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No. 65463-2-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MONIKA JOHNSON,

Respondent,

v.

RECREATIONAL EQUIPMENT, INC.,

Petitioner.

BRIEF OF PETITIONER RECREATIONAL EQUIPMENT, INC.

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I. INTRODUCTION

Petitioner Recreational Equipment Inc. (“REI”) asks this Court to review and reverse the trial court’s decision below holding that sellers of products that bear the seller’s brand name may not avail themselves of Washington’s statutory comparative fault system. That decision was not only contrary to the express language of the governing statute, RCW 4.22.070(1), and the holding of the Washington Supreme Court in Hiner v. Bridgestone/Firestone, Inc., 138 Wn.2d 248, 262, 978 P.2d 505 (1999), it also defeats the underlying purpose of Washington’s comparative fault tort system. The well-recognized purpose of that system is to ensure that each entity whose conduct has contributed to producing the harm suffered by a tort victim pays its proportionate share of the tort victim’s total damages—no more and no less. By refusing to allow REI to attribute fault to a non-party whose conduct caused or contributed to causing the harm alleged by respondent Monika Johnson, the court below committed reversible error.

The court below also erred by resolving genuine factual issues in favor of the party who was moving for summary judgment under Civil Rule 56, and by entering summary judgment against Petitioner REI on liability despite the existence of an incomplete and heatedly disputed factual record. The court below compounded these errors by deciding, *sua sponte*, that REI’s third party claim against the manufacturer of the

product that allegedly caused Johnson's harm should be bifurcated and tried separately from the trial on Johnson's personal injury claim against REI. The unintended effect of these rulings, if they are not corrected, would be to impose 100% of the liability for Johnson's alleged injuries on REI, and deprive REI of any viable mechanism to seek contribution under Washington law from the manufacturer of the product that allegedly caused those injuries.

REI respectfully asks this Court to reverse these erroneous decisions by the trial court and to remand this action for a trial on the merits in which REI is permitted to attribute fault to the manufacturer of the product at issue, and to submit the manufacturer's proportionate fault to the jury based on the proof adduced at trial.

II. ASSIGNMENTS OF ERROR

1. The court below erred by barring REI from invoking Washington's comparative fault system to attribute fault to the entity that designed and manufactured the bicycle component that allegedly caused Johnson's harm.
2. The court below erred by entering summary judgment against REI, and finding REI liable to Johnson as a matter of law, in the absence of evidence on essential elements of

Johnson's claim and despite contradictory expert testimony on the issue of causation.

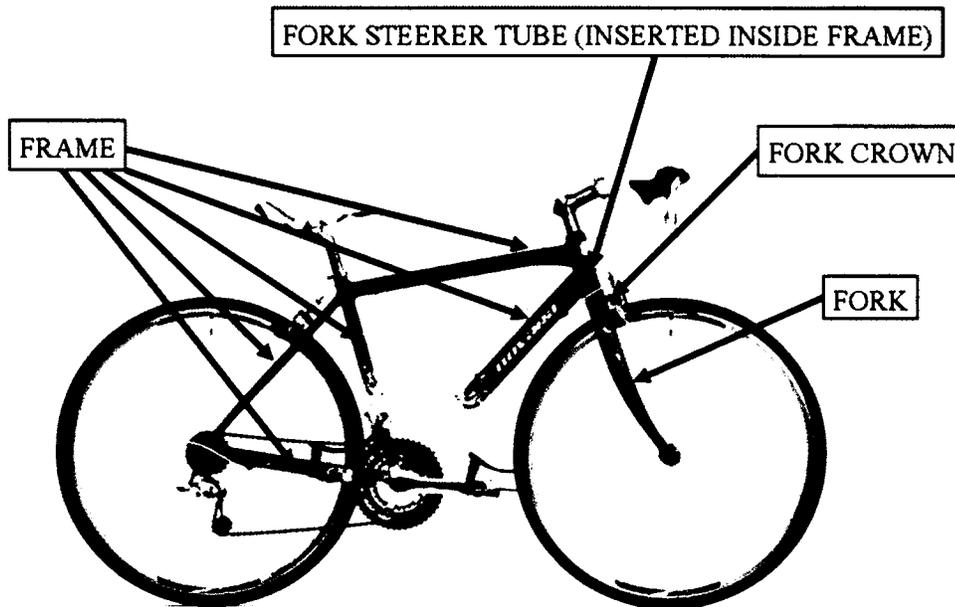
3. The court below erred by resolving genuine factual disputes in favor of the party moving for summary judgment, by drawing factual inferences in favor of the moving party, and by refusing to allow the nonmoving party a continuance under CR 56(f) to conduct discovery on the issues presented in Johnson's motion.
4. The court below erred by preemptively bifurcating trial on REI's contribution claim against Aprebic from Johnson's personal injury claim against REI, thereby depriving REI of the opportunity to establish the elements of its contribution claim against Aprebic under Washington law.

III. STATEMENT OF THE CASE

A. The Bicycle Purchase and the 2005 Repair.

Johnson purchased a new Novara Trionfo bicycle from REI in 2002. (CP 4.) Three years later, in July 2005, she collided with a car door and brought the bicycle back to REI for repairs. (CP 56.) An REI employee obtained a new bicycle frame and carbon fiber fork from REI's replacement parts inventory and sold them to Johnson. (CP 56-57.) The

following diagram, depicting a different REI Novara bicycle, identifies the relevant bicycle components:



Johnson did not like the color of the replacement frame and fork, so she painted them herself before asking REI to install them on her bicycle.

(CP 57.)

B. The 2006 and 2007 Accidents.

Fourteen months later, on September 13, 2006, Johnson was involved in another accident. (Id.) Johnson described the accident as “very minor” and claimed that it resulted in “minor damage to the rear wheel.” (Id.) However, the damage was significant enough that she again brought the bicycle back to REI for repairs. (Id.)

On November 19, 2007, as she was riding the bicycle on a sidewalk in downtown Seattle, Johnson was involved in a third accident, the accident that gave rise to this case. (CP 5.) According to the Complaint, the fork of the bicycle sheared off at the perimeter joint between the crown and the steering tube. (Id.) Johnson alleges that she fell forward onto the sidewalk. (Id.) Someone called an ambulance. (CP 58.) Emergency crews arrived and took her to the hospital. (Id.) Sixteen months later, she brought suit against REI, alleging that design and manufacturing defects in the bicycle fork caused her injuries. (CP 3-8.)

C. The Replacement Fork that Fractured on November 19, 2007 was Designed and Manufactured by Aprebic.

REI neither designed nor manufactured the allegedly defective fork. (CP 35, 180.) The bicycle was originally manufactured and sold to REI by Fairly Bike Manufacturing Co., Ltd. (“Fairly”). (Id.) Fairly also purchased surplus component parts and sold them separately to REI for warranties and repairs. (Id.) Among these component parts were carbon fiber forks designed and manufactured by Aprebic Industry Co., Ltd. (“Aprebic”). (Id.)

