No. 96538-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondents,

v.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof; et al.,

Appellants.

PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

This is a matter of first impression in Washington.

RCW 4.22.070 mandates that fault be allocated to "every entity which caused the claimant's damage," including "the claimant, defendants, third party defendants, and entities who have been released, those who have individual defenses against the claimant, ***and those who are immune*** (other than under Title 51 RCW [i.e., the Industrial Insurance Act, encompassing Washington's Workers Compensation statute])." *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 111, 75 P.3d 497 (2003) (emphasis added).

The Court of Appeals issued a published ruling dated October 22, 2018 (the "Ruling") that precludes defendant motorists whom the Washington State Department of Transportation ("WSDOT") sues for damage caused by bridge strikes from raising affirmative defenses and defensive counterclaims based on WSDOT's own wrongdoing. Appendix 1. Moreover, the Ruling creates authority that would allow WSDOT to forego maintaining bridges, posting warning signage, and properly issuing oversize load permits, all as required by law. A range of plaintiffs which have statutory immunity from liability could apply the Ruling's logic to avoid a comparative fault analysis of their own negligence.

This was not the legislature's intent in enacting RCW 46.44.020. This Court should grant review to determine whether the Ruling and its implications should remain within Washington jurisprudence.

II. IDENTITY OF PETITIONERS AND CITATION TO COURT OF APPEALS DECISION

Defendants/petitioners Mullen Trucking 2005, Ltd, William Scott ("Scott") and Jane Doe Scott (collectively, "the Mullen Defendants") respectfully petition the Court pursuant to RAP 13.4 for review of the Ruling. The Ruling affirmed the trial court's orders granting WSDOT's motion for partial summary judgment finalized on December 15, 2016. Appendix 2.

III. ISSUES PRESENTED FOR REVIEW

1) RCW 46.44.020 provides the State specified immunity liability for payment of damages for bridge strikes. However, the courts below extended that immunity by ruling "that the amount of WSDOT's recovery in this matter may not be reduced by WSDOT's degree of fault in causing the subject bridge collapse, if any; and defendants' collective liability to WSDOT, if any, may not be diminished by any finding of fault on WSDOT's part in causing the subject bridge collapse." Did the courts below err by enlarging RCW 46.44.020 to preclude defendants' assertion of affirmative defenses?

2) Did the Court of Appeals err by concluding that two statutes addressing parallel concerns indicate legislative intent that courts may not consider the State's culpability in causing a bridge collapse despite Washington's comparative fault regime under RCW 4.22.070?

IV. STATEMENT OF THE CASE

On May 23, 2013, truck driver Scott, employed with defendant Mullen Trucking 2005, Ltd. ("Mullen"), was transporting an oversize load on I-5. CP 458, 472. A tractor trailer operated by third-party defendant Motorways Transport, Ltd. ("Motorways") improperly overtook Scott's truck within the Bridge, causing Scott to veer into the Bridge's shoulder and strike its structural girders. CP 48, 474. A Bridge span collapsed into the Skagit River. CP 446, 476.

In advance of the transport, WSDOT issued to Scott and Mullen a Special Motor Vehicle Oversize/Overweight Permit that stated "Max Dimensions" of "Width 11ft 6" and "Height 15ft 9". CP 472, 533. Scott measured his load to confirm its 15'9" height before departing. CP 472.

The Bridge's road lanes narrowed from the standard 12'0" width to 11'4" at the point of impact within the right shoulder. CP 473. These narrow lanes and shoulders violated nationally adopted design standards. The U.S. Federal Highway Administration had deemed the Bridge "functionally obsolete." CP 476-77. The Bridge's overhead clearance

lowered to below 15’9” in the shoulder space. CP 475. No road signage warned of the narrowing lanes or lowered clearance. CP 477-78, 572-99 (especially CP 596). Thus, Scott was not alerted to safe passage points through the Bridge by signage or the permitting process. CP 473, 475, 596.

The State instituted this action to recover damages related to the Bridge’s repair. The Mullen Defendants’ answer includes indemnity cross claims; a third-party action against Motorways; and the following affirmative defense: “2) Plaintiff’s damages, if any, were caused, wholly or partially, by its own negligence, breach of contract, violation of statute or regulation, and/or other wrongdoing, such that Answering Defendants are not liable therefor.” CP 25. The Mullen Defendants also interposed a defensive counterclaim against the State specifying it:

> … seeks no monetary relief in excess of that which may be awarded to the plaintiff. Mullen seeks a whole or partial reduction, or recoupment, of the plaintiff’s claims, based on the plaintiff’s contributory negligence, violation of statute or regulation, and/or other wrongdoing, but no affirmative damages above and beyond.

CP 126. The State brought a direct action against Motorways. CP 43-62. Thus, allocation of fault amongst the defendants/third-party defendant is at issue.

The State filed a Motion for Partial Summary Judgment Re: RCW 46.44.020 seeking a determination it "… cannot be held financially responsible for any portion of the damages that resulted from Defendant William Scott's May 23, 2013 single-vehicle collision with the Skagit River Bridge." CP 139. On October 6, 2016, the trial court granted that motion, ultimately (after reconsideration) ruling:

> …The Washington State Department of Transportation ("WSDOT") may not be held liable or financially responsible for any portion of the damages that resulted from the subject May 23, 2013 bridge collapse.
>
> The Court further rules that the amount of WSDOT's recovery in this matter may not be reduced by WSDOT's degree of fault in causing the subject bridge collapse, if any; and defendants' collective liability to WSDOT, if any, may not be diminished by any finding of fault on WSDOT's part in causing the subject bridge collapse. RCW 46.44.020 provides in pertinent part that "no liability may attach to the state … 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 …" The Court interprets this statute to ensure that the State shall not be held liable for any of the proven damages in the event of a strike to a bridge over fourteen feet high regardless of whether its own fault contributed to the strike. …

CP 1317-18. The Court ruled as follows from the bench at oral argument:

> [G]enuine issues of material fact have been raised on the other two prongs that are argued -- both the warning signs in terms of the narrowing lanes, and shoulder, and clearance, and also the permitting process which could have, especially in today's modern technology of

> computers, immediately identified the load size that's requesting the permit and recognizing the need perhaps for that load to travel other than in the right lane. …
>
> …. I just want to make those additional findings so any reviewing court has a sense of what I have found from the information before me.

Transcript of Proceedings, copies of relevant pages are attached at Appendix B to the Mullen Defendants' Motion to Modify Ruling Denying Discretionary Review (RAP 17.7), filed May 18, 2017, at 33-34. Thus, the trial court barred the Mullen Defendants from pursuing their Affirmative Defense No. 2 and defensive counterclaim while finding they potentially have merit. The Court of Appeals granted discretionary interlocutory review, and affirmed.

