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No. 93076-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DILLON SMELSER and DERRICK SMELSER,

Plaintiffs/Petitioners,

vs.

JEANNE PAUL and RONALD SMELSER.,

Defendants/Respondents.

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OCT 17 2016
WASHINGTON STATE
SUPREME COURT
byh

BRIEF OF AMICUS CURIAE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper interpretation and application of RCW 4.22.020 and 4.22.070.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with an opportunity to decide whether a minor child's right, under the common law and RCW 4.22.020, to have his or her recovery undiminished by the negligence of a parent, is consistent with an allocation of fault to that parent pursuant to RCW 4.22.070 that reduces the child's recovery. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Smelser v. Paul, 2016 WL 1306678, *noted at* 193 Wn. App. 1014, *review granted*, 186 Wn.2d 1002 (2016); Smelser Pet. for Rev. at 6-9; Smelser Br. at 3-12; Paul Br. at 2-10.

For purposes of this brief, the following facts are relevant. In April, 1998, Jeanne Paul (Paul) was visiting Ronald Smelser (Ronald). When Paul was leaving, the truck she was driving struck Ronald's two-year-old son Derrick Smelser (Derrick). Ronald's five-year-old son, Dillon Smelser (Dillon), witnessed the accident.

Derrick and Dillon brought an action against Paul, alleging failure to use reasonable care in operating her truck. Derrick sought damages for injuries he received when he was hit by the truck and Dillon sought damages for emotional injuries resulting from witnessing the accident. Paul answered, denying liability and alleging that fault should be allocated to Ronald, who at that time was not a party. Derrick and Dillon brought a motion for partial summary judgment on several issues, including arguments that fault could not be allocated to Ronald because parental immunity means Ronald had no fault for the allegedly negligent supervision of his children, and because RCW 4.22.020 precludes imputation of a parent's negligence to a minor child. On the latter issue, the court denied the motion, holding that the trier of fact could allocate fault to Ronald as a potential at fault entity under RCW 4.22.070, and that any amount of fault allocated to Ronald would result in a deduction from the verdict. As a result of that ruling, the plaintiffs amended their complaint, stating that Ronald was being named as a defendant solely because Paul identified him as an at fault entity for purposes of allocating fault under RCW 4.22.070, and in order to preserve joint and several liability. Ronald failed to appear or answer, and an order of default was entered against him.

The case proceeded to trial and Ronald testified. The jury was instructed that plaintiffs had the burden of proving that defendant Paul was negligent and that defendant Paul's negligence was a proximate cause of

their injuries. The jury was also instructed that defendant Paul had the burden of proving that defendant Ronald was negligent and that defendant Ronald's negligence was a proximate cause of injuries to the plaintiffs. See Paul Br., App. B, Jury Instruction No. 12. The jury entered a special verdict finding both defendant Paul and defendant Ronald negligent, finding both Paul and Ronald's negligence was a proximate cause of injury to plaintiff Derrick, and allocated 50% fault to defendant Paul and 50% fault to defendant Ronald. However, the jury found that the defendants' negligence was not a proximate cause of injury to plaintiff Dillon. See Smelser Br., App. 4, Special Verdict Form. The trial court entered judgment only against defendant Paul in the amount of 50% of the damages the jury awarded to Derrick. See Smelser Br., App. 5, Judgment on Jury Verdict.

The minor plaintiffs appealed, and the Court of Appeals affirmed. The court found that RCW 4.22.070(1) "... requires the trier of fact to determine the percentage of fault attributable to *every* entity that caused the plaintiffs injuries," and that "[f]ault must be allocated to... *an entity immune from liability to the plaintiff.*" Smelser, 2016 WL 1306678 at *2. It concluded "the trial court did not err in permitting the jury to allocate fault to Ronald," id. at *4, based upon the parental immunity doctrine and RCW 4.22.070. The court also held that because Derrick and Dillon neither alleged nor argued that Ronald was liable to them, Ronald could

not be held jointly or severally liable to the plaintiffs and the trial court properly entered judgment only against defendant Paul. See id.

The Court of Appeals did not discuss RCW 4.22.020, which precludes imputing a parent's negligence to a minor child to diminish the child's recovery, in relation to the jury's allocation of fault to Ronald and the trial court's reduction of 50% of Derrick's damages.

III. ISSUE PRESENTED

Should a child's right under the common law and RCW 4.22.020 to a recovery of damages undiminished by parental fault be abrogated by allocating fault to the child's parent pursuant to RCW 4.22.070?

See Smelser Pet. for Rev. at 5; Paul Ans. to Pet. for Rev. at 11-12.

IV. SUMMARY OF ARGUMENT

The right of a child to obtain recovery undiminished by parental fault, grounded in both common law and RCW 4.22.020, should not be abrogated by RCW 4.22.070, which provides for allocation of fault to at-fault entities. The Legislature did not clearly evidence its intent to diminish or abolish a child's right against imputation of a parent's fault in its enactment of 4.22.070. RCW 4.22.020 and 4.22.070 can be reconciled so as to maintain the integrity of both. In a child's action for damages for his or her own injuries, RCW 4.22.020 should operate to prohibit imputation of a parent's fault to the child. In a child's action for damages for the wrongful death or loss of consortium of a parent, under RCW 4.22.020 and 4.22.070, a defendant may seek to allocate fault to the parent.

Alternatively, if it is determined that the statutes cannot be reconciled, the right of a child to a recovery undiminished by parental fault in an action for the child's own injuries should prevail over a defendant's right to allocate fault to the parent. The child's right under 4.22.020 is more specific than a defendant's general right under 4.22.070 to seek an allocation of fault against immune entities.

V. ARGUMENT

A. Overview Of The Common Law Rule, Now Codified At RCW 4.22.020, That A Parent's Negligence Is Not Imputed To A Minor Child To Diminish The Child's Recovery Of Damages.

Re: Common Law

At early common law, the contributory negligence of one spouse was imputed to the other, solely on the basis of the marital relation. W. Prosser, Handbook of the Law of Torts, Ch. 12, § 74, p. 489 (4th ed. 1971). "Another old rule, of a particularly hideous character, imputed the contributory negligence of a parent to his child." Id. at 490. While this was at one time nearly the prevailing rule, it is now abrogated by statute or by case law nearly everywhere. See id.

