NO. 93076-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

DILLON SMELSER, individually AND DERRICK SMELSER, individually

Petitioners,

vs.

JEANNE PAUL, individually

Respondent

and

RONALD SMELSER, individually

Defendant

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

Jeanne Paul, respondent in the Court of Appeals, submits this Answer in opposition to appellants Smelsers' Petition for Review.

II. RESTATEMENT OF ISSUES PRESENTED

Respondent contends that the issues presented by this Petition are more appropriately expressed as follows:

1. Does RCW 4.22.070(1), requiring allocation of fault to "every entity which caused the claimant's damages," including "entities immune from liability to the claimant" (with the sole exception of entities immune under Title 51), unambiguously include allocation to parents who have case law-established "limited immunity" from liability to their children for negligent supervision, i.e.: negligent failure to protect them from harm, in a suit by the children against an alleged tortfeasor such as automobile driver Jeanne Paul?

2. Did the trial court correctly enter Judgment against Jeanne Paul for only her proportionate 50% of fault as found by the jury, when at the close of trial plaintiffs expressly elected to not make a negligence claim against their father, Ronald Smelser, who had arguably waived his parental immunity from such a claim?

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. Introduction

Petitioners' sole basis on which they claim that this case is appropriate for Supreme Court review is that it involves "an issue of substantial public interest" that should be determined by this Court, pursuant to RAP 13.4 (b)(4). This argument is based on the supposed "ambiguity" of RCW 4.22.070(1), the allocation of fault section on the 1986 Tort Reform Act, which they claim requires resolution. However, Washington appellate courts have had no previous difficulty in discerning the Legislature's intent in this statue, and the Court of Appeals decision in this case is a straightforward application of the plain language of the statute and the prior case law to the facts of this unremarkable case.

Simply put, petitioners are merely dissatisfied with the policy choices made by the Legislature 30 years ago, and modified only once in the ensuing years, which radically changed and restricted the way injured plaintiffs may recover tort damages and from whom they may recover them. They are asking this Court to inject ambiguity into the statute where none exists, and to carve out a new, un-legislated exception to the clear direction of section .070 that the 100% of fault for each injury must be allocated among "every entity which caused the claimant's damages," including those immune from liability

to the claimant. They argue that the Legislature did not contemplate including "immune" negligent parents in the 100% fault calculation, either when originally drafting the statute, or in 1993 when the sole exception was added, to exclude allocation of fault to entities immune under the Industrial Insurance Act, Title 51, and that this Court should accept review to repair this "omission" under the guise of statutory construction. This Court should reject this invitation for the reasons set forth below.

B. RCW 4.22.070 is Not Ambiguous, As Written or as Subsequently Construed by the Courts

As petitioners point out, RCW 4.22.070 is indeed the "centerpiece" of the 1986 Tort Reform legislation. The section at issue provides, as pertinent to this matter, as follows:

> "(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant...defendants, third-party defendants, entities released by the claimant and entities with any other individual defense against the claimant, *and entities immune from liability to the claimant,* but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant...in the amount that represents that party's proportionate share of the claimant's total damages..."
> RCW 4.22.070(1) [emphasis added]

Petitioners contend that section .070 is ambiguous, primarily because the terms "entity" and "immune" are not defined in the statute. However, in Price v. Kitsap Transit, 125 Wn.2d 456, 886 P.2d 556 (1994) this Court filled any statutory gap as to the meaning of the term "entity." In Price the Court clarified that, as used in RCW 4.22.070(1), an "entity" is every "juridical being capable of fault," and excludes only a person/ thing "incapable of fault as a matter of law," such as animals, inanimate objects, forces of nature and, as decided in Price, very young children. Id. at 461. The court explained that these non- "entities" all share the characteristic of not having the capacity to comprehend a duty and conform to a standard of care. Id. at 462

The Price court also expounded on the meaning of the statutorily undefined term, an entity "immune from liability to the claimant." In response to Kitsap Transit's argument that the four-year old child in question was an "immune entity" to whom fault could and should be allocated under the statute, the Price court explained the difference between "incapacity" (for instance, a very young child) and "immunity." It held that immune entities are "juridical beings capable of fault, but excused for policy reasons from incurring liability," while "infants escape liability not because of immunity, but because they lack the mental capacity to commit a tort." Id. at 463

Furthermore, the concept of public policy-based "immunity" from

liability in tort had a well-established meaning in Washington case law in 1986, both in general and in terms of parental immunity. In drafting statutes, the Legislature is presumed to know the state of existing court decisions and to legislate with reference to them. Price, supra at 463. The Legislature clearly intended to incorporate this existing law in its use of the single term "immunity" in the statute.