V. ARGUMENT

Under RAP 13.4(b)(1) and (2), this Court should accept review because the Ruling conflicts with its existing precedents, and based on substantial public interests.

A) Summary of Argument

RCW 46.44.020 shields the State from liability to motorists for damages resulting from strikes to bridges over fourteen feet high. However, the courts below concluded that RCW 46.44.020 also bars a defendant motorist from demonstrating the State's wrongdoing as a

contributing factor of a bridge strike in defending against the State's action to recover bridge repair costs.

As no party alleges the State is "liable" for the subject bridge strike, RCW 46.44.020 is inapplicable. The Mullen Defendants should be allowed to demonstrate, pursuant to RCW 4.22.070, how the State's own fault caused or contributed to its damages so as to reduce or negate their liability by way of a purely defensive counterclaim. Affirming the trial court, the Court of Appeals found "…a legislative determination that all financial responsibility for damage to the Skagit River Bridge must be borne by negligent motorists and none may be shifted to the State. An allocation of fault under RCW 4.22.070 would shift a portion of financial responsibility to the State in contravention of RCW 46.44.020."

The State has duties to provide reasonably safe roadways for the traveling public. A jury could conclude that although the Bridge was over 14 feet high, the State negligently failed to address inherent dangers by its permitting process and/or failure to post signage. The three statutes at issue can be harmonized in a manner that would not enlarge the meaning of "liability" to supplant Washington's comparative fault statute.

B) Argument

1) WSDOT's Failure to Implement Adequate Permitting Procedures

WSDOT's role is to "provide a timely and efficient permitting process to safely move these large and heavy loads on the state's highway system. And it's to protect the motoring public and also protect our infrastructure in Washington State." CP 1030. RCW 46.44.010, .020, .030 and .090, and WAC 468-38-050, address permitting requirements for vehicles exceeding 14' in height, 8'6" in width, or 53' in length. WSDOT was aware it needed a more effective warning system. CP 796-98. A jury could conclude WSDOT breached its duty to improve its permitting process, and that this failure caused or contributed to the accident.

2) WSDOT's Failure to Provide Adequate Signage

In *Lucas v. Phillips*, 34 Wn.2d 591, 595, 209, P.2d 279 (1949), this Court held that municipalities must maintain warning signs when either "(a) prescribed by law, or (b) the situation is inherently dangerous or of such a character as to mislead a traveler exercising reasonable care." The Bridge's conditions were inherently dangerous and misleading. WSDOT failed to provide any warning signage despite the Bridge's functionally obsolete nature; and multiple strikes to the Bridge during the preceding nine years. In *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 790, 108 P.3d 1220 (2005), this Court found a

governmental entity negligent for failing to remediate known dangerous conditions where, as here, it had an array of remedial measures at its disposal. "[A]s the danger [at a particular roadway] becomes greater, the [municipality] is required to exercise caution commensurate with it." *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 907, 223 P.3d 1230 (2009). WSDOT did not install vertical clearance signage near the Bridge. CP 730-32.

3) RCW 4.22 Requires Analysis of the State's Fault

"RCW 4.22.070(1) is applicable '[i]n all actions involving *fault* of more than one entity. . . .'" *Price v. Kitsap Transit*, 125 Wn.2d 456, 461, 886 P.2d 556 (1994) (emphasis in original). "In an action based on fault seeking to recover damages for . . . harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery." RCW 4.22.005.

Again, RCW 4.22.070 mandates that fault be allocated to "every entity which caused the claimant's damage," including "the claimant, … ***and those who are immune*** …" *Tegman*, 150 Wn.2d at 111(emphasis added).

RCW 4.22.070(1) provides that the "claimant or person suffering personal injury or incurring property damage" is an "entit[y] whose fault

shall be determined. . . ." By initiating this fault-based action to seek recovery based on the fault of more than one entity, the State established itself as an "entity" within RCW 4.22.070(1).

RCW 4.22.015 provides the only definition of "fault" within RCW 4.22, and Washington courts apply it. *Tegman*, 150 Wn.2d at 109. Under RCW 4.22.015, fault "includes acts or omissions . . . that are in any measure negligent or reckless . . . [, and an] unreasonable failure to avoid an injury or to mitigate damages." *Welch v. Southland Corp.*, 134 Wn.2d 629, 634, 952 P.2d 162 (1998) ("RCW 4.22.070 provides for apportionment of liability '[i]n all actions involving *fault* of more than one entity . . . .' RCW 4.22.015, in turn, defines *fault* as 'acts or omissions . . . that are in any measure *negligent* or *reckless* toward the person or property of the actor or others. . . .'") (emphasis in original).

4) RCW 46.44.020 and .110

RCW 46.44.110, entitled "Liability for damage to highways, bridges, etc.," defines the extent oversize load operators may be liable to the State for bridge strikes:

> Any person operating any vehicle … upon any public highway in this state or upon any bridge … is liable for that the … bridge… may sustain ***as a result of any illegal operation of the vehicle*** …. ***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. . . [emphasis added]

The language "… liable for any damage to any . . . bridge . . . sustained as the result of any negligent operation thereof" imposes a negligence standard, but does not supplant the comparative fault doctrine. In Washington, comparative fault is an implicit consideration in any negligence analysis. RCW 4.22.005, .070.

RCW 46.44.020, entitled "Maximum height—Impaired clearance signs," provides: "[N]o ***liability*** may attach to the state . . . 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 . . ." (emphasis added).

Thus, RCW 46.44.110 defines a motorist's liability to the State for bridge strikes, and RCW 46.44.020 defines the State's liability to motorists for bridge strikes.

5) RCW 46.44.020 Does Not Insulate WSDOT from "Fault," Only "Liability" and "Financial Responsibility," which are Distinct Concepts

The courts below conflated the concepts of "liability" and "fault." RCW 46.44.020 addresses only the State's "liability" for bridge strike

accidents, and is not concerned with "fault" that might be ascribed to the State in a comparative fault analysis. They ruled that because RCW 46.44.020 ostensibly protects the State from "financial responsibility," it also is insulated from any ascription of "fault" related to a bridge collapse. Courts in Washington and around the country hold that a party, though immune from liability, may be held to be at "fault."

The legal concepts of "fault" and "liability" are significantly distinct. "Fault," as defined by RCW 4.22.015, is as an element of liability:

> . . . acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. . . . Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

RCW 4.22 provides no different definition of "fault." "[I]mmune entities can be capable of fault." *Humes v. Fritz Cos., Inc.*, 125 Wn. App. 477, 491, 105 P.3d 1000 (2005) (also holding that although "[s]overeign immunity protects the Tribe from being subject to suit or incurring liability, . . . it does not render the Tribe incapable of fault.").

