Supreme Court No.: 930761-7

Court of Appeals State of Washington Division I - No.: 73964-6-I

Pierce County Superior Court No: 11-2-14979-5

DILLION SMELSER and DERRICK SMELSER,

Petitioners,

vs.

JEANNE PAUL and RONALD SMELSER,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioners, Dillon and Derrick Smelser, the plaintiffs below, seek review of the Court of Appeals decision affirming various trial court rulings relating to the application of the doctrine of "parental immunity" in the context of apportionment of fault under RCW 4.22.070(1).

II. COURT OF APPEALS DECISION

The Court of Appeals decision was filed on April 4, 2016. The Court of Appeals Opinion is attached hereto as Appendix A1 to A9.

III. ISSUES PRESENTED FOR REVIEW

As observed by one commentator, in 1986, in a response to intense lobbying efforts by the insurance industry, and other special-interest groups, the Washington Legislature adopted tort reform legislation based on the arguably misguided belief that such legislation would make insurance more affordable and available. See, C. Peck, *Washington's Partial Rejection and Modification of the Common-Law Rule of Joint and Several Liability, 62 Wash. L.Rev. 233, 234-35* (1987). As noted by Professor Peck, the Washington Legislature rather "uncritically" accepted proposed legislation sponsored by these special-interest groups. It has been recognized that the "centerpiece" of the 1986 tort reform efforts, was RCW 4.22.070 which provides that several, or proportionate, liability was intended to be a new "general rule," in substitution for previously

recognized "joint and several" liability principles. See *Tegman v. Accident and Medical Investigations, Inc.*, 150 Wn.2d 102, 109, 75 P.3d 497 (2003). What is at issue in this matter is that portion of RCW 422.070(1) which permits the trier of fact to allocate responsibility to entities "immune" from liability, and against whom a judgment cannot be entered.

Such language relating to "immune" parties, according to Professor Peck can result in an allocation of fault to parents, a result which was likely uncontemplated and unintended by the Legislature, and which creates "complications". *Id.* page 235.

It can be readily observed that the subject statute is poorly written and is flawed by ambiguity due to the absence of statutory definitions relating to its terms.[1]

This case provides a prime example of the "complications" created by the over-broad use of the word "immune" within the terms of RCW 4.22.070(1):

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[1] RCW 4.22.015 provides a definition of "fault", but, as observed by Professor Peck at page 243-246 of his article, noticeably absent is a definition of "entity". Also absent is a definition of the term "immune". The initial version of RCW 4.22.070 was subsequently modified to exclude entities immune from liability to the claimant under the terms of Title 51 RCW. See *Clark v. Pacificcorp.*, 118 Wn.2d 167, 882 P.2d 162 (1991) (analyzing former statutes which permitted allocation of fault to employer in third-party cases, thus resulting in a reduction of Department of Labor and Industries entitlement to reimbursement otherwise set forth by statute). See also *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 480 n7, 912 P.2d 472 (1996) (acknowledging that RCW 4.22.070(1) was amended in 1993 in response to *Clark v. Pacificcorp., supra*, to exclude employers with immunity under RCW 51 as an entity against whom fault can be assessed.

> If allocation of fault to parents reduce the recoveries obtained by minors, the consequence will be different only degrees from those under the 'barbarous rule" of the common law by which the negligence of parents was imputed to a child for the purpose of barring recovery under the contributory negligence rule. That rule was rejected by the Washington court long ago when the court stated that both the ethical basis for imputing negligence and sound authority sustained the new that the parents' negligence was not a defense to an action by a child for injuries suffered. The consequences would also conflict with a statutory prohibition, against imputing the parents' negligence to a child.[2]
>
> (Citations and footnotes omitted).

In the context of "parental immunity" not only are there issues regarding the lack of a legislative intent to permit parental negligence to be a matter upon which there can be a "allocation" under RCW 4.22.070(1), but also significant questions with respect to the need for harmonization of otherwise conflicting statutes, as well as a need to explore jurisprudentially what exactly is "parental immunity".

As suggested by this Court's opinion the case of *Zellmer v. Zellmer*, 164 Wn.2d 147, 155-61, 188 P.3d 497 (2008), "parental immunity" can either be characterized as an "immunity", a privilege, or

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[2] See RCW 4.22.020 which, despite the adoption of RCW 4.22.070, appears to still be "good law". See WPI 11.04; *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011); *Vioen v. Cluff*, 69 Wn.2d 306, 418 P.2d 430 (1966); *Adamson v. Traylor*, 60 Wn.2d 332, 373 P.2d 961 (1962); *Gregg v. King County*, 80 Wn. 196, 141 P. 340 (1914).

simply an acknowledgement of a lack of a legally cognizable duty which can be subject to breach.