It is true that "immunity" has a wide variety of meanings and analytical underpinnings, depending on the particular statutory or common law immunity in question, but that does not make the term ambiguous. All share the common thread that the decision-maker recognizing the immunity, whether a Court or the Legislature, has determined that an overriding public policy dictates that the immune person or organization be excused from the legal consequences of his/ its otherwise actionable wrongdoing.

The many recognized immunities from tort liability have differing public policy rationales. For instance, protection of parental or government discretion from court interference; protection of judicial and prosecutorial independence; the sovereign status and independence from outside laws of Indian Tribes; and the "grand compromise" of the Industrial Insurance system, trading employer immunity from suit for sure and certain, no-fault compensation for workers.

None of these rationales has anything to do with the immune entity's ability to be negligent—to fail to exercise ordinary care—and therefore to be "at fault." Looking at one of the most absolute immunities extant, the Court in Humes v. Fritz Companies, 125 Wn.App. 477, 489-490, 105 P.3d 1000 (2005) directly addressed and rejected the argument, similar to that made by petitioners here, that because the State cannot impose a duty of care on a sovereign entity, an Indian Tribe had no duty could not "be negligent." Based on the rationale of Price, supra, the Court held:

> "The Tribe is a juridical being clearly capable of fault. Sovereign immunity protects the Tribe from being subject to suit or incurring liability, but it does not render the Tribe incapable of fault." Id. at 491-492.

The Humes Court found the legislative intent in RCW 4.22.070, requiring allocation of fault to all damage-causing entities, to be "clear" that non-immune defendants pay only their proportionate share of damages and that plaintiffs not recover for fault attributable to immune entities. Id. at 491.

Years earlier, in Clark v. Pacificorp, 118 Wn.2d 167, 181, 822 P.2d 162 (1991), before the 1993 amendment removing Industrial Insurance immunity from the allocation formula, the Supreme Court also found "The language of RCW 4.22.070(1) is clear and unambiguous," and held that fault "shall" mandatorily be allocated to one of the most sacrosanct immune

entities: the Title 51 employer, which has no actionable duty to its employees but which clearly is capable of being negligent and causing harm.

Petitioners cite Esparza v. Skyreach Equipment, 103 Wn.App. 916, 15 P.3d 188 (2000), to support their argument that a Court can and should ignore plain statutory language to avoid an "absurd" result. This case holds no such thing. Esparza joined the other Courts which have construed RCW 4.22.070 and found the 1993 amended statute to be unambiguous: that only employers immune under Title 51 are removed from the 100% fault allocation. The Esparza court believed that the "plain language" of RCW 4.22.070(1), which requires fault allocation to an employer immune to its workers under Federal maritime law, the same as any other non-Title 51 immune entity, would indeed produce an "absurd" result, probably unintended by the Legislature. However, despite an invitation to "construe" the statute to avoid this result, the court felt constrained to read the statute exactly as written. It did not apply the plain language only because it found that the RCW provision was preempted by the terms of the inconsistent Federal statute, and that therefore the maritime employer could not be allocated fault to reduce the worker's recovery. Id. at 938-941.

By contrast here, no such preemption applies to remove immune parents from the clearly written fault allocation scheme, and it is no more

"absurd" to assign fault to parent than to any other non-employer immune entity, such as an Indian Tribe.

C. Parental Immunity is No Different Than Other Immunities, and is Within the Legislative Intent That Immune Entities be Allocated Fault to Reduce the Liability of Defendants and the Recovery of Plaintiffs

Petitioners contend that Legislature could not have contemplated that the immunity from suit by their children for negligence afforded to parents by developing case law would be encompassed within the fault allocation scheme of RCW 4.22.070. This is so, they argue, because parental immunity is not a "real" immunity, but simply a lack of a duty to supervise their children, and that to reduce the recovery of the children from another tortfeasor based on parental fault would produce an "absurd result." This argument has no support in the statutory language or in either the pre-Tort Reform or subsequent case law.

