

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/6/2019 4:23 PM  
BY SUSAN L. CARLSON  
CLERK

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.

---

Appellants' Supplemental Brief

---

**FOSTER PEPPER PLLC**  
1111 Third Avenue, Suite 3000  
Seattle, WA 98101-3292  
Telephone: 206.447.4400  
Facsimile: 206.447.9700

Steven W. Block, WSBA No. 24299  
Christopher Rogers, WSBA No. 49634  
Thomas F. Ahearne, WSBA No. 14844

**WILSON ELSER LAW FIRM**  
1133 Westchester Avenue  
White Plains, NY 10604

Brian Del Gatto, WSBA No. 47569  
Thomas W. Tobin, *pro hac vice*

Attorneys for Appellants Mullen  
Trucking 2005, Ltd d/b/a Mullen  
Trucking LP; William Scott and Jane  
Doe Scott

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ASSIGNMENT OF ERROR..... 2

III. STATEMENT OF THE CASE..... 2

    A. The Bridge ..... 2

        1. Fracture-Critical Construction  
           (“house-of-cards” design)..... 2

        2. Narrowed Roadway (swift narrowing by 8½ feet)..... 3

        3. Uneven Vertical Clearance Height  
           (arched overhead support trusses) ..... 4

    B. The Bridge Accident ..... 5

    C. The State’s Lawsuit..... 5

IV. LEGAL DISCUSSION..... 6

    A. The Statutory Language..... 6

        1. Contributory Fault Statute (RCW 4.22.070) ..... 6

        2. Fourteen-Foot Vertical Clearance Statute  
           (RCW 46.44.020) ..... 7

    B. Assessment Of The State’s “Fault” Under RCW 4.22.070  
       Is Not Barred By The “Liability” Language In  
       RCW 46.44.020 ..... 7

        1. The legislature’s wording of RCW 4.22.070 confirms  
           that “fault” does not mean “liability” ..... 7

        2. Washington case law confirms that “fault” does not  
           mean “liability” ..... 8

        3. The State is not the one type of party the legislature  
           chose to exempt from RCW 4.22.070 (i.e., a party  
           immune to the claimant under Title 51 RCW) ..... 9

        4. The State’s claim in this case is not one of the three  
           types of claims the legislature chose to exempt from  
           RCW 4.22.070 (i.e., certain hazardous waste, tortious  
           interference, & fungible product claims)..... 10

C. Assessing The State’s “Fault” Under RCW 4.22.070 Is Not Barred By Supplementing The “Liability” Language In RCW 46.44.020 With The “Negligent Operation” Clause In RCW 46.44.110 .....11

D. *Smelser* Does Not Support The Lower Court’s Construction Of RCW 4.22.070 Because The State Has A Common Law Duty To Provide A Safe Roadway Approaching And On Its Bridge.....16

V. CONCLUSION .....19

## TABLE OF AUTHORITIES

### CASES

<i>American Continental Insurance Co. v. Steen</i> , 151 Wn.2d 512, 91 P.3d 864 (2004).....	14
<i>Berrocal v. Fernandez</i> , 155 Wn.2d 585, 121 P.3d 82 (2005).....	7
<i>Central Puget Sound Regional Transit Authority v. WR-SRI 120th N. LLC</i> , 191 Wn.2d 223, 422 P.3d 891 (2018).....	18
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	15
<i>Department of Transportation v. Mullen Trucking 2005, Ltd.</i> , 5 Wn.App.2d 787, 428 P.3d 401 (2018).....	passim
<i>Humes v. Fritz Cos.</i> , 125 Wn.App. 477, 105 P.3d 1000 (2005), <i>clarified by</i> No. 53349-5-I, 2005 Wn.App. 435 (2005) .....	9
<i>Kabbae v. DSHS</i> , 144 Wn.App. 432, 192 P.3d 903 (2008).....	15
<i>King County v. Taxpayers of King County</i> , 104 Wn.2d 1, 700 P.2d 1143 (1985).....	7
<i>Laguna v. State</i> , 146 Wn.App. 260, 192 P.3d 374 (2008).....	17
<i>Lake v. Woodcreek Homeowners Association</i> , 169 Wn.2d 516, 243 P.3d 1283 (2010).....	7, 10, 11
<i>Lucas v. Phillips</i> , 34 Wn.2d 591, 209 P.2d 279 (1949).....	17