REI had no contractual relationship with Aprebic (CP 86), and provided no input on the design or the manufacture of the fork that was

installed on Johnson's bicycle at the time of her November 19, 2007 accident. (CP 35, 180.) Fairly purchased that fork from Aprebic off the shelf. (CP 180) Aprebic alone designed and manufactured the fork. (Id.)

D. In Its Answer to Johnson's Complaint, REI Named Aprebic as an Entity Potentially at Fault for Johnson's Alleged Injuries.

In its answer, REI specifically named Aprebic as an entity potentially at fault for the plaintiff's injuries under RCW 4.22.070, Washington's statutory comparative fault system. (CP 14.) Under RCW 4.22.070, a tort defendant like REI can ask the trier of fact to reduce its liability to a tort plaintiff in proportion to the fault attributable to the conduct of a non-party like Aprebic. It is customary for a plaintiff in this situation to amend her Complaint to name as an additional defendant the entity identified as being potentially at fault, to avoid the possibility of a reduction in any judgment she might ultimately receive. Instead, in this case, Johnson's counsel declined to name Aprebic as an additional defendant, arguing that she was entitled to obtain a full recovery from REI and that REI was barred by RCW 7.72.040(2)(e) from asking the trier of fact to allocate fault to Aprebic. (CP 32.)

RCW 7.72.040(2)(e) is a provision of the Washington Product Liability Act ("WPLA") that places "the liability of a manufacturer" on a

product seller when a product is marketed under the seller's brand name.¹ Because REI's Novara brand logo was affixed to the fork at issue (CP 56), Johnson argued that REI was legally barred from attributing fault to Aprebic. (CP 32.) REI disagreed, citing the broad language of the comparative fault statutes and the expansive reading of those statutes by Washington courts. (Id.)

E. REI's Motion for Partial Summary Judgment Under RCW 4.22.070.

While the parties below disagreed on the proper application of RCW 4.22.070 to the facts of this case, they agreed on the need to resolve that issue in advance of trial. (CP 32-33.) REI therefore moved for partial summary judgment, requesting a ruling that REI could invoke Washington's comparative fault system in this case and attribute fault for Johnson's injuries to Aprebic, subject to proof.² (CP 17-30.) In the alternative, REI requested leave to file a third-party complaint against Aprebic to preserve its right to seek contribution from Aprebic, if, for any reason, the court refused to allow REI to invoke RCW 4.22.070 and attribute fault to Aprebic at trial. (Id.)

¹ It is important to note that this provision, which was enacted five years *before* Washington's legislature enacted its pure comparative fault system, does not state that comparative fault principles are inapplicable to torts involving the failure of products that bear a seller's brand name.

² REI did not ask the court to find Aprebic to be "at fault;" rather, it asked only that the issue of Aprebic's proportionate fault be submitted to the jury, based on the evidence adduced at trial.

F. Johnson's Summary Judgment Motion on Liability for Construction Defect Under RCW 7.72.030(2)(a).

1. Johnson Asked the Court to Decide the Issues of Product Defect and Causation as a Matter of Law, Leaving Only Damages for Trial.

Shortly after REI filed its motion, Johnson filed a separate motion for partial summary judgment on strict liability. (CP 39-54.) The motion asked the Court to decide several issues as a matter of law: that the "Fork deviated in a material way from the performance standards of the manufacturer"; that this defect "existed at the time the Fork left the manufacturer"; that "REI is strictly liable, as a matter of law, for all damages proximately caused in [the] accident"; and that the trial be limited to determining "the nature and scope of [Johnson's] injuries and the amount of monetary damages to compensate her." (CP 53.)

In support of her motion, Johnson filed a declaration from Gerald Zamiski, her retained engineering expert. (CP 104-08.) Zamiski opined that the "the steerer tube to crown interface, where the fracture occurred, was manufactured using a relatively small number of layers The small number of carbon fiber layers and their orientation interface resulted in the nucleation and propagation of cracking." (CP 106.) "In addition," he asserted, "the interface layers displayed voids, gaps, separations, and kinks, which are all indicative of defective manufacturing." (*Id.*) Zamiski also opined that "the exposed carbon fiber layers that failed were starved

of epoxy, which made the plies of carbon fiber more susceptible to failure.” (CP 107.) These observations, Zamiski further opined, were “indicative of defective manufacturing (assembly) at the factory. The orientation and makeup of the carbon fiber layers can only occur during manufacturing; they are not defects that can occur after the product has been manufactured.” (Id.) Zamiski offered no opinions relating to whether the fork was defectively designed.

In arriving at his conclusion that the fork was manufactured improperly, Zamiski did not compare the fork to any design drawings or specifications, because none of Aprebic’s design drawings or specifications were available. Nor did he review any manufacturing records for the fork. Nor did he compare the fork to any other forks manufactured to the same specification. Nor did he determine whether the fork complied with industry standards. Nor did he attempt to discover how much force the allegedly defective fork could withstand, or how much force a fork that was manufactured properly to Aprebic’s specifications could withstand.

Nonetheless, Johnson grounded her motion solely on the provision of WPLA that imposes liability on a manufacturer if, “when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the

manufacturer[.]” RCW 7.72.030(2)(a); (see CP 45). Johnson acknowledged that Aprebic was the fork’s manufacturer, and she acknowledged that she could not introduce any evidence as to Aprebic’s design specifications or performance standards.

2. REI Opposed Johnson’s Motion by Disputing the Opinions of Plaintiff’s Retained Expert and Identifying the Absence of Evidence on Essential Elements of Johnson’s Construction Defect Claim.

When Johnson filed her motion, a host of facts essential to proving her construction defect claim were unknown, and the discovery cutoff was still almost five months out. (CP 171.) While the parties had exchanged initial written discovery (CP 75-76, 155), not a single deposition had been taken (CP 155) and the parties had not exchanged witness lists or expert reports (CP 171).

In addition, REI’s retained metallurgical expert, David Mitchell, had not completed his physical examination of the bicycle. (CP 177-78.) At the time Johnson filed her motion, Mitchell found that there was insufficient information available to determine what caused the fork to fracture. (CP 178.) There was, however, physical evidence that pointed to abuse and poor maintenance as the cause of the fracture. (See CP 176, 178.) Mitchell stated in his declaration that his “initial visual examination in 2008 revealed a bicycle that had been subjected to substantial use and

abuse. It was clearly a high mileage vehicle displaying substantial wear and tear, and it had been repainted.” (CP 176.) Mitchell declared that the effects of the 2006 crash—which took place between the time the replacement fork was installed in 2005 and the date of the accident in 2007—were as yet unknown. (CP 178.)

