

FILED
11/2/2017 2:14 PM
Court of Appeals
Division I
State of Washington

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

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,

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; 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,

Petitioners.

No. 96538-2

No. 76310-5

BRIEF OF PETITIONERS
MULLEN TRUCKING 2005,
LTD d/b/a MULLEN
TRUCKING LP; WILLIAM
SCOTT and JANE DOE SCOTT

BRIEF OF PETITIONERS MULLEN TRUCKING 2005,
LTD d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT
and JANE DOE SCOTT

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MULLEN TRUCKING LP; WILLIAM SCOTT and JANE DOE SCOTT

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BRIEF OF PETITIONERS MULLEN TRUCKING 2005,
LTD d/b/a MULLEN TRUCKING LP; WILLIAM SCOTT
and JANE DOE SCOTT

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I. INTRODUCTION

Defendants/Petitioners Mullen Trucking 2005, Ltd, William Scott (“Scott”) and Jane Doe Scott (collectively, “the Mullen Defendants”) respectfully appeal the trial court’s motion ruling that RCW 46.44.020 supplants and bars application of RCW 4.22.070, such that the comparative fault of the State of Washington (“the State”) may not be considered in an RCW 4.22.070 analysis of the Mullen Defendants’ liability, if any, for damages that resulted from Scott’s May 23, 2013 single-vehicle collision with the Skagit River Bridge (“the Bridge”).

II. ASSIGNMENT OF ERROR

1) Interpreting RCW 46.44.020, the trial court erred 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.”

III. STATEMENT OF THE CASE

1) Factual Background

On May 23, 2013, Scott, a veteran truck driver for defendant motor carrier Mullen Trucking 2005, Ltd. (“Mullen”) specializing in oversize cargo, was transporting an oversize load for Mullen southbound on I-5.

CP 458, 472. He was in the right lane following a pilot car operated by defendant Tammy DeTray in compliance with WAC 468-38-100 as he entered the Bridge south of Mount Vernon. CP 472-75. Defendant Amandeep Sidhu (“Sidhu”), operating a tractor trailer for defendant Motorways Transport, Ltd. (“Motorways”), improperly overtook Scott’s truck in the left southbound lane within the Bridge. CP 48, 474. This caused Scott to veer his truck to the right into the Bridge’s narrow shoulder, and strike the Bridge’s overhead structural girders. CP 474-75. Consequently, a span within the Bridge collapsed into the Skagit River. CP 446, 475.

The road lanes within the Bridge had narrowed from the standard 12’0” width to 11’4” at the point of impact within the right shoulder. CP 473. While the Bridge’s overhead clearance at the edge of Scott’s lane of travel averaged his load’s height of 15’9”, clearance over the shoulder, into which Scott was forced to veer, diminished to less than 15’. CP 475.

No posted road signage warned of the narrowing lanes or the lowered clearance. CP 473; 572-99 (especially 596).

Scott’s trip originated from Alberta, Canada bound for Vancouver, Washington, transporting a flatbed trailer containing a cargo of an oversized steel casing shed. CP 140. In advance of the transport, the State, through the Washington State Department of Transportation

(“WSDOT”), issued to Scott and Mullen a Special Motor Vehicle Oversize/Overweight Permit (“the Permit”). CP 472 and 533. The Permit states “Max Dimensions” of “Width 11ft 6” “ and “Height 15ft 9”.” CP 533. When Scott picked up the load, he measured it multiple times to confirm its 15’9” height. CP 472.

As he approached the Bridge, there were no low-clearance or lane narrowing signs that would alert him to safe passage points through the Bridge. CP 473, 596. Nor had the permitting process informed him that the lanes within the Bridge contracted from 12’0” to 11’4”, and the shoulders contracted from 10’0” to 2’2”. CP 473, 475. Thus, without warning, nearly 40% of Scott’s lane of travel and shoulder space disappeared (from 22’0” to 13’6”). CP 478. As he veered into the shoulder, the clearance diminished from a maximum height of 15’11” to a minimum of 14’ ½”. CP 475.