While the *Zellmer* opinion did not decide upon which jurisprudential basis the doctrine rest, it is noted, as evidenced by this case, how "parental immunity" is appropriately characterized is of profound legal significance. This is because an "entity" cannot be subject to a fault allocation under RCW 4.22.070 unless it has engaged in a matter upon which "fault" can be assigned, as defined by RCW 4.22.015.[3]

If, as suggested by *Zellmer*, "parental immunity" is simply a shorthand way of stating that a parent lacks an actionable duty than a parent engaged in no conduct within the definition of "fault" subject to allocation of RCW 4.22.070, by not supervising their children.

In this case the plaintiffs joined their father as a defendant in the case and the jury within its verdict allocated responsibility to him. Here, despite the presence of the defendant father on the jury verdict, the trial court, as affirmed by the Court of Appeals found that nevertheless joint and several liability did not apply due to the manner in which plaintiff's crafted their pleadings.

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[3] See *Price v. Kitsap Transit*, 125 Wn.2d 456, 461, 886 P.2d 556 (1994) (The definition of "fault" contained within RCW 4.22.015 applies to RCW 4.22.070(1).

Based on such concerns, Petitioners urge the Court to accept review of this matter of the following issues, which involve matters of substantial public concern within the meaning of RAP 13.4(b)(1), (4):

ISSUES

1. Is the term "immune", as used with an RCW 4.22.070(1) ambiguous, particularly in the context as "parental immunity", which, as recognized in *Zellmer* can stand for either "an immunity", a "privilege" or the non-existence of a legal duty?

2. Under the rules of statutory construction should the Supreme Court harmonize the term "immune" within RCW 4.22.070 with the terms of RCW 4.22.020, which precludes the imputation of parental negligence to a child, and find that the term "immune" as used in subsection .070 does not include parental immunity?

3. Is "parental immunity" a true immunity or is it simply an acknowledgement that a parent owes no duties to their child relating to supervision?

4. Did the trial court and the Court of Appeals er in failing to find defendant Paul jointly and severably liable with Ronald Smelser, the Plaintiffs' father, when Mr. Smelser's name appeared on the verdict form and the jury's verdict found that both defendant Paul and Ronald Smelser

were proportionately responsible for the injuries suffered by two children who were fault free as a matter of law?

IV. STATEMENT OF THE CASE

A. Factual Background of the Personal Injury Claims Brought by the Plaintiffs.

The factual background of this matter is generally well stated within the Court of Appeals opinion Pages 1 through 3 (A1-A3). On April 16, 1998, Jeanne Paul was visiting with Ronald Smelser at his house in Orting, Washington. Mr. Smelser's two young boys, Dillon and Derrick were playing in the field that wraparound part of the house. At the time Dillon was 5-years-old and Derrick was 2-years-old.

When Paul got into her truck to leave she backed up her lifted SUV a few truck lengths before turning to go forward out the driveway. As she started to drive forward, Ms. Paul heard a thump noise as she was plowing over Derrick, who had been playing in the middle of the driveway. As Ms. Paul's lifted SUV stopped Derrick was under it. Mr. Smelser was able to pull him out and discover that Derrick was bleeding profusely from his forehead. The accident and the injuries suffered by his younger brother Derrick, were observed by Dillon, who was five years old at the time. Mr. Smelser immediately sought out medical care for Derrick.

After Dillon reached 18-years of age, he and his younger brother Derrick filed suit against defendant Paul. (As both Dillon and Derrick were under the age of 18 at the time of the accident their claims were subject to tolling under the terms of RCW 4.16.190(2)). Defendant Paul within her Answer specifically alleged as an affirmative defense allocation under RCW 4.22 and identified Ronald Smelser as a person who caused or contributed to the Plaintiff's injuries. (LP)

Prior to trial, the Smelser children moved for Partial Summary Judgment on the issues of whether or not, given the fact that they were both under the age of six at the time of injury, they could be comparatively at-fault as a matter of law, and on the issue of whether or not, given the operation of "parental immunity", whether Ronald Smelser, could be allocated fault. The trial court granted the motion with respect to Dillon and Derrick's capacity to be comparatively at fault, but denied their motion with respect to the issue of whether or not Ronald could be allocated fault as a potential non-party at-fault under the terms of RCW 4.22.070(1).[4] The trial court denied the motion with respect to

[4] It is well established that even after the passage of RCW 4.22.070 that children under the age of six are incapable of contributory/comparative negligence as a matter of law. See *Price v. Kitsap Transit*, 131 Wn. 2d. at 460 (a child who is under six does not have the mental capacity to comprehend a duty of reasonable care, therefore cannot be negligent as a matter of law). Therefore a child under the age of six cannot be "an entity" subject to fault allocation under RCW 4.20.070(1) because he is incapable of "fault" as defined by RCW 4.22.015.