Mitchell also found Zamiski’s analysis incomplete. He noted that, while Zamiski’s examination described certain features of the fork separation, “the nature of the fracture was not determined. That is, Dr. Zamiski, in his Declaration, did not associate the fracture with a single overload event or as the consequence of accumulated fork damage over time.” (CP 177.) Mitchell further observed that Zamiski did not provide an estimation or calculation of the fork’s strength or the load required to fracture it. (CP 177-78.) This information is critical to determining causation because “[p]roper failure analysis involves a correlation gathered from physical evidence, scientific principals, and other information such as testimony and eye witness accounts.” (CP 177.)

Further, Mitchell identified the additional evidence and discovery that would be necessary to determine the cause of the fracture. Johnson would need to be deposed and asked about the history and use of the bicycle, including the 2006 accident. (CP 178.) Additional laboratory testing was necessary, involving measurements of exemplar forks for

stress loads and impact strength. (CP 177-78.) And because Zamiski's opinions focused on the manufacture of the fork, Aprebic's design specifications and analyses were relevant and needed to be collected and analyzed. (CP 178.)

Because so much was left to be done, and because the discovery cutoff was nearly five months away, REI requested the opportunity under CR 56(f) to conduct necessary discovery into the issues on which Johnson sought summary judgment. (CP 140.)

G. The Orders Entered by the Superior Court.

On April 26, 2010, the trial court denied REI's motion to attribute fault to Aprebic, subject to proof, and granted Johnson's motion for summary judgment on strict liability against REI. (CP 195-98.) In doing so, it held that WPLA placed on REI "the same liability as the actual manufacturer ..." and that WPLA deprived REI of the right to allocate fault for Johnsons' injuries to Aprebic. (CP 196.) The court also held that REI "is strictly liable as a matter of law for all damages that plaintiff sustained in the November 19, 2007 bicycle accident in this lawsuit," thereby taking the issues of product defect and causation completely out of the case. (CP 198.)

Although neither party had asked for such relief, the court also preemptively declared that if REI exercised its prerogative to name

Aprebic as a third-party defendant, the court would bifurcate REI's third party claim against Aprebic from Johnson's personal injury claim against REI and order separate trials. (Id.) REI was never given an opportunity to brief this issue, or to explain that the unintended consequence of bifurcation would be to deprive REI of an opportunity to pursue a contribution claim against Aprebic under RCW 4.22.040. (See CP 199-206.) REI moved for reconsideration of this decision, which the court summarily denied. (CP 213-14.) REI then moved this Court for discretionary review, which the Court granted, finding that

[d]iscretionary review is warranted at this stage of the proceedings as to the questions whether REI is strictly liable for injuries suffered by Johnson, whether comparative fault applies to her claims, and whether any third party complaint for contribution should be severed for trial.

Commissioner's Ruling Granting Discretionary Review 8.

IV. ARGUMENT

A. **The Court Below Erred by Depriving REI of the Right to Attribute Fault to a Non-Party Under Washington's Comparative Fault System.**

Every tort defendant has the fundamental right to attribute fault to a non-party under Washington's comparative fault system, RCW 4.22.070. The court below committed a profound error by depriving REI of this fundamental right that the Washington legislature created in 1986 and that

the Washington Supreme Court has consistently protected whenever it has been challenged. Nothing in the text, history, or purpose of WPLA suggests that the seller of a branded product should be cast out of the comparative fault system that is available to every other tort defendant under well-established Washington law. The seller of a branded product—like any other tort defendant, including the *actual manufacturer* of a branded product—should be allowed to attribute fault to any other entity that caused or contributed to causing a claimant’s damages. This court should reverse the erroneous decision below and reaffirm this fundamental right under RCW 4.22.070.

1. The History of Comparative Fault in Washington.

Washington is a comparative fault state. With the narrow exception of employers who are immune from tort liability under the Industrial Insurance Act—an exception not applicable here—*every* tort defendant is entitled to ask the trier of fact to assign a percentage of fault for the plaintiff’s damages to any other entity that contributed to causing those damages, leaving the tort defendant liable to the plaintiff only for its own assigned percentage of the total fault. RCW 4.22.070(1).

This was not always the case. Before 1986, multiple tortfeasors were jointly and severally liable with one another for the damages sustained by the victim of a tort. Waite v. Morisette, 68 Wn. App. 521,

523-24, 843 P.2d 1121 (1993). That is, a claimant could recover all his damages from any liable defendant. Id. at 524. This, combined with the pre-1981 common law that forbade contribution among joint tortfeasors, led to situations where defendants bearing relatively little fault for a plaintiff's injuries shouldered the entire liability, while other defendants with greater responsibility for the plaintiff's injuries avoided liability altogether.

The legislature addressed this injustice in 1986. That year it enacted the comparative fault system we have today. Laws of 1986, ch. 305, § 401, codified at RCW 4.22.070. Under the new comparative fault system, “[i]n 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” RCW 4.22.070(1). The universe of entities to whom fault may be attributed is all-inclusive. It includes the claimant, other defendants, third-party defendants, entities the claimant has released, entities with individual defenses, and even immune entities.³ Id. The legislature also defined “fault” broadly; it includes all acts or omissions, “including misuse of a product,” that are in any way negligent or reckless, “or that

³ The legislature added a single exception to this rule in 1993, to preclude fault allocation to employers who are immune from tort liability under the Industrial Insurance Act. Laws of 1993, ch. 496, § 1. This exception does not apply to the present case.

subject a person to *strict tort liability or liability on a product liability claim.*” RCW 4.22.015 (emphasis added). Once the factfinder attributes fault to each required entity, judgment is then entered “in an amount which represents that party’s proportionate share of the claimant’s total damages.” RCW 4.22.070(1).

a. Washington’s Comparative Fault System Rests on the Legislature’s Sound Policy Decision That Each Tortfeasor Should Pay Only Its Own Fair Share of the Damages Suffered by a Tort Victim.

By passing the comparative fault system in 1986, the legislature endorsed a simple but profound principle: every entity responsible for committing a tort should be liable to the plaintiff based on its own individual share of the total fault, no more and no less. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 294, 840 P.2d 860 (1992) (RCW 4.22.070 “evidences legislative intent that fault be apportioned and that generally an entity be required to pay that entity’s proportionate share of damages only”); Humes v. Fritz Cos., Inc., 125 Wn. App. 477, 491, 105 P.3d 1000 (2005) (“The statute evidences an intent by the legislature that entities ... pay only their own proportionate share of damages”). By allowing factfinders to attribute fault to all entities whose conduct contributed to causing a tort, including those who have settled, or have personal defenses, or whom the plaintiff simply chose not to sue, the comparative

fault system ensures that each tortfeasor will pay only to the extent its fault contributed to a claimant's damages.

