and failing to know the clearance heights on the bridge.

The State brought an action against Mullen, Scott, and DeTray, alleging that their negligence caused the bridge collapse.[1] In its answer, Mullen asserted contributory negligence as an affirmative defense and counterclaim, alleging that the State's damages were caused wholly or partially by its own negligence in bridge maintenance, signage, and permitting. Mullen argued that its liability should be reduced by the State's comparative fault. Mullen also asserted a cross claim against Motorways. The State amended its complaint to add a negligence claim against Motorways.[2]

The State moved for partial summary judgment, arguing that under RCW 46.44.020, it could not be found financially responsible for any portion of the damages resulting from the bridge collapse. Mullen and Motorways opposed the motion, arguing that RCW 46.44.020 does not protect the State from defensive counterclaims or from a finding of comparative fault that would reduce the defendants' liability. In addition, Motorways argued that, even if the statute shields the State from any finding of comparative fault as to Mullen, it does not have the same effect as to Motorways.

The trial court granted the State's motion for partial summary judgment, concluding that RCW 46.44.020 shields the State from liability and, in this case,

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[1] The State also asserted a negligence claim against Saxon, the company that hired Mullen to transport the casing. Saxon did not participate in this appeal.

[2] The State also added a claim against Olympic Peninsula Pilot Service, which allegedly employed DeTray. The motorists whose cars crashed into the river, Sligh and Kenning, joined the State's action. Sligh and Kenning settled and were no longer parties to the action when the court granted partial summary judgment to the State.

precludes any finding of comparative fault that would shift financial responsibility to the State. We granted discretionary review.

ANALYSIS

Mullen and Motorways appeal the grant of partial summary judgment to the State, arguing that the trial court erroneously interpreted RCW 46.44.020 to preclude any finding that the State was contributorily negligent. Mullen and Motorways assert that, under Washington's comparative fault scheme, they should be permitted to seek an allocation of fault against any and all at-fault entities. See RCW 4.22.070. They contend RCW 46.44.020 shields the State from liability but not from an allocation of fault.

Article II, § 26 of the Washington State Constitution provides that "the legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." In 1961, the Legislature waived the state's sovereign immunity with respect to tort actions. LAWS OF 1961, ch. 136, § 1, codified as RCW 4.92.090. This statute makes the state presumptively liable for its tortious conduct "in all instances in which the Legislature has *not* indicated otherwise." Savage v. State, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995). But the right to sue the State is not a fundamental right. Wells Fargo Bank, N.A. v. Dep't of Revenue, 166 Wn. App. 342, 358, 271 P.3d 268 (2012). The legislature has the authority to define the parameters of any cause of action, including claims that may be asserted against the State. See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 666, 771, P.2d 711 (1989); O'Donoghue v. State, 66 Wn.2d 787, 789, 405 P.2d 258 (1965). See also Wells Fargo Bank, 166 Wn. App. at 358 (holding that Washington's

Administrative Procedure Act, chapter 34.05 RCW, limited the general right to sue the State).

WSDOT contends that RCW 46.44.020 constitutes a legislative decision to restrict claims, and by extension, a contributory negligence affirmative defense, against the State arising out of vehicular damage to a State-owned bridge as long as the State has provided at least 14 feet of vertical clearance. We agree.

Statutory interpretation is a question of law that we review de novo. City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). Our primary duty in interpreting a statute is to discern the intent of the legislature. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We begin with the statute's plain language, which may be discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002). If the plain meaning of the statute is unambiguous, our inquiry is at an end. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

The statute at issue concerns vehicle height and vertical clearance. This statute was first enacted in 1937 and has changed little since that time.[3] LAWS OF 1937, ch. 189, § 48. The current statute, RCW 46.44.020, limits vehicle height to 14 feet and requires the vehicle operator to exercise due care in ensuring adequate vertical clearance:

> It is unlawful for any vehicle. . . to exceed a height of fourteen feet above the level surface upon which the vehicle stands. . . The

[3] The original statute limited vehicle height to 12 feet 6 inches. LAWS OF 1937, ch. 189, § 48.