RCW 4.22.070 confirms this reading, as only entities immune under RCW 51 and those incapable of fault are not ascribed degrees of fault. RCW 4.22.070(1); *Price*, 125 Wn.2d at 463. WSDOT is neither.

The statute makes clear that although no judgment may attach to entities "immune from liability," those entities may nonetheless be held at "fault" for a portion of the resulting damage. RCW 4.22.070(1). Thus, even an immune claimant's "fault" should be included in the damages allocation under a comparative fault analysis. Thus, while RCW 46.44.020 might immunize the State from liability, it does not insulate the State from inclusion in a RCW 4.22.070 comparative fault analysis.

6) The Ruling Violates Canons of Statutory Construction and Conflicts with Precedents

The Court of Appeals departed from this Court's precedents requiring courts to harmonize statutes before applying other cannons of statutory construction. The rulings below disregard decisions that considered whether the fault of entities protected from liability under sovereign immunity must be allocated.

The Court of Appeals essentially ruled that RCW 46.44.020, when read in coordination with RCW 46.44.110, creates an exception to Washington's broad waiver of sovereign immunity, as "[t]he legislature has the authority to define the parameters of any cause of action, including claims that may be asserted against the State." Ruling at 7. It adopted the State's position that RCW 46.44 "constitutes a legislative decision to restrict claims, and by extension, a contributory negligence affirmative

defense, against the State arising out of vehicular damage to a State-owned bridge as long as the State has provided at least 14 feet of vertical clearance." *Id* at 8.

By construing RCW 46.44.020 as "both a sword and a shield," the Court of Appeals ignored existing precedents. It did not properly harmonize the two provisions of RCW 46.44 with RCW 4.22.070. Rather, it implicitly found – with no stated analysis – that RCW 46.44 irreconcilably conflicts with RCW 4.22.070, such that the more specific 46.44 ostensibly defeats the more general 4.22.070. Ruling at 12. This analysis is improper.

As this Court has ruled, "where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible." *Higbee v. Shorewood Osteopathic Hosp.,* 105 Wn.2d 33, 37, 711 P.2d 306, 309 (1985). Proper statutory construction easily harmonizes RCW 46.44 and RCW 4.22.070 through their plain language. As an immune entity, WSDOT's fault is allocated, but judgment is not entered against it. *Ottis Holwegner Trucking*, 72 Wn. App. at 118; *Humes*, 125 Wn. App. at 491 ("[T]he Tribe's sovereign immunity does not bar the allocation of fault to it in a negligence action against the Fritz defendants.").

WSDOT's fault can and must be allocated. The concept of "no liability may attached to the State" even when interpreted in conjunction with the concept that a motorist "is liable for all damages that the … bridge… may sustain as a result of any illegal operation of the vehicle," is not irreconcilable with Washington's comparative fault statute. The latter clause would not impose liability on a motorist to the extent illegal operation of his/her vehicle did not cause or contribute to the damage, such that entities whose fault did cause damage must be considered. Of course, if the Bridge damage resulted 100% "as a result of any illegal operation of the vehicle," then no comparative fault would be ascribed to the State. However, no previous application or legislative history of RCW 4.22.070 suggests the legislature intended the extreme effect of holding a motorist liable for bridge damages his/her wrongful operation of a vehicle did not cause.

The Court of Appeals implies that because WSDOT has no duty, it cannot be allocated fault. It relied on *Smelser v. Paul*, 188 Wn.2d 648, 659, 398 P.3d 1086 (2017), which held that a father owes no duty of care to his child, and therefore, could not be held negligent. Because the father did not breach any legal duty, no fault could be allocated to him. The Court of Appeals analogized the father to WSDOT to find contributory

fault inapplicable. Ruling at 12-13. However, *Smelser* did not hold that parental immunity bars consideration of contributory fault.

While recognizing that "[t]he State has a common law duty to maintain roads in a condition safe for ordinary travel," the Court of Appeals disregarded *Smelser*'s warning that "immunity" not be conflated with the lack of tort duty. Ruling at 11-12. It further disregarded this Court's distinction between "[j]uridical beings capable of fault, but excused for policy reasons from incurring liability" and "beings or objects incapable of fault." *Price*, 125 Wn.2d at 463. WSDOT is an entity capable of fault but immune from liability for policy reasons. It is not an entity incapable of fault.

Had the legislature intended RCW 46.44 to render WSDOT an entity "incapable of fault," thereby barring the comparative fault doctrine, it could and would have so specified. The "no liability" language contained in RCW 46.44.020 and .110 does not create an entity "incapable of fault" as would be required to avoid application of the comparative fault doctrine. In determining that RCW 46.44.020 renders WSDOT an entity incapable of fault, the Court of Appeals impermissibly "added language" to RCW 4.22.070 by creating an additional exception. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

The Ruling erred by dismissing the statutory requirement within RCW 4.22.005 that fault be determined and allocated in all fault-based actions. "[T]he Legislature has determined that the comparative fault doctrine shall apply to all actions based on 'fault,' including strict liability and product liability claims." *Lundberg v. All-Pure Chem. Co.*, 55 Wn. App. 181, 186, 777 P.2d 15 (1989)(even in strict liability cases, the comparative fault doctrine applies); *see also Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 261, 978 P.2d 505 (1999).

7) The Ruling's Broader Implications

Numerous other Washington statutes contain language such as "no liability may attach," "no liability on the part of," and "no cause of action may arise against" an entity incapable of fault. Although the Ruling addresses only RCW 46.44.020, its effect is much broader, as its logic could be extended to other immunity statutes.

For example, RCW 25.10.321 provides:

> A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.

By the Ruling's logic, if a limited partner sued the business partner of his/her LP, that business partner would be precluded from raising

affirmative defenses related to the limited partner's individual wrongdoing. Similarly, RCW 74.15.038 provides that:

> If an agency operating under contract with the department chooses to hire an individual that would be precluded from employment with the department …, the department and its officers and employees have no liability arising from any injury or harm to a child . . . attributable to such individual.

Per the Ruling's interpretation of "no liability," the Department of Social and Health Services would not have its fault allocated if a child were injured through the concurrent negligence of a person precluded from employment with the Department.

In considering this petition for review, this Court should be mindful of how the Ruling will affect interpretation of other statutes and prohibit allocations of fault for other "no liability" entities despite their own wrongdoing. A partial list of statutes that could potentially be affected is attached as Appendix 3.