Ronald Smelser determining that the trier of fact could determine Ronald's percentage of fault, because he was potentially a non-party at-fault. The court further determined that any amount of fault attributed to Ronald could be reduced from the verdict.

The Plaintiffs sought reconsideration of this ruling which was denied by the trial court.

Confronted with such a "Hobson's choice" Dillon and Derrick amended their complaint to add Ronald as a party. To maintain consistency in their position, the Plaintiffs at paragraph 2.5 of the Amended Complaint specifically allege:

> "2.5 defendant Ronald Smelser is the father of the Plaintiffs. He is being sued because he was identified by the defendant Paul as an entity at-fault for Plaintiff's injuries and in order to preserve joint several liability.

As observed by the Court of Appeals thereafter the case proceeded to trial and at the close of the evidence Dillon and Derrick moved for judgment as a matter law on these issue, among others. The trial court denied the motion ruling that under RCW 4.22.070 it was for the jury to make a determination amongst all named entities as to who caused the accident.

The jury found both Paul and Ronald negligent. And it also found that the negligence of each was the proximate cause of Derrick's injuries.

However, it also found that neither defendant's negligence was the proximate cause of Dillon's injuries. The jury allocated fault between Paul and Ronald on a 50\50 basis, but nevertheless the trail court entered judgment against Paul only. Thereafter the Plaintiffs appealed. On appeal, the Court of Appeals affirmed the trial court in all respects.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

On Proper Application Of The Rules Of Statutory Construction The Term "Immune" Set Forth Within RCW 4.22.070(1) Is "Ambiguous".

The Court of Appeals decision in this case analyzing the plaintiff's position in this matter provided little attention to the rules of statutory construction. Under the rules of statutory construction, generally one cannot read into a poorly written statute something that is missing in order to try to avoid its infirmities. See *State v. Martin* 94 Wn. 2d 1, 8, 614 P. 2d 164 (1980). If after a "plain meeting analysis the statute still remains susceptible to more than one reasonable meaning, a court considers it ambiguous and it is appropriate to resort to construction. See *WPTA v. DOR* 148 Wn. 2d 637, 62 P. 3d 462 (2003). Another rule of statutory construction is the notion that statutes relating to the same subject matter should be read together. *Premera v. Kreidler* 133 Wn. App. 23, 131 P. 3d 930 (2006). Further courts should avoid a reading of a statute which will result in unlikely, absurd or strained consequences. Id. Statutes dealing

with the same subject matter should be harmonized with existing provisions and statutory purposes and implicit repeal and/or abrogation is disfavored. See *Gilbert v. Sacred Heart Medical Center* 127 Wn. 2d 370, 900 P. 2d 552 (1995). The Supreme Court must construe statutes dealing with the same subject matter so that the integrity of both will be maintained.

It is noted that it has been previously recognized that literally applying the term "immune," as utilized in RCW 4.22.070(1), has the potential of leading to absurd results. *Esparza v. Skyreach Equipment, Inc.* 103 Wn. App. 918, 15 P. 3d 188 (2000).

The term "immune," unquestionably is ambiguous in that it has a wide variety of meanings, many of which are analytically quite different. For example, the term could include absolute judicial, prosecutor or witness immunity. It could include matters such as sovereign immunity, governmental discretionary immunity, state and federal qualified immunity, statutory immunities, and one could go on.

Often little case law has developed as to whether or not "but for" an immunity liability otherwise can imposed. For example, one could imagine a whole host of situations involving legal malpractice where arguments could be made that either a judge, prosecutor or a witness has the potential of being a "empty chair" defendant, despite their immunity.

Another example, of the likelihood of absurd and/or strained results generated by the overbroad and ambiguous use of the term "immune" within this statutory scheme can be shown by analyzing a recent case *Avellaneda v. State* 167 Wn. App. 474, 273 P. 2d 477 (2012). In that case, the plaintiff, who was a motorist seriously injured when two cars crossed the center median SR 512, that the State was negligent in failing to timely install median barriers. The claims against the state ultimately were dismissed on the basis of the state's "discretionary immunity." Given such a holding in *Avellaneda,* could under the terms of RCW 4.22.070, the State nevertheless be an "empty chair"?