Commentators in Washington have recognized the importance of this principle. For example, Gregory C. Sisk—who the Washington Supreme Court quoted favorably and at length in Hiner v. Bridgestone/Firestone, Inc., 138 Wn.2d 248, 262, 978 P.2d 505 (1999)—notes that “comparative fault—the allocation of liability according to the extent of fault—comports with common sense and practical understanding.” Gregory C. Sisk, Comparative Fault and Common Sense, 30 Gonz. L. Rev. 29, 32-37 (1995). Others across the country have concurred. See, e.g., Daniel Levi, Note, A Comparison of Comparative Negligence Statutes: Jury Allocation of Fault—Do Defendants Risk Paying for the Fault of Nonparty Tortfeasors?, 76 Wash. U.L.Q. 407, 430 (1998) (recommending a pure comparative fault system because “each defendant can be confident that they will only be liable for their share of damages equivalent to their share of fault”); Kevin J. Grehan, Note Comparative Negligence, 81 Colum. L. Rev. 1668, 1670 (1981) (noting that “comparative negligence incorporates the apportionment principle: a negligent party should be liable only to the extent that his fault contributes to an injurious result”).

By adopting a pure comparative fault system, the Washington legislature embraced as a guiding principle the common sense idea that tortfeasors should pay only their own proportionate share of the total liability found by the trier of fact.

b. Washington Joined a National Trend by Adopting Comparative Fault.

By adopting pure comparative fault, Washington joined a growing national trend. See generally Victor E. Schwartz, Comparative Negligence 2-4 (4th ed. 2002). States across the country have reexamined the rules governing cases involving multiple potentially at-fault parties, and most such states have chosen to move away from the harsh rules of the common law. Id.

Although this trend has been widespread in its basic principles and policy objectives, it has not been entirely uniform in its specifics. The majority of states enacted a modified version of comparative fault, under which a plaintiff may only recover from a particular defendant if his own fault is less than that of that defendant. Id. at 32-33. Washington, along with ten other states, made the considered decision to adopt instead a “pure” form of comparative fault, wherein the plaintiff’s right to recover from any particular defendant does not depend upon a comparison of which party was *more* at fault. In a pure comparative fault system, even a

defendant responsible for only one percent of the total fault may be held liable to the plaintiff for one percent of the plaintiff's damages. Id. at 31-32.

Several states limited their comparative fault systems to cases involving negligence, specifically to exclude cases based on strict liability. Id. at 34-35. But Washington, like many other states, opted for broader coverage, defining "fault" to include not only negligence, but also recklessness, strict liability, and product liability. RCW 4.22.015; see also Alaska Stat. § 09.17.900 ("fault" includes recklessness, negligence, strict liability, and product liability); Ariz. Rev. Stat. § 12-2506(F)(2) ("fault" includes strict and product liability, but not recklessness); Fla. Stat. § 768.81(4)(a) (comparative fault applies in negligence cases, defined to include strict liability and product liability, but not recklessness cases); Ky. Rev. Stat. Ann. § 411.182(1) (comparative fault applies "[i]n all tort actions, including products liability actions"); Miss. Code Ann. § 85-5-7 ("'fault' means an act or omission of a person which is a proximate cause of injury" and includes negligence, strict liability, and absolute liability).

By making the conscious choice to enact a pure comparative fault system with a broad definition of fault that included strict liability, the Washington legislature chose a system that adheres most closely to the ideal that tortfeasors should pay only their own proportionate share of a

plaintiff's damages. Had it decided, for example, to limit the comparative fault system to negligence actions only, then product liability defendants could find themselves shouldering more liability than their fault would dictate. Or if it had adopted the modified version of comparative fault, a plaintiff could be precluded from recovering from a defendant even though that defendant was partially at fault for his injuries. Rather than allow these scenarios, the legislature chose a broad and pure comparative fault system, to ensure that liability would follow fault in every case (except cases where fault lies with an immune employer).

c. Washington Courts Have Unswervingly Adhered to the Policy That Tortfeasors Pay Only Their Own Proportionate Share of a Tort Victim's Damages.

Given the clarity of the statutory direction, it is unsurprising that Washington courts have consistently implemented the comparative fault system in a way that ensures that tortfeasors pay damages in proportion to their own share of the total fault. Hiner, 138 Wn.2d at 261, is the most significant of these cases, because it is the Washington Supreme Court's most in-depth treatment of the comparative fault system, and because the underlying theory of liability in that case, like this one, was strict product liability under WPLA.

In Hiner, the plaintiff asserted product liability claims against a manufacturer of snow tires under WPLA. Id. at 507. She had been involved in a car accident after she had installed snow tires manufactured by the defendant on only the two front wheels of her car, rather than on all four wheels. Id. In its answer to the complaint, the snow tire manufacturer raised as an affirmative defense the argument that others—including the manufacturer of the car’s two rear tires, the mechanic who installed the tires, and the manufacturer of the car itself—were at fault for the plaintiff’s damages and argued that its liability to the plaintiff should be reduced in proportion to the fault attributed by the jury to those non-parties. Id. at 508, n.18. The trial court struck this affirmative defense, and the court of appeals affirmed, ruling that a defendant that is strictly liable to an injured plaintiff under WPLA may not attribute fault to others who may be liable to the plaintiff under other theories. Id. at 511.

The defendant appealed, and the Washington State Supreme Court reversed. Id. The Court found that the ““legislature has determined that the comparative fault doctrine shall apply to all actions based on “fault,” including strict liability and product liability claims.”” Id. at 261 (quoting Lundberg v. All-Pure Chem. Co., 55 Wn. App. 181, 186, 777 P.2d 15 (1989)). It noted that the definition of “fault” in RCW 4.22.015 is “quite broad,” and that the language of RCW 4.22.070(1) “is similarly quite

broad, applying to ‘*all* actions involving fault of more than one entity.’” Id. at 260 (quoting RCW 4.22.070). “‘In sum, the statutory modification of joint and several liability applies to *all* actions based upon the broad definition of fault, whatever the theory of liability.’” Id. at 262 (quoting Gregory C. Sisk, Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 U. Puget Sound L.Rev. 1, 22 (1992)) (emphasis in original).

The only court of appeals cases to have squarely considered this issue similarly hold that the comparative fault system operates in *all* cases to ensure that tortfeasors pay only their own proportionate share of the fault for a plaintiff’s damages. Mailloux v. State Farm Mut. Auto. Ins. Co., 76 Wn. App. 507, 511-12, 887 P.2d 449 (1995) (under RCW 4.22.070(1), “any party to a proceeding can assert that another party is at fault” and such fault “operates to reduce the ‘proportionate share’ of damages the plaintiff can recover from those against whom the plaintiff has claimed”); Lundberg, 55 Wn. App. at 185 (“for purposes of determining whether ‘comparative fault’ is a factor for consideration, it makes no difference what theory of liability ultimately serves as the basis for a product liability action”).

Washington courts have made it perfectly clear that any exception to the comparative fault system must come from the legislature, not the

judiciary. This was precisely the path that created the exception for immune employers. The court in Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) was asked to decide whether an employer's fault should be considered under the comparative fault scheme. Id. at 172. At the time, RCW 4.22.070(1) contained no exception for employers, but, as now, required the factfinder to attribute fault to "all entities" that contributed to a claimant's damages. As here, the plaintiff in Clark argued that an earlier-passed law—the Industrial Insurance Act—should be construed to limit the operation of Washington's comparative fault system. Id. The court roundly rejected that argument. The language of the comparative fault scheme, it held, "is clear and unambiguous" and required an employer's fault to be considered. Id. at 181. Two years later, the legislature accepted the court's implied invitation and enacted the current exception for immune employers. Laws of 1993, c. 496. As in Clark, this Court should decline to create an exception to the comparative fault scheme for sellers of branded products. Deciding whether to create such an exception is a matter that falls within the sole province of the legislature.