8) A Grant of Absolute Immunity Would Contravene Public Policy

Application of statutes like RCW 46.44.020 as "both a shield and a sword" contravenes public policy. In *Department of Public Safety v. Parker*, a court rejected a sovereign plaintiff's contention that its immunity was a defense to contributory negligence on the grounds that "that such immunity is intended to be used 'as a shield, but not as a

sword.'" 161 So. 2d 886, 888 (Fla. Dist. Ct. App. 1964). In *Department of Finance and Administration v. Shinkle*, the Oregon Supreme Court summarized that "[h]ere the state employs the machinery of justice to enforce a claim and yet it seeks to deny the defendant a defense which would be available to him as against any other plaintiff…. [T]he fact that the state initiates the proceeding puts the matter in a setting which runs counter to generally accepted notions of fair play. The state as the creator of laws should not present such an image of injustice." 231 Or. 528, 539-40, 373 P.2d 674 (Or. 1962). Appendix 4 contains a lengthy list of citations to courts around the country which reject the notion that similar applications of sovereign immunity may be used as both shield and sword.

The statute's correct construction, including proper application of this Court's precedents, would disincentive WSDOT from performing its duties regarding public roadways maintenance. RCW 46.44.020 allows fault to be allocated to WSDOT because fault is not synonymous with liability.

VI. CONCLUSION

Any derogation from Washington's comparative fault regime is extremely significant given its importance to our system of liability based on accountability. The judiciary should carefully scrutinize the exceptionally rare circumstance where ambiguous legislative intent

suggests comparative fault does not apply. However, the Ruling takes the drastic step of finding absolute, unrestricted motorist liability in a circumstance where such legislative intent is not suggested, and statutes at issue can be harmonized. Especially given that the published Ruling's effects could be broad, this Court should accept review.

DATED this 21st day of November, 2018.

s/ Steven W. Block

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CERTIFICATE OF SERVICE

I hereby certify that I am a legal assistant at Foster Pepper PLLC and that on November 21, 2018, I filed this pleading with the Supreme Court and have served this via E-mail service by consent of the following parties:

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Court of Appeals - Division 1

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, on November 21, 2018.

s/ Michelle Stark
Michelle Stark

APPENDIX 1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Respondents, DANIEL A. SLIGH and SALLETTEE R. SLIGH, individually and the marital community composed thereof; BRYCE KENNING, a single person, Plaintiffs, v. MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof, Petitioners, and SAXON ENERGY SERVICES, INC., TAMMY J. DETRAY and GREGORY DETRAY, individually and the marital community composed thereof; G&T CRAWLERS SERVICE, a Washington business entity, Defendants. --- MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT and JANE	No. 76310-5-I DIVISION ONE PUBLISHED OPINION

DOE SCOTT, individually and the marital community composed thereof;

Petitioners,

v.

STATE OF WASHINGTON,

Respondent,

PATTY AUVIL d/b/a OLYMPIC PENINSULA PILOT SERVICE and JOHN DOE AUVIL, individually and the marital community composed thereof,

Defendants,

and

MOTORWAYS TRANSPORT, LTD, a Canadian corporation; AMANDEEP SIDHU and JANE DOE SIDHU, individually and the marital community composed thereof,

Petitioners.

FILED: October 22, 2018

ANDRUS, J. — William Scott, a truck driver employed by Mullen Trucking 2005 Ltd. (Mullen), was transporting an over-height load when his truck struck overhead supports on the Skagit River Bridge, causing the bridge to collapse. The Washington State Department of Transportation (State or WSDOT) sued Scott and Mullen Trucking for negligence. Mullen alleged that WSDOT and a second truck driver, Amandeep Sidhu and Sidhu's employer, Motorways Transport, Ltd., were contributorily liable for the bridge collapse. After WSDOT added Motorways to the lawsuit, Mullen and Motorways sought to reduce their liability by the percentage of fault they claimed was attributable to the State. The trial court dismissed Mullen's

and Motorways' contributory negligence affirmative defense and/or counterclaim on summary judgment, ruling that under RCW 46.44.020, no fault may be allocated to the State. We granted Mullen's motion for discretionary review, which Motorways joined.

Under Washington's motor vehicle code, a person who operates a vehicle in any negligent or illegal manner is liable for "all damages" to a public highway or bridge. RCW 46.44.110. The legislature passed a statute explicitly providing that "no liability" may attach to the State for damages that occur by reason of the existence of an overhead structure where, as here, the State provides at least 14 feet of vertical clearance. RCW 46.44.020. We conclude that these statutes unambiguously express a legislative determination that all financial responsibility for damage to the Skagit River Bridge must be borne by negligent motorists and none may be shifted to the State. An allocation of fault under RCW 4.22.070 would shift a portion of financial responsibility to the State in contravention of RCW 46.44.020. We affirm the trial court.

FACTS

The Skagit River Bridge is located on Interstate 5 between Burlington and Mount Vernon. The bridge has two lanes in each direction with a concrete barrier separating northbound and southbound traffic. Before its collapse, the bridge was a "through truss structure," meaning that it had trusses, or supports, above the roadway. Several of the bridge's steel parts were in tension ("fracture critical") so that if one failed, a portion of the bridge could collapse. The bridge's supports formed an arch so that vertical clearance was highest in the center and lowest on

the sides of the roadway. The left southbound lane had a clearance of 17 feet 6 inches and the right lane had a clearance of 15 feet 6 inches. The right shoulder had a clearance of 14 feet 8 inches.

The traffic lanes were narrower on the bridge than on the roadway approaching the bridge. The bridge was signed with what is known as an "object marker," which indicates a variety of road conditions, but it did not specifically identify vertical clearance or lane width.

On May 23, 2013, Scott was transporting a metal casing shed from Canada to Washington State for his employer, Mullen Trucking. Before crossing the border, Scott obtained an online permit from WSDOT to transport an over-width and over-height load from Valemount, British Columbia, to Vancouver, Washington. Online permits are self-issued and require the user to supply load and route information. Mullen's permit listed the load as having a maximum width of 11 feet 6 inches and a maximum height of 15 feet 9 inches. The permit warned that WSDOT did not guarantee height clearances. Scott acknowledged that the driver is responsible for researching the route and ensuring clearance.

Because of the height of Scott's load, he was required to use a pilot car with a height pole. The pilot car driver is expected to know road clearances and inform the truck driver of any obstacles. Scott hired a local pilot car driver, Tammy DeTray, for her knowledge and experience of the local roads. DeTray did not research Scott's route or give him any information about the Skagit River Bridge.

As DeTray and Scott approached the bridge, they were both in the right hand lane, with DeTray a few seconds ahead of Scott. Scott observed a semi-

truck approaching quickly from behind. This second truck belonged to Motorways Transport and was driven by Sidhu. Sidhu moved into the left lane and began passing Scott before they entered the bridge.

DeTray, the pilot car driver, crossed the bridge. She was on the phone with her husband as she drove. Although DeTray testified that her height pole did not strike the bridge, a witness stated that DeTray's height pole struck the bridge's overhead spans several times.