<i>McCluskey v. Handorff-Sherman</i> , 125 Wn.2d 1, 882 P.2d 157 (1994).....	17, 18
<i>Millay v. Cam</i> , 135 Wn.2d 193, 955 P.2d 791 (1998).....	14
<i>Owen v. Burlington Northern Santa Fe Railroad Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005).....	17
<i>Potter v. Washington State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008).....	17
<i>Price v. Kitsap Transit</i> , 125 Wn.2d 456, 886 P.2d 556 (1994).....	9
<i>Ravenscroft v. Washington Water Power Co.</i> , 136 Wn.2d 911, 969 P.2d 75 (1998).....	14
<i>Restaurant Development, Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 80 P.3d 598 (2003).....	10, 11
<i>Seattle v. Williams</i> , 128 Wn.2d 341, 908 P.2d 359 (1995).....	19
<i>Sidis v. Brodie/Dohrmann, Inc.</i> , 117 Wn.2d 325, 815 P.2d 781 (1991).....	7
<i>Smelser v. Paul</i> , 188 Wn.2d 648, 398 P.3d 1086 (2017).....	16, 17, 18, 19
<i>State ex rel. Public Disclosure Commission v. Rains</i> , 87 Wn.2d 626, 555 P.2d 1368 (1976).....	14
<i>State v. K.L.B.</i> , 180 Wn.2d 735, 328 P.3d 886 (2014).....	19
<i>Stiles v. Kearney</i> , 168 Wn.App. 250, 277 P.3d 9 (2012).....	15

<i>Tegman v. Accident &amp; Medical Investigations, Inc.</i> , 150 Wn.2d 102, 75 P.3d 497 (2003).....	9
<i>United Parcel Service v. State</i> , 102 Wn.2d 355, 687 P.2d 186 (1984).....	14
<i>Western Telepage v. City of Tacoma</i> , 140 Wn.2d 599, 998 P.2d 884 (2000).....	14
<i>Weyerhaeuser Co. v. Aetna Casualty &amp; Surety Co.</i> , 123 Wn.2d 891, 874 P.2d 142 (1994).....	9
<i>Wuthrich v. King County</i> , 185 Wn.2d 19, 366 P.3d 926 (2016).....	17

**STATUTES AND REGULATIONS**

RCW 4.22.015 .....	8, 12, 18
RCW 4.22.070 .....	passim
RCW 46.44.020 .....	passim
RCW 46.44.110 .....	passim
RCW 51.04.010 .....	17
RCW 59.18.230 .....	17
Title 51 RCW .....	passim
WAC 468-38-050.....	15

**OTHER AUTHORITIES**

Merriam-Webster Dictionary.....	14
---------------------------------	----

## **I. INTRODUCTION**

A State road crosses the Skagit River on a bridge. The State is suing for damage to that bridge. The Mullen defendants allege the State's own fault contributed to that damage and the accident which caused it.

The lower court construed Washington's contributory fault statute to bar consideration of the State's fault in bridge-strike cases whenever a bridge's clearance exceeds 14 feet. Specifically, it reasoned that in such instances, the "liability" wording in RCW 46.44.020 (1) exempts the State from "fault" in RCW 4.22.070; and (2) abolishes the State's common law duty to provide safe roads.

This Court's review accordingly turns on two questions:

- (1) Does the word "liability" in RCW 46.44.020 have the same meaning as the word "fault" in RCW 4.22.070? *As Parts IV.B and C of this brief explain, the answer under Washington law is "no".*
- (2) Did RCW 46.44.020 abolish the State's common law duty to provide safe roadways whenever a roadway's corresponding bridge has 14 feet of clearance? *As Part IV.D of this brief explains, the answer under Washington law is "no".*

Washington law accordingly requires this Court to reverse the lower court's statutory construction, and hold:

- (1) The State's contributory fault in this case must be considered under RCW 4.22.070; and
- (2) RCW 46.44.020 did not abolish the State's common law duty to provide a safe road approaching and on the bridge in this case.

## II. ASSIGNMENT OF ERROR

The Court of Appeals erred by construing RCW 4.22.070 to bar consideration of the State’s contributory fault whenever the State sues for damage to any bridge with 14 feet of clearance above the road.

## III. STATEMENT OF THE CASE

### A. The Bridge



CP 473

#### *1. Fracture-Critical Construction (“house-of-cards” design)*

The State designed and built its bridge to be “fracture critical” – which means the bridge could collapse if a single steel girder fails.<sup>1</sup>

The State did not post any signs warning drivers of the caution therefore required when crossing this fracture-critical bridge.<sup>2</sup> That is especially relevant here because:

---

<sup>1</sup> CP 330 (fracture critical means the bridge has “steel members in tension arranged such that if one fails, a portion or all of the bridge could collapse”); accord CP 1032.

<sup>2</sup> CP 331-333, 716-718.

- The Federal Highway Administration manual recommends posting signs to warn drivers of dangers on an upcoming bridge.<sup>3</sup>
- The State has long known this particular bridge has a history of being struck by vehicles passing through it.<sup>4</sup>

**2. Narrowed Roadway (swift narrowing by 8½ feet)**

The right lane and shoulder on the State’s road approaching this bridge narrow by 8½ feet on the bridge.<sup>5</sup>

The State did not post any Narrow Bridge sign to warn approaching drivers of that narrowed roadway.<sup>6</sup> That is especially relevant here because:

- The Federal Highway Administration manual expressly directs a narrow bridge sign “should be used in advance of...any bridge...having a roadway clearance less than the width of the approach travel lanes.”<sup>7</sup>
- The State accordingly posts such Narrow Bridge warning signs on other bridges.<sup>8</sup>
- The driver of the tractor trailer truck whose passing edged the Mullen truck into the bridge testified he does not pass when a sign warns an upcoming bridge has narrow lanes.<sup>9</sup>

