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STATE OF WASHINGTON  
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NO. 96538-2

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Respondent,

v.

MULLEN TRUCKING 2005, LTD., et al.,

Petitioners.

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**STATE OF WASHINGTON'S SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

Since 1937, commercial trucking companies have been on notice that when they drive an over-height load through this State, they are liable for all damages their negligence causes to Washington's bridges. Laws of 1937, ch. 189, §§ 48, 57 (codified at RCW 46.44.020 and RCW 46.44.110). When the State has provided at least 14 feet of vertical clearance on the bridge, "no liability may attach to the State." RCW 46.44.020. Strong policy reasons support the liability provisions that apply to these limited circumstances. Negligent operation of an over-height truck creates a fatality risk for all other motorists and pedestrians on bridges, risks destruction of tremendously expensive infrastructure, and extended closure of freeways. Trucking companies and their drivers are in the best position to minimize the risks by accurately measuring their height, checking bridge clearance before getting on the highway, hiring competent pilot car drivers, and crossing bridges in the lane providing the greatest clearance.

The State is not an "at-fault entity" subject to an assignment of comparative fault under RCW 4.22.070. RCW 46.44.020; *Smelser v. Paul*, 188 Wn.2d 648, 657, 398 P.3d 1086 (2017). The State met its duty by providing over 14 feet of clearance on the Skagit River Bridge, and therefore had no tort liability for Mullen's crash.

## **II. STATEMENT OF THE ISSUE**

Under RCW 46.44.020 and .110, truckers are liable for “all damages” when their negligent operation of an over-height truck results in damage to a bridge and “no liability may attach” to the State. Did the Court of Appeals correctly hold that Mullen and Motorways are liable for all damages related to their negligent destruction of the Skagit River Bridge?

## **III. STATEMENT OF THE CASE**

### **A. Mullen Knew It Was Responsible for Checking Vertical Clearance, But Chose Not To**

In 2013, William Scott, a commercial truck driver for Mullen Trucking, was hired to carry an over-height truck load of steel casing from Canada to Vancouver, Washington. CP 334, 533-35. Mullen knew that, like every state in the nation, Washington puts the responsibility on the hauler to plan a route with sufficient vertical clearance. CP 203, 214, 216-17, 1137. The company used WSDOT’s website to self-issue a state permit for the trip. The permit reminded Mullen that: “WSDOT does not guarantee height clearances.” CP 254-56, 533-34. WSDOT provided a variety of resources Mullen could have consulted, resources Mullen admittedly used to plan the routes for its prior over-height loads. They included: (1) a bridge list stating clearance height at the center of the Skagit River Bridge and in the bridge’s outer lanes, (2) a website showing

the bridge's arched structure with the vertical clearance of each travel lane, (3) and a WSDOT phone number for help with route planning. CP 264-66, 292-94, 340, 399, 1137.

As the one person in control of the direction, speed, and height of his truck, Scott conceded he was ultimately responsible for checking the clearance on his chosen route before driving on any public street. CP 203, 214, 216-17, 1137. Although he measured the load at 15 feet 9 inches—nearly two feet above the legal limit—he admittedly made no effort to determine which bridges his route would travel over or whether he would have sufficient vertical clearance. Instead, he opted to play a game of chance.

If Mullen and Scott had examined their route, they would have learned that the arch of the Skagit River Bridge had a clearance of 17 feet 3 inches at its center, that declined to 14 feet 5 inches on the shoulder. CP 243. WSDOT engineers inspected the bridge each year from 2000 to 2013, and determined that the bridge was safe. CP 1151. Although the bridge was labeled “functionally obsolete,” this was solely because a side access road *under* the bridge did not meet modern day lateral clearance standards. It had nothing to do with the bridge deck itself, the vertical clearance, or the width of the travel lanes and shoulders on the bridge. CP 626. Based on the unchallenged evidence, the trial court found that

neither the condition of the steel members of the Skagit River Bridge nor WSDOT's maintenance of the bridge caused or contributed to the collapse. CP 1305; *see also* CP 911-12; 1151-52. Stated more succinctly, had Scott's collision occurred the day after the bridge opened in 1955, it would have forced the exact same bridge collapse. CP 912, 1151. This, too, is undisputed.