When Scott entered the bridge, Sidhu was pulling ahead of him in the left lane. Sidhu's truck was extremely close to Scott, forcing Scott to the right and partially onto the shoulder. Scott heard a huge bang, his truck began to shake, and he felt some of the truck's tires come off the ground. Scott did not know what had happened. He coasted across the bridge, regained control, and pulled over. When Scott walked back to the bridge, he saw that the north section had collapsed and was in the water.

Three passenger vehicles had entered the bridge behind Scott and Sidhu. The first, driven by David Ruiz, managed to cross the bridge. The next two vehicles, driven by Daniel Sligh and Bryce Kenning, crashed into the river as the bridge collapsed. The occupants suffered non-life threatening injuries.

An investigation later determined that Scott's load had an actual maximum height of 15 feet 11 inches, two inches above his permit allowance, and that the load struck 11 of the bridge's braces. The investigation report stated that Scott's load could only have cleared the bridge if it straddled the right and left lanes. Scott could not straddle the lanes because Sidhu's truck was in the left lane. The

investigation concluded that Scott caused the collision by failing to ensure his load height was proper and failing to know the clearance heights on the bridge.

The State brought an action against Mullen, Scott, and DeTray, alleging that their negligence caused the bridge collapse.[1] In its answer, Mullen asserted contributory negligence as an affirmative defense and counterclaim, alleging that the State's damages were caused wholly or partially by its own negligence in bridge maintenance, signage, and permitting. Mullen argued that its liability should be reduced by the State's comparative fault. Mullen also asserted a cross claim against Motorways. The State amended its complaint to add a negligence claim against Motorways.[2]

The State moved for partial summary judgment, arguing that under RCW 46.44.020, it could not be found financially responsible for any portion of the damages resulting from the bridge collapse. Mullen and Motorways opposed the motion, arguing that RCW 46.44.020 does not protect the State from defensive counterclaims or from a finding of comparative fault that would reduce the defendants' liability. In addition, Motorways argued that, even if the statute shields the State from any finding of comparative fault as to Mullen, it does not have the same effect as to Motorways.

The trial court granted the State's motion for partial summary judgment, concluding that RCW 46.44.020 shields the State from liability and, in this case,

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[1] The State also asserted a negligence claim against Saxon, the company that hired Mullen to transport the casing. Saxon did not participate in this appeal.

[2] The State also added a claim against Olympic Peninsula Pilot Service, which allegedly employed DeTray. The motorists whose cars crashed into the river, Sligh and Kenning, joined the State's action. Sligh and Kenning settled and were no longer parties to the action when the court granted partial summary judgment to the State.

precludes any finding of comparative fault that would shift financial responsibility to the State. We granted discretionary review.

ANALYSIS

Mullen and Motorways appeal the grant of partial summary judgment to the State, arguing that the trial court erroneously interpreted RCW 46.44.020 to preclude any finding that the State was contributorily negligent. Mullen and Motorways assert that, under Washington's comparative fault scheme, they should be permitted to seek an allocation of fault against any and all at-fault entities. See RCW 4.22.070. They contend RCW 46.44.020 shields the State from liability but not from an allocation of fault.

Article II, § 26 of the Washington State Constitution provides that "the legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." In 1961, the Legislature waived the state's sovereign immunity with respect to tort actions. LAWS OF 1961, ch. 136, § 1, codified as RCW 4.92.090. This statute makes the state presumptively liable for its tortious conduct "in all instances in which the Legislature has *not* indicated otherwise." Savage v. State, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995). But the right to sue the State is not a fundamental right. Wells Fargo Bank, N.A. v. Dep't of Revenue, 166 Wn. App. 342, 358, 271 P.3d 268 (2012). The legislature has the authority to define the parameters of any cause of action, including claims that may be asserted against the State. See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 666, 771, P.2d 711 (1989); O'Donoghue v. State, 66 Wn.2d 787, 789, 405 P.2d 258 (1965). See also Wells Fargo Bank, 166 Wn. App. at 358 (holding that Washington's

Administrative Procedure Act, chapter 34.05 RCW, limited the general right to sue the State).

WSDOT contends that RCW 46.44.020 constitutes a legislative decision to restrict claims, and by extension, a contributory negligence affirmative defense, against the State arising out of vehicular damage to a State-owned bridge as long as the State has provided at least 14 feet of vertical clearance. We agree.

Statutory interpretation is a question of law that we review de novo. City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). Our primary duty in interpreting a statute is to discern the intent of the legislature. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We begin with the statute's plain language, which may be discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002). If the plain meaning of the statute is unambiguous, our inquiry is at an end. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

The statute at issue concerns vehicle height and vertical clearance. This statute was first enacted in 1937 and has changed little since that time.[3] LAWS OF 1937, ch. 189, § 48. The current statute, RCW 46.44.020, limits vehicle height to 14 feet and requires the vehicle operator to exercise due care in ensuring adequate vertical clearance:

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

[3] The original statute limited vehicle height to 12 feet 6 inches. LAWS OF 1937, ch. 189, § 48.

> 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.

The same statute relieves the State of liability if it has either (1) provided at least 14 feet of clearance or (2) properly signed a lower clearance:

> [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 on the right side of any such public highway. . . If any structure over or across any public highway is not owned by the state or by a county, city, town, or other political subdivision. . . no liability may attach to the owner by reason of any damage or injury to persons or property caused by impaired vertical clearance above the roadway.

RCW 46.44.020. It is undisputed that in this case, the State provided more than 14 feet of vertical clearance on the Skagit River Bridge, Scott's load exceeded 14 feet in height and, although permitted for 15 feet 9 inches,[4] his load exceeded the 15 feet 6 inches of clearance on the bridge.

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[4] The State notes that, under the rules governing permits, the operator accepts liability for any damage resulting from the use of an oversize vehicle:

> 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 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.

WAC 468-38-050(5).

A related provision, RCW 46.44.110, defines a motorist's liability.[5] Under that statute, a motorist who operates a vehicle negligently or illegally is liable for all damages to a public highway or bridge:

> Any person operating any vehicle or moving any object or conveyance upon any public highway in this state or upon any bridge or elevated structure that is a 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 or as a result of the operation or moving of any vehicle, object, or conveyance weighing in excess of the legal weight limits allowed by law. 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.

Read together, these statutes unambiguously (1) limit vehicle height and require a vehicle's operator to exercise due care as to vertical clearance; (2) declare that "no liability may attach to the state" where it has provided at least 14 feet of clearance; and (3) assign to a negligent motorist liability for "all damages" to a public highway or bridge. Applying these statutes to the circumstances here, we conclude that they clearly express a legislative determination that the State is to bear no financial responsibility for damages resulting from the collision of the Mullen truck with the Skagit River Bridge. The trial court did not err in interpreting RCW 46.44.020 to preclude any finding of comparative fault.