---

<sup>3</sup> CP 737-741. *The Federal Highway Administration publishes this Manual on Uniform Traffic Control Devices (“MUTCD”) to define the standards used by road managers nationwide on public roads. <https://mutcd.fhwa.dot.gov/>. The State routinely follows this Federal Highway Administration manual. CP 706-707.*

<sup>4</sup> CP 647, 759. *E.g., nine reported strikes in the 10 years before this accident, six of which even involved spans hit in this case (spans 7 & 8). CP 1033.*

<sup>5</sup> *The State’s 12-foot-wide lanes approaching this bridge become 11 feet four inches on the bridge, and the 10-foot-wide shoulder approaching this bridge becomes 2 feet two inches on the bridge. CP 330, 709-712, 1034-1036.*

<sup>6</sup> CP 724, 724-727.

<sup>7</sup> CP 738 (also noting signs when shoulders are narrowed or eliminated).

<sup>8</sup> *See WSDOT Traffic Manual at pp. 2-29 (warning signs for “narrow bridges with reduced shoulders”) [<http://www.wsdot.wa.gov/publications/manuals/fulltext/M51-02/Chapter2.pdf>].*

<sup>9</sup> CP 755.

- The driver of the Mullen truck testified that if signs had warned the upcoming bridge had narrow lanes, he would have centered up to straddle the two southbound lanes so another vehicle could not pull alongside and edge him to the right into the bridge.<sup>10</sup>
- The State’s investigation concluded the Mullen driver could have cleared the bridge if he’d been able to straddle the two southbound lanes, but he could not because the Motorways tractor trailer was passing in the left lane.<sup>11</sup>

**3. Uneven Vertical Clearance Height (arched overhead support trusses)**

The State designed and built its bridge to have arched overhead support trusses – which made the vertical clearance allowed for drivers on the bridge vary by almost three feet from the center to the right side.<sup>12</sup>

The State did not post any signs to warn an approaching driver that once he or she was on the bridge, the right lane (and narrowed shoulder) would give that driver less vertical space than the middle lane.<sup>13</sup> That is relevant here because:

- The Federal Highway Administration manual expressly states: “In the case of an arch or other structure under which the clearance varies greatly, two or more signs should be used as necessary on the structure itself to give information as to the clearances over the entire roadway.”<sup>14</sup>
- The State accordingly posts such signs on other bridges to warn of vertical clearance variances of as little as one inch.<sup>15</sup>

---

<sup>10</sup> CP 523.

<sup>11</sup> *Mullen Trucking*, 5 Wn.App.2d at 792.

<sup>12</sup> The bridge’s vertical clearance above the road varied from 17 feet three inches in the center to 14 feet five inches on the side. CP 330.

<sup>13</sup> CP 1032, 725, 331-333, 577.

<sup>14</sup> CP 739; see footnote 3 regarding this manual and the State’s routinely following it.

<sup>15</sup> E.g., the State’s Nooksack River Bridge signs conspicuously warn drivers of the one-inch variance in that bridge’s vertical clearance. CP 465-466 (photographs). See

- The State’s permit approval process for this route crossing the Skagit River could (but did not) notify permit holders like Mullen of this bridge’s vertical clearance variances.<sup>16</sup>

## **B. The Bridge Accident**

Appellant William Scott is a driver for appellant Mullen Trucking 2005, Ltd. (collectively “Mullen”).<sup>17</sup> On May 23, 2013, a tractor trailer truck operated by Motorways Transport, Ltd. improperly passed Scott’s truck on the Skagit River Bridge, causing Scott to veer into the narrow shoulder and strike some girders on this fracture-critical bridge.<sup>18</sup>

The foreseeable result of the State’s bridge and roadway design ensued: part of this fracture-critical bridge collapsed.<sup>19</sup>

## **C. The State’s Lawsuit**

The State is suing Mullen for negligence.<sup>20</sup> Mullen’s Answer alleged that the State’s damages award should be reduced by the State’s

---

also *WSDOT Traffic Manual* at pp. 2-7, -20, -21, -84 (low clearance signage) [<http://www.wsdot.wa.gov/publications/manuals/fulltext/M51-02/Chapter2.pdf>]

<sup>16</sup> See CP 800-802. The trial court also found there are genuine issues of material fact concerning the State’s negligence with respect to warning signs regarding the narrowing lanes, shoulder, and clearance, as well as its permitting process’s failure to warn drivers like Mullen of the need to cross the bridge in the middle lane. CP 1240-1241.

<sup>17</sup> CP 512, 529.

<sup>18</sup> CP 61, 334-336, 520-521, 526. For example, hitting fracture-critical spans 7 and 8. CP 1032-1037. The lower court accordingly acknowledged that the Motorways tractor trailer began passing Mullen before the bridge, so that when Mullen was on the bridge, the Motorways tractor trailer was pulling ahead in the left lane, forcing Mullen into the narrowed right shoulder. *Mullen Trucking*, 5 Wn.App.2d at 791. The State accordingly maintains that Motorway’s overtaking Mullen on a narrow bridge caused Mullen to strike the bridge. *Id.* at 799.