**B. Mullen's Truck Rammed the Bridge, Causing It to Collapse**

As Scott moved the over-height load down I-5, he was required to have a pilot car with a height-measuring pole travel in front of him. WAC 468-38-100(1)(h). The pilot car driver, Tammy DeTray, crossed the Skagit River Bridge first. DeTray chatted on her cell phone as she traveled in the right lane across the bridge, and failed to notice the height pole repeatedly smacking the bridge's overhead braces.<sup>1</sup> CP 345-49, 352-54.

Scott traveled in the right lane as he approached the bridge at 50-55 miles an hour.<sup>2</sup> CP 525, 1168. He saw two staggered object marker signs warning drivers that the right shoulder narrowed on the bridge. CP 721-23. Approximately one-half to one mile before Scott reached the

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<sup>1</sup> Washington State Patrol's Major Accident Investigation Team concluded that Scott followed so closely behind Detray, that even if she had warned him about the bridge height, Scott did not have enough time to "mitigate speed and avoid striking the structure." CP 338.

<sup>2</sup> At 55 miles an hour, the steel casing carried by Mullen slammed into the bridge at a speed of over 81 feet per second. The over-height load was traveling the length of a professional football field every 3.7 seconds. CP 1168-69.

bridge, a Motorways Transport truck overtook him on the left.

Motorways' truck rode on the line separating the lanes, squeezing Scott further to the right. CP 207-09, 521. Without slowing, Scott drove onto the bridge deck. "[T]here was a giant bang" and "everything got violent."

CP 521. The over-height load tore through eleven of the bridge's overhead braces, causing the center span to plunge into the Skagit River. CP 1168.

Two passenger vehicles were also thrown into the river. CP 88. After the accident, the State Patrol determined that the actual height of Mullen's load was 15 feet 11 inches, two inches higher than its permit allowed.

CP 323-24.

It cost the taxpayers \$17,585,900 to clear the collapsed bridge span from the river, and build first a temporary, and then a permanent replacement span. CP 361.

**C. The Lower Courts Held that Mullen Cannot Reduce Its Liability by Assigning Fault to the State**

The State sued Mullen, Scott, Motorways, and DeTray for the cost of the bridge collapse. CP 1-15. Mullen and Motorways responded that the State was contributorily negligent. The trial court granted the State's motion for partial summary judgment, and held that Mullen cannot allocate fault to the State. "[N]o liability is about as clear as you can

get . . . [and] contributory negligence is simply apportioning of liability.”  
CP 1305.

The Court of Appeals agreed. *State v. Mullen Trucking 2004, Ltd.*,  
5 Wn. App. 2d 787, 428 P.3d 401 (2018), *review granted*, 192 Wn.2d  
1022 (2019). It held that RCW 46.44.020 and .110 unambiguously  
preclude finding the State liable for any damage to the bridge given the  
undisputed fact that the bridge had over 14 feet of vertical clearance. The  
statutes “clearly express a legislative determination that the State is to bear  
no financial responsibility” for Mullen’s destruction of the bridge. *Mullen*,  
5 Wn. App. 2d at 796. The Court of Appeals reasoned that assigning  
comparative fault would “shift a degree of liability to the State, contrary to  
RCW 46.44.020” and “relieve the negligent motorist of its liability for ‘all  
damages’ under RCW 46.44.110.” *Id.* at 797.

#### **IV. ARGUMENT**

When a trucking company illegally or negligently runs an over-  
height load through Washington, it creates two problems. First, colliding  
with an overhead obstacle, such as a bridge or overpass, threatens the lives  
of other motorists and pedestrians. Second, negligently destroying a bridge  
or overpass—particularly on Interstate 5—places a significant economic  
burden on the public.