In Washington, since at least 1896, the rule has been that when a child is injured due to the negligence of multiple tortfeasors which include a parent, the negligence of the parent will not be imputed to the child. In Roth v. Union Depot Co., 13 Wash. 525, 43 P. 641 (1896), the guardian ad litem for a nine-year-old plaintiff brought suit against a railway terminal company for injuries the boy suffered when he was run over by a railroad

car. The defendant railway terminal company appealed a verdict for the plaintiff and, among other things, argued that it should have been allowed to show at trial that the accident was caused by the negligence of the child's parent. See id., 13 Wash. at 545. This Court held that since the action had been brought for the benefit of the child, "the negligence of the parent cannot be imputed to the child." Id. at 545-46.

In Gregg v. King County, 80 Wash. 196, 203, 141 P. 340 (1914), a six-year-old plaintiff suffered injuries allegedly resulting from the defendant county's negligence in the construction and maintenance of a dock. Following a jury verdict for the child, the county appealed, objecting to a jury instruction stating that the parents' negligence could not prevent recovery by the child if the jury found the county liable. The Supreme Court affirmed the verdict for the child:

In cases of injury to, or wrongful death of, a child, where the action is brought by a parent for his own benefit, the contributory negligence of the parent, the actual plaintiff, will, of course, bar a recovery. It is obvious that such cases afford no support to the doctrine that the negligence of the parent is to be imputed to the child. Both the ethical basis of the rule of imputed negligence and sound authority sustain the view that, where the child is the real plaintiff in an action for his own injury, the parent's contributory negligence is no defense. The view is certainly sustained by reason and is now supported by the great weight of authority.

Id. at 204 (citations omitted).

The rule has been consistently followed by this Court. See e.g. Eskildsen v. Seattle, 29 Wash. 583, 584-85, 70 P. 64 (1902) (holding negligence of a parent cannot be imputed to a child where a father instructed his son to go between railroad cars, and the child then caught

his foot in the tracks and was run over by a railroad car); Adamson v. Traylor, 60 Wn.2d 332, 334-35, 373 P.2d 961 (1962) (where a child was run over by a truck while sleeping near tire ruts, holding the trial court erred in allowing evidence of the father's alleged negligence because, as a matter of law, his negligence could not be imputed to his eight-year-old son); Vioen v. Cluff, 69 Wn.2d 306, 315-20, 418 P.2d 430 (1966) (holding trial court erred in failing to clearly instruct a jury that if it found the defendant negligently caused injury to the minor plaintiff, the fact that the parent's failure to supervise her son may have also contributed to the injury is irrelevant, and that recovery is not to be denied the minor plaintiff because of such negligence of the parent); Ohler v. Tacoma Gen'l Hosp., 92 Wn.2d 507, 512, 598 P.2d 1358 (1979) (citing the rule that the negligence of a parent is not imputed to a child in support of holding that actual or constructive knowledge of a parent of a potential medical malpractice claim is not imputed to a child, at least absent communication to the child).

The rule that a parent's negligence will not be imputed to a child to reduce the child's recovery was most recently addressed in Anderson v. Akzo Nobel Coatings, 172 Wn.2d 593, 613-15, 260 P.3d 857 (2011). In reversing summary judgment dismissal of a negligence claim alleging birth defects caused in utero as a result of a mother's exposure to toxins, this Court held the mother may be comparatively at fault for her independent injury. However, with respect to the child's claim, this Court

cautioned: "Should the comparative negligence claim proceed to trial, careful consideration must be given to how the jury is instructed and the argument limited. *See, e.g.*, RCW 4.22.020 (negligence of the parent may not be imputed to the child)." *Id.*, 172 Wn.2d at 614-15.

Re: RCW 4.22.020

The common law rule that parental fault will not be imputed to a child is now codified in RCW 4.22.020. The initial version of RCW 4.22.020 was enacted as part of the 1973 Comparative Negligence Act, and provided that the negligence of one spouse shall not be imputed to the other spouse so as to bar recovery from a third party in a negligence action resulting in death or injury. See Laws of 1973, 1st Ex. Sess., Ch. 138 § 2. In 1981 the statute was amended and expanded to cover minor children:

The contributory fault of one spouse shall not be imputed to the other spouse or the minor child of the spouse to diminish recovery in an action by the other spouse or the minor child of the spouse, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property, whether separate or community, of the spouse. In an action brought for wrongful death, the contributory fault of the decedent shall be imputed to the claimant in that action.

Laws of 1981, Ch. 27 § 10. In 1987, the statute was amended again to provide that the contributory fault of a decedent or injured person shall be imputed to the claimant in an action brought for loss of consortium. See Laws of 1987, Ch. 212 § 801.

A 2008 amendment equated the rights of domestic partners with spouses; the current version of RCW 4.22.020 now provides:

The contributory fault of one spouse or one domestic partner shall not be imputed to the other spouse or other domestic partner or the minor child of the spouse or domestic partner to diminish recovery in an action by the other spouse or other domestic partner or the minor child of the spouse or other domestic partner, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property, whether separate or community, of the spouse or domestic partner. In an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action.

Laws of 2008, Ch. 6 § 401.

B. A Minor Child's Right To A Recovery Of Damages Undiminished By Parental Fault, Established By Common Law And RCW 4.22.020, Should Not Be Abrogated By Allocating Fault To A Parent Pursuant To RCW 4.22.070.

The language of RCW 4.22.020 pertinent to this appeal states:

The contributory fault of one spouse ... shall not be imputed to ... the minor child of the spouse ... to diminish recovery in an action by ... the minor child ... to recover damages caused by fault resulting in death or injury In an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action.¹

¹ In RCW 4.22.005, "contributory fault" is specifically limited to "fault chargeable to the claimant." However, "contributory fault" in the first sentence of RCW 4.22.020 should not be limited to mean only a plaintiff's failure to use due care for his or her own protection. Rather, in the context of 4.22.020, contributory fault includes the failure to use due care for the protection of others. This latter, more expansive, use of contributory fault is consistent with Washington cases applying the common law rule that the negligence of the parent will not be imputed to the child. See e.g., Gregg v. King County, 80 Wash. at 204, where in an action for the benefit of a child against a county for negligent construction and maintenance of a dock, the Court referred to the fault of the child's parent as "contributory negligence." Also, while under the first sentence of 4.22.020 the contributory fault of a parent shall not be imputed to a child, under the second sentence of the statute, in a child's action for wrongful death of a parent or loss of consortium of a parent the fault of the parent shall be imputed to the child. If "contributory fault" in the first sentence is limited to mean only a parent's failure to use due care for his or her own protection, the statute would be nonsensical, as the first sentence would provide a right which is then taken away in the second sentence. Statutes must be interpreted to avoid absurd results. State v. Larson, 184 Wn.2d 843, 851, 365 P.3d 740 (2015).