2) *The Bridge was “Functionally Obsolete”*

Long before the accident, the U.S. Federal Highway Administration had deemed the Bridge “functionally obsolete” due to its narrow travel lanes, narrow shoulders and low vertical clearances. CP 476-77. The narrow travel lanes and shoulders failed to meet current design standards set by the American Association of State Highway and Transportation Officials’ Policy on Geometric Design of Highways and

Streets (“the Policy”). CP 477. The Policy states that freeways should have a minimum of two through-traffic lanes at least 12’0” wide. CP 477. The travel lanes leading to the Bridge rapidly contracted from 12’0” to 11’4”. CP 477. Similarly, the Policy states that heavily traveled, high speed highways and highways carrying large numbers of trucks (such as I-5) should have useable shoulders at least 10’0” wide. CP 477. The shoulders leading to the Bridge rapidly contracted from 10’0” to 2’2”. CP 474-77.

3) Proceedings

The State instituted this action on January 30, 2015 in the Superior Court of Washington for King County seeking to recover damages related to the Bridge’s repair, but it was subsequently re-venued in Skagit County. CP 1-15. The Mullen Defendants answered the complaint on March 30, 2015. CP 16-32. The Mullen Defendants’ answer includes indemnity cross claims against the other defendants, and asserts 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. CP 124-27. This defensive counterclaim alleges the State's wrongdoing, and specifies that 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 126.¹ The Mullen Defendants also interposed crossclaims against the other named defendants, and instituted a third-party action against Motorways. CP 111-36. The State later brought direct actions against the third-party defendants. CP 43-62. Thus, allocation of fault amongst the various defendants/third-party defendants is critically at issue.

On July 21, 2016, the State filed with the trial court Washington State Department of Transportation's Motion for Partial Summary Judgment Re: RCW 46.44.020 (the "State's Motion") 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 137-56. The Mullen Defendants and Motorways opposed the State's Motion in

¹ Originally, the Mullen Defendants' counterclaim sought recovery of "damages by way of damage to Mullen's Truck and its cargo, including repair and other costs, in amounts to be determined at trial." CP 28. The Mullen Defendants modified the relief requested in an amended counterclaim to clarify that it was purely defensive in nature. CP 126.

vastly extensive briefing (the trial court allowed sur-replies and entertained a motion for reconsideration). CP 137-1242. On October 6, 2016, the trial court granted the State's Motion, ruling that "[n]o fault may be charged or assessed against WSDOT in this matter, nor may WSDOT be held liable for any portion of the damages that resulted from the subject May 23, 2013 collision." CP 1220-23.

The Court ruled as follows from the bench at oral argument on the State's Motion:

I do want to make some further findings because I would strongly expect this ruling will be reviewed. And if I am in error in my interpretation and, in fact, contributory negligence is allowed I want to additionally find that I don't believe that a genuine issue of material fact has been raised as to the repair maintenance issue of the bridge by any of the experts' opinions that have been submitted.

However, I would find that genuine 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. But that would only get there, of course, if my interpretation is wrong. I just wanted to make those additional findings.

.... But 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 of which are attached as Appendix B to the Mullen Defendants' Motion to Modify Ruling Denying Discretionary Review (RAP 17.7) filed with this Court on May 18, 2017 at 33-34.

On October 14, 2016, the Mullen Defendants moved the trial court for reconsideration or clarification of its October 6, 2016 Order, which the trial court granted by its Order Granting Defendants Mullen Trucking 2005, Ltd; William Scott and Jane Doe Scott's RAP 2.3(b)(4) Motion for Reconsideration and Clarification dated December 15, 2016. CP 1226-35, 1316-19. In doing so, the trial court vacated and replaced its October 6, 2016 Order to rule as follows:

Washington State Department of Transportation's Motion for Partial Summary Judgment Re: RCW 46.44.020 is GRANTED. 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. In all other respects Mullen's motion for reconsideration is denied.

CP 1318. Thus, the trial court barred the Mullen Defendants from pursuing their Affirmative Defense No. 2 and defensive counterclaim.

The trial court further amended its order by a letter to counsel dated October 6, 2016 which stated: "Upon further consideration, I am not finding RCW 46.44.020 to be a strict liability statute, and I am only interpreting it to limit the state's liability in a bridge strike case 14 feet or higher in clearance." CP 1225.