In 1937, the Legislature addressed these risks by enacting two statutes, which read together (1) limit the legal vehicle height and place a duty on the driver to exercise due care, (2) establish that if the State has provided at least 14 feet of vertical clearance on the bridge, “no liability may attach to the State” for an overhead bridge crash, and (3) provide that the driver “is liable for all damages” resulting from illegal or negligent operation of the over-height vehicle. Laws of 1937, ch. 189, §§ 48, 57 (codified at RCW 46.44.020 and RCW 46.44.110). The State satisfied its duty by providing over 14 feet of clearance on the Skagit River Bridge. Because the State had no tort liability under RCW 46.44.020 for this overhead bridge crash, the Court of Appeals correctly held that RCW 4.22.070 is inapplicable to this case. *Mullen*, 5 Wn. App. 2d at 797.

**A. Because the State Satisfied Its Tort Duty, No Liability May Attach to the State for the Trucking Companies’ Negligent Destruction of the Bridge**

The Court of Appeals correctly held that the State met its duty of care and therefore had no tort liability for this overhead bridge crash. As a result, the negligent motorists were statutorily liable for “all damages” and no liability could attach to the State.

In cases involving an overhead bridge crash, the duty of care for both the driver of an over-height truck, and the State, is set forth in RCW 46.44.020. The statute establishes the vehicle height limit and

assigns drivers the duty to exercise due care in determining whether their over-height load will clear all of the bridges and overpasses on its chosen route.

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

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

RCW 46.44.020. Even when a permit is obtained, the person in control of the load has a duty to ensure that their route provides sufficient clearance, and is specifically required to “check, or prerun, the proposed route and provide for safe maneuvers around the obstruction or detours as necessary.” RCW 46.44.020; WAC 468-38-070(1)(b). Consistent with RCW 46.44.020, the permitting regulations state that the permittee is liable for all damage to persons or property caused by the over-height vehicle, and that the permittee will hold the State blameless and indemnify the State against any claims or loss resulting from the over-height load. WAC 468-38-050(5).<sup>3</sup> Mullen accepted these terms when it self-issued the permit for Scott’s over-height load. CP 282-86.

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<sup>3</sup> WAC 468-38-050(5) states: “**What specific responsibility and liability does the state assign to the permit applicant through the special permit?** Permits are granted with the specific understanding that the permit applicant shall be responsible and liable for accidents, damage or injury to any person or property resulting from the operation of the vehicle covered by the permit upon public highways of the state. The

RCW 46.44.020 also establishes the State’s duty. The Legislature has specific constitutional authority to “define parameters of a cause of action,” including claims against the State. Const. art. II, § 26; *Sofie v. Fibreboard*, 112 Wn.2d 636, 666, 771 P.2d 711 (1989). Here, the Legislature declared that the State must either provide 14 feet of vertical clearance or erect signs warning motorists that the clearance is impaired. If the State meets this duty, it is relieved of all liability:

**[N]o liability may attach to the state or to any county, city, town, or other political subdivision by reason of any damage or injury to persons or property by reason of the existence of any structure over or across any public highway where the vertical clearance above the roadway is fourteen feet or more; or, where the vertical clearance is less than fourteen feet, if impaired clearance signs . . . are erected and maintained . . . .**

RCW 46.44.020 (emphases added). The statute makes no distinction between the State acting as the plaintiff or as a defendant—in either case, it precludes imposition of tort liability for overhead bridge crashes if 14 feet of clearance is provided. If the State fails to meet that duty, it is not relieved of liability.