In this case, the trial court permitted defendant Paul to present evidence of Ronald's fault, submitted a Special Verdict Form to the jury permitting an allocation of fault to Ronald, and, following the jury's allocation of 50% fault to Ronald, entered a judgment that reduced Derrick's recovery by the 50% fault allocated to Ronald. In effect, in the language of RCW 4.22.020, the court imputed the fault of the parent to the minor child to diminish recovery in an action by the minor child to recover damages caused by fault resulting in injury. This abolishes the child's right under the common law and RCW 4.22.020 to not have a parent's fault imputed to the child.

The Court of Appeals affirmed on the basis that RCW 4.22.070 requires the trier of fact to allocate the percentage of fault attributable to multiple "entities" responsible for causing a plaintiff's injuries, including those "entities" immune from liability to the plaintiff, and states that judgment shall not be entered against an immune entity. See Smelser at *2. Holding that Ronald had parental immunity and that RCW 4.22.070 permits allocation of fault to parents with parental immunity, the court affirmed the trial court's entry of judgment solely against Paul for 50% of Derrick's damages. *Id.* at *4. The Court of Appeals did not discuss RCW 4.22.020 and the effect of the allocation of fault on Derrick's right to not have Ronald's fault imputed to him so as to diminish his recovery. The effect of this RCW 4.22.070 parental fault allocation is at odds with the

common law and RCW 4.22.020 right of a child not to suffer the consequences of a parent's negligence.

RCW 4.22.070 was first enacted in 1986, Laws of 1986, Ch. 305 § 401, and amended in 1993 to exclude entities immune from liability to the claimant under Title 51 RCW from the fault allocation equation. See Laws of 1993, Ch. 496 § 1. The language of RCW 4.22.070(1) pertinent to this appeal states:

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages.... The entities whose fault shall be determined include... entities immune from liability to the claimant.... Judgment shall be entered against each defendant except those who... are immune from liability to the claimant....

Both RCW 4.22.020 and 4.22.070 appear in RCW Chapter 4.22, which is entitled "Contributory Fault – Effect – Imputation – Contribution – Settlement Agreements." The issue presented here is how, or whether, these two statutes can be construed together and harmonized.²

The Court's primary duty in interpreting a statute "is to discern and implement the intent of the legislature." State v. J.P., 149 Wn.2d 444, 450,

² "If allocations of fault to parents reduce the recoveries obtained by minors, the consequences will be different only in degree from those under the 'barbarous rule' of the common law by which the negligence of the 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 sustain the view that the parent's negligence was not a defense to an action by a child for injuries suffered. These consequences would also conflict with a statutory prohibition ... against imputing the parent's negligence to a child." Cornelius J. Peck, Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability, 62 Wash. L. Rev. 233, 246 (1987). See also, WPI 11.04, COMMENT, discussing whether RCW 4.22.020 may have been abrogated by RCW 4.22.070, and noting that "[t]he implicit repeal of statutes is strongly disfavored." Washington Practice, Vol. 6, Washington Pattern Jury Instructions – Civil, WPI Sixth Edition (Thomson Reuters, 2012).

69 P.3d 318 (2003).³ The plain meaning of a statute 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 & Gwynn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). “We do not favor repeal by implication, and where potentially conflicting acts can be harmonized, we construe each to maintain the integrity of the other.” Anderson v. Dep’t of Corrections, 159 Wn.2d 849, 858-59, 154 P.3d 220 (2007). “Authority is legion that implied repeals of statutes are disfavored and courts have a duty to interpret statutes so as to give them effect.” Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co., 103 Wn.2d 111, 122, 691 P.2d 178 (1984). Only if statutes conflict to the extent that they cannot be harmonized does a court rely upon the general-specific rule of statutory interpretation. O.S.T. v. Regence Blueshield, 181 Wn.2d 691, 701, 335 P.3d 416 (2014). That rule provides that if the Legislature enacts a general statute after a specific statute, the original specific statute is construed as an exception to the general statute, unless the original statute is expressly repealed. See O.S.T., *id.*

In Potter v. Washington State Patrol, 165 Wn.2d 67, 196 P.3d 691 (2008), the Court discussed statutory abrogation of the common law:

³ Paul relies upon State v. J.P., *supra*, as authority for the maxim of statutory construction that in the event of apparent conflict between statutes, the more recent statute prevails. See Paul Supp. Br. at 6-7. RCW 4.22.020 was amended to include minor children in 1981, while 4.22.070 was enacted in 1986, so Paul argues the later statute is given automatic preference. This argument ignores the 1987 amendment which provided an exception to 4.22.020, adding that the contributory fault of a decedent or injured person is imputed to a child in a child’s derivative action. See Laws of 1987, Ch. 212 § 801. This exception demonstrates the Legislature’s continued recognition, after enactment of 4.22.070, of the general rule that the parent’s fault will not be imputed to a child.

In general, our state is governed by the common law to the extent the common law is not inconsistent with constitutional, federal, or state law.... The legislature has the power to supersede, abrogate, or modify the common law.... However, we are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law. "It is a well-established principle of statutory construction that '[t]he common law... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'"... A law abrogates the common law when "the provisions of a... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force."... A statute in derogation of the common law "must be strictly construed and no intent to change that law will be found, unless it appears with clarity."

165 Wn.2d at 76-77 (internal citations omitted).

RCW 4.22.020 and 4.22.070 can be read together to give both effect. Under RCW 4.22.020, in a child's action for his or her *own* injuries, a parent's fault "shall not be imputed" to the child, and the child's right to an undiminished recovery should prohibit allocation of fault to the child's parent under RCW 4.22.070 based upon parental immunity. On the other hand, in a child's action for a derivative claim arising from the wrongful death or loss of consortium of a parent, 4.22.070 "entity" fault is allocated to the child's parent.

In Johnson v. Recreational Equip., Inc., 159 Wn. App. 939, 247 P.3d 18, *review denied*, 172 Wn.2d 1007 (2011), the Court of Appeals upheld a plaintiff's right which had been created by the Legislature in Washington's Product Liability Act (WPLA) by refusing to permit the defendant to effectively abrogate that right through an allocation of "entity" fault under RCW 4.22.070. Johnson purchased a bicycle from

REI and was injured when the front fork on her bicycle failed. REI had not manufactured the bicycle frame or fork, but marketed and sold the bicycle under REI's brand name. Johnson brought an action solely against REI pursuant to RCW 7.72.040(2)(e), a statute in the WPLA, alleging a manufacturing defect in the fork. See Johnson, 159 Wn. App. at 943. RCW 7.72.040(2)(e) provides that a product seller has the liability of a manufacturer where a product is marketed under a brand name of the seller.