> provisions of this section do not relieve the owner or operator of a vehicle or combination of vehicles from the exercise of due care in determining that sufficient vertical clearance is provided upon the public highways where the vehicle or combination of vehicles is being operated. . .

RCW 46.44.020.

The same statute relieves the State of liability if it has either (1) provided at least 14 feet of clearance or (2) properly signed a lower clearance:

> [N]o liability may attach to the state or to any county, city, town, or other political subdivision by reason of any damage or injury to persons or property by reason of the existence of any structure over or across any public highway where the vertical clearance above the roadway is fourteen feet or more; or, where the vertical clearance is less than fourteen feet, if impaired clearance signs. . . are erected and maintained on the right side of any such public highway. . . If any structure over or across any public highway is not owned by the state or by a county, city, town, or other political subdivision. . . no liability may attach to the owner by reason of any damage or injury to persons or property caused by impaired vertical clearance above the roadway.

RCW 46.44.020. It is undisputed that in this case, the State provided more than 14 feet of vertical clearance on the Skagit River Bridge, Scott's load exceeded 14 feet in height and, although permitted for 15 feet 9 inches,[4] his load exceeded the 15 feet 6 inches of clearance on the bridge.

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[4] The State notes that, under the rules governing permits, the operator accepts liability for any damage resulting from the use of an oversize vehicle:

> Permits are granted with the specific understanding that the permit applicant shall be responsible and liable for accidents, damage or injury to any person or property resulting from the operation of the vehicle covered by the permit upon public highways of the state. The permit applicant shall hold blameless and harmless and shall indemnify the state of Washington, department of transportation, its officers, agents, and employees against any and all claims, demands, loss, injury, damage, actions and costs of actions whatsoever, that any of them may sustain by reason of unlawful acts, conduct or operations of the permit applicant in connection with the operations covered by the permit.

WAC 468-38-050(5).

A related provision, RCW 46.44.110, defines a motorist's liability.[5] Under that statute, a motorist who operates a vehicle negligently or illegally is liable for all damages to a public highway or bridge:

> Any person operating any vehicle or moving any object or conveyance upon any public highway in this state or upon any bridge or elevated structure that is a part of any such public highway is liable for all damages that the public highway, bridge, elevated structure, or other state property may sustain as a result of any illegal operation of the vehicle or the moving of any such object or conveyance or as a result of the operation or moving of any vehicle, object, or conveyance weighing in excess of the legal weight limits allowed by law. This section applies to any person operating any vehicle or moving any object or contrivance in any illegal or negligent manner or without a special permit as provided by law for vehicles, objects, or contrivances that are overweight, overwidth, overheight, or overlength. Any person operating any vehicle is liable for any damage to any public highway, bridge, elevated structure, or other state property sustained as the result of any negligent operation thereof.

RCW 46.44.110.

Read together, these statutes unambiguously (1) limit vehicle height and require a vehicle's operator to exercise due care as to vertical clearance; (2) declare that "no liability may attach to the state" where it has provided at least 14 feet of clearance; and (3) assign to a negligent motorist liability for "all damages" to a public highway or bridge. Applying these statutes to the circumstances here, we conclude that they clearly express a legislative determination that the State is to bear no financial responsibility for damages resulting from the collision of the Mullen truck with the Skagit River Bridge. The trial court did not err in interpreting RCW 46.44.020 to preclude any finding of comparative fault.

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[5] This statute was also first enacted in 1937. LAWS OF 1937, ch. 189, § 57.

Mullen and Motorways contend that apportioning fault to the State under RCW 4.22.070(1) would not shift "liability" to the State but only reduce the State's recovery. But, reducing the State's recovery would, in fact, shift a degree of liability to the State, contrary to RCW 46.44.020. Apportioning fault to the State would also relieve the negligent motorist of its liability for "all damages" under RCW 46.44.110.