In the face of this clear authority, Johnson relied below on a passing comment in Farmers Ins. Co. v. Waxman Indus., Inc., 132 Wn. App. 142, 130 P.3d 847 (2006), a case that did not involve an

interpretation of Washington’s comparative fault scheme. That case turned on the rules governing default judgments. Id. at 146-48. The plaintiff had sued the company whose name was affixed to certain pipes that proved to be faulty. Id. at 144. The defendant failed to answer the complaint and the plaintiff received a default judgment. Id. Only then did the defendant appear and move to vacate the judgment. Id. at 145. But rather than put forth a defense to the claims—as one must do to vacate a default judgment—the defendant simply suggested that defects in pipes can sometimes be attributed to component parts or shoddy maintenance, without providing any reason to believe either theory was applicable to the failures in that case. Id. at 146. It waited until argument on appeal to claim that a separate suit it brought against its suppliers could stand as a defense to the plaintiff. Id. at 148. “[T]oo little, too late,” the court held. Id.

That case did not cite RCW 4.22.070(1), or Hiner, or Mailloux, or Lundberg. It undertook no discussion of Washington’s comparative fault system. And its central holding—that comparative fault does not operate as a complete defense to liability—is one that neither party here disputes. Farmers Ins. simply does not shed light on the question presented here: whether REI—having appeared, answered, and identified Aprebic as a non-party at fault for Johnson’s alleged damages—may invoke

Washington's comparative fault scheme to attribute fault to Aprebic at trial, just like any other defendant in a tort case governed by Washington law.

Given these principles, the court below erred by placing REI outside the comparative fault system that applies to every other alleged tortfeasor—including Aprebic itself.⁴ It not only declined to apply the straightforward language of RCW 4.22.070(1), and the central holdings of three controlling Washington court decisions, but it also undermined the animating purpose behind the comparative fault statute by placing REI in a situation where it might potentially be held liable for the conduct of another entity that contributed to causing the plaintiff's damages.

2. WPLA Should Not be Interpreted as Abrogating the Subsequently Enacted Comparative Fault System.

Rather than apply the comparative fault system the Washington legislature adopted in 1986, the court below decided that a provision of WPLA, enacted five years earlier, in 1981, singles out sellers of branded products and takes them—and only them—outside Washington's

⁴ After this Court accepted discretionary review, plaintiff was granted leave to amend her complaint to add Aprebic as a direct defendant. (Order Granting Stip. Mot. (1) to Continue Trial Date and Associated Pretrial Deadlines, (2) to Stay Proceedings Pending Resolution of Interlocutory Appeal, and (3) for Leave to File and Serve [Proposed] First Am. Complaint, filed Jul. 26, 2010; Stip. Mot. (1) to Continue Trial Date and Associated Pretrial Deadlines, (2) to Stay Proceedings Pending Resolution of Interlocutory Appeal, and (3) for Leave to File and Serve [Proposed] First Am. Complaint, filed Jul. 23, 2010, Ex. A (First Am. Complaint).) When Aprebic appears, it will have every right to invoke Washington's comparative fault system to attribute fault to REI if it sees fit to do so.

comparative fault system. (CP 196.) The provision the trial court relied on, RCW 7.72.040(2)(e), declares that a product seller “shall have the liability of a manufacturer to the claimant if ... [t]he product was marketed under a trade name or brand name of the product seller.” The court below essentially rewrote this language and decided that it should be interpreted to mean that “REI has the same liability as the actual manufacturer.” (CP 196.) It then went on to preclude REI from attributing fault to the entity that actually manufactured the fork. (Id.) This decision was clear and obvious error.

a. RCW 7.72.040(2)(e) Does Not Transform the Seller of a Branded Product into the Actual Manufacturer of that Product.

First, the court below erred by deciding that WPLA transformed REI into “*the actual manufacturer*” of the fork. (CP 196 (emphasis added).) RCW 7.72.040(2)(e) simply imposes on sellers of branded products the same *liability standard* that applies to manufacturers. As a mere product seller, REI would normally be liable only for its own negligence, for breach of an express warranty, or for intentional misrepresentation. RCW 7.72.040(1). As the seller of a *branded* product, it is assigned “the liability of a manufacturer,” and therefore may also be found liable if the product was not reasonably safe as designed, if it was not reasonably safe in construction, if adequate warnings were not

provided, or if the UCC implied warranties were breached. RCW 7.72.030. Nothing in WPLA provides that having “the liability of a manufacturer,” as described above, transforms a product seller into *the actual manufacturer* of a product, or deprives a product seller of the right to attribute fault to other entities under RCW 4.22.070.

Indeed, the legislature specifically used the indefinite article “a,” rather than the definite article “the.” This is not mere quibbling: “a different legislative intent is indicated by the use of the indefinite article ‘an,’ ... rather than the more specific ‘his’ or ‘the’[.]” State ex rel. Becker v. Wiley, 16 Wn.2d 340, 352, 133 P.2d 507 (1943); accord In re Detention of Stroud, 167 Wn.2d 180, 188-89, 217 P.3d 1159 (2009). By inserting “the” where the legislature used “a,” the court below twisted RCW 7.72.040(2)(e) to mean something it does not say.

Finally, it is entirely clear that entities that have “the liability of a manufacturer” are included in Washington’s comparative fault system. The defendants in Hiner, Mailloux, and Lundberg each possessed “the liability of a manufacturer.” They were, after all, manufacturers. Yet each could attribute fault to others, including the sellers of their products. By holding as it did, the court below imposed greater liability on REI for an alleged manufacturing defect than it imposed on the actual manufacturer who was responsible for that defect. Indeed, it effectively *immunized* the

actual manufacturer from any liability for its own conduct by imposing 100% of that liability on REI.

b. If RCW 4.22.070 and RCW 7.72.040(2) Conflict, Then the 1986 Comparative Fault System Embodied in RCW 4.22.070 Controls.

REI respectfully submits that a seller of branded products can be subjected to the same liability standard as a product manufacturer without depriving the product seller of the right to attribute fault to a nonparty under RCW 4.22.070, and therefore there is no irreconcilable conflict between RCW 4.22.070 and RCW 7.72.040(2). However, if this Court concludes that such a conflict exists, then it should be resolved in favor of enforcing RCW 4.22.070, which was enacted five years after RCW 7.72.040(2). “[W]here the conflict is irreconcilable, a more recent statute takes priority over an older statute.” City of Spokane v. Rothwell, 166 Wn.2d 872, 877, 215 P.3d 162 (2009); cf. Clark, 118 Wn.2d at 181 (applying the comparative fault system in the face of the earlier-passed Industrial Insurance Act’s immunity for employers). This rule of construction forecloses the possibility that the branded product provision of WPLA, enacted in 1981, could trump the comparative fault system, enacted in 1986.