REI brought a motion for partial summary judgment, seeking, among other things, a ruling that it was entitled to allocate fault to the manufacturer, as an "entity," pursuant to RCW 4.22.070. Johnson responded with a motion for partial summary judgment asserting that REI was strictly liable. See id. The trial court granted Johnson's motion for summary judgment for strict liability and denied REI's motion to allocate fault to the manufacturer, ruling that REI had the liability of a "manufacturer" pursuant to RCW 7.72.040(2)(e). REI's motion for discretionary review was granted. See id. at 945.

The Court of Appeals affirmed the trial court's refusal to allow any RCW 4.22.070 allocation. See id. at 953-54. REI contended that the 1986 Comparative Fault Act demanded that REI be permitted to ask the jury to allocate fault to the manufacturer as an entity. See id. at 945. REI further contended that if RCW 7.72.040(2)(e) does not permit a product seller to

seek to allocate fault to the manufacturer, that statute is inconsistent with RCW 4.22.070. See id. at 949-50.

The Court of Appeals held that the Legislature created a statutory form of vicarious liability in RCW 7.72.040(2)(e), and that permitting REI to seek to allocate fault to the manufacturer under RCW 4.22.070 would undermine the statutory scheme of the WPLA, and would effectively abrogate the vicarious liability of RCW 7.72.040(2)(e). See id. at 947-50. "Because the WPLA and our state's statutory comparative fault system can be reconciled, we will not hold that our legislature intended, by passing the tort reform act of 1986, to impliedly repeal RCW 7.72.040(2)(e)...We are loathe to find a silent repeal, and we decline to do so here." Id. at 950 (internal citation omitted).

The court acknowledged that where a manufacturing defect is at issue, the manufacturer - not the product seller - caused the defect. See id. at 947 & 949. However, because under RCW 7.72.040(2)(e) the seller of a branded product vicariously assumes the liability of the manufacturer, refusing to permit the seller to allocate fault to the manufacturer is not inconsistent with RCW 4.22.070. See id. at 949. The court held the WPLA expresses the legislature's intent that the seller of a branded product assumes the liability of a manufacturer, and permitting the seller to allocate fault to the manufacturer under RCW 4.22.070 would effectively repeal RCW 7.72.040(2)(e). See id. at 950.

The bicycle manufacturer caused Johnson's damages. RCW 4.22.070 provides "the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages." Despite that language, the court did not permit allocation, because to do so would abrogate the right of the plaintiff, which had been created by the Legislature by enacting RCW 7.72.040(2)(e), to bring a product liability action solely against the seller of a branded product.⁴ The court held the statutes were not inconsistent, as the clear statement in the WPLA that the seller of a branded product assumes the liability of a manufacturer necessarily informs the product seller that it will not be permitted to allocate fault to that manufacturer under 4.22.070. See id. at 949-51.

Similarly, construing RCW 4.22.070 to permit a tortfeasor to seek to allocate fault to the parent of a plaintiff minor child would effectively eliminate the child's common law and RCW 4.22.020 right to not have a parent's fault imputed to the child so as to reduce the child's recovery in a cause of action against a tortfeasor. No intent to change a child's common law right will be found, unless it appears with clarity. See Potter, 165 Wn.2d at 77. The 1986 comparative fault law, including RCW 4.22.070, did not clearly and explicitly repeal a child's right not to have parental

⁴ The court compared the retention of principles of vicarious liability in 4.20.070 with the vicarious liability created in 7.72.040(2)(e). Id. at 950. While the comparison was apt, it was not the basis for the court's holding. RCW 4.22.070(1)(a) provides that a party shall be liable for the fault of another person in two specific instances: where both were acting in concert, and when one was acting as the agent or servant of the other. Neither of those instances involve the vicarious liability of a seller of a branded product for the fault of a manufacturer created in RCW 7.72.040(2)(e).

fault imputed to the child. In Smelser, the Court of Appeals failed to account for the impact of RCW 4.22.020. Yet its application of 4.22.070 to reduce the minor child's recovery by the fault allocated to his parent is tantamount to recognizing an implicit repeal of 4.22.020, a result which is strongly disfavored.

RCW 4.22.020 and 4.22.070 can be harmonized and construed so as to maintain the integrity of each statute. Upholding the rule not to impute parental fault to a child, and thus not allow a tortfeasor to allocate fault to a parent, does not render RCW 4.22.070 meaningless in cases involving parental immunity. Under the last sentence of RCW 4.22.020, when a minor child seeks recovery for the wrongful death or loss of consortium of a parent, the fault of the parent is imputed to the child. Accordingly, a tortfeasor is permitted to seek allocation of fault to a parent pursuant to RCW 4.22.070 in cases in which a child seeks damages for wrongful death or loss of consortium.

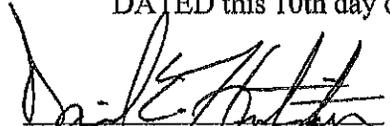
If the Court determines RCW 4.22.020 and 4.22.070 to be irreconcilable, 4.22.020 should prevail as the more specific statute. See O.S.T., 181 Wn.2d at 701. RCW 4.22.020 codified the long-standing common law right of a child to have his or her recovery in an action for damages undiminished by parental fault. The codification of a child's common law right in 4.22.020 is decidedly more specific than the general provision for allocation of fault in all actions involving the fault of more than one entity set forth in 4.22.070.

Under Chapter 4.22 RCW, a fault-free minor child plaintiff in an action against at-fault multiple tortfeasors without immunities is entitled to a modified joint and several liability judgment for full recovery of the child's damages. RCW 4.22.070(1)(b). In light of the common law and RCW 4.22.020's prohibition against imputing parental fault to a child, and absent an explicit direction from the Legislature, a child should not be placed in a worse position when one of the at-fault tortfeasors is a parent. In such circumstances, the child's recovery of damages should not be diminished by the allocation of fault to the parent.

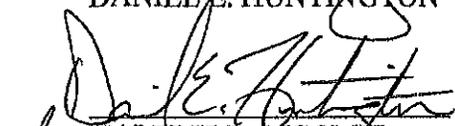
VI. CONCLUSION

The Court should adopt the analysis advanced in this brief, and apply it in resolving whether a child's right in RCW 4.22.020 is abrogated by RCW 4.22.070.

DATED this 10th day of October, 2016.