<sup>19</sup> CP 322, 1038-1040.

<sup>20</sup> *Department of Transportation v. Mullen Trucking 2005, Ltd.*, 5 Wn.App.2d 787, 789 (the State “sued Mullen for negligence”) & 792 (State’s suit claims Mullen’s “negligence

contributory fault pursuant to Washington’s contributory fault statute (RCW 4.22.070).<sup>21</sup> The Court of Appeals construed RCW 4.22.070 to bar any consideration of the State’s fault since this bridge has 14 feet of vertical clearance above its roadway.<sup>22</sup>

#### **IV. LEGAL DISCUSSION**

##### **A. The Statutory Language**

###### ***1. Contributory Fault Statute (RCW 4.22.070)***

Washington’s contributory fault statute explicitly applies to an entity’s “fault”. It states:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant’s damages except entities immune from liability to the claimant under Title 51 RCW. .... The entities whose fault shall be determined include the claimant....

....

- (3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.
- (b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.
- (c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

RCW 4.22.070.

---

*caused this collapse”), 428 P.3d 401 (2018); accord, CP 99-101; CP 338 (noting State infraction for “Negligent Driving 2<sup>nd</sup> Degree”).*

<sup>21</sup> CP 123, 126.

<sup>22</sup> *Mullen Trucking*, 5 Wn.App.2d 787, 428 P.3d 401 (2018), review granted, 192 Wn.2d 1022 (2019).

**2. Fourteen-Foot Vertical Clearance Statute (RCW 46.44.020)**

Washington’s 14-foot vertical clearance statute explicitly applies to “liability”. It 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....

RCW 46.44.020.

**B. Assessment Of The State’s “Fault” Under RCW 4.22.070 Is Not Barred By The “Liability” Language In RCW 46.44.020**

This Court has made its role in statutory construction clear:

The court’s fundamental objective in construing a statute is to ascertain and carry out the legislature’s intent. Statutory interpretation begins with the statute’s plain meaning.<sup>23</sup>

To determine a statute’s plain meaning, this Court has repeatedly reiterated that “the first rule is the court should assume that the legislature means exactly what it says.”<sup>24</sup> The lower court did not do that here.

**1. The legislature’s wording of RCW 4.22.070 confirms that “fault” does not mean “liability”**

Words matter. The legislature chose to use the word “fault” in RCW 4.22.070 and the word “liability” in RCW 46.44.020. The legislature’s word choice matters, as “fault” does not mean “liability”.

---

<sup>23</sup> *Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (internal quotation marks & citation omitted); see also, e.g., *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

<sup>24</sup> *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991) (internal quotation marks omitted); see also, e.g., *King County v. Taxpayers of King County*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985) (same).

The legislature expressly defined the meaning of “fault” for the purposes of its contributory fault statute:

4.22.015. “Fault” defined.

“Fault” includes acts or omissions...that are in any measure negligent or reckless toward the person or property of the actor or others.... The term also includes...unreasonable failure to avoid an injury or to mitigate damages.

If a jury finds the State’s acts and omissions as explained in Part III.A of this brief were “in any measure negligent” or any “unreasonable failure to avoid an injury or to mitigate damages,” then that would be “fault” as the legislature expressly defined it in its contributory fault statute.

The legislature also expressly provided that this definition of “fault” includes parties with no “liability”. RCW 4.22.070 (“entities whose fault shall be determined include ... entities immune from liability”).

Because courts assume the legislature means exactly what it says, the statutory language in RCW 4.22.070 confirms that the State can be at fault under the contributory fault statute even if the fourteen-foot statute immunizes it from liability. Thus, the lower court erred as a straightforward matter of statutory construction under Washington law.

**2. *Washington case law confirms that “fault” does not mean “liability”***

Washington case law also confirms that “fault” is not the same as “liability”. For example:

- *Humes v. Fritz Cos.*, 125 Wn.App. 477, 491-493, 105 P.3d 1000 (2005) (the Tribe’s not having legal liability does not render the Tribe incapable having fault – and thus the Tribe’s immunity from liability does not bar the allocation of fault to the Tribe).
- *Tegman v. Accident & Medial Investigations, Inc.*, 150 Wn.2d 102, 111, 75 P.3d 497 (2003) (“Importantly, the statute [RCW 4.22.070] does not speak of a total representing 100 percent of liability, but, rather, a total representing 100 percent of *fault*.” (underlines added; italics in original)).
- *Price v. Kitsap Transit*, 125 Wn.2d 456, 462-463, 886 P.2d 556 (1994) (distinguishing between a party’s legal “liability” and a party’s capacity/incapacity to be at “fault”).
- *Weyerhaeuser Co. v. Aetna Casualty & Surety Co.*, 123 Wn.2d 891, 909, 874 P.2d 142 (1994) (noting that “fault” and “liability” are not the same under environmental statutes).

Thus, the lower court’s ruling that the State’s being excused from “liability” also excuses it from being at “fault” is contrary not only to the previously noted wording of RCW 4.22.070, but also to established Washington case law concerning those two terms.