First, the common law "limited immunity" of parents as it exists today was well settled in the case law in 1986, when section .070 was enacted. In fact, on January 16, 1986, months before Tort Reform, this Court issued the three decisions discussed in Zellmer v. Zellmer, 164 W.2d 147, 158, 188 P.3d 497 (2008) which "reaffirmed the viability of the doctrine of parental immunity with respect to assertions of negligent supervision." Baughn v. Honda Motor Co., 105 Wn.2d 118, 712 P.2d 293 (1986); Talarico v.

Foremost Ins. Co., 105 Wn.2d 114, 712 P.2d 294 (1986); Jenkins v. Snohomish County P.U.D., 105 Wn.2d 99, 713 P.2d 79 (1986). The Legislature is presumed to be familiar with existing case law, so must have known at the time of enacting section .070 that negligent parents were among the "entities immune from liability to the claimant" to whom fault was to be allocated in a suit by their children.

Additionally, when the Supreme Court found in Clark v. Pacificorp, supra that the "clear and unambiguous" language of original section .070 included Industrial Insurance-immune employers and co-workers as entities subject to fault allocation, the Legislature disagreed and promptly amended that section to exclude them from the 100% total. (Laws of 1993, c. 496, sec.1) Tellingly, it did not then or at any subsequent time reassess whether parental, or any other, immunity should likewise be excluded, and the statute remains unchanged since 1993. As the Court of Appeals noted in this case, under the "*expressio unius est exclusio alterius*" doctrine, this strongly supports the conclusion that Industrial Insurance immunity is the only one intended to excluded from the fault allocation formula.

Petitioners also speculate (Petition, pages 10-11) whether the Legislature intended that other legal statuses described in case law as being "immunities" but which they claim are "really" a lack of duty of care, such

judicial/prosecutorial immunity and discretionary governmental immunity, not be included in the fault allocation process as "empty chairs." The question of allocation of fault to entities entitled to judicial or discretionary immunity has not been specifically addressed by the Courts, but the answer, based on Price v. Kitsap Transit, is clearly that allocation is the rule. Judges, prosecutors and high level government decision-makers are all "juridical beings capable of fault." If the Legislature disapproved of that definition of fault-allocable immune entities, it has had since the Price decision in 1994 to say so, but no such amendment has been made.

Finally, petitioners' basic premise that parental immunity is not an "immunity" at all, but is really a lack of any duty to supervise their children, is flawed. Parental immunity—as with all immunities—does involve a lack of an actionable duty, since the immune entity has been excused from legal liability on policy grounds. However, parents do have a duty to supervise their children. As the Court of Appeals here recognized, this duty is enforceable in certain circumstances for the protection of third parties injured by the child. See: Carey v. Reeve, 56 Wn.App. 18, 781 P.2d 904 (1989).

Parents also have a general duty to their children to supervise and protect them from harm, although it is not enforceable by the child for mere negligence. See eg: Curran v. Marysville, 53 Wn.App. 358, 766 P.2d 1141

(1989), cited in Carey, supra at 25, as "instructive on the general duty to supervise." Curran held, in the case of a babysitting grandfather, that it is "well settled" that one who assumes responsibility for the care of a child has a duty to exercise reasonable care to protect the child. Id. at 365. This duty by a parent to supervise was also recognized and enforced in favor of a defendant, in the days of contributory negligence, to bar an action by the parent for injury to his child. See: Cox v. Hugo, 52 Wn.2d 815, 821, 329 P.2d 467 (1958), ruling on the defendant's claim of contributory negligence, that the parent had a duty to supervise, but factually did not breach it in that case by failing to keep the child under constant surveillance. See also: Gabel v.Koba, 1 Wn.App. 684, 688-689, 463 P.2d 237 (1969), holding that the mother had a duty to protect her child from dangers caused by the landowner defendant, and that in that case whether her alleged contributory negligence should bar her wrongful death action was a question for the jury.