In the seminal case of *Zellmer v. Zellmer,* 164 Wn.2d 147, 188 P.3d 497 (2008), the Supreme Court explored the nature of "parental immunity" and in such exploration clearly suggested that parental immunity is not a true immunity at all, but rather is recognition that a parent breaches no actionable duty by failing to supervise children (**unless there is proof of wanton and willful misconduct**). As observed by *Zellmer* 157, parental immunity can be justified as a limited form of immunity, parental privilege, or **"lack of an actionable parental duty to supervise,"** citing to *Holodock v. Spencer*, 36 N.Y.2^{d} 35, 325 N.E.2nd 338, 364 N.Y.S.2^{d} 859 (1974) (declining to recognize cause of action for parental supervision claim following abrogation of parental immunity

doctrine); see also, 6 A.L.R.4th 1066, § 14 (1981) (collecting cases where negligent supervision claims are barred notwithstanding abolition of parental immunity doctrine). In *Zellmer,* the Court was less than clear as to what Washington's view is with respect to the nature of "parental immunity," i.e., whether or not it is a true immunity, a privilege, or simply a recognition that a parent who negligently supervises their children does not breach any actionable duty.

However, in surveying its own prior case law, the Supreme Court in *Zellmer,* observed that: "this Court has consistently held a parent is **not liable for ordinary negligence in the performance of parental responsibilities**." (Emphasis added). *Id* at 155, citing to *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 104 Wn.2d 99, 713 P. 2nd 79 (1989); see also *Talarico v. Foremost Ins. Co.*, 104 Wn.2d 114, 712 P.2nd 294 (1986). This is because the parent under such circumstances breaches no actionable duty. Plaintiffs' counsel has been unable to unearth any case that directly states that there is a cause of action for negligent parental supervision of a child in Washington.

This is a significant distinction. This is significant because under the terms of RCW 4.22.015 in order to be an entity towards whom "fault" can be allocated, one must have engaged in some kind of negligence or breached some form of duty. If it is recognized that a parent who is subject to

"parental immunity" has breached no actionable duty, then as a matter of course they cannot be subject to a fault allocation under the statutory scheme set forth within RCW 4.22 et seq.

Such an analysis is not detracted from based on the fact that in highly distinguishable contexts there can be parental liability to third parties for failing to supervise children. See *Carey v. Reaves* 56 Wn. App. 18, 22-23, 781 P. 2d 904 (1989). Such a limited duty only applies where the parent fails to control a child with "known dangerous proclivities" to injure a third party. Id.

Here there is no allegations that either of the Smelser children have dangerous proclivities. Simply because there is a recognized duty applicable to entirely different factual circumstances does not mean a duty exists for a failure of a parent to supervise their children owed to the children themselves. It is noted that the New York Appellate Courts, while still recognizing the above-cited *Holodook* opinion, has had little difficulty in maintaining the notion that a parent has no actionable duty to their children to be non-negligent in their supervision, while at the same time permitting third parties to sue parents for a failure of supervision in limited circumstances. See *Rios v. Smith* 744 NE. 2d 1156 (N.Y. 2001). Thus, contrary to the Court of Appeals opinion, the mere fact that there may be limited third party claims does not necessarily mean that "but for"

immunity a parent otherwise can be liable. The claims that third parties can bring are entirely different given their limitations.

B. The Trial Court And The Appellate Court's Inclusion Of Parental Immunity Within The Term "Immune" Is Inconsistent And Eviscerates The Protections Set Forth Within RCW 4.22.020 Which Precludes The Imputation Of Parental Fault To A Child.

As noted above, when construing statutes addressing the same subject matter, our courts are obligated to construe them in a manner which maintains the integrity of both.

Construction is necessary in order to harmonize the terms of RCW 4.22.070, with prior common law and RCW 4.22.020, which despite not being a model of clarity, has been consistently interpreted to mean that the negligence of a parent cannot be imputed onto their children. See *WPI* 11.04; see also, *Vioen v. Cluff*, 69 Wn.2d 305, 418 P.2nd 430 (1966).