***3. The State is not the one type of party the legislature chose to exempt from RCW 4.22.070 (i.e., a party immune to the claimant under Title 51 RCW)***

There is a second reason why the lower court’s statutory construction exempting this bridge claim violates Washington law.

The legislature wrote its contributory fault statute to identify the specific parties it intended to be exempt from that statute’s application. It identified those parties as “entities immune from liability to the claimant under Title 51 RCW.” RCW 4.22.070(1).

This statutory exemption does not apply because the State in this case is not an entity immune from liability under Title 51 RCW.

The lower court effectively amended the wording of RCW 4.22.070(1) to exempt entities immune from liability “under Title 51 RCW or RCW 46.44.” The lower court’s amendment violated Washington law because this Court has repeatedly held that courts “must not add words where the legislature has chosen not to include them.”<sup>25</sup>

***4. The State’s claim in this case is not one of the three types of claims the legislature chose to exempt from RCW 4.22.070 (i.e., certain hazardous waste, tortious interference, & fungible product claims)***

There is a third reason why the lower court’s statutory construction violates Washington law.

The legislature wrote its contributory fault statute to identify the specific types of claims it intended to exempt from that statute’s application. It identified them as certain claims relating to hazardous waste, tortious interference, and fungible products. RCW 4.22.070(3)(a), (b), & (c).

Those three statutory exemptions do not apply here because the State is not asserting any of them.

Thus, the lower court effectively added a new subparagraph (d) to RCW 4.22.070(3), exempting bridge-strike claims when the bridge’s

---

<sup>25</sup> E.g., Lake, 169 Wn.2d at 526 (internal quotation marks omitted); Restaurant Development, Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

clearance exceeds 14 feet. That fourth exemption violated Washington law because this Court has repeatedly held that courts “must not add words where the legislature has chosen not to include them.”<sup>26</sup>

**C. Assessing The State’s “Fault” Under RCW 4.22.070 Is Not Barred By Supplementing The “Liability” Language In RCW 46.44.020 With The “Negligent Operation” Clause In RCW 46.44.110**

The lower court cited RCW 46.44.110 as being a supplement to RCW 46.44.020, stating those provisions together “unambiguously express a legislative determination that all financial responsibility for damage to the Skagit River Bridge must be borne by negligent motorists,” and that the definition of “fault” for RCW 4.22.070 should therefore be construed to exclude acts or omissions of the State in order to avoid “contravention of RCW 46.44.020.”<sup>27</sup>

The lower court’s so construing RCW 4.22.070 violated Washington law for at least three reasons:

*First*, Washington law does not allow courts to add language to a statute under the guise of interpretation.<sup>28</sup> That is exactly what the lower court did here, adding an exclusion to RCW 4.22.070 that exempts the State’s own fault whenever the State claims any damage to any bridge with a 14-foot clearance.

---

<sup>26</sup> *Supra*, footnote 25.

<sup>27</sup> *Mullen Trucking*, 5 Wn.App.2d at 790 (*underline added*).

<sup>28</sup> *Supra*, footnote 25.

The legislature easily could have defined “fault” with that exclusion. It did not.<sup>29</sup>

Moreover, the legislature enacted the exclusions it intended for RCW 4.22.070. See *supra*, Part IV.A.3 of this brief (noting the RCW 4.22.070(1) exclusion re: liability under Title 51 RCW); and Part IV.A.4 (noting the RCW 4.22.070(3)(a) exclusion re: hazardous waste claims, RCW 4.22.070(3)(b) exclusion re: tortious interference claims, and RCW 4.22.070(3)(c) exclusion re: fungible product claims).

The legislature did not, however, enact the bridge exclusion that the lower court “construed” into RCW 4.22.070.

***Second***, the State alleges that Mullen and its driver were negligent, and not the operator of an illegal or overweight vehicle.<sup>30</sup> The “negligent operation” clause of RCW 46.44.110 acknowledges that a negligent driver is not liable for all damage to a bridge. To the contrary, the State would hold negligent drivers liable for damage resulting from their negligence – and not the State’s negligence. RCW 46.44.110, third sentence.<sup>31</sup>

---

<sup>29</sup> RCW 4.22.015 (“ ‘Fault’ defined. ‘Fault’ includes acts or omissions...that are in any measure negligent or reckless toward the person or property of the actor or others. ... The term also includes...unreasonable failure to avoid an injury or to mitigate damages.”).

<sup>30</sup> *Supra*, footnote 20.

<sup>31</sup> The ***first*** sentence of RCW 46.44.110 applies to illegal or overweight vehicle drivers. That sentence does not apply here because, as noted earlier, the State accuses Mullen of being a negligent driver – not an illegal or overweight vehicle driver. *Supra*, footnote 20. The ***third*** sentence applies to a driver’s negligent operation of a vehicle. This “negligent operation” clause states in full: “Any person operating any vehicle is liable for any

Thus, RCW 4.22.070's apportionment of fault here would be consistent with, and not in contravention of or in conflict with, RCW 46.44.110's provision that a negligent driver is liable for the portion of damage attributable to his/her negligence (rather than the State's negligence).