This provision was particularly important when it was enacted in 1937. At that time, contributory negligence served as a complete bar to

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permit applicant shall hold blameless and harmless and shall indemnify the state of Washington, department of transportation, its officers, agents, and employees against any and all claims, demands, loss, injury, damage, actions and costs of actions whatsoever, that any of them may sustain by reason of unlawful acts, conduct or operations of the permit applicant in connection with the operations covered by the permit.”

recovery. See *Hynek v. City of Seattle*, 7 Wn.2d 386, 395-98, 111 P.2d 247 (1941). Without the protection of this statute, attributing even a small percentage of liability to the State would have completely destroyed its ability to recover the bridge damage caused by a negligent trucking company. *Id.* RCW 46.44.020 prevented such a windfall. Although the State waived sovereign immunity in 1961, that same year the Legislature re-codified RCW 46.44.020 without modifying the State's protection from tort liability. Laws of 1961, ch. 12. Since 1961, the Legislature has amended RCW 46.44.020 five times without modifying the State's protection from tort liability. Laws of 1984, ch. 7, § 52; Laws of 1977, ch. 81, § 1; Laws of 1975-76, 2d Ex. Sess., ch. 64 § 7; Laws of 1971, 1st Ex. Sess., ch. 248, § 1; Laws of 1965, ch. 43, § 1. This evidences the Legislature's ongoing commitment to protect the State from tort liability, and ensure a full recovery of damages from the negligent trucking company, when this very specific type of damage to a bridge occurs.

In conjunction with RCW 46.44.020, the Legislature enacted a companion statute defining the negligent motorist's liability for breach of duty. Laws of 1937, ch. 189, §§ 48, 57. RCW 46.44.110 states, in relevant part:

Any person operating any vehicle or moving any object or conveyance upon . . . any bridge or elevated structure that is part of any such public highway **is liable for all damages**

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

RCW 46.44.110 (emphases added).

Mullen and its driver breached the duty of care under RCW 46.44.020 by failing to determine whether there was sufficient vertical clearance on their route. Although Mullen obtained a permit for an over-height load of 15 feet 9 inches, this was two inches less than the actual height of the load. CP 323. Despite the fact that the face of its permit reminded Mullen of its duty to check the height clearance on the route, Mullen chose to endanger the public by putting its over-height load on the road without making any effort to do so. CP 272, 276-77, 292-93, 309, 315, 318 (“that is where we failed”). Scott knew the right lane of the bridge provided the least clearance, but testified that he never even considered crossing the bridge in the left lane or straddling the two southbound lanes. CP 203, 214, 216-17, 525, 1140. Mullen and Scott concede their negligence caused the destruction of

the bridge. CP 203, 214, 216-17, 272, 276-77, 292-93, 318, 1137. As a result, they are “liable for all damages” sustained as a result of their collision with the bridge. RCW 46.44.020; RCW 46.44.110.

Unlike Mullen and Scott, the State *did* satisfy its duty under RCW 46.44.020 by providing more than 14 feet of vertical clearance on the bridge. Because the State satisfied its duty, “no liability may attach to the State.” RCW 46.44.020. Moreover, in an action brought by the State against the negligent trucking companies, “any measure of damage determined by the department of transportation . . . is prima facie the amount of damage caused thereby and is presumed to be the amount recoverable” in a civil action. RCW 46.44.110. This strong presumption of damages, in conjunction with RCW 46.44.020’s preclusion of tort liability, ensures that Washington taxpayers will not pay the cost of the commercial trucking company’s negligent destruction of the bridge.

But the impact of this statutory scheme goes beyond addressing recovery after the accident. Read together, RCW 46.44.020 and .110 serve an important public policy goal. Time is money for a commercial trucking company. When they are liable for “all damages” resulting from their negligence, “no liability may attach to the State,” and there is a strong presumption of damages, the trucking company and its

driver have a compelling financial incentive to slow down and check the vertical clearance before endangering the public with their over-height vehicle. After the State meets its duty to providing 14 feet of clearance, the trucking company is in the best position to control the danger their hazardous activity creates.