DANIEL E. HUNTINGTON


GARY N. BLOOM


for VALERIE D. MCOME

On Behalf of WSAJ Foundation

APPENDIX

RCW 4.22.020

Imputation of contributory fault—Spouse, domestic partner, or minor child of spouse or domestic partner—Wrongful death actions.

The contributory fault of one spouse or one domestic partner shall not be imputed to the other spouse or other domestic partner or the minor child of the spouse or domestic partner to diminish recovery in an action by the other spouse or other domestic partner or the minor child of the spouse or other domestic partner, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property, whether separate or community, of the spouse or domestic partner. In an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action.

[2008 c 6 § 401; 1987 c 212 § 801; 1981 c 27 § 10; 1973 1st ex.s. c 138 § 2.]

NOTES:

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

Wrongful death actions: Chapter 4.20 RCW.

CERTIFICATION OF ENROLLMENT
SECOND SUBSTITUTE HOUSE BILL 3104

Chapter 6, Laws of 2008

60th Legislature
2008 Regular Session

DOMESTIC PARTNERSHIPS--RIGHTS

EFFECTIVE DATE: 06/12/08 - Except section 1044, which becomes effective 01/01/09; and section 1047, which becomes effective 07/01/09.

Passed by the House February 15, 2008
Yeas 62 Nays 32

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 4, 2008
Yeas 29 Nays 20

BRAD OWEN

President of the Senate

Approved March 12, 2008, 2:16 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SECOND SUBSTITUTE HOUSE BILL 3104** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 13, 2008

**Secretary of State
State of Washington**

1 listen to the views and act upon the grievances and recommendations of
2 residents and families concerning proposed policy and operational
3 decisions affecting resident care and life in the facility.

4 (f) The resident has the right to refuse to perform services for
5 the facility except as voluntarily agreed by the resident and the
6 facility in the resident's service plan.

7 (4) A resident has the right to participate in social, religious,
8 and community activities that do not interfere with the rights of other
9 residents in the facility.

10 (5) A resident has the right to:

11 (a) Reside and receive services in the facility with reasonable
12 accommodation of individual needs and preferences, except when the
13 health or safety of the individual or other residents would be
14 endangered; and

15 (b) Receive notice before the resident's room or roommate in the
16 facility is changed.

17 (6) A resident has the right to share a double room with his or her
18 spouse or domestic partner when (~~married~~) residents who are married
19 to each other or in a domestic partnership with each other live in the
20 same facility and both spouses or both domestic partners consent to the
21 arrangement.

22 **Sec. 305.** RCW 74.42.070 and 1979 ex.s. c 211 s 7 are each amended
23 to read as follows:

24 Residents shall be given privacy during treatment and care of
25 personal needs. (~~Married~~) Residents who are spouses or domestic
26 partners shall be given privacy during visits with their spouses or
27 their domestic partners. If both (~~husband and wife~~) spouses or both
28 domestic partners are residents of the facility, the facility shall
29 permit the (~~husband and wife~~) spouses or domestic partners to share
30 a room, unless medically contraindicated.

31 **PART IV - JUDICIAL PROCESS--VICTIM'S RIGHTS**

32 **Sec. 401.** RCW 4.22.020 and 1987 c 212 s 801 are each amended to
33 read as follows:

34 The contributory fault of one spouse or one domestic partner shall
35 not be imputed to the other spouse or other domestic partner or the

1 minor child of the spouse or domestic partner to diminish recovery in
2 an action by the other spouse or other domestic partner or the minor
3 child of the spouse or other domestic partner, or his or her legal
4 representative, to recover damages caused by fault resulting in death
5 or in injury to the person or property, whether separate or community,
6 of the spouse or domestic partner. In an action brought for wrongful
7 death or loss of consortium, the contributory fault of the decedent or
8 injured person shall be imputed to the claimant in that action.

9 **Sec. 402.** RCW 5.60.060 and 2007 c 472 s 1 are each amended to read
10 as follows:

11 (1) A (~~husband~~) spouse or domestic partner shall not be examined
12 for or against his (~~wife~~) or her spouse or domestic partner, without
13 the consent of the (~~wife, nor a wife for or against her husband~~
14 ~~without the consent of the husband~~) spouse or domestic partner; nor
15 can either during marriage or during the domestic partnership or
16 afterward, be without the consent of the other, examined as to any
17 communication made by one to the other during the marriage or the
18 domestic partnership. But this exception shall not apply to a civil
19 action or proceeding by one against the other, nor to a criminal action
20 or proceeding for a crime committed by one against the other, nor to a
21 criminal action or proceeding against a spouse or domestic partner if
22 the marriage or the domestic partnership occurred subsequent to the
23 filing of formal charges against the defendant, nor to a criminal
24 action or proceeding for a crime committed by said (~~husband or wife~~)
25 spouse or domestic partner against any child of whom said (~~husband or~~
26 ~~wife~~) spouse or domestic partner is the parent or guardian, nor to a
27 proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW:
28 PROVIDED, That the spouse or the domestic partner of a person sought to
29 be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not
30 be compelled to testify and shall be so informed by the court prior to
31 being called as a witness.

32 (2) (a) An attorney or counselor shall not, without the consent of
33 his or her client, be examined as to any communication made by the
34 client to him or her, or his or her advice given thereon in the course
35 of professional employment.

36 (b) A parent or guardian of a minor child arrested on a criminal
37 charge may not be examined as to a communication between the child and

means the secretary of state has determined the document complies as to form with the applicable requirements of this title.

(10) "Effective date" means, in connection with a filing made by the secretary of state, the date which is shown by affixing a "filed" stamp on the documents. When a document is received for filing by the secretary of state in a form which complies with the requirements of this title and which would entitle the document to be filed immediately upon receipt, but the secretary of state's approval action occurs subsequent to the date of receipt, the secretary of state's filing date shall relate back to the date on which the secretary of state first received the document in acceptable form. An applicant may request a specific effective date no more than thirty days later than the date of receipt which might otherwise be applied as the effective date.

(11) "Executed by an officer of the corporation," or words of similar import, means that any document signed by such person shall be and is signed by that person under penalties of perjury and in an official and authorized capacity on behalf of the corporation or person submitting the document with the secretary of state.

(12) "An officer of the corporation" means, in connection with the execution of documents submitted for filing with the secretary of state, the president, a vice president, the secretary or the treasurer of the corporation.

(13) "Distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a dividend; a purchase, redemption, or other acquisition of shares; or otherwise.