**Third**, the lower court's invocation of RCW 46.44.110 rests on its stated premise that RCW 46.44.110 imposes on a negligent driver liability for "all damages" to the bridge.<sup>32</sup>

That is not what RCW 46.44.110 says.

RCW 46.44.110 establishes two separate categories of drivers: illegal/overweight vehicle drivers<sup>33</sup> and negligent drivers.<sup>34</sup> The legislature wrote RCW 46.44.110 to provide that illegal/overweight vehicle drivers are liable for "all damages", while negligent drivers, in contrast, are liable for "any damage" resulting from their negligent vehicle operation. RCW 46.44.110, first and third sentences (emphasis added).

---

*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, *third sentence* (underline added).

<sup>32</sup> *Mullen Trucking*, 5 Wn.App.2d at 789 ("a person who operates a vehicle in any negligent...manner is liable for 'all damages' to a public highway or bridge. RCW 46.44.110."), 796 (statute makes negligent motorist liable for "all damages" to a public bridge), & 797 (RCW 46.44.110 makes negligent motorist liable for "all damages" to a public bridge).

<sup>33</sup> RCW 46.44.110, **first** sentence. An overweight vehicle driver is a person "operat[ing] or moving ... any vehicle, object, or conveyance weighing in excess of the legal weight limits allowed by law." RCW 46.44.110, **first** sentence.

<sup>34</sup> RCW 46.44.110, **third** sentence.

At first blush, one might dismiss as meaningless the legislature's use of both "all" and "any" in RCW 46.44.110. However, this Court has repeatedly held that when the legislature uses different words in a statute, the legislature must have intended those different words to have a different meaning.<sup>35</sup> If a statute does not define words' meanings, then this Court looks to common dictionary definitions.<sup>36</sup>

The Merriam-Webster Dictionary defines "any" to mean "one or some indiscriminately of whatever kind."<sup>37</sup> It defines "all" to mean more: "the whole amount, quantity, or extent of...as much as possible."<sup>38</sup> Per this dictionary difference between "all" and "any," the third sentence of RCW 46.44.110 ("any") provides that a negligent driver may be liable for one or some of the damages involved, while the first sentence ("all")

---

<sup>35</sup> E.g., *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) ("It is well settled that where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed."); *United Parcel Service v. State*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984) (noting the "elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent"); *State ex rel. Public Disclosure Commission v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976) ("Where, as here, different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.").

<sup>36</sup> E.g., *American Continental Insurance Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004) (when statute does not define a term, "we give the term its plain and ordinary meaning ascertained from a standard dictionary"); *Western Telepage v. City of Tacoma*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000) (when statute does not define a term, "we turn to their ordinary dictionary meaning"); *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 922, 969 P.2d 75 (1998) ("Courts often look to standard dictionaries to determine the ordinary meaning of words.").

<sup>37</sup> Merriam-Webster Dictionary (definition of "any") <https://www.merriam-webster.com/dictionary/any> (viewed 5/4/2019) (underline added).

<sup>38</sup> Merriam-Webster Dictionary (definition of "all") <https://www.merriam-webster.com/dictionary/all> (viewed 5/4/2019) (underline added).

provides that an illegal or overweight vehicle driver could be liable for “the whole amount” of the damages involved.

Thus, the lower court’s foundational premise that RCW 46.44.110 makes a negligent driver liable for “all damages” to the bridge was faulty. As the State accuses Mullen of being a negligent driver (and not an illegal or overweight one), the legislature’s use of “any” as opposed to “all” in the applicable sentence of RCW 46.44.110 means that Mullen can be liable for some (less than 100%) of the bridge damage and not the whole amount (100%) of that damage. That is consistent with, and not contrary to or conflicting with, the contributory fault statute’s apportionment of less than 100% to a negligent driver when sued by the State.

*Each of these three reasons* demonstrates that RCW 46.44.110 does not support the lower court’s construction of the words in RCW 4.22.070 to exempt the State’s own fault when the State claims any damage to any bridge with a 14-foot clearance.<sup>39</sup>

---

<sup>39</sup> *While the State’s supplemental brief might claim that WAC 468-38-050 permit conditions bar consideration of its fault under RCW 4.22.070, Mullen notes (1) that claim is not properly in this case given that the State first raised it in its summary judgment reply brief [e.g., Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”)]; (2) in the Court of Appeals, the State simply cited to the WAC without analysis or explanation [e.g., Stiles v. Kearney, 168 Wn.App. 250, 266, 277 P.3d 9 (2012) (“Passing treatment of an issue or lack of a reasoned argument does not provide a sufficient basis for review.”)]; and (3) any administrative WAC provision that conflicts with the legislature’s contributory fault statute is void [cf. Kabbae v. DSHS, 144 Wn.App. 432, 435, 192 P.3d 903 (2008) (“An agency rule that conflicts with the plain language and the legislative intent of a statute is invalid.”)].*

**D. *Smelser* Does Not Support The Lower Court’s Construction Of RCW 4.22.070 Because The State Has A Common Law Duty To Provide A Safe Roadway Approaching And On Its Bridge**

The majority opinion in *Smelser* held that because Washington common law does not require a father to non-negligently supervise his child, a father’s failure to non-negligently supervise his child is not “fault” under RCW 4.22.070.<sup>40</sup>

As explained below, the current matter addresses different circumstances. Longstanding Washington common law does require the State to provide reasonably safe roadways. The majority opinion in *Smelser* accordingly does not support the lower court’s conclusion that the State’s failure to provide a reasonably safe roadway approaching and on the Skagit River Bridge cannot be “fault” under RCW 4.22.070.