The trial court granted the Mullen Defendants' motion for certification to this Court of its ruling for discretionary interlocutory review. CP 1354-59. This Court granted discretionary review in response to the Mullen Defendants' motion.

IV. SUMMARY OF ARGUMENT

The trial court ruled that evidence suggests the State's improper issuance to the Mullen Defendants of an oversize load permit, and the State's failure to post adequate warning signage, caused or contributed to the Bridge's collapse and the State's resultant damages.

RCW 46.44.020 shields the State from liability to motorists and other claimants for damages resulting from bridge strikes when a bridge's

clearance exceeds fourteen feet. Thus, a motorist might be barred from seeking recovery from the State of damages to his/her vehicle after its collision with a bridge over fourteen feet high. However, the trial court concluded that RCW 46.44.020 also bars a defendant motorist from presenting evidence as to the State's wrongdoing as contributing factors 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 the Mullen Defendants' liability by way of a purely defensive counterclaim.

The trial court's erroneous ruling is significant because it would negate the Mullen Defendants' ability to demonstrate the State's wrongdoing in causing its loss and would create joint and several liability amongst the defendants, as compared to the several liability Washington law provides under its comparative fault scheme.

V. ARGUMENT

1) Standard of Review

The State's Motion sought a determination that RCW 46.44.020 precludes a court's consideration of the State's wrongdoing as causative

factors of the State's own bridge strike damages so long as the bridge's height exceeds 14 feet. Because this is an issue of statutory interpretation, the standard of review is *de novo*. As this Court has ruled:

When an action turns on the correct interpretation of a statute, the standard of review is *de novo*. "The purpose of statutory interpretation is to effectuate the legislature's intent." Absent ambiguity, we rely on the statute's language alone. But, if a statute is ambiguous, we will resort to principles of statutory construction, legislative history, and relevant case law to assist in interpreting it.

A principle of statutory construction is to avoid interpreting statutes to create conflicts between different provisions, so as to achieve a harmonious statutory scheme.

Scheib v. Crosby, 160 Wn. App. 345, 350, 249 P.3d 184, 186, (2011) (first citing *Johnson v. Kittitas County*, 103 Wn. App. 212, 216, 11 P.3d 862 (2000); then quoting *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000); then citing *State v. Azpitarte*, 140 Wn.2d 138, 142, 995 P.2d 31 (2000); then citing *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002); and then citing *Am. Legion Post # 149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008)).

2) *The State Had Notice of the Dangerous Conditions and a Duty to Cure by Improving its Permitting Process and Posting Signage*

a. The State Has a Duty to Provide Safe Roadways.

The essential elements of actionable negligence are: (1) a duty owed to the complaining party; (2) a breach thereof; (3) a resulting injury;

and (4) a proximate cause between the breach and resulting injury. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). “The existence and scope of a duty are questions of law.” *Wuthrich v. King County*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016). “[G]overnmental entities are held to the same negligence standards as private individuals.” *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220, (2005) (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002)). As such, the general duty of care is that of a “reasonable person under the circumstances.” *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 900, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010).

It is well settled that the State and its political subdivisions have duties to provide reasonably safe roadways for the traveling public. *Keller*, 146 Wn.2d at 249; *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994); *Owens v. City of Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956). In *Meabon v. State of Washington*, this Court explained such duties as follows:

The duty imposed upon the state in the maintenance of its public highways is the same as set forth for municipalities in *Owens v. Seattle* [citation omitted], *i.e.*, 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 in exercising ordinary care for their own

safety. As stated in *Provins v. Bevis*, [70 Wn.2d 131, 138, 422 P.2d 505 (1967)]:

At the outset, it should be observed that we are committed to the rule that, although a county is not an insurer against accident nor a guarantor of the safety of travelers upon its roadways, it is nevertheless obligated to exercise ordinary care to keep its public ways in a safe condition for ordinary travel. . . . [T]his obligation includes the responsibility to post adequate and appropriate warning signs when such are required by law, or where the situation, to the county's actual or constructive knowledge is inherently dangerous or of such a character as to mislead a traveler exercising reasonable care.