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[5] This statute was also first enacted in 1937. LAWS OF 1937, ch. 189, § 57.

Mullen and Motorways contend that apportioning fault to the State under RCW 4.22.070(1) would not shift "liability" to the State but only reduce the State's recovery. But, reducing the State's recovery would, in fact, shift a degree of liability to the State, contrary to RCW 46.44.020. Apportioning fault to the State would also relieve the negligent motorist of its liability for "all damages" under RCW 46.44.110.

Mullen and Motorways also assert that, by the plain language of the comparative fault statute, RCW 4.22.070(1), it applies here. As part of the tort reform act of 1986, the legislature replaced joint and several liability with comparative negligence in most situations. Tegman v. Accident & Med. Investigations, Inc., 150 Wn.2d 102, 108-09, 75 P.3d 497 (2003). To determine proportionate liability, the trier of fact allocates fault among all at-fault entities. RCW 4.22.070(1). The State does not argue that it is categorically exempt from proportionate liability. Rather, it asserts that, 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, these statutes, and not RCW 4.22.070, govern. We agree.

The State has a common law duty to maintain roads in a condition safe for ordinary travel. Wuthrich v. King County, 185 Wn.2d 19, 25, 366 P.3d 926 (2016). And generally, when a motorist sues the state for a breach of this common law duty, proportionate liability is the general rule. Tegman, 150 Wn.2d at 109. But under our state constitution, the legislature has the authority to limit the type of legal claims that may be asserted against the State. See Wells Fargo Bank, 166

Wn. App. at 358. Where a specific statute conflicts with a general one, the specific statute prevails. Id. See also Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC), 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) (where one statute is specific and the other is general, the specific statute controls regardless of when it was enacted). Because the motorist liability statutes, RCW 46.44.020 and .110, specifically address liability in the circumstances here, they control over the general proportionate liability statute.

Mullen and Motorways argue that RCW 46.44.020 does not displace RCW 4.22.070 but is, at most, a grant of immunity. They contend that if the State is "an entity immune from liability," RCW 4.22.070 contemplates that its fault should be determined. Mullen and Motorways rely on Humes v. Fritz Cos., Inc., 125 Wn. App. 477, 105 P.3d 1000 (2005) to assert that fault must be apportioned to all entities, even those who may be immune from suit. In Humes, a crane operator sued a trucking company for personal injuries he sustained outside the Tulalip Casino on the Tulalip Indian Reservation. Humes, 125 Wn. App. at 481. The defendant sought to allocate fault to the Tulalip Tribe (Tribe) who was protected from suit by sovereign immunity. Id. The trial court ruled that, because the Tribe had sovereign immunity, no fault could be allocated to it under RCW 4.22.070. Id. This court reversed, ruling that the Tribe's sovereign immunity did not bar the allocation of fault. Id. at 491.

But the Supreme Court in Smelser v. Paul, 188 Wn.2d 648, 653-54, 398 P.3d 1086 (2017) cautioned courts not to confuse "immunity" with the lack of a tort duty. We conclude that the motor vehicle statute is not a grant of "immunity," but

instead sets out the scope of the State's tort duty to the traveling public. RCW 46.44.020 provides that the State must erect and maintain a warning sign of an impaired clearance when vertical clearance is under 14 feet. But where clearance exceeds 14 feet, the State owes no further duty of care with regard to the overhead structure. The duty to exercise due care falls to the owners or operators of vehicles. The statutory language evidences an intent to define and narrow the scope of the State's tort duty. It does not immunize the State from all liability associated with damages arising from overhead obstacles on public highways.

Motorways contends that, even if RCW 46.44.020 precludes a finding of comparative fault in the State's action against Mullen, it does not preclude a finding of comparative fault in the State's action against Motorways. Motorways argues RCW 46.44.020 only addresses liability between the bridge owner and the motorist who struck the bridge. The argument is without merit. The State's claim is that Motorways drove its truck negligently by overtaking Mullen's truck on a narrow bridge, proximately causing Mullen to strike the overhead structures of the Skagit River Bridge. Because this claim concerns damage "by reason of the existence of any structure over or across any public highway," RCW 46.44.020 applies.

Finally, Mullen and Motorways argue that if we eliminate their ability to assert comparative fault against WSDOT, it will affect whether they are ultimately only severally liable or jointly and severally liable. The trial court expressly declined to rule on whether joint and several liability applies in this case, reserving that issue for trial. Joint and several liability was not an issue raised in the petition for discretionary review and, because the trial court made no ruling on the

question, there is no assignment of error on this issue. We decline to reach the issue of whether Mullen and Motorways' liability is joint and several or several only, as that issue is beyond the scope of our review. See Clark County v. W. Wash. Growth Mgmt. Hr'gs Review Bd., 177 Wn.2d 136, 144-45, 298 P.3d 704 (2013).

Affirmed.

Andrus, J.

WE CONCUR:

Mann, A.C.J.

Becker, J.

APPENDIX 2

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STATE OF WASHINGTON
SKAGIT COUNTY SUPERIOR COURT

WASHINGTON STATE DEPARTMENT OF TRASPORTATION, Plaintiff, v. MULLEN TRUCKING 2005 LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof; SAXON ENERGY SERVICES, INC.; TAMMY J. DETRAY and GREGORY S. DETRAY, individually and the marital community composed thereof; G&T CRAWLERS SERVICE, a Washington business entity, Defendants.	NO. 15-2-00163-1 [Consolidated] ORDER GRANTING WASHINGTON STATE DEPARTMENT OF TRANSPORTATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT
MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM D. SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof, Third-Party Plaintiffs, v. PATTY AUVIL d/b/a OLYMPIC	

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PENNINSULA PILOT SERVICE and JOHN DOE AUVIL, individually and the marital community composed thereof; MOTORWAYS TRANSPORT, LTD, a Canadian corporation; AMANDEEP SIDHU and JANE DOE SIDHU, individually and the marital community composed thereof,

Third-Party Defendants.

DANIEL A. SLIGH and SALLETTEE R. SLIGH, individually and the marital community composed thereof, BRYCE KENNING, a single man,

Plaintiffs,

v.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM D. SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof; TAMMY J. DETRAY and GREGORY S. DETRAY, individually and the marital community composed thereof, d/b/a G&T CRAWLERS SERVICE, a Washington State business entity,

Defendants.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM D. SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof,

Third-Party Plaintiffs,

v.

THE STATE OF WASHINGTON; PATTY AUVIL d/b/a OLYMPIC PENNINSULA PILOT SERVICE and JOHN DOE AUVIL, individually and the marital community composed thereof; MOTORWAYS TRANSPORT, LTD, a

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Canadian corporation; AMANDEEP SIDHU and JANE DOE SIDHU, individually and the marital community composed thereof,

Third-Party Defendants.