The lower court’s underlying assumption that RCW 46.44.020 abolished the State’s common law duty to provide safe roadways on and approaching bridges with 14 feet of vertical clearance is incorrect for at least three reasons:

---

<sup>40</sup> *Smelser v. Paul*, 188 Wn.2d 648, 657, 398 P.3d 1086 (2017) (majority opinion) (“Bad parenting cannot be subject to judicial second-guessing ... through the medium of a tort action. .... the trier of fact cannot apportion fault to individuals whose actions fall outside the legal definition of recklessness or negligence. .... Thus, in this case, because a parent owes no duty based on negligent supervision, there is no actionable ‘fault’ to bring the parent within the scope of RCW 4.22.070....”) (internal quotation marks and citations omitted).

**First**, when the legislature intends to abolish a common law principle, it says so.<sup>41</sup> It did not do that in RCW 46.44.020.

Longstanding Washington case law establishes that the State has an overarching common law duty to provide reasonably safe roadways – a common law duty that includes, for example, the posting of warning signs.<sup>42</sup> The wording in RCW 46.44.020 does not even mention – never mind abolish – the State’s longstanding common law duty.

**Second**, the defendant in *Smelser* was the two-year-old plaintiff’s father.<sup>43</sup> *Smelser* held that because a father does not owe his child any

---

<sup>41</sup> E.g., RCW 59.18.230(4) (“The common law right of the landlord of distress for rent is hereby abolished for property covered by this chapter.”); RCW 51.04.010 (specifying the specific parts of the common law relating to employment injuries that are “hereby abolished”); see also *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008) (“It is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.”) (internal quotation marks and ellipses omitted).

<sup>42</sup> E.g., *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994) (“Under the common law, the State of Washington has a duty to exercise ordinary care in the repair and maintenance of its public highways, keeping them in such a condition that they are reasonably safe for ordinary travel by persons using them in a proper manner. This obligation includes posting warning signs when required by law or when the State has actual or constructive knowledge that the highway is inherently dangerous or of such a character as to mislead a traveler exercising reasonable care.”) (internal citations omitted); *Laguna v. State*, 146 Wn.App. 260, 263, 192 P.3d 374 (2008) (“The State has a duty to maintain its roads so that they are reasonably safe for ordinary travel.”); *Lucas v. Phillips*, 34 Wn.2d 591, 595, 597, 209 P.2d 279 (1949) (common law duty to provide safe roadways includes, e.g., warning signs where there is a condition that is inherently dangerous or is of such a character as to mislead a driver exercising reasonable care); *Owen v. Burlington Northern Santa Fe Railroad Co.*, 153 Wn.2d 780, 786-788, 108 P.3d 1220 (2005) (reiterating common law’s “overarching duty to provide reasonably safe roadways for the people of this state to drive upon” – regardless of whether the driver is “negligent or fault-free”); *Wuthrich v. King County*, 185 Wn.2d 19, 25-26, 366 P.3d 926 (2016) (reaffirming common law’s “overarching duty to provide reasonably safe roadways for the people of this state to drive upon”) (internal quotation marks omitted).

<sup>43</sup> *Smelser*, 188 Wn.2d at 651.

duty of non-negligent supervision, the father's failure to provide his child non-negligent supervision is not considered a fault in our State.<sup>44</sup>

In contrast here, this Court's longstanding case law establishes that the State does owe Mullen and other drivers a common law duty to provide reasonably safe roadways.<sup>45</sup> Since the State's failure to do so is considered a fault in our State, assigning fault for failing to provide a reasonably safe roadway approaching and on the Skagit River Bridge is not inconsistent with *Smelser*.

**Third**, the lower court effectively construed the immunity language out of RCW 4.22.070, such that if an entity's immunity from liability exempts it from any attribution of fault under RCW 4.22.070, the statute's express exemption for "entities immune from liability to the claimant under Title 51 RCW" is meaningless surplusage. This Court has repeatedly reiterated that courts must not construe statutes to render their language meaningless surplusage.<sup>46</sup>

---

<sup>44</sup> *Supra*, footnote 40 (quoting *Smelser*, 188 Wn.2d at 657). *Smelser* also emphasized the importance of the two-year-old plaintiff's being undisputedly fault free. *Id.* at 658. That is not the case with the claimant in this case (the plaintiff State). See *supra*, Part III.A of this brief (outlining the State's acts and omissions that are in at least some measure negligent, or a failure to avoid or mitigate the damages at issue); cf. the contributory fault statute at RCW 4.22.015 (" 'Fault' defined. 'Fault' includes acts or omissions ... that are in any measure negligent or reckless toward the person or property of the actor or others.... The term also includes ... unreasonable failure to avoid an injury or to mitigate damages. ").