It has long been recognized that statutes which are in derogation of the common law must be strictly construed. See *Topline Builders, Inc. v. Bovenkamp*,179 Wn.App. 794, 320 P.3d 130, (2014). It is respectfully suggested that the only way to interpret RCW 4.22.070(1)'s "immunity" language in a manner consistent with the common law, and which harmonizes with RCW 4.22.020, is to recognize that "immunity" under its terms, **does not include "parental immunity".**

Given the existence of RCW 4.22.020 it is highly debatable that the legislature intended to include "parental immunity" within the ill-groups of immunities at issue or immunities potentially addressed potentially within RCW 4.22.070.

C. Assuming that Fault Can Be Allocated, the Trial Court Erred in Failing to Find that Ron Smelser and Ms. Paul were "Jointly and Severely" Liable, And By Refusing to Enter a Judgment Against Mr. Smelser.

Ms. Paul in her Answer to Plaintiffs' Complaint specifically alleged as an affirmative defense "RCW 4.22" and named Ron Smelser as a potentially responsible individual. (CP 6-9). Disagreeing with the defense position in August of 2012, plaintiffs moved for partial summary judgment on, *inter alia*, the viability of a "empty chair" defense under RCW 4.22.070. (CP 23-49). As pretrial motion practice developed, not only did the Trial Court deny plaintiffs' motion for partial summary judgment on the "empty chair" defense, but also indicated that in the Trial Courts' view, Ron Smelser could be entitled to "parental immunity", but nevertheless could be allocated fault by the jury. (CP 246-248; 289-290).

Confronted with such pretrial rulings plaintiffs filed a Motion to Amend the Complaint in order to add Ron Smelser as a party (CP 293-302). The motion was granted. (CP 337-338). (CP 329-332).

Within the amended complaint, and consistent with Plaintiffs' position below, and herein, it is specifically alleged that Paragraph 2.5;

> Defendant Ronald Smelser is the father of the plaintiff. He's being sued because he was identified by the Defendant Paul as an entity at fault for Plaintiffs' injuries and in order to preserve joint and several liability.

It was further alleged that the 'defendants had a duty to exercise ordinary care and that the defendants' breach of various duties was a sole, direct and proximate cause of the incident, Plaintiffs' damages and Plaintiffs' severe injuries. The complaint also has specific prayer for damages directed towards **the *defendants***.

After being served Mr. Smelser did nothing. He did not answer, and was subject to an Order of Default.

On examination of the Amended Complaint, it is quite clear that plaintiff did make a claim against Mr. Smelser, albeit with an explanation, that was more than adequate for notice pleading purposes. See CR 8. See *Putnam v. Wenatchee Valley Medical Center, P.S.* 166 Wn.2d 974, 216 P.3d 374 (2009).

Given such standards, and the procedural posture of the case, plaintiffs' counsel did everything possible to maintain a legally and factually consistent position in this lawsuit, while at the same time not prejudicing the Plaintiffs' ability to acquire a judgment that would be joint

and severable under the terms of RCW 4.22.070. Plaintiffs' counsel is unaware of any requirement that simply because a defendant raises an "empty chair" defense, the plaintiff has the Hobson's choice to either abandon their legal position that there is no other party at fault, risking the breaking of "joint and several liability", or adding the identified alleged wrongdoer to the lawsuit.

To the extent that the court instructed the jury that it was Ms. Paul's burden of proof to establish that Mr. Smelser was negligent, does not change the fact that plaintiffs in their complaint brought an actionable claim against Mr. Smelser, upon which he defaulted. Once the jury allocated fault to Mr. Smelser, a judgment should have been entered against him. (CP 1686-1688).

The bottom line is that the jury entered a verdict against Mr. Smelser finding that he was negligent and there was no legal basis for the trial court not to enter a judgment against him "joint and severally" with Ms. Paul. He was on the verdict form. Damages were awarded and he was allocated fault.

The case of *Mailloux v. State Farm,* 76 Wn. App. 507, 513, 877 P.2d 449 (1985), relied on by the Appellate Court provides no help. The *Mailloux* case simply stands for the proposition that in order to preserve joint and several liability, once an empty chair defense has been raised, a

plaintiff is obligated to add the alleged wrongdoing party to the lawsuit in order to preserve any potential joint and several liability. See also *Anderson v. City of Seattle,* 143 Wn.2d 847, 873 P.2d 489 (1994) (plaintiff allowed bankrupt, at fault party to be dismissed from lawsuit and did not have a judgment entered against the bankrupt).