D. RCW 4.22.020 is Not Applicable Here, and RCW 4.22.070 Does Not Have the Effect of "Imputing" a Parent's Negligence to His Child

Despite the comment to WPI 11.04 and petitioners' argument here, RCW 4.22.020 does not express the common law concept that the negligence of a parent cannot be "imputed" to a child. By its (admittedly confusing) terms, that statute does not apply to a case like this one, involving injury to

the child allegedly caused by the negligent parent. Section .020 merely refers to the imputation of the fault of a spouse to the other spouse or a minor child in a suit for injury to the at-fault spouse/parent. (In fact, after the amendment to section .020 in 1987 to require imputation of fault in loss of consortium cases, it is not clear that there is anything of substance left in the statute,) Therefore, there is no need to attempt to "harmonize" section .020 with section .070's allocation of fault to immune entities such as parents.

As the authors note in the above-referenced WPI comment, the common law of not "imputing" parental fault to a child may or not have survived Tort Reform. However, allocating a percentage of fault to an immune parent under section .070 does not in fact involve "imputing" that fault to the child. If the negligence of the parent were actually imputed to the child, the injured child would no longer be "fault free," and Tort Reform "joint and several" liability would not be in the picture at all. See: Sisk, Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 University of Puget Sound Law Review 1, 57-58. (1992).

E. Judgment Was Properly Entered Only Against Jeanne Paul for Her Proportionate Share of Fault, Because Plaintiffs Did Not Make a Claim Against Ronald Smelser

After the trial court's pre-trial ruling that fault could be allocated to plaintiffs' father, Ronald Smelser, despite his parental immunity, plaintiffs amended their Complaint to add him as a party defendant. (CP 246-248, 329-332) Paul has contended, and the Court of Appeals agreed, that the Amended Complaint did not actually plead a negligence cause of action against Ronald, but only alleged that Paul contended that he was concurrently negligent and that Ronald was being named "to preserve joint and several liability." (CP 331) However, whether or not the Amended Complaint could possibly be read to allege negligence against Ronald, as argued in the Petition for Review (page 16), at the conclusion of the trial, the plaintiffs specifically elected on the record to not make a claim against their father.

Ronald Smelser appeared and testified at trial, and neither expressly waived not expressly asserted his parental immunity, nor did either party ask him about it. (RP 287-333, 540-649). At the conclusion of the evidence, plaintiffs argued that Ronald had waived his parental immunity by defaulting to the Amended Complaint. (CP1506-1508, RP 1620, 1624, 1629-1630) In the course of settling the jury instructions, when asked whether a claim was being made against Ronald, plaintiffs' counsel plainly stated that Ronald was

not negligent and the plaintiffs were not claiming that he was. (RP 1596-1598, 1600-1602.) They accepted the Court's jury Instruction No. 12 (CP 1632-1633) that only Paul was alleging Ronald Smelser's negligence and that it was an affirmative defense on which she had the burden of proof. (RP 1642, 1653). In their closing argument to the jury, plaintiffs repeatedly argued that Ronald Smelser was not negligent and that Jeanne Paul was 100% at fault. (CP 1616-1617, RP 1725, 1811, 1814)

Based on the Court's instructions, the jury returned its verdict answering the questions on the Special Verdict Form, finding both Jeanne Paul and Ronald Smelser negligent and assigning 50% fault to each, and awarding Derrick total damages of $30,225.40. (CP 1644-1646). Judgment was then entered only against Jeanne Paul for her half of Derrick's damages. (CP 1686-1688).

The Judgment here was correct in accordance with the way the case was tried and submitted to and decided by the jury. Even if the trial court had found that Ronald had waived his parental immunity by defaulting to the Amended Complaint, to allow his sons to recover against him for mere negligence, no Judgment could properly be entered against him, because the plaintiffs made no claim against him.