<sup>45</sup> *Supra*, footnote 42.

<sup>46</sup> *Central Puget Sound Regional Transit Authority v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 234, 422 P.3d 891 (2018) ("We may not interpret a statute in a way that

*Each of these three reasons* illustrates why the majority opinion in *Smelser* does not support the lower court’s “construing” RCW 4.22.070 to add an exclusion the legislature did not include, or its abolishing the State’s longstanding common law duty to provide safe roadways whenever it builds a bridge with 14 feet of vertical clearance.

## V. CONCLUSION

The lower court’s statutory construction of Washington’s contributory fault statute ignored the legislature’s explicit wording. The words “fault” and “liability” are not synonymous. The State in this case is not the one type of entity the legislature exempted (a party immune under Title 51 RCW). This case does not involve any of the three types of claims the legislature exempted (certain hazardous waste, tortious interference, and fungible product claims). *Supra*, Part IV.B.

Allowing a jury to consider whether the State bears any fault is not only what the legislature’s express language in RCW 4.22.070 provides for, but is also consistent with the “negligent operation” clause in RCW 46.44.110. *Supra*, Part IV.C.

---

*renders a portion meaningless or superfluous”) (internal quotation marks omitted); State v. K.L.B., 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (same); Seattle v. Williams, 128 Wn.2d 341, 349, 908 P.2d 359 (1995) (“we are duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous”).*

Allowing a jury to consider whether the State bears any fault is also consistent with the State's common law duty to provide reasonably safe roadways – a duty the legislature did not abolish in RCW 46.44.020. *Supra*, Part IV.D.

Washington law accordingly requires this Court to reverse the lower court's statutory construction, and hold that (1) the State's contributory fault should be considered under RCW 4.22.070; and (2) RCW 46.44.020 did not abolish the State's common law duty to provide a safe roadway approaching and on the Skagit River Bridge.

DATED this 6th day of May, 2019.

*s/ Steven W. Block*

---

Steven W. Block, WSBA No. 24299  
Christopher Rogers, WSBA No. 49634  
Thomas F. Ahearne, WSBA No. 14844  
FOSTER PEPPER PLLC  
1111 Third Avenue, Suite 3000  
Seattle, Washington 98101-3299  
Telephone: (206) 447-4400  
Facsimile: (206) 447-9700

Thomas W. Tobin, *pro hac vice*  
Brian Del Gatto, WSBA 47569  
WILSON ELSER LAW FIRM  
1133 Westchester Avenue  
White Plains, NY 10604

*Attorneys for Petitioners Mullen  
Trucking 2005, Ltd d/b/a Mullen  
Trucking LP; William Scott and Jane  
Doe Scott*

**CERTIFICATE OF SERVICE**

I hereby certify that I am a legal assistant at Foster Pepper PLLC and that on May 6, 2019, I filed this pleading with the Supreme Court and have served this via E-mail service by consent of the following parties:

Michael A. Lynch	mikel@atg.wa.gov
Steve Puz	steve.puz@atg.wa.gov
Patricia D. Todd	PatriciaT2@atg.wa.gov
Alicia O. Young	AliciaO@atg.wa.gov
Anne E. Egeler	AnneE1@atg.wa.gov
Aaron Dean	Aaron@adeanandassoc.com
Amanda E. Vedrich	Amanda@careyvedrich.com
Mark P. Scheer	mscheer@scheerlaw.com
Matthew C. Erickson	merickson@scheerlaw.com

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 May 6, 2019.

s/ Alyssa Jaskot  
Alyssa Jaskot

**FOSTER PEPPER PLLC**

**May 06, 2019 - 4:23 PM**

**Transmittal Information**

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

**The following documents have been uploaded:**

- 965382\_Briefs\_20190506162033SC977055\_2454.pdf  
This File Contains:  
Briefs - Appellants Supplemental  
*The Original File Name was Supplemental Brief of Appellants.pdf*

**A copy of the uploaded files will be sent to:**

- AnneE1@atg.wa.gov
- PatriciaT2@atg.wa.gov
- aaron@adeanandassoc.com
- alicia.young@atg.wa.gov
- amanda@careyvedrich.com
- brian.delgatto@wilsonelser.com
- comcec@atg.wa.gov
- goldend3@gmail.com
- merickson@scheerlaw.com
- mikel@atg.wa.gov
- mscheer@scheerlaw.com
- nicoleb3@atg.wa.gov
- stevep@atg.wa.gov

**Comments:**

---

Sender Name: Alyssa Jaskot - Email: alyssa.jaskot@foster.com

**Filing on Behalf of:** Steven William Block - Email: steve.block@foster.com (Alternate Email: litdocket@foster.com)

Address:  
1111 Third Avenue, Suite 3000  
Seattle, WA, 98101  
Phone: (206) 447-4400

**Note: The Filing Id is 20190506162033SC977055**