**B. Because the State Has No Tort Liability for the Bridge Crash, RCW 4.22.070 Does Not Permit Allocation of Fault**

The comparative fault provisions of RCW 4.22 do not supplant the tort duties and limitations on liability established by RCW 46.44.020 and RCW 46.44.110. Comparative fault is assigned only to “at-fault entities.” RCW 4.22.070(1). Fault exists only when a party engages in “negligent or reckless conduct breaching some recognized duty.” *Smelser v. Paul*, 188 Wn.2d 648, 657, 398 P.3d 1086 (2017) (citing *Price v. Kitsap Transit*, 125 Wn.2d 456, 461-62, 886 P.2d 556 (1994)). In the very limited circumstances involving an overhead bridge crash that results from negligent operation of an over-height truck, the State’s duty is restricted to providing sufficient clearance or signage. RCW 46.44.020. If this duty is met, the State has no tort liability for such a crash and the vehicle operator “is liable for all damages.” *Smelser*, 188 Wn.2d at 657; RCW 46.44.110. Because the State met its duty by providing over 14 feet

of clearance on the Skagit River Bridge, it is not an “at-fault entity” subject to an assignment of comparative fault under RCW 4.22.070.<sup>4</sup>

Although Mullen and Motorways suggest that the State is relying on an immunity argument, it is not. RCW 4.22.070 authorizes allocation of fault regardless of whether an entity has immunity. The statute turns on a finding of liability. As the Court of Appeals explained, comparative fault is inapplicable to this case “because the motorist liability statutes specifically relieve the State of liability under the factual circumstances of this case, and assign all liability to the negligent motorists.” *Mullen*, 5 Wn. App. 2d at 797.

The focus on liability, rather than immunity, is directly supported by this Court’s recent decision in *Smelser*. The *Smelser* case addressed a tort action filed on behalf of a two-year old child who was hit by a car driven by his father’s girlfriend, Jeanne Paul. *Smelser*, 188 Wn.2d at 649-50. Paul argued that the court should allocate contributory liability to the father for his negligent supervision of the child, pursuant to RCW 4.22.070. The lower courts mistakenly relied on the language of RCW 4.22.070 that allows fault to be allocated to “every entity,” including

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<sup>4</sup> Mullen has argued that RCW 46.44.020 does not limit fault, because it uses the word “liability” rather than “fault.” Mullen Pet. at 11. The distinction is meaningless because liability subsumes fault. For that reason, this Court has repeatedly referred to chapter 4.22 RCW establishing “proportionate liability.” See, e.g., *Tegman v. Accident Med. Investigations, Inc.*, 150 Wn.2d 102, 111, 75 P.3d 497 (2003); *Kottler v. State*, 136 Wn.2d 437, 444, 963 P.2d 834 (1998).

those that have immunity, and held that parental immunity did not protect the father from comparative liability. *Smelser*, 188 Wn.2d at 653. The trial court entered a judgment that subtracted the damages caused by the fault of the “immune” father, and the Court of Appeals affirmed.

This Court reversed and cautioned courts not to confuse immunity with a lack of a tort duty. The Court explained that “under chapter 4.22 RCW, a determination of fault must precede any analysis of immunity.” *Id.* at 659. In order to be at fault, “one must have negligent or reckless conduct breaching some recognized duty.” *Id.* at 657. But “[w]here no tort duty exists, no legal duty can be breached and no fault attributed or apportioned under RCW 4.22.070(1).” *Id.* at 656. The Court held that fault could not be allocated to the father because “no tort claim exists based on negligent parental supervision.” *Id.*

That is precisely the situation presented here. RCW 46.44.020 confines the scope of the State’s tort liability. The State satisfied its duty by providing over 14 feet of clearance on the bridge. In this limited factual context, the State cannot have any tort liability for the damage caused by appellants’ overhead bridge crash. Where no tort liability exists, there is no actionable “fault” and the matter does not fall within the scope of RCW 4.22.070. *Smelser*, 188 Wn.2d at 657.

Mullen also has argued that RCW 46.44.020 and .110 establish State immunity, rather than prescribing the State's duty. Mullen Pet. at 14 (citing *Ottis Holwegner Trucking v. Moser*, 72 Wn. App. 114, 118, 863 P.2d 609 (1993) and *Humes v. Fritz Cos., Inc.*, 125 Wn. App. 477, 491, 105 P.3d 1000 (2005)). Neither of the two Court of Appeals decisions support Mullen's argument.