The motion for partial summary judgment brought by Plaintiff Washington State Department of Transportation (WSDOT) was heard by the undersigned judge on October 6, 2016. All parties appeared by and through their counsel of record.

The Court reviewed the records and files herein, and the following documents filed in conjunction with this motion:

1. WSDOT's Motion for Partial Summary Judgment;
2. Declaration of Steve Puz plus exhibits;
3. Motorways' Opposition to WSDOT's Motion for Partial Summary Judgment;
4. Declaration of Rebecca R. Morris plus exhibits;
5. Mullen & Scott's Opposition to WSDOT's Motion for Partial Summary Judgment;
6. Declaration of Thomas W. Tobin plus exhibits;
7. WSDOT's Reply in Support of Motion for Partial Summary Judgment;
8. Declaration of John Nisbet;
9. Declaration of Glen Scroggins;
10. 2nd Declaration of Steve Puz plus exhibits;
11. Mullen & Scott's Motion to Strike Portions of WSDOT's Reply;
12. Mullen & Scott's Sur-Reply;
13. Affidavit of Steve A. Todd plus exhibits;

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14. Declaration of Bryan P. Templeton plus exhibits;

15. Declaration of Thomas W. Tobin plus exhibits;

16. Declaration of Alan C. Topinka plus exhibits;

17. Motorways' Second Opposition to WSDOT's Motion for Partial Summary Judgment;

18. WSDOT's Supplemental Brief;

19. 3rd Declaration of Steve Puz plus exhibits;

20. Declaration of Abolhassan Astaneh-Asl, Ph.D., P.E., plus exhibits;

21. Declaration of John M. Barsom, Ph.D., plus exhibits;

22. Declaration of Nathan Rose plus exhibits.

The Court, having considered the pleadings and the admissible portions of the declarations and exhibits submitted, and listened to the argument of counsel, it is now, therefore

ORDERED, ADJUDGED AND DECREED that WSDOT's Motion for Partial Summary Judgment is **GRANTED**. No fault may be charged or assessed against WSDOT in this matter, nor may WSDOT be held ~~financially responsible~~ LIABLE for any portion of the damages that resulted from the subject May 23, 2013 collision

DONE IN OPEN COURT this 6th day of October, 2016.

JUDGE

Presented by:
Dated: October 6, 2016

ROBERT W. FERGUSON
Attorney General

/s/ Steve Puz
Steve Puz, WSBA #17407
Senior Counsel
Attorneys for WSDOT

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Dated: October _____, 2016

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Dated: October 6, 2016

Aaron Dean, WSBA No. 26447
Attorney for Defendants Tammy and Gregory Detray and G&T Crawlers Service

Dated: October 6, 2016

Mark P. Scheer, WSBA No. 16651
Attorney for Defendants Motorways Transport & Sidhu

Dated: October 6, 2016

Amanda E. Vedrich, WSBA No. 28701
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Skagit County Superior Court

SUPERIOR COURT OF WASHINGTON IN AND FOR SKAGIT COUNTY

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; DANIEL A. SLIGH and SALLETTEE R. SLIGH, individually and the marital community composed thereof; BRYCE KENNING, a single person,

Plaintiffs,

v.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof; SAXON ENERGY SERVICES, INC.; TAMMY J. DETRAY and GREGORY S. DETRAY, individually and the marital community composed thereof; G&T CRAWLERS SERVICE, a Washington business entity,

Defendants.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business entity d/b/a MULLEN TRUCKING LP; WILLIAM D. SCOTT and JANE DOE SCOTT, individually and the marital community composed thereof,

Third-Party Plaintiffs,

v.

THE STATE OF WASHINGTON; PATTY

No. 15-2-00163-1

[Consolidated with Case No. 15-2-00510-6]

[PROPOSED] ORDER GRANTING DEFENDANTS MULLEN TRUCKING 2005, LTD; WILLIAM SCOTT and JANE DOE SCOTT'S RAP 2.3(b)(4) MOTION FOR RECONSIDERATION AND CLARIFICATION

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AUVIL d/b/a OLYMPIC PENINSULA PILOT SERVICE and JOHN DOE AUVIL, individually and the marital community composed thereof; MOTORWAYS TRANSPORT, LTD, a Canadian corporation; AMANDEEP SIDHU and JANE DOE SIDHU, individually and the marital community composed thereof,

Third-Party Defendants.

THIS MATTER came before the Court on Defendants Mullen Trucking 2005, Ltd; William Scott and Jane Doe Scott's Motion for Reconsideration and Clarification. The Court considered the following submissions:

1. Defendants Mullen Trucking 2005, Ltd; William Scott and Jane Doe Scott's Motion for Reconsideration and Clarification;

2. Declaration of Steven W. Block with Exhibit;

3. Opposition to Defendant Mullen Trucking's' Motion for Reconsideration (filed by plaintiff State of Washington);

4. Declaration of Steve Puz in Opposition to Mullen's Motion for Reconsideration

5. Pleadings and records on file herein.

The Court considered the oral argument of counsel and is fully advised of the premises.

NOW, THEREFORE, it is hereby

ORDERED that Defendants Mullen Trucking 2005, Ltd; William Scott and Jane Doe Scott's Motion for Reconsideration and Clarification be and hereby is

GRANTED, and it is further

ORDERED that the Court's Order dated October 6, 2016 be and hereby is

VACATED and REPLACED with the following Order:

Washington State Department of Transportation's Motion for Partial Summary Judgment Re: RCW 46.44.020 is GRANTED. The Washington State Department of Transportation

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("WSDOT") may not be held liable or financially responsible for any portion of the damages that resulted from the subject May 23, 2013 bridge collapse.

The Court further rules that the amount of WSDOT's recovery in this matter may not be reduced by WSDOT's degree of fault in causing the subject bridge collapse, if any; and defendants' collective liability to WSDOT, if any, may not be diminished by any finding of fault on WSDOT's part in causing the subject bridge collapse. RCW 46.44.020 provides in pertinent part that "no liability may attach to the state … 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 …" The Court interprets this statute to ensure that the State shall ~~collect 100% of its proven damages~~ not be held liable for any of the proven damages in the event of a strike to a bridge over fourteen feet high regardless of whether its own fault contributed to the strike. SB 12/15/16 SB

In all other respects Mullen's motion for reconsideration is denied. SB

DATED this 15 day of December, 2016.

Dave Needy

Hon. Dave Needy

Presented by:

SB 12/15/16

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APPENDIX 3

APPENDIX 3

RCW 48.43.350. No liability or cause of action against commissioner or department.

RCW 25.10.321. No liability as limited partner for limited partnership obligations.