Here, Mr. Smelser was a named party in the lawsuit and was on the verdict form. Plaintiffs should have been provided the benefit of the verdict and judgment should have been entered "jointly and severally" against him, and Ms. Paul

CONCLUSION

The Court of Appeals interpretation of RCW 4.22.070(1) hurts children and is inconsistent with public policy, the common law and RCW 4.22.020. "Immune" in context of the law has multiple meanings. It simply goes too far to assume that the Legislature's unartfully and imprudent use of the undefined term "immune" intended to undermine parental immunity or RCW 4.22.020. It is respectfully hoped the Supreme Court accepts review of the important issues raised within this Petition.

Dated this 4th day of May, 2016.

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DECLARATION OF SERVICE

I, Tiffany Dixon, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years and am not a party to this case.

On this 4th Day of May, 2015, I caused to be served and delivered to the attorney for the Respondents, a copy of **PETITION FOR REVIEW**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

I Filed with the Supreme Court of the State of Washington, via email, with the filing fee being mailed via USPS to:

Supreme Court
PO Box 40929
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These documents were provided to Respondents' attorneys, via email and delivery via ABC Legal Messenger:

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Tiffany Dixon, Paralegal
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Appendices

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DILLON SMELSER, individually, and DERRICK SMELSER, individually,	)	No. 73964-6-I
Appellants,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
JEANNE PAUL, individually, and RONALD SMELSER, individually,	)	
Respondents.	)	FILED: April 4, 2016

APPELWICK, J. — Dillon and Derrick Smelser argue the trial court erred in permitting the jury to consider Paul's defense that the automobile-pedestrian accident was unavoidable. They argue the trial court erroneously applied RCW 4.22.070 to the fact of Ronald Smelser's parental immunity when it entered judgment against Paul severally rather than jointly. We affirm.

FACTS

On April 16, 1998, Jeanne Paul visited Ronald Smelser at his house in Orting. Ronald's[1] two young boys, Dillon and Derrick, were playing in a field that

[1] We refer to members of the Smelser family by their first names for clarity. No disrespect is intended.

wrapped around part of the house. At the time, Dillon was five years old and Derrick was two years old.

When Paul got in her truck to leave, she backed up her truck a few truck lengths before turning to go forward out of the driveway. As she started to drive forward, Paul heard a "thunk" noise. She had hit Derrick. He was underneath the truck. Ronald pulled him out, and Derrick was bleeding profusely from his head. Ronald immediately sought medical care for Derrick.

Dillon and Derrick sued Paul in 2011. They argued that Paul breached her duty to exercise reasonable care in operating her vehicle, and as a result caused Derrick's physical injuries and Dillon's emotional injuries. Paul responded to the complaint. As an affirmative defense, Paul argued that Ronald caused Dillon's and Derrick's injuries. Paul sought to have fault allocated amongst all entities who caused the injuries, including Ronald.

Dillon and Derrick moved for partial summary judgment. They contended that the trier of fact could not allocate fault to Ronald, because he had parental immunity. The trial court denied this motion, ruling that the trier of fact would determine Ronald's percentage of fault, because he was a potential nonparty at fault. The court further determined that any amount of fault attributable to Ronald would be reduced from the verdict.

Consequently, Dillon and Derrick added Ronald as a party. But, their amended complaint did not allege that Ronald was responsible for their injuries.

The case proceeded to trial. At the close of the evidence, Dillon and Derrick moved for judgment as a matter of law. They asserted that Ronald must be dismissed from the case, because he did not act negligently. The trial court denied the motion, ruling that under RCW 4.22.070, the trier of fact must allocate fault amongst all entities who may have caused the accident.

The jury found that both Paul and Ronald were negligent. It found that the negligence of each was a proximate cause of Derrick's injuries. But, it found that neither defendant's negligence was a proximate cause of Dillon's injuries. The jury found that Derrick's general damages were $16,000, in addition to $14,225.40 in undisputed expenses. The jury allocated fault between Paul and Ronald on a 50/50 basis. But, the trial court entered judgment against only Paul, in the amount of $15,112.70 plus costs. Dillon and Derrick appeal.

DISCUSSION

I. Application of RCW 4.22.070

Dillon and Derrick assert that the trial court misinterpreted RCW 4.22.070 and incorrectly permitted the jury to allocate fault to Ronald despite his parental immunity. And, they contend that once the court submitted the issue of Ronald's fault to the jury, the court erred by not entering judgment joint and severally.

Washington's tort reform statute has abolished joint and several liability, except in limited situations, replacing it with proportionate liability. See RCW 4.22.070; Mailloux v. State Farm Mut. Auto. Ins. Co., 76 Wn. App. 507, 511-12, 887 P.2d 449 (1995). The proportionate liability scheme requires the trier of fact to allocate the percentage of fault attributable to multiple entities responsible for

the plaintiff's injuries. RCW 4.22.070(1). The statute lists entities whose fault shall be determined, including, "entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW."[2] Id. But, judgment shall not be entered against an entity that is immune from liability to the claimant. Id. Fault, for purposes of this statutory scheme, is defined as "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." RCW 4.22.015.