The court below committed error by grafting an exception on to the comparative fault scheme that the legislature itself had declined to

adopt. When it enacted pure comparative fault, the legislature included several specific exceptions. It excepted parties acting in concert, agents and principals, and torts involving hazardous waste, tortious interference with contracts, and fungible generic products. RCW 4.22.070(1)(a), (2).⁵ “[T]he mention of one thing implies the exclusion of others[.]” W. Telepage, Inc. v. City of Tacoma Dep’t of Fin., 140 Wn.2d 599, 611, 998 P.2d 884 (2000). “[W]here the Legislature did not expressly exclude” branded product seller cases from Washington’s comparative fault system, “it must be assumed the Legislature did so intentionally.” Id.

This assumption is particularly apt here, because the legislature specifically considered and *rejected* a proposal to exclude WPLA cases from the comparative fault system. In the Senate debate on the 1986 bill, then-Senator Talmadge proposed an amendment that would have prevented product liability defendants from attributing fault to others. S. Journal, Regular Sess., at 467 (Wash. 1986). The amendment was rejected. Id. at 468.

The rule that the expression of one is the exclusion of others also addresses another concern of the court below, that is, the possibility that manufacturers of branded products may be insolvent. RCW 7.72.040(2), in addition to placing the liability of a manufacturer on branded product

⁵ There is no suggestion that any of these statutory exceptions apply in this case.

sellers, also places such liability on sellers where no solvent manufacturer is subject to service of process, or where the court determines it is highly probable the claimant would be unable to enforce a judgment against any manufacturer. Id. at (2)(a), (b). Johnson argued below that these possibilities justify a rule that bars a branded product seller from attributing fault to the product's manufacturer.

This argument is a red herring. There is no claim in this case that Aprebic is not subject to service of process, or that it is insolvent or unable to satisfy a judgment. Aprebic manufactures carbon fiber forks for sale to users throughout the United States. (CP 35.) That issue simply is not presented in this case. But, to the extent that the WPLA provisions relating to an insolvent manufacturer stand in tension with RCW 4.22.070(1), which reduces a defendant's liability based on the fault of immune entities and entities with individual defenses like bankruptcy, then RCW 4.22.070(1) controls. This provision represents the considered judgment of the legislature, made five years after WPLA was enacted, that one tortfeasor should not be held responsible for the fault attributable to another tortfeasor, merely because the latter tortfeasor may be insolvent or immune from suit. Washburn, 120 Wn.2d at 294 (RCW 4.22.070 "evidences legislative intent that certain entities' share of fault not be at all recoverable by a plaintiff; for example, the proportionate share of immune

parties”); Humes, 125 Wn. App. at 491 (RCW 4.22.070, by allocating fault to immune entities, “clarifies that a plaintiff such as Humes should not recover for fault attributable to immune parties”). This determination controls and renders the decision below clearly erroneous.

In sum, the court below erred by barring REI from asking the trier of fact to allocate fault to Aprebic, subject to proof. This decision was contrary to the language of the comparative fault statute and unfaithful to its animating purpose. The decision places REI in danger of bearing responsibility for Aprebic’s fault as well as its own. Such an outcome, should it stand, would directly contradict the primary goal of the comparative fault system, which is to ensure that every entity that contributed to a plaintiff’s harm is held liable for its own proportionate share of the total fault—no more, and no less. The Washington legislature made the conscious decision to adopt the system of pure comparative fault embodied in RCW 4.22.070, and it is that choice that controls.

B. The Court Below Incorrectly Entered Summary Judgment Against REI and Erroneously Deprived REI of the Right to Present Liability Evidence to the Trier of Fact.

The court below ruled as a matter of law that REI is strictly liable for Johnson’s injuries, thereby usurping the responsibility of the trier of fact to weigh the conflicting evidence on the central issues of product defect and causation. By doing so, the court resolved disputed factual

issues in favor of the moving party, in direct contravention of well-established standards applicable to motions for summary judgment. It ruled in Johnson's favor even on issues for which there was no evidence in the court record at all, much less undisputed evidence supporting her allegations. These decisions by the court below turned the summary judgment standard on its head.

The court below compounded this error by refusing to allow REI to complete discovery on the issues presented in Johnson's motion and by denying REI's CR 56(f) request for additional discovery. At the time the court ruled on REI's liability as a matter of law, the parties had only begun to engage in written discovery. No depositions had been taken and no witness lists had been exchanged. The court ruled that a construction defect in the fork caused Johnson's injuries before she had even been deposed; it found that the fork deviated from manufacturing specifications that were not even in evidence; and it relieved Johnson of the burden of proving the critical element of causation on a hotly disputed factual record.

1. The Court Resolved Factual Disputes in Favor of Johnson, the Moving Party.

On summary judgment, disputed factual issues and reasonable inferences must be resolved in the non-moving party's favor. Rathvon v.

Columbia Pac. Airlines, 30 Wn. App. 193, 201, 633 P.2d 122 (1981). The court below failed to follow this maxim.

a. The Court Ruled That the Fork Deviated from Applicable Design Specifications and Performance Standards Even Though There Was No Evidence of Aprebic's Design Specifications or Its Performance Standards in the Record.

Johnson asked the court below to enter summary judgment in her favor on the ground that the fork deviated in a material way from the “design specifications and performance standards that Aprebic utilizes in the manufacturing process.” (CP 45.) By basing her motion solely on this provision of WPLA, Johnson assumed the burden of proving, based on undisputed evidence, that the fork “contained a ‘flaw,’ departing from the specifications for the product line as a whole.” 16 David K. DeWolf & Keller W. Allen, Wash. Pract., Tort Law & Pract., § 16.12 (3d ed. 2006). Johnson did not assert that the fork was designed improperly, or that REI should have included additional warnings. Rather, she asserted that the fork at issue failed to satisfy the design specifications for the fork established by Aprebic.

Yet Johnson produced no evidence whatsoever regarding the design specifications and performance standards that Aprebic utilized in manufacturing the fork. Johnson's retained expert did not review Aprebic's standards and specifications for the fork because no such

standards or specifications were available. He did not review any documents about Aprebic's manufacturing process. He did not compare this fork with other Aprebic forks to determine whether they differed. In short, there is no evidence in the record to establish that the fork at issue deviated from Aprebic's design standards. None.

To her credit, Johnson conceded below that she had no evidence of Aprebic's standards or specifications. Before the trial court, Johnson argued that specifications were irrelevant to a construction defect claim, citing the elements of a common law product liability claim set forth in a decision that pre-dated the 1981 passage of WPLA. (CP 48-53, 184-86.) Of course, these common law standards were preempted by WPLA. Washington Water Power Co. v. Greybar Elec. Co., 112 Wn.2d 847, 853-54, 774 P.2d 1199, amended by, 779 P.2d 697 (1989). WPLA sets forth the elements of a product liability claim in Washington and Johnson must prove these elements to establish her claim.