(14) "Public company" means a corporation that has a class of shares registered with the federal securities and exchange commission pursuant to section 12 of the securities exchange act of 1934, or section 8 of the investment company act of 1940, or any successor statute, and that has more than three hundred holders of record of its shares.

PART VIII CONSORTIUM

Sec. 801. Section 2, chapter 138, Laws of 1973 1st ex. sess. as amended by section 10, chapter 27, Laws of 1981 and RCW 4.22.020 are each amended to read as follows:

The contributory fault of one spouse shall not be imputed to the other spouse or the minor child of the spouse to diminish recovery in an action by the other spouse or the minor child of the spouse, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property, whether separate or community, of the spouse. In an action brought for wrongful death or loss of consortium, the contributory

fault of the decedent or injured person shall be imputed to the claimant in that action.

PART IX
LIMITATION OF ACTIONS—FELONY

Sec. 901. Section 501, chapter 305, Laws of 1986 and RCW 4.24.420 are each amended to read as follows:

It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony ~~((if))~~ at the time of the occurrence causing the injury or death and the felony was ((causally related to the injury or death in time, place, or activity)) a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

PART X
INTOXICATION DEFENSE

Sec. 1001. Section 902, chapter 305, Laws of 1986 and RCW 5.40.060 are each amended to read as follows:

It is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition ((contributed more than fifty percent to his or her injuries or death. If the amount of alcohol in a person's blood is shown by chemical analysis of his or her blood, breath, or other bodily substance to have been 0.10 percent or more by weight of alcohol in the blood, it is conclusive proof that the person was under the influence of intoxicating liquor)) was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

PART XI
IMMUNITY FOR DIRECTORS OF NONPROFIT CORPORATIONS

Sec. 1101. Section 903, chapter 305, Laws of 1986 and RCW 4.24.264 are each amended to read as follows:

(1) Except as provided in subsection (2) of this section, a member of the board of directors or an officer of any nonprofit corporation is not ~~((civilly))~~ individually liable for any ((act or omission in the course and scope of)) discretionary decision or failure to make a discretionary decision within

A comparison of fault for any purpose under sections 8 through 14 of this amendatory act shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

Sec. 10. Section 2, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.020 are each amended to read as follows:

The ~~((negligence))~~ contributory fault of one ~~((marital))~~ spouse shall not be imputed to the other spouse or the minor child of the spouse to ~~((the marriage so as to bar))~~ diminish recovery in an action by the other spouse ~~((to the marriage))~~ or the minor child of the spouse, or his or her legal representative, to recover damages ~~((from a third party))~~ caused by ~~((negligence))~~ fault resulting in death or in injury to the person or property, whether separate or community, of the spouse. In an action brought for wrongful death, the contributory fault of the decedent shall be imputed to the claimant in that action.

NEW SECTION. Sec. 11. NATURE OF LIABILITY. If more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

NEW SECTION. Sec. 12. RIGHT OF CONTRIBUTION. (1) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution among liable persons is the comparative fault of each such person. However, the court may determine that two or more persons are to be treated as a single person for purposes of contribution.

(2) Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement and (b) to the extent that the amount paid in settlement was reasonable at the time of the settlement.

(3) The common law right of indemnity between active and passive tortfeasors is abolished.

NEW SECTION. Sec. 13. ENFORCEMENT OF CONTRIBUTION.

(1) If the comparative fault of the parties to a claim for contribution has been established previously by the court in the original action, a party paying more than that party's equitable share of the obligation, upon motion, may recover judgment for contribution.

(2) If the comparative fault of the parties to the claim for contribution has not been established by the court in the original action, contribution may be enforced in a separate action, whether or not a judgment has been

and Washington State University during the 1973-75 biennium under the provisions of RCW 66.08.180. If this section is not deleted, the University of Washington will receive \$300,000 less than anticipated, Washington State University will receive \$200,000 less than anticipated, and the Division of Health-Department of Social and Health Services will receive \$500,000 more than anticipated for alcoholism programs authorized by RCW 70.96.040.

Veto
Message

Although the language of this section does not contain the word "appropriation," in the absence of any specific language to the contrary, the effect is an appropriation of \$500,000 for additional expenditures by the Division of Health. The Alcoholism Program of the Division of Health was funded at the level recommended in my proposed budget for the 1973-75 biennium, and I do not believe the Legislature intended to provide additional funds for that program.

With the exception of the items described above, the remainder of the bill is approved."

CHAPTER 138

[Engrossed Senate Bill No. 2045]

COMPARATIVE NEGLIGENCE--IMPUTED NEGLIGENCE

AN ACT Relating to civil procedure; creating a new chapter in Title 4 RCW; and declaring an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages caused by negligence resulting in death or in injury to person or property, but any damages allowed shall be diminished in proportion to the percentage of negligence attributable to the party recovering.

NEW SECTION. Sec. 2. The negligence of one marital spouse shall not be imputed to the other spouse to the marriage so as to bar recovery in an action by the other spouse to the marriage, or his or her legal representative, to recover damages from a third party caused by negligence resulting in death or in injury to the person.

NEW SECTION. Sec. 3. This act takes effect as of 12:01 a.m. on April 1, 1974.

NEW SECTION. Sec. 4. If any provision of this act or the application thereof to any person or circumstance is held

RCW 4.22.070

Percentage of fault—Determination—Exception—Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

NOTES:

Effective date—1993 c 496: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 496 § 3.]

Application—1993 c 496: "This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993." [1993 c 496 § 4.]

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW 4.16.160.

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 1264

Chapter 496, Laws of 1993

53rd Legislature
1993 Regular Session

WORKERS' COMPENSATION--THIRD PARTY RECOVERIES

EFFECTIVE DATE: 7/1/93

Passed by the House February 17, 1993
Yeas 93 Nays 3

BRIAN EBERSOLE
Speaker of the
House of Representatives

Passed by the Senate April 6, 1993
Yeas 44 Nays 3

R. LORRAINE WOJAHN
President of the Senate

Approved May 18, 1993

MIKE LOWRY
Governor of the State of Washington

CERTIFICATE

I, Alan Thompson, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED HOUSE BILL 1264** as passed by the House of Representatives and the Senate on the dates hereon set forth.

ALAN THOMPSON
Chief Clerk

FILED

May 18, 1993 - 2:27 p.m.