RCW 4.22.070(1) plainly does not provide an exception for parental immunity. It requires the trier of fact to determine the percentage of fault attributable to every entity that caused the plaintiff's injuries. Id. Fault must be allocated to such an entity, regardless of whether it is a defendant, third party defendant, entity released by the plaintiff, or an entity immune from liability to the plaintiff. RCW 4.22.070(1). RCW 4.22.070(1) provides a single exception: entities immune from liability under Title 51 RCW. Under the expressio unius est exclusio alterius canon of statutory construction, the expression of one item in a category implies that other items are excluded. Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). Had the legislature envisioned an exception for entities with parental immunity, it would have included such an exception in RCW 4.22.070(1).

Previous courts have clarified the meaning of this statutory scheme. In Price v. Kitsap Transit, 125 Wn.2d 456, 464, 886 P.2d 556 (1994), the court held

[2] Title 51 RCW is Washington's workers' compensation statute.

that a four year old child is not an "entity" to which fault can be allocated under RCW 4.22.070(1). Considering the definition of fault in RCW 4.22.015, the court determined that an entity "must be a juridical being capable of fault." Id. at 461. Because children under the age of six lack the mental capacity to be negligent, a four year old child cannot be considered an "entity" for purposes of RCW 4.22.070(1). Id. at 461-62. In reaching this holding, the court explicitly distinguished the concepts of incapacity and immunity. Id. at 462-63. An immune entity is capable of fault but has been excused from liability for policy reasons, but a child is mentally incapable of fault. Id. at 463. Therefore, fault could not be allocated to either of the injured children here. However, no case has held that parents are not juridical beings or entities for purposes of allocating fault under RCW 4.22.070(1) because of parental immunity.

Dillon and Derrick assert that parents entitled to parental immunity are not entities to which fault can be allocated under RCW 4.22.070. They contend that parental immunity is different from other immunities. They argue that parental immunity is not an "immunity" at all, but rather a recognition that there is no duty to supervise one's children. And, they assert that an entity that does not breach a duty cannot be at fault under RCW 4.22.015.

We disagree with Dillon and Derrick's interpretation of parental immunity. Recently, the Washington Supreme Court reaffirmed its earlier holding in Jenkins v. Snohomish County Public Utility District No. 1, 105 Wn.2d 99, 713 P.2d 79 (1986) that parents are immune from liability to their children for negligent

supervision, but not for willful or wanton misconduct. Zellmer v. Zellmer, 164 Wn.2d 147, 161, 188 P.3d 497 (2008). The Jenkins court stated,

> Washington has continued to follow the rule of parental immunity where the parent may have been negligent but was not engaged in willful misconduct. . . .
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> . . . .
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> There is, however, a point at which parental neglect properly becomes a matter of public concern. With this in mind, our rule remains that where parental negligence rises to the level of willful or wanton misconduct, the doctrine of parental immunity will not preclude liability. Willful and wanton misconduct falls between simple negligence and intentional tort. It is sufficient that the actor "know, or has reason to know, of circumstances which would bring home to the realization of the ordinary reasonable [person] the highly dangerous character of his conduct."

105 Wn.2d at 105-06 (alteration in original) (quoting Foldi v Jeffries, 93 N.J. 533, 549-50, 461 A.2d 1145 (1983)). The Zellmer court describes this rule as limiting "the scope of conduct protected by the parental immunity doctrine." 164 Wn.2d at 163.

When a child injures a third party as a result of his parent's negligent failure to supervise, the parent may be liable to the third party. See Eldredge v. Kamp Kachess Youth Servs., Inc., 90 Wn.2d 402, 408, 583 P.2d 626 (1978); Carey v. Reeve, 56 Wn. App. 18, 22-23, 781 P.2d 904 (1989). The liability threshold is the failure to exercise reasonable care in controlling the child's known dangerous proclivities. Sun Mountain Prod., Inc. v. Pierre, 84 Wn. App. 608, 614-15, 929 P.2d 494 (1997). Should that same conduct by the parent also result in injury to the child, the child will not be able to recover damages from the parent. This is not because no duty to supervise existed. It is because the standard of care

accompanying parents' duty to their child is different. To be liable to their children for a failure to supervise, parents must do more than fail to exercise ordinary care—their conduct must rise to the level of willful and wanton misconduct. This policy decision protects family autonomy and parental decision-making. See Zellmer, 164 Wn.2d at 159. No Washington case has stated that parents have no duty to their children to supervise them. The cases go no further than preventing the child from recovering for injuries caused by the lack of ordinary care in supervision, as opposed to willful or wanton misconduct.