Mullen's reliance on *Ottis* is particularly misplaced, because the decision directly supports the State's position. In *Ottis*, the Court determined that the State complied with its duty under RCW 46.44.020 when it posted impaired clearance signs on and before a highway tunnel. Having met this statutory duty, the State could not be held liable for an accident that occurred in the tunnel. *Ottis*, 72 Wn. App. at 121-22. Although *Ottis* refers to immunity, the Court's analysis focused entirely on the State's satisfaction of its duty under RCW 46.44.020 to provide impaired clearance signs. The Court held that the duty under RCW 46.44.020 takes precedence over other statutory provisions addressing standards for low clearance signs. *Ottis*, 72 Wn. App. at 123.

*Humes* is entirely consistent with *Smelser*. The Court of Appeals held that immunity does not bar allocation of fault under RCW 4.22.070(1). *Humes*, 125 Wash. App. at 490-91. After finding that the Tulalip Indian Tribe was an entity capable of fault, the Court's analysis

focused on whether the Tribe had a duty to control the workplace at issue, and could therefore be allocated fault for Humes' workplace injury. *Id.* at 493. Unlike the Tribe, by statute, the State has no tort liability in this limited context if it has provided 14 feet of vertical clearance. RCW 4.22.070.

Mullen also complains that the trial court's ruling will result in joint and several liability for all liable defendants for WSDOT's proven damages. But that is precisely what the Legislature intended. When, as here, RCW 4.22.070 does not apply and "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." RCW 4.22.030.

Finally, Mullen's petition for review mischaracterized the impact of the Court of Appeals decision on other immunity statutes. Mullen Pet. at 17. Citing RCW 25.10.321 as a primary example of this potentially "broad" impact, Mullen suggested that if the decision is affirmed, the fault of limited partners could no longer be determined for their "individual wrongdoing." Mullen Pet. at 18. But RCW 25.10.321 states only that a limited partner is not personally liable for a limited partnership's obligations "*solely by reason of being a limited partner.*" (Emphasis added). It does not prevent allocation of fault for wrongful conduct. Contributory negligence will have no bearing on most of the statutes cited

in Appendix 3 to Mullen’s petition. *See, e.g.*, RCW 53.34.100 (port commission members not personally liable solely for executing revenue bonds or notes); RCW 74.34.050 (limiting liability for good faith reporting of abuse of vulnerable adults); RCW 15.70.050 (no liability of United States for transfer of funds held in trust on behalf of Washington rural rehabilitation corporation to state director of agriculture); RCW 4.96.010 (local governmental entities liable for damages arising out of their or their officers’ tortious conduct to the same extent as if they were a private person or corporation). The Court of Appeals ruling regarding the limited factual circumstances of this case simply does not have the potential for the far-reaching implications that Mullen suggests.

In sum, the Court of Appeals properly applied RCW 4.22.070. Fault cannot be allocated to entities that do not have tort liability. And RCW 46.44.020 plainly states that “no liability may attach to the State” after it has met its duty to provide sufficient clearance.

**C. Motorways Is Jointly and Severally Liable for the Destruction of the Bridge**

Motorways is jointly and severally liable for the full amount of the State’s damages. Although Motorways’ truck did not hit the bridge, RCW 46.44.110 provides that “[a]ny person operating any vehicle is liable for any damage . . . to a bridge . . . sustained as the result of any negligent

operation thereof.” The damage to the bridge was sustained in part because Motorways’ negligence proximately caused Mullen’s truck to more squarely strike and collapse the bridge. As this Court has repeatedly recognized, there may be more than one proximate cause, and a second party’s concurrent liability does not break the causal chain for the first party’s negligence. *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 437, 378 P.3d 162 (2016).

## V. CONCLUSION

The State respectfully requests that the Court affirm the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 6th day of May 2019.

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### **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service::

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# SOLICITOR GENERAL OFFICE

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## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96538-2  
**Appellate Court Case Title:** State of Washington, Department of Transportation v. Mullen Trucking 2005, LTD., et al.  
**Superior Court Case Number:** 15-2-00163-1

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