Secretary of State
State of Washington

ENGROSSED HOUSE BILL 1264

Passed Legislature - 1993 Regular Session

State of Washington 53rd Legislature 1993 Regular Session

By Representatives Heavey and R. Meyers

Read first time 01/20/93. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to third party recoveries in workers' compensation
2 cases; amending RCW 4.22.070 and 51.24.060; creating a new section;
3 providing an effective date; and declaring an emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 4.22.070 and 1986 c 305 s 401 are each amended to read
6 as follows:

7 (1) In all actions involving fault of more than one entity, the
8 trier of fact shall determine the percentage of the total fault which
9 is attributable to every entity which caused the claimant's damages (~~(~~
10 ~~including)~~) except entities immune from liability to the claimant under
11 Title 51 RCW. The sum of the percentages of the total fault attributed
12 to at-fault entities shall equal one hundred percent. The entities
13 whose fault shall be determined include the claimant or person
14 suffering personal injury or incurring property damage, defendants,
15 third-party defendants, entities released by the claimant, entities
16 with any other individual defense against the claimant, and entities
17 immune from liability to the claimant ((and entities with any other
18 individual defense against the claimant)), but shall not include those
19 entities immune from liability to the claimant under Title 51 RCW.

1 Judgment shall be entered against each defendant except those who have
2 been released by the claimant or are immune from liability to the
3 claimant or have prevailed on any other individual defense against the
4 claimant in an amount which represents that party's proportionate share
5 of the claimant's total damages. The liability of each defendant shall
6 be several only and shall not be joint except:

7 (a) A party shall be responsible for the fault of another person or
8 for payment of the proportionate share of another party where both were
9 acting in concert or when a person was acting as an agent or servant of
10 the party.

11 (b) If the trier of fact determines that the claimant or party
12 suffering bodily injury or incurring property damages was not at fault,
13 the defendants against whom judgment is entered shall be jointly and
14 severally liable for the sum of their proportionate shares of the
15 claimants total damages.

16 (2) If a defendant is jointly and severally liable under one of the
17 exceptions listed in subsections (1)(a) or (1)(b) of this section, such
18 defendant's rights to contribution against another jointly and
19 severally liable defendant, and the effect of settlement by either such
20 defendant, shall be determined under RCW 4.22.040, 4.22.050, and
21 4.22.060.

22 (3) (a) Nothing in this section affects any cause of action relating
23 to hazardous wastes or substances or solid waste disposal sites.

24 (b) Nothing in this section shall affect a cause of action arising
25 from the tortious interference with contracts or business relations.

26 (c) Nothing in this section shall affect any cause of action
27 arising from the manufacture or marketing of a fungible product in a
28 generic form which contains no clearly identifiable shape, color, or
29 marking.

30 **Sec. 2.** RCW 51.24.060 and 1987 c 442 s 1118 are each amended to
31 read as follows:

32 (1) If the injured worker or beneficiary elects to seek damages
33 from the third person, any recovery made shall be distributed as
34 follows:

35 (a) The costs and reasonable attorneys' fees shall be paid
36 proportionately by the injured worker or beneficiary and the department
37 and/or self-insurer: PROVIDED, That the department and/or self-insurer
38 may require court approval of costs and attorneys' fees or may petition

1 a court for determination of the reasonableness of costs and attorneys'
2 fees;

3 (b) The injured worker or beneficiary shall be paid twenty-five
4 percent of the balance of the award: PROVIDED, That in the event of a
5 compromise and settlement by the parties, the injured worker or
6 beneficiary may agree to a sum less than twenty-five percent;

7 (c) The department and/or self-insurer shall be paid the balance of
8 the recovery made, but only to the extent necessary to reimburse the
9 department and/or self-insurer for (~~compensation and~~) benefits paid;

10 (i) The department and/or self-insurer shall bear its proportionate
11 share of the costs and reasonable attorneys' fees incurred by the
12 worker or beneficiary to the extent of the benefits paid (~~or payable~~)
13 under this title: PROVIDED, That the department's (~~or~~) and/or self-
14 insurer's (~~may require court approval of costs and attorneys' fees or~~
15 ~~may petition a court for determination of the reasonableness of costs~~
16 ~~and~~) proportionate share shall not exceed one hundred percent of the
17 costs and reasonable attorneys' fees(~~or~~);

18 (ii) (~~The sum representing the department's and/or self-insurer's~~
19 ~~proportionate share shall not be subject to subsection (1) (d) and (e)~~
20 ~~of this section.)) The department's and/or self-insurer's
21 proportionate share of the costs and reasonable attorneys' fees shall
22 be determined by dividing the gross recovery amount into the benefits
23 paid amount and multiplying this percentage times the costs and
24 reasonable attorneys' fees incurred by the worker or beneficiary;~~

25 (iii) The department's and/or self-insurer's reimbursement share
26 shall be determined by subtracting their proportionate share of the
27 costs and reasonable attorneys' fees from the benefits paid amount;

28 (d) Any remaining balance shall be paid to the injured worker or
29 beneficiary; and

30 (e) Thereafter no payment shall be made to or on behalf of a worker
31 or beneficiary by the department and/or self-insurer for such injury
32 until the amount of any further compensation and benefits shall equal
33 any such remaining balance minus the department's and/or self-insurer's
34 proportionate share of the costs and reasonable attorneys' fees in
35 regards to the remaining balance. This proportionate share shall be
36 determined by dividing the gross recovery amount into the remaining
37 balance amount and multiplying this percentage times the costs and
38 reasonable attorneys' fees incurred by the worker or beneficiary.
39 Thereafter, such benefits shall be paid by the department and/or self-

1 insurer to or on behalf of the worker or beneficiary as though no
2 recovery had been made from a third person(+

3 ~~(f) If the employer or a co-employee are determined under RCW
4 4.22.070 to be at fault, (c) and (e) of this subsection do not apply
5 and benefits shall be paid by the department and/or self-insurer to or
6 on behalf of the worker or beneficiary as though no recovery had been
7 made from a third person).~~

8 (2) The recovery made shall be subject to a lien by the department
9 and/or self-insurer for its share under this section.

10 (3) The department or self-insurer has sole discretion to
11 compromise the amount of its lien. In deciding whether or to what
12 extent to compromise its lien, the department or self-insurer shall
13 consider at least the following:

14 (a) The likelihood of collection of the award or settlement as may
15 be affected by insurance coverage, solvency, or other factors relating
16 to the third person;

17 (b) Factual and legal issues of liability as between the injured
18 worker or beneficiary and the third person. Such issues include but
19 are not limited to possible contributory negligence and novel theories
20 of liability; and

21 (c) Problems of proof faced in obtaining the award or settlement.