We conclude that RCW 4.22.070(1) permits the trier of fact to allocate fault to parents with parental immunity. Here, the parties have agreed that Ronald did not commit willful or wanton misconduct. The allegation is that Ronald negligently supervised his children. Therefore, Ronald would have been immune from liability to Dillon and Derrick, had they made a claim against him. But, the jury could have found that Ronald's action or inaction caused harm to Derrick and/or Dillon. Therefore, we hold that trial court did not err in permitting the jury to allocate fault to Ronald.

Dillon and Derrick further argue that once the jury allocated fault to Ronald, the trial court should have found both defendants jointly and severally liable. They contend that parental immunity does not apply, because Ronald waived the defense by failing to raise it, and Paul did not have standing to assert it herself.

Derrick and Dillon never asserted that Ronald was liable to them. In their amended complaint, they stated only that Paul claimed that Ronald was concurrently negligent or engaged in willful misconduct that was a proximate cause

of their injuries. Derrick and Dillon themselves never argued that Ronald's failure to supervise was a proximate cause of the accident. Yet, only a plaintiff can assert that another person is liable to the plaintiff. Mailloux, 76 Wn. App. at 511. If a party other than the plaintiff proves that a person is a proximate cause of the plaintiff's damages, the person at fault is not liable to the plaintiff. Id. at 512. Because the plaintiffs here never argued that Ronald was liable to them, Ronald was not obliged to assert the parental immunity defense or risk waiving it by failing to do so. Ronald could not be held liable to the plaintiffs jointly or severally.

We hold that the trial court correctly interpreted RCW 4.22.070(1) by permitting the jury to allocate fault to Ronald and by entering judgment against only Paul.

II. Unavoidable Accident Defense

Dillon and Derrick also contend that the trial court erroneously allowed Paul to argue that the accident was unavoidable. They assert that the trial court erred in permitting hearsay evidence that supported this defense.[3] They claim that the

[3] Dillon and Derrick argue that the admission of the medical intake record which contained the sentence, "He is a usually healthy child who was playing on the front bumper of a raised 4x4 truck which was being driven by his father's girlfriend" was improper admission of hearsay. They argue that "[s]tanding alone the admission of this highly prejudicial, unsupportable hearsay evidence should be deemed as grounds for a new trial." Appellants sought to exclude it because it was being offered only to establish fault on the part of the children. No fault was allocated to the children. The statement appeared to support Paul's unavoidable accident defense in that she would not have been able to see him on her bumper from the driver's seat. But, the jury clearly rejected that theory and found her negligent. Dillon's claim for negligent infliction of emotional distress was based on witnessing his brother being run over by the vehicle, not by where his brother was positioned when he was run over. The factual basis for the negligence of the father was the lack of supervision. Whether Derrick was playing on the bumper or positioned in some other manner where he could be struck by the vehicle is of no

trial court erred in instructing the jury on unavoidable accidents. And, they argue that the trial court should have found Paul negligent as a matter of law.

But, the jury found Paul negligent. In doing so, it necessarily rejected Paul's unavoidable accident defense. Therefore, any error relating to this defense was harmless. See Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (noting that an error that does not affect the outcome of the trial is not grounds for reversal).

We are also unpersuaded by Dillon and Derrick's argument that this defense confused the jury about Dillon's negligent infliction of emotional distress claim. This defense went to the issues of Paul's negligence and proximate cause. One element of Dillon's claim was that the negligence of one of the defendants caused Derrick's injuries. As the jury found that Paul's negligence proximately caused Derrick's injuries, this element was met. Therefore, any error relating to Paul's unavoidable accident defense cannot have affected Dillon's claim.

We affirm.

WE CONCUR:

consequence to the fact that his father did not know where he was and was not adequately supervising him. Assuming without deciding the admission was erroneous, the appellants do not demonstrate prejudice.

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Good Afternoon,

Attached for filing is a Petition for Review. The filing fee is being mailed separately. The Court of Appeals Cause No. is Division 1- 73964-6-I, the Case name is Smelser v. Paul and Smelser. The attorney I'm emailing this for is Paul Lindenmuth, WSBA# 15817, paul@benbarcus.com.

Thank you!

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