Mullen and Motorways also assert that, by the plain language of the comparative fault statute, RCW 4.22.070(1), it applies here. As part of the tort reform act of 1986, the legislature replaced joint and several liability with comparative negligence in most situations. Tegman v. Accident & Med. Investigations, Inc., 150 Wn.2d 102, 108-09, 75 P.3d 497 (2003). To determine proportionate liability, the trier of fact allocates fault among all at-fault entities. RCW 4.22.070(1). The State does not argue that it is categorically exempt from proportionate liability. Rather, it asserts that, because the motorist liability statutes specifically relieve the State of liability under the factual circumstances of this case, and assign all liability to the negligent motorists, these statutes, and not RCW 4.22.070, govern. We agree.

The State has a common law duty to maintain roads in a condition safe for ordinary travel. Wuthrich v. King County, 185 Wn.2d 19, 25, 366 P.3d 926 (2016). And generally, when a motorist sues the state for a breach of this common law duty, proportionate liability is the general rule. Tegman, 150 Wn.2d at 109. But under our state constitution, the legislature has the authority to limit the type of legal claims that may be asserted against the State. See Wells Fargo Bank, 166

Wn. App. at 358. Where a specific statute conflicts with a general one, the specific statute prevails. Id. See also Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC), 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) (where one statute is specific and the other is general, the specific statute controls regardless of when it was enacted). Because the motorist liability statutes, RCW 46.44.020 and .110, specifically address liability in the circumstances here, they control over the general proportionate liability statute.

Mullen and Motorways argue that RCW 46.44.020 does not displace RCW 4.22.070 but is, at most, a grant of immunity. They contend that if the State is "an entity immune from liability," RCW 4.22.070 contemplates that its fault should be determined. Mullen and Motorways rely on Humes v. Fritz Cos., Inc., 125 Wn. App. 477, 105 P.3d 1000 (2005) to assert that fault must be apportioned to all entities, even those who may be immune from suit. In Humes, a crane operator sued a trucking company for personal injuries he sustained outside the Tulalip Casino on the Tulalip Indian Reservation. Humes, 125 Wn. App. at 481. The defendant sought to allocate fault to the Tulalip Tribe (Tribe) who was protected from suit by sovereign immunity. Id. The trial court ruled that, because the Tribe had sovereign immunity, no fault could be allocated to it under RCW 4.22.070. Id. This court reversed, ruling that the Tribe's sovereign immunity did not bar the allocation of fault. Id. at 491.

But the Supreme Court in Smelser v. Paul, 188 Wn.2d 648, 653-54, 398 P.3d 1086 (2017) cautioned courts not to confuse "immunity" with the lack of a tort duty. We conclude that the motor vehicle statute is not a grant of "immunity," but

instead sets out the scope of the State's tort duty to the traveling public. RCW 46.44.020 provides that the State must erect and maintain a warning sign of an impaired clearance when vertical clearance is under 14 feet. But where clearance exceeds 14 feet, the State owes no further duty of care with regard to the overhead structure. The duty to exercise due care falls to the owners or operators of vehicles. The statutory language evidences an intent to define and narrow the scope of the State's tort duty. It does not immunize the State from all liability associated with damages arising from overhead obstacles on public highways.

Motorways contends that, even if RCW 46.44.020 precludes a finding of comparative fault in the State's action against Mullen, it does not preclude a finding of comparative fault in the State's action against Motorways. Motorways argues RCW 46.44.020 only addresses liability between the bridge owner and the motorist who struck the bridge. The argument is without merit. The State's claim is that Motorways drove its truck negligently by overtaking Mullen's truck on a narrow bridge, proximately causing Mullen to strike the overhead structures of the Skagit River Bridge. Because this claim concerns damage "by reason of the existence of any structure over or across any public highway," RCW 46.44.020 applies.

Finally, Mullen and Motorways argue that if we eliminate their ability to assert comparative fault against WSDOT, it will affect whether they are ultimately only severally liable or jointly and severally liable. The trial court expressly declined to rule on whether joint and several liability applies in this case, reserving that issue for trial. Joint and several liability was not an issue raised in the petition for discretionary review and, because the trial court made no ruling on the

question, there is no assignment of error on this issue. We decline to reach the issue of whether Mullen and Motorways' liability is joint and several or several only, as that issue is beyond the scope of our review. See Clark County v. W. Wash. Growth Mgmt. Hr'gs Review Bd., 177 Wn.2d 136, 144-45, 298 P.3d 704 (2013).