Contrary to plaintiffs' argument, the case of Mailloux v. State Farm,

76 Wn.App. 507, 887 P.2d 449 (1995) is directly on point. While the factual context was different, the Mailloux court correctly explained the operation of RCW 4.22.070 as it applies to this case:

> "Under that statute, any party to a proceeding can assert that another person is at fault. Only the plaintiff, however, can assert that another person is liable to the plaintiff.
> . . .
> If the plaintiff proves fault that is the proximate cause of plaintiff's damages, the person at fault is also liable to the plaintiff, and judgment is entered as set forth in the statute. If a party other than the plaintiff proves fault that is a proximate cause of the plaintiff's damages, the person at fault is not liable to the plaintiff—the plaintiff has made no claim against him or her --but his or her fault nevertheless operates to reduce the 'proportionate share' of damages from those against whom the plaintiff has claimed."
> Id. at511-512 [emphasis added, internal citations omitted]

As the Mailloux court further explained, "A person is not liable to the plaintiff at all, much less jointly and severally," if he has not been alleged to be a potentially liable party by the plaintiff, who must then prove fault. Id. at 513. Contrary to petitioners' assertion, they must do more than "add the alleged wrongdoing party to the lawsuit"; they must actually make a claim against him. See also: Adcox v. Children's Hospital, 123 Wn.2d 15, 25, 28, 864 P.2 921 (1993), holding that "RCW 4.22.070 is not self-executing," and that a party who has "made a deliberate choice at trial" to not pursue fault on the part of another cannot seek to have that fault included in the Judgment

after the fact.

F. If There Was Error in the Way Ronald Smelser's Fault Was Handled, the Remedy on Appeal is to Amend the Judgment to Assign His 50% of Derrick's Damages to Jeanne Paul

Petitioners have not stated here or in the Court of Appeals what relief they believe they are entitled to for the alleged error regarding Ronald Smelser's parental immunity and allocation of fault to him. While, of course, Jeanne Paul continues to assert that the trial court's rulings on these matters were not erroneous in any respect, if this Court were to find error, the only appropriate remedy is to direct that the Judgment be amended to assign Ronald Smelser's one-half of Derrick's damages to Jeanne Paul. No new trial on either liability or damages is warranted. No error in the immunity and fault allocation issues could have had any possible effect on the jury's determination of the amount of Derrick's total recoverable damages or its decision that Jeanne Paul's (and Ronald Smelser's) negligence was not a proximate cause of injury or damage to Dillon on his "bystander" claim.

IV. CONCLUSION

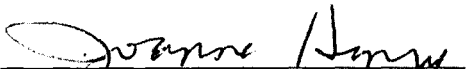
The Court of Appeals decision here was a correct reading of an unambiguous statute. Any "harm" to children resulting from the application of section .070's requirement of allocation of fault to immune parents in suits by their children is clearly consistent with the public policy of Tort Reform as

expressed by the Legislature: that non-immune defendants pay only their proportionate share of a claimant's damages and that claimants not recover for the share of fault of immune entities, with the sole exception of Title 51 immunity.

Any quarrel that the petitioners have with that policy must be addressed to the Legislate, and not this Court.

Respectfully submitted this 31st day of May, 2016

SLOAN BOBRICK, P.S.



By: JOANNE HENRY, WSBA #6798
Of Attorneys for Respondent Paul

DECLARATION OF FILING AND SERVICE

I certify that on the 31st day of May 2016 I caused to be filed with the Supreme Court of the State of Washington a copy of the ANSWER TO PETITION FOR REVIEW, to which this certificate is attached by e-mail to

supreme@courts.wa.gov

and served this Answer by e-mail, by consent, to counsel for Petitioners:

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DATED May 31, 2016 at Tacoma, Washington

JOANNE HENRY, WSBA #6798
Of Attorneys for Respondent Paul

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, May 31, 2016 3:05 PM
To: 'Joanne Henry'
Cc: 'Paul Lindenmuth'; 'Ben Barcus'; sbobrick@sloanbobricklaw.com
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Cc: 'Paul Lindenmuth' <Paul@benbarcus.com>; 'Ben Barcus' <ben@benbarcus.com>; sbobrick@sloanbobricklaw.com
Subject: Dillon Smelser and Derrick Smelser v. Jeanne Paul, Supreme Court No. 93076-7

Dear Clerk:

Attached for filing in the above matter is respondent Paul's Answer to Petition for Review. By consent, this Answer is being served by e-mail on counsel for petitioners.

Will you please confirm that this Answer has been properly filed?

Thank you.

Joanne Henry
Attorney for respondent Jeanne Paul