22 (4) In the case of an employer not qualifying as a self-insurer,
23 the department shall make a retroactive adjustment to such employer's
24 experience rating in which the third party claim has been included to
25 reflect that portion of the award or settlement which is reimbursed for
26 compensation and benefits paid and, if the claim is open at the time of
27 recovery, applied against further compensation and benefits to which
28 the injured worker or beneficiary may be entitled.

29 (5) In an action under this section, the self-insurer may act on
30 behalf and for the benefit of the department to the extent of any
31 compensation and benefits paid or payable from state funds.

32 (6) It shall be the duty of the person to whom any recovery is paid
33 before distribution under this section to advise the department or
34 self-insurer of the fact and amount of such recovery, the costs and
35 reasonable attorneys' fees associated with the recovery, and to
36 distribute the recovery in compliance with this section.

37 (7) The distribution of any recovery made by award or settlement of
38 the third party action shall be confirmed by department order, served
39 by registered or certified mail, and shall be subject to chapter 51.52

1 RCW. In the event the order of distribution becomes final under
2 chapter 51.52 RCW, the director or the director's designee may file
3 with the clerk of any county within the state a warrant in the amount
4 of the sum representing the unpaid lien plus interest accruing from the
5 date the order became final. The clerk of the county in which the
6 warrant is filed shall immediately designate a superior court cause
7 number for such warrant and the clerk shall cause to be entered in the
8 judgment docket under the superior court cause number assigned to the
9 warrant, the name of such worker or beneficiary mentioned in the
10 warrant, the amount of the unpaid lien plus interest accrued and the
11 date when the warrant was filed. The amount of such warrant as
12 docketed shall become a lien upon the title to and interest in all real
13 and personal property of the injured worker or beneficiary against whom
14 the warrant is issued, the same as a judgment in a civil case docketed
15 in the office of such clerk. The sheriff shall then proceed in the
16 same manner and with like effect as prescribed by law with respect to
17 execution or other process issued against rights or property upon
18 judgment in the superior court. Such warrant so docketed shall be
19 sufficient to support the issuance of writs of garnishment in favor of
20 the department in the manner provided by law in the case of judgment,
21 wholly or partially unsatisfied. The clerk of the court shall be
22 entitled to a filing fee of five dollars, which shall be added to the
23 amount of the warrant. A copy of such warrant shall be mailed to the
24 injured worker or beneficiary within three days of filing with the
25 clerk.

26 (8) The director, or the director's designee, may issue to any
27 person, firm, corporation, municipal corporation, political subdivision
28 of the state, public corporation, or agency of the state, a notice and
29 order to withhold and deliver property of any kind if he or she has
30 reason to believe that there is in the possession of such person, firm,
31 corporation, municipal corporation, political subdivision of the state,
32 public corporation, or agency of the state, property which is due,
33 owing, or belonging to any worker or beneficiary upon whom a warrant
34 has been served by the department for payments due to the state fund.
35 The notice and order to withhold and deliver shall be served by the
36 sheriff of the county or by the sheriff's deputy, or by any authorized
37 representatives of the director. Any person, firm, corporation,
38 municipal corporation, political subdivision of the state, public
39 corporation, or agency of the state upon whom service has been made

1 shall answer the notice within twenty days exclusive of the day of
2 service, under oath and in writing, and shall make true answers to the
3 matters inquired of in the notice and order to withhold and deliver.
4 In the event there is in the possession of the party named and served
5 with such notice and order, any property which may be subject to the
6 claim of the department, such property shall be delivered forthwith to
7 the director or the director's authorized representative upon demand.
8 If the party served and named in the notice and order fails to answer
9 the notice and order within the time prescribed in this section, the
10 court may, after the time to answer such order has expired, render
11 judgment by default against the party named in the notice for the full
12 amount claimed by the director in the notice together with costs. In
13 the event that a notice to withhold and deliver is served upon an
14 employer and the property found to be subject thereto is wages, the
15 employer may assert in the answer to all exemptions provided for by
16 chapter 6.27 RCW to which the wage earner may be entitled.

17 NEW SECTION. **Sec. 3.** This act is necessary for the immediate
18 preservation of the public peace, health, or safety, or support of the
19 state government and its existing public institutions, and shall take
20 effect July 1, 1993.

21 NEW SECTION. **Sec. 4.** This act applies to all causes of action
22 that the parties have not settled or in which judgment has not been
23 entered prior to July 1, 1993.

Passed the House February 17, 1993.

Passed the Senate April 6, 1993.

Approved by the Governor May 18, 1993.

Filed in Office of Secretary of State May 18, 1993.

PART III
LIMITATION ON NONECONOMIC DAMAGES

NEW SECTION. Sec. 301. A new section is added to chapter 4.56 RCW to read as follows:

(1) As used in this section, the following terms have the meanings indicated unless the context clearly requires otherwise.

(a) "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

(b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

(c) "Bodily injury" means physical injury, sickness, or disease, including death.

(d) "Average annual wage" means the average annual wage in the state of Washington as determined under RCW 50.04.355.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

PART IV
APPORTIONMENT OF DAMAGES

NEW SECTION. Sec. 401. A new section is added to chapter 4.22 RCW to read as follows:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or

person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant's total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Sec. 402. Section 11, chapter 27, Laws of 1981 and RCW 4.22.030 are each amended to read as follows:

Except as otherwise provided in section 401 of this 1986 act, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

Sec. 403. Section 4, chapter 85, Laws of 1977 ex. sess. as last amended by section 5, chapter 218, Laws of 1984 and RCW 51.24.060 are each amended to read as follows:

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer;

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Cc: paul@benbarcus.com; joannehenry1@outlook.com; Bryan Harnetiaux (bryanpharnetiauxwsba@gmail.com); Bryan P. Harnetiaux (amicuswsajf@wsajf.org); Valerie McOmie; garyb@hblaw2.com
Subject: RE: Smelser v. Smelser (S.C. #93076-7)

Rec'd 10/10/16

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Subject: Smelser v. Smelser (S.C. #93076-7)

Dear Ms. Carlson:

Re: Smelser v. Smelser
Supreme Court Case No. 93076-7

On September 30, 2016, Washington State Association for Justice Foundation (WSAJ Foundation) submitted a letter request that it be granted Amicus Curiae status in this case, and that the deadline for submitting its Amicus Curiae Brief be extended from October 3, 2016, to October 10, 2016. As of this date, the Court has not ruled on WSAJ Foundation's letter request. In hopes that the Court grants its letter request, attached please find WSAJ Foundation's proposed Amicus Curiae Brief. Counsel for the parties are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

Daniel E. Huntington

WSBA #8277

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