Inherent in this duty of ordinary care is the alternative duty either to eliminate a hazardous condition, or to adequately warn the traveling public of its presence.

1 Wn. App. 824, 827, 463 P.2d 789 (1970); see also *Bartlett v. N. Pac. R. Co.*, 74 Wn.2d 881, 882, 447 P.2d 735 (1968) (“[T]he municipality may be chargeable with negligence for failure to maintain warning signs or barriers if the situation along the highway is inherently dangerous or of such character as to mislead a traveler exercising reasonable care.”).

Originally, the State owed these duties only to persons using public roadways “in a proper manner and exercising due care for their own safety.” *Owens v. City of Seattle*, 49 Wn.2d at 191. However, the Supreme Court later redefined the State's duty by eliminating that qualification, holding that roads should be reasonably safe for “all persons,

whether negligent or fault-free. . . .” *Keller v. City of Spokane*, 146 Wn.2d at 249.

The Supreme Court recently reaffirmed these principles. In *Wuthrich v. King County*, plaintiff Wuthrich, who was struck by a motorist while approaching an intersection, alleged that King County was liable for his injuries because overgrown vegetation had obstructed the motorist’s view of traffic. 185 Wn.2d at 24. The court found a genuine issue of material fact as to whether King County had breached its duty to provide reasonably safe roads, noting the “well established” principle that a municipality has a duty to “to maintain its roadways in a condition safe for ordinary travel.” *Id.* at 25.

The *Wuthrich* court distinguished three precedents King County cited, as “each of those cases was decided before the legislature waived sovereign immunity for municipalities and therefore relied on the rule that the municipalities’ duties to address conditions outside the roadway was limited to warning or protecting against inherently dangerous or misleading conditions. . . . That rule no longer applies.” *Id.* at 26. The court further ruled that the municipality’s “overarching duty” was to provide “reasonably safe roads,” and that “[a]ddressing inherently dangerous or misleading conditions is simply ‘part of’ that duty.” *Id.*

Specifically:

To the extent that *Ruff v. County of King*, has been misread as holding that a municipality's duty is limited to complying with applicable law and eliminating inherently dangerous conditions, we clarify that it is not. Municipalities are generally held to a reasonableness standard consistent with that applied to private parties.

Id. at 26 (citation omitted). Regarding inherently dangerous conditions, the court explained:

[W]hether a condition is inherently dangerous does *not* depend on whether the condition “exists in the roadway itself.” It depends on whether there is an ““extraordinary condition or unusual hazard.”” Such a hazard may be presented by “the situation along the highway.” Inherent dangerousness is a question of fact that may be relevant to the level of care that is reasonable, but it does not affect the existence of the overall duty to take reasonable care.

Id. at 26-27 (emphasis in the original) (citation omitted). The court then took the opportunity to “reaffirm that a municipality has a duty to take reasonable steps to remove or correct for hazardous conditions that make a roadway unsafe for ordinary travel.” *Id.* at 27.

As for causation and King County's knowledge of the overgrown vegetation, the *Wuthrich* court ruled:

The County also contends that legal causation is not established because there were very few prior accidents at the intersection, so it did not have notice that the blackberry bushes were hazardous. However, to the extent legal causation includes a notice component, it is simply notice of the condition. There is evidence in the record that the blackberry bushes had been there for years and the County knew about them. The lack of prior accidents could be relevant circumstantial evidence as to the reasonableness of

the County's actions when evaluating breach, but it does not preclude legal causation.