Affirmed.

Andrus, J.

WE CONCUR:

Mann, A.C.J.

Becker, J.

APPENDIX B

RCW 46.44.020

Maximum height—Impaired clearance signs.

It is unlawful for any vehicle unladen or with load to exceed a height of fourteen feet above the level surface upon which the vehicle stands. This height limitation does not apply to authorized emergency vehicles or repair equipment of a public utility engaged in reasonably necessary operation. The provisions of this section do not relieve the owner or operator of a vehicle or combination of vehicles from the exercise of due care in determining that sufficient vertical clearance is provided upon the public highways where the vehicle or combination of vehicles is being operated; and no liability may attach to the state or to any county, city, town, or other political subdivision by reason of any damage or injury to persons or property by reason of the existence of any structure over or across any public highway where the vertical clearance above the roadway is fourteen feet or more; or, where the vertical clearance is less than fourteen feet, if impaired clearance signs of a design approved by the state department of transportation are erected and maintained on the right side of any such public highway in accordance with the manual of uniform traffic control devices for streets and highways as adopted by the state department of transportation under chapter **47.36** RCW. If any structure over or across any public highway is not owned by the state or by a county, city, town, or other political subdivision, it is the duty of the owner thereof when billed therefor to reimburse the state department of transportation or the county, city, town, or other political subdivision having jurisdiction over the highway for the actual cost of erecting and maintaining the impaired clearance signs, but no liability may attach to the owner by reason of any damage or injury to persons or property caused by impaired vertical clearance above the roadway.

[**1984 c 7 § 52; 1977 c 81 § 1;** 1975-'76 2nd ex.s. c 64 § 7; **1971 ex.s. c 248 § 1; 1965 c 43 § 1; 1961 c 12 § 46.44.020.** Prior: **1959 c 319 § 26; 1955 c 384 § 1; 1953 c 125 § 1; 1951 c 269 § 20; 1937 c 189 § 48;** RRS § 6360-48.]

NOTES:

Effective dates—Severability—1975-'76 2nd ex.s. c 64: See notes following RCW **46.16A.455**.

APPENDIX C

RCW 46.44.110

Liability for damage to highways, bridges, etc.

Any person operating any vehicle or moving any object or conveyance upon any public highway in this state or upon any bridge or elevated structure that is a part of any such public highway is liable for all damages that the public highway, bridge, elevated structure, or other state property may sustain as a result of any illegal operation of the vehicle or the moving of any such object or conveyance or as a result of the operation or moving of any vehicle, object, or conveyance weighing in excess of the legal weight limits allowed by law. This section applies to any person operating any vehicle or moving any object or contrivance in any illegal or negligent manner or without a special permit as provided by law for vehicles, objects, or contrivances that are overweight, overwidth, overheight, or overlength. Any person operating any vehicle is liable for any damage to any public highway, bridge, elevated structure, or other state property sustained as the result of any negligent operation thereof. When the operator is not the owner of the vehicle, object, or contrivance but is operating or moving it with the express or implied permission of the owner, the owner and the operator are jointly and severally liable for any such damage. Such damage to any state highway, structure, or other state property may be recovered in a civil action instituted in the name of the state of Washington by the department of transportation or other affected state agency. Any measure of damage determined by the department of transportation to its highway, bridge, elevated structure, or other property under this section is prima facie the amount of damage caused thereby and is presumed to be the amount recoverable in any civil action therefor. The damages available under this section include the incident response costs, including traffic control, incurred by the department of transportation.

[**2009 c 393 § 1; 1984 c 7 § 59; 1961 c 12 § 46.44.110.** Prior: **1937 c 189 § 57;** RRS 6360-57.]

SCHEER LAW GROUP

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