RCW 62A.7-404. No liability for good-faith delivery pursuant to document of title.

RCW 53.34.100. No personal liability on bonds or notes.

RCW 65.08.140. No liability for error in recording when properly indexed.

RCW 48.05.480. No liability for regulation of capital and surplus requirements.

RCW 74.15.038. Harm to child or client by individual hired by contracted agency — Department not liable.

RCW 4.96.010. Tortious conduct of local governmental entities — Liability for damages.

RCW 41.05.550. Prescription drug assistance foundation — Nonprofit and tax-exempt corporation — Definitions — Liability.

RCW 7.60.170. Personal liability of receiver.

RCW 15.70.050. No liability as to United States.

RCW 15.65.290. Claims and liabilities, enforcement against organization — Personal liabilities of officials, employees, etc.

RCW 62A.7-301. Liability for nonreceipt or misdescription; “said to contain”; “shipper’s weight, load, and count”; improper handling.

RCW 19.48.030. Liability for loss of valuables when safe or vault furnished — Limitation.

RCW 19.48.070. Liability for loss of baggage and other property — Limitation — Storage — Disposal.

RCW 70.54.120. Immunity from implied warranties and civil liability relating to blood, blood products, tissues, organs, or bones — Scope — Effective date.

RCW 74.34.050. Immunity from liability.

RCW 15.88.060. Enforcement of commission obligations against commission assets — Liability of commission members and employees.

RCW 15.74.050. Obligations, liabilities, and claims.

RCW 69.50.506. Burden of proof; liabilities.
RCW 77.55.181. Fish habitat enhancement project — Permit review and approval process — Limitation of liability.

RCW 70.48.502. Use of restraints on pregnant women or youth in custody — Limited immunity from liability.

RCW 9A.83.040. Release from liability.

RCW 69.51A.130. State and municipalities — Not subject to liability.

RCW 70.290.080. Limitation of liability.

RCW 77.57.030. Fishways required in dams, obstructions — Penalties, remedies for failure.

RCW 48.18.293. Nonliability of commissioner, agents, insurer for information giving reasons for cancellation or refusal to renew — Proof of mailing of notice.

RCW 19.330.030. Acts not constituting violation of chapter.

RCW 48.30.330. Immunity from libel or slander.

RCW 48.32.150. Immunity.

RCW 48.32A.165. Immunity.

RCW 48.44.270. Immunity from libel or slander.

APPENDIX 4

APPENDIX 4

FEDERAL CASE LAW:

Supreme Court

See, e.g., United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 511 n.6 (1940) (noting that a concession between the parties was based on the "theory that a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim."); *see also id.* at 262 (quoting *The Siren*, 74 U.S. 152 (1869)). *See generally Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *Bull v. United States*, 295 U.S. 247, 262 (1935)("[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded.").

Circuit Courts

See, e.g., United States v. Forma, 42 F.3d 759, 765 (2d Cir. 1994)(permitting purely defensive counterclaims in an action brought by Sovereign-Plaintiff); *The Fort Fetterman v. S. Carolina State Highway Dep't*, 261 F.2d 563, 569 (4th Cir. 1958), modified, 268 F.2d 27 (4th Cir. 1959); *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967); *In re Greenstreet Inc.*, 209 F.2d 660, 663 (7th Cir. 1954); *Rosebud Sioux Tribe v. Val-U Constr. Co. of S. Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995); *United States v. Park Place Assocs.*, 563 F.3d 907, 932 n.16 (9th Cir. 2009); *Fid. & Cas. Co. v. Reserve Ins. Co.*, 596 F.2d 914, 916 (9th Cir. 1979); *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. Cal. 1970); *United States v. Finn*, 239 F.2d 679, 682 (9th Cir. Cal. 1956); *Berrey v. Asarco, Inc.*, 439 F.3d 636 (10th Cir. 2006); *FDIC v. Hulsey*, 22 F.3d 1472, 1486-1487 (10th Cir. Okla. 1994); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982); *see also California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. Cal. 2004)("California's conception of sovereign immunity as a sword rather than a shield is unavailing. . . .").

District Courts

See, e.g., State of Alaska v. O/S Lynn Kendall, 310 F. Supp. 433, 435 (U.S.D.C. Alaska 1970) (permitting purely defensive counterclaims in an action brought by Sovereign-Plaintiff); *Tohono O'odham Nation v. Ducey*, No. CV-15-01135-PHX-DGC, 2016 U.S. Dist. LEXIS 42410, at *14-15 (D. Ariz. Mar. 30, 2016; *United States v. Sierra Pac. Indus.*, 879 F. Supp. 2d 1128, 1133 (E.D.C.A. 2012); *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 777 F. Supp. 779, 785 (N.D. Cal. 1991); *Dep't of Public Safety v. Parker*, 161 So. 2d 886, 888 (Fla. Dist. Ct. App. 1964); *Woelffer v. Happy States of America, Inc.*, 626 F. Supp. 499, 502 (N.D. Ill. 1985); *Dep't of Transp. v. American Commercial Lines, Inc.*, 350 F. Supp. 835 (N.D. Ill. 1972); *CPC International, Inc. v. Aerojet-General Corp.*, 764 F. Supp. 479, 482 (W.D. Mich. 1991)(reh'g. granted and vacated, 67 F.3d 586 (6th Cir. 1995)); *Lima Sch. Dist. v. Simonsen*, 683 P.2d 471 (Mont. 1984); *Board of Regents v. Dawes*, 370 F. Supp. 1190, 1191 (D. Neb. 1974); *United States v. Mottolo*, 605 F. Supp. 898, 910-11 (D.N.H. 1985); *Quinault Indian Nation v. Comenout*, 2015 U.S. Dist. LEXIS 36145, 5-6 (W.D. Wash. Mar. 23, 2015); *Pakootas v. Teck Cominco Metals*, Ltd., 632 F. Supp. 2d 1029, 1035 (E.D. Wash. 2009); *United States v. Washington*, 19 F. Supp. 3d 1317 (W.D. Wash. 2001).

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Chief Info. Officer v. Computers Plus Ctr., Inc., 74 A.3d 1242, 1254 – 1255 n. 21 (Conn. 2013); *State v. Young*, 151 N.E.2d 697, 700 (Ind. 1958); *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245 (Ill. 1998); *State v. Hogg*, 535 A.2d 923 (Md. 1988), overruled on other grounds by *Dawkins v. Baltimore Police Dept.*, 376 Md. 53, 64, 827 A.2d 115 (Md. 2003); *Department of Finance and Administration v. Shinkle*, 231 Ore. 528, 373 P.2d 674 (Or. 1962); *Scates v. Bd. of Comm'rs*, 265 S.W.2d 563, 566 (Tenn. 1954).

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