Id. at 29 (citation omitted). Thus, the Supreme Court reversed and remanded because genuine issues of material fact existed “as to whether the intersection . . . was reasonably safe for ordinary travel, whether the County took reasonable steps to remove hazardous conditions at the intersection, and whether any of the County's actions or omissions proximately caused Wuthrich's injuries.” *Id.*

The Supreme Court also has addressed hazardous circumstances within bridges wherein, like the matter at hand, the State was on notice of an inherently dangerous condition. In *Boeing Company v. State*, a truck's cargo was damaged after striking an underpass. 89 Wn.2d 443, 444-45, 572 P.2d 8 (1978). The court ruled:

Here, the respondent's evidence showed a past history of frequent accidents in spite of the warning signs posted. It further showed the [State's] awareness of the need for a more effective warning system and that in other similar circumstances governmental bodies had devised warning systems to meet the problem. This evidence was sufficient to take to the jury the question whether the [State] exercised reasonable care under the circumstances. The jury could reasonably conclude that the situation called for the exercise of some ingenuity in the solution of the problem presented by this substandard underpass – either the invention and construction of an adequate warning system, the rerouting of truck traffic, or the restructuring of the highway to correct the defect.

Id. at 448.

b. The State Breached its Duty of Care by Failing to Safeguard Against Inherently Dangerous and Misleading Conditions of the Skagit River Bridge.

In the matter at hand, oversize loads had struck the Bridge multiple times over the ten years preceding the subject accident. CP 968-69. A jury certainly could conclude that although the Bridge was over 15'3", the State nonetheless was negligent by failing to address inherent dangers posed by the fracture critical bridge with improvements to its permitting process and/or signage. Importantly, this Court has explained that proving that a "particular defective physical characteristic" created an "inherently misleading or inherently dangerous" condition was not essential to a determination of whether a governmental entity breached its duty to maintain a roadway in a reasonably safe manner. *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. at 901 (applying the analysis outlined by the Supreme Court in *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940)). To the contrary, the governmental entity's breach, if any, could be inferred "based on the totality of the surrounding circumstances." *Id.*; see also *Wuthrich v. King County*, 185 Wn.2d at 27.

i. Failure to Implement Adequate Permitting Procedures

With over 120,000 permits granted to oversized loads annually, the State's permitting department plays an integral role in keeping with the State's duty to maintain its roadways in a safe condition. As the State has

explained, the permitting department'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. As noted earlier, the trier of fact can infer that a governmental entity breached its duty to maintain a roadway in a safe condition based on the totality of the relevant surrounding circumstances. *Xiao Ping Chen*, 153 Wn. App. at 909. Thus, in making its determination of whether the State breached its duty in a particular case, the trier of fact may consider the failures, if any, of the permitting procedures employed by WSDOT. More importantly, however, in view of this case's circumstances, the trier of fact could reasonably conclude that the State's permitting policies not only were inadequate, but that they were misleading and a proximate cause of the May 23, 2013 collision. Indeed, this matter exemplifies what can occur when permitting policies abrogate all responsibility for the State's bridge infrastructure, instead relying solely on drivers, who are often from out of state and unfamiliar with differing roadways and their unique hazards, to assess risks associated with oversize loads.

Per RCW 46.44.090 and WAC 468-38-050, an oversize load permit is required for vehicles exceeding 14' in height, 8'6" in width, or 53' in length. *See also* RCW 46.44.010, 46.44.020, 46.44.030. To

comply with these permitting requirements in 2013, an applicant could choose from any of three methods for obtaining a permit: (1) in-person at the permitting department; (2) by fax to the permitting department; or (3) online. CP 794-96. With all three methods, information is simply entered into a program, either by WSDOT's permitting department personnel or the applicant itself, and the program processes the application. CP 795.

WSDOT concededly performed no analysis in 2013 regarding overhead clearances, by a human or a computer, for oversize permits; rather, it processed permit requests with proposed dimensions and routes based solely on information submitted by the applicant. CP 795-96; 800-01. WSDOT's program would issue a permit for a load that was higher than the published minimum vertical clearance of a bridge regardless of who entered the application. CP 808-09. Although Mullen self-issued the Permit, WSDOT failed to conduct any independent analysis, such as a rudimentary height comparison, to determine whether Scott's proposed route was safe. CP 794-95, 799, 800-01.

WSDOT knew the load for which it granted the Permit was 15'9" high and would not fit under the Bridge's truss structure. Although its permitting software is capable of providing height restriction warnings, WSDOT failed to notify, much less warn, Mullen and Scott about the Bridge's hazards on the Permit. CP 808-11. The permit misleadingly

confirms the opposite with a notation of “Route OK.” CP 803. In addition, WSDOT failed to provide any lane-specific information regarding either the varying vertical clearances over the travel lanes or the narrow travel lanes or shoulders on the Bridge’s approach.