In opposing REI's motion for discretionary review, Johnson repeated her reliance on the pre-WPLA, preempted common law. (Answer to Mot. for Discretionary Review 12-14.) She also argued that she was entitled to an inference that the fork *must have* deviated from Aprebic's design standards and specifications because "no bicycle Fork

manufacturer could possibly design a Fork” that would fail in normal use. (Id. at 14.)

The court below either relied improperly on the preempted case law submitted by Johnson, or drew an inference that the fork must have been defectively manufactured, and relied upon that inference to find that an essential element of Johnson’s cause of action had been proven as a matter of law. This was clearly error. (CP 198.) Inferences must be drawn in favor of the non-moving party in the context of a summary judgment motion. E.g., Fortune View Condo. Ass’n v. Fortune Star Dev. Co., 151 Wn.2d 534, 539, 90 P.3d 1062 (2004). It runs contrary to well-settled summary judgment law to allow a moving party to ask the court to assume that evidence that is not in the record would support the allegations in his or her complaint.

Moreover, Johnson’s argument for an inference that the product deviated from its specifications proves too much. Taken to its logical conclusion, this argument would mean that every product failure would give rise to an inference that the product contained a manufacturing defect, because products are never “designed to fail.” If such an argument were to become law, plaintiffs would no longer be burdened in a product liability case with proving that “the product deviated in some material way from the design specifications and performance standards of the

manufacturer[.]” RCW 7.72.030(2)(a). A plaintiff alleging that a seat belt was manufactured improperly, for example, would not need to obtain the design specifications for the seat belt; he or she would simply ask the court to “infer” the existence of a manufacturing defect, since no manufacturer would intentionally design a seat belt to fail. Not only would this inference rewrite summary judgment jurisprudence, and nullify RCW 7.72.030(2)(a), it would effectively eliminate the burden of proof that WPLA now places on plaintiffs seeking to impose liability on a product manufacturer.

The court below erred in ruling, as a matter of law, that the subject fork contained a manufacturing defect as defined in WPLA.

b. The Court Below Erred by Finding, as a Matter of Law, That a Construction Defect in the Fork Caused the Plaintiff’s Injuries.

The court below not only found a manufacturing defect, as a matter of law, it also decided, again as a matter of law, that this manufacturing defect *caused* the plaintiff’s injuries. (CP 198.) “Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury.” Schooley v. Pinch’s Deli Market, Inc., 134 Wn.2d 468, 478, 951 P.2d 749 (1998); accord Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). The finder of fact should decide what caused Johnson’s accident, based on a full consideration of the evidence

presented at trial, not the court, based on nothing more than two conflicting expert declarations.

Cause in fact is hotly disputed in this case. According to Johnson's expert, the carbon fiber layers inside the fork were insufficient and did not contain enough epoxy, causing the fork to fracture. (CP 106-07.) He apparently reached this conclusion without considering or addressing the intervening traffic accident during which the bicycle was struck by a moving car. This oversight matters because Johnson has argued for an inference that the very fact of the accident is proof of a manufacturing defect; that because no fork would be designed to fail, the accident itself is all the evidence needed to prove a manufacturing defect.

In contrast, David Mitchell, REI's metallurgical expert, testified that his "initial visual examination in 2008 revealed a bicycle that had been subjected to substantial use and abuse. It was clearly a high mileage vehicle displaying substantial wear and tear[.]" (CP 176.) He testified that the effects of the intervening 2006 accident were currently unknown but critical to determining causation. (CP 177-78.)

Mitchell squarely addressed and disagreed with the causation opinions of Johnson's expert. Mitchell observed that "the nature of the fracture was not determined. That is, Dr. Zamiski, in his Declaration, did not associate the fracture with a single overload event or as the

consequence of accumulated fork damage over time.” (CP 177.) Mitchell noted that Zamiski failed to provide an estimation or calculation of the fork’s strength or the load required to fracture it. (*Id.*) “Proper failure analysis involves a correlation gathered from physical evidence, scientific principals, and other information such as testimony and eye witness accounts.” (*Id.*) “In summary,” he averred, “there is presently insufficient information to rule out the accumulation of prior damage to the front fork as the cause of ultimate fork separation.” (CP 178.) On the record before the trial court at the time Johnson’s motion was granted, there was evidence that the cause of the accident was not a manufacturing defect within the fork, but years of improper use and abuse by Johnson herself.

Despite the submission of expert testimony rebutting Johnson’s claims, the court below took the issue of causation away from the finder of fact and resolved it in favor of the moving party as a matter of law. This ruling was erroneous and should be reversed.

c. The Court Below Erred by Finding, as a Matter of Law That the Fork Was Unsafe Beyond the Contemplation of an Ordinary Consumer.

The court below made a third fundamental error in granting Johnson’s summary judgment motion. Under WPLA, Johnson bears the burden of proving that the fork “was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” RCW

7.72.030(3). “Fundamentally, it is for the trier of fact to determine if the product was unsafe to an extent beyond that which would be expected by an ordinary consumer.” Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 328, 971 P.2d 500 (1999). This case was an especially poor candidate for summary judgment on this issue.

Johnson purchased the fork over two years before the accident. During that time, the bicycle was struck in traffic by a moving car. As Mitchell testified by declaration, this case involves “a bicycle that had been subjected to substantial use and abuse. It was clearly a high mileage vehicle displaying substantial wear and tear[.]” (CP 176.) The bicycle “exhibited significant wear and lack of maintenance.” (Id.) At the time the trial court decided the causation issue as a matter of law, there was “insufficient information to rule out the accumulation of prior damage to the front fork as the cause of the ultimate fork separation.” (CP 178.) Under these circumstances, the trier of fact should have been permitted to weigh the conflicting evidence and decide how an ordinary consumer would expect a carbon fiber fork to perform after it had been subjected to heavy use and abuse for more than two years, including a traffic accident in which it was struck by a moving car. Taking that issue away from the jury was clear error.

2. The Court Below Erred by Refusing to Allow REI to Conduct Discovery Before Deciding Disputed Factual Issues as a Matter of Law.

At the time the court below entered summary judgment on liability, numerous material facts were in dispute, and a host of key facts were simply unknown. Most of the discovery relevant to causation was yet to occur. The discovery deadline was almost five months away. (CP 171.) Not a single deposition had been taken. (CP 155.) REI's expert had not had the opportunity to complete his investigation. (CP 178.) The parties had not exchanged possible primary witness lists pursuant to King County Local Civil Rule 26(b)(1). (CP 171.) Neither party had disclosed its expert's reports. Nor was either party in possession of the design specifications from which the fork allegedly deviated.