The procedures of every other state agency responsible for oversize/overweight permitting in the country would have either (1) checked a permit application’s requested height against the state’s known vertical clearance data, through either manual or automated permit system means; (2) rejected an application based upon height; (3) specifically notified the applicant about specific lane(s) it may or may not travel under specific overhead clearances; and/or (4) some combination of these. CP 1029.

Notwithstanding general application of low clearance warning signs and an appropriate permitting system, the Bridge also had a history of frequent accidents, with nine reported strikes within the ten years preceding the subject accident. CP 968-69. WSDOT clearly was fully aware of the need for a more effective warning system; however, WSDOT admitted that its permitting department was not involved in any analysis of the role the permitting process may have played in accidents relating to oversize loads. CP 797-98. Furthermore, at the time of the subject accident, the WSDOT permitting department did not receive information

regarding prior bridge strikes, including any of the Bridge's nine high load strikes, and therefore implemented no additional measures to safeguard against future strikes. CP 797-98. The jury easily could conclude that WSDOT breached its duty to maintain the Bridge in a safe condition by failing to implement corrective measures with improvements to its permitting process, and/or to otherwise analyze, respond to, and warn the traveling public of the inherently dangerous conditions of the Bridge.

ii. Failure to Provide Adequate Signage

In *Lucas v. Phillips*, the Supreme Court held that municipalities must maintain warning signs either when “(a) prescribed by law, or (b) the situation is inherently dangerous or of such a character as to mislead a traveler exercising reasonable care.” 34 Wn.2d 591, 595, 209, P.2d 279 (1949); *see also Meabon v. State of Washington*, 1 Wn. App. at 827 (“The duty imposed upon the state in the maintenance of its public highways is the same as set forth for municipalities in *Owens v. Seattle*. . . .”) “The question of whether the bridge and its surroundings present an inherently dangerous situation requiring appropriate warning to users of the highway is a question of fact.” *Tanguma v. Yakima County*, 18 Wn. App. 555, 560, 569 P.2d 1225, 1228 (1977). The totality of circumstances in this case demonstrated that the Bridge conditions were inherently dangerous and misleading. Both the travel lanes and shoulders diminish within the

Bridge. CP 473, 475. Overall, 40% of the travel lane and shoulders rapidly disappear on the Bridge's approach (from a combined 22'0" to only 13'6"). CP 478. Furthermore, the Bridge's travel lanes had varying vertical clearances, such that the right lane's overhead clearance was more restricted than the left lane's. With narrow travel lanes, restricted overhead clearances, and nine prior overheight hits, WSDOT knew or should have known that the Bridge created an inherently dangerous situation for oversize loads.

The State follows the Manual on Uniform Traffic Control Devices ("MUTCD") in adopting uniform standards for traffic control devices installed along Washington highways. CP 477-80. The MUTCD sets standards for traffic control devices including signage for low clearance, narrowing lanes and narrowing shoulders. CP 736-46. These include signage warning of narrow bridge width whenever a roadway clearance is less than the width of the approach lanes. CP 738. Washington courts have held that the MUTCD's provisions evince applicable duties. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d at 787-88. Moreover, in *Otis Holwegner Trucking v. Moser*, this Court also held that "[e]ven though much of the MUTCD language is advisory, a jury could find that the State was negligent in failing to properly sign. . . ." 72 Wn. App. 114, 121-22, 863 P.2d 609 (1993). Thus, the trier of fact could reasonably

conclude that the absence of warning signs, whether required or not, created an inherently dangerous condition for which the State owed a duty to cure.

iii. Signage Regarding Narrow Travel Lanes and Narrow Shoulders

In *Lucas*, a two-lane bridge spanning the Yakima River with a bridge deck 16 feet high was constructed with no signs warning of the narrowness of the bridge. Yakima County brought suit against the defendant truck driver after a bridge collision. *Lucas*, 34 Wn.2d at 592-94. Relying on factors such as the bridge's importance to the highway and whether drivers were familiar with it, the Court held that Yakima County breached its duty by failing to place proper warning signs of the narrowness of the bridge due to the inherently dangerous conditions of the bridge. *Id.* at 596-97.

In the matter at hand, the Bridge is an integral part of I-5 corridor, creating a link between Vancouver, British Columbia and Seattle. Scott, having traveled over the Bridge with an oversized load only a few times, had limited familiarity with the conditions it presented. The State concedes that the lanes approaching the Bridge narrowed from 12'0" to 11'4", and that the shoulders narrowed from 10'0" to 2'2". CP 709-12; 728-29; 743-46. However, WSDOT failed to provide any warning signage despite the Bridge's importance to the I-5 highway system, the

Bridge's fracture critical nature, or the fact that the Bridge had been struck multiple times in the nine years prior to the May 23, 2013 collision.

In *Owen v. Burlington Northern & Santa Fe Railroad Co.*, the Supreme Court found a governmental entity negligent for failing to take adequate corrective actions where, as here, it had an array of remedial measures at its disposal. 153 Wn.2d at 790. Given WSDOT's knowledge of the foregoing conditions, it breached its duty to warn motorists of these inherently dangerous conditions by providing adequate warning signage.

Scott testified that had signs warned him of the Bridge's narrow travel lanes and shoulders, he would have contacted the pilot car operator to discuss strategies to safely cross the Bridge, such as straddling the lanes or moving entirely into the left lane. CP 523. Similarly, Sidhu testified he would not have passed Scott had signs warned him the lanes were narrowing, as it would not have been safe to do so. CP 754-55.

iv. Signage Regarding Low Clearance

WSDOT's low-clearance signage policy requires signage only for bridges with clearances of 15'3" or less. CP 706. As the Bridge was over 15'3" high, WSDOT did not install any vertical clearance signage. CP 732. Washington courts hold that "as 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.

at 907. In other words, an unusual hazard may require the State to exercise greater care than would be sufficient in other settings.

The State admits it makes exceptions to its low-clearance signage policy by placing signage on bridges where vertical distance between the roadway and overhead structures exceeds 15'3". CP 712. These exceptions are made based on public and political requests, local operational characteristics, engineering judgment, the frequency of prior bridge strikes and the severity of the potential hazard. CP 713-15. The State also noted it would consider "whether or not the sign would add any value" and "any extenuating circumstances" in making a decision regarding bridge signage. CP 714. Nevertheless, WSDOT's signage decisions do not take into consideration whether a high load impact might actually cause a fracture critical bridge's complete failure. CP 719. Notwithstanding the Bridge's eighty-eight fracture critical members, the fact that it was functionally obsolete with narrow lanes, and the nine reported prior bridge strikes, WSDOT never considered making an exception to its low-clearance signage policy for the Bridge. CP 716.

Washington courts have held that inherently dangerous and misleading conditions are not based solely on a roadway's physical characteristics. As the Supreme Court explained in *Wuthrich v. King County*:

[W]hether a condition is inherently dangerous does not depend on whether the condition exists in the roadway itself. It depends on whether there is an extraordinary condition or unusual hazard. Such a hazard may be presented by the situation along the highway. Inherent dangerousness is a question of fact that may be relevant to the level of care that is reasonable, but it does not affect the existence of the overall duty to take reasonable care.

185 Wn.2d at 26-27. Here, WSDOT failed to warn of the Bridge's inherently dangerous and misleading varying overhead clearances. Again, WSDOT on previous occasions added signage for a bridge over 15' 3". Although it was not fracture critical, WSDOT placed low-clearance signs in advance of the SR-16 Olympic NW Bridge, which had vertical clearances higher than 15'3". CP 715. This decision was made after only two overheight load strikes. CP 716. In comparison, the Bridge had been struck multiple times and as many as nine times in the ten years preceding the May 23, 2013 collision. CP 1036-37; *see also* CP 757-63. WSDOT failed to extend greater care to the Bridge despite its having over four times as many overhead bridge strikes than the SR-16 Olympic NW Bridge and containing eighty-eight fracture critical members. CP 1036-37, 757-63. The frequency and severity of the prior