Because so much discovery remained to be completed, and so much relevant information was unknown, REI asked the court below for a continuance under CR 56(f) to allow REI to complete needed discovery. (CP 140.) In connection with that request, REI's expert identified the evidence that he still needed in order to complete his investigation. He testified that "there remains much information to be gathered, including plaintiff's own testimony, in order to complete the failure analysis of the fork in question." (CP 177.) Johnson would need to be deposed and asked about the history and use of the bicycle, and the 2006 accident.

(CP 177-78.) Additional laboratory testing was needed to measure exemplar forks for stress loads and impact strength. (Id.) Because Johnson's claim focused on the manufacture of the fork, Aprebic's design specifications and analyses were relevant and needed to be collected and analyzed. (CP 178.)

The court below denied REI's CR 56(f) request without comment. This unexplained refusal to allow basic discovery on the issues presented in Johnson's summary judgment motion amounted to an abuse of discretion. Cf. Coggle v. Snow, 56 Wn. App. 499, 507-08, 784 P.2d 554 (1990) (holding as an abuse of discretion a denial of a CR 56(f) request when little discovery had been done and a party's retained expert had not been given the opportunity to complete his investigation.).

C. The Court Below Erred by Bifurcating Johnson's Personal Injury Claim from REI's Claim for Contribution Against Aprebic, Potentially Depriving REI of the Opportunity to Seek Contribution Under Washington Law.

Although neither party requested it, the court below preemptively decided that if REI added Aprebic as a third-party defendant, the court would bifurcate REI's third party claim against Aprebic from Johnson's personal injury claim against REI—even though both claims arose out of the *same bicycle accident* and would require a jury to review the same evidence. The court below appeared to be unaware of the impact such

bifurcation would have on the viability of REI's contribution claim. If the decision below stands, then REI could find itself in the pre-1981 legal landscape that the Legislature purposefully amended in 1981, and then again in 1986. REI might end up shouldering liability for 100% of Johnson's damages and have no avenue to pursue a contribution claim against the actual manufacturer of the allegedly defective fork.

1. Joint and Several Liability Is a Prerequisite to Contribution Under Washington Law.

Before 1981, joint tortfeasors were jointly and severally liable with one another and had no right to seek contribution. Waite, 68 Wn. App. at 523-24. In the same 1981 bill that created WPLA, the legislature also for the first time granted a right to contribution, but limited that right to defendants held jointly and severally liable for an injury. RCW 4.22.040(1); see also Kottler v. State, 136 Wn.2d 437, 442, 963 P.2d 834 (1998) (since the passage of RCW 4.22.040(1), Washington courts "have, without exception, affirmed that joint and several liability is a prerequisite to a right to seek contribution"); accord Gass v. MacPherson's Inc. Realtors, 79 Wn. App. 65, 69, 899 P.2d 1325 (1995) ("Joint liability is a prerequisite to a contribution action").

The 1981 contribution statute had the effect of ensuring that any defendant facing joint and several liability, even if forced in the first

instance to pay all of a plaintiff's damages, would ultimately have the opportunity to seek contribution from other entities at fault. By allowing for contribution in 1981, the legislature remedied the injustice of requiring one tortfeasor to pay 100% of the plaintiff's damages while allowing him no recourse against others who were equally or more at fault.

2. REI and Aprebic Cannot Be Jointly and Severally Liable to Johnson Unless Both Are Parties Against Whom Judgment Is Entered in Johnson's Suit.

The newly recognized right to contribution had widespread application when joint and several liability was the background rule. However, its impact was significantly diminished in 1986 when the legislature abolished joint and several liability in most instances.⁶ Kottler, 136 Wn.2d at 443. In the ordinary case, post-1986, defendants no longer need to seek contribution because, under Washington's comparative fault scheme, they pay their own proportionate share of the total liability and no more. There is, accordingly, no reason for them to seek contribution. Because joint and several liability—and thus a right to contribution—are retained in only narrow circumstances, any contribution right REI may have against Aprebic must be predicated on one of those few circumstances.

⁶ This was entirely appropriate, since the need for a contribution cause of action was virtually eliminated by the enactment of a comparative fault system.

The only plausible pathway to joint and several liability in this case depends, ironically, on Johnson being found to be “fault-free.” If the “claimant ... 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.” RCW 4.22.070(1)(b) (emphasis added). Under this provision, the only potential defendants in a contribution action are those defendants against whom judgment is entered. Kottler, 136 Wn.2d at 447 (“[P]arties not named in the underlying suit are not ‘defendants against whom judgment is entered.’”); see also Mailloux, 76 Wn. App. at 513 (“A person is not liable to the plaintiff, let alone jointly and severally liable, if he or she has not been named by the plaintiff.”).

3. Bifurcating Trials Would Guarantee That Judgment Is Not Entered Against Aprebic in Johnson’s Suit.

Johnson claims to be fault-free. Should the factfinder agree, the bifurcation of the REI/Aprebic trial from the Johnson/REI trial means that Aprebic cannot be a “defendant against whom judgment is entered” in the Johnson/REI trial. Accordingly, REI may be stuck with 100% of the plaintiff’s damages with no right of contribution against Aprebic. This result would not only unfairly burden REI, it would allow Aprebic, who is

the undisputed manufacturer of the allegedly defective fork, to avoid any liability at all.

This result clearly illustrates one of the many flaws in the trial court's decision below, which is premised on selectively applying some features of tort reform and ignoring others. The trial court held that the 1981 WPLA requires REI and Aprebic to be treated as one and the same entity, and thus foreclosed REI's opportunity to take advantage of the 1986 comparative fault system. But the court then deprived REI of the right to pursue a contribution claim that was adopted in the same 1981 bill that created WPLA. This type of patchwork application of incompatible legal doctrines defeats the purpose of our legislature's comprehensive statutory tort system. Under pure comparative fault, REI should never be responsible for the portion of the plaintiff's damages caused by Aprebic, and then find itself with no legal recourse under WPLA to recover contribution from Aprebic.

V. CONCLUSION

The court below made numerous fundamental errors. If not corrected, these errors will (a) place REI, and every other seller of a branded product, entirely outside Washington's otherwise universally applicable comparative fault system, (b) deprive REI of the opportunity to present evidence to the trier of fact regarding the cause of the accident at

issue, and (c) prevent REI from seeking contribution from Aprebic, thus allowing the manufacturer of the fork that allegedly caused the plaintiff's harm to escape any liability whatsoever. This Court should reverse the orders below and order that REI can invoke Washington's comparative fault system and present evidence as to Aprebic's fault to the trier of fact, exactly as the Washington legislature intended.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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Respondent,
v.
RECREATIONAL EQUIPMENT,
INC.,
Petitioner.

DECLARATION OF SERVICE

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I certify that I caused to be served a copy of Petitioner Recreational Equipment, Inc.'s Brief to Robert L. Christie, Christie Law Group, PLLC, counsel for plaintiff, at 2100 Westlake Avenue North, Suite 206, Seattle, WA 98109-5802, via Messenger, on September 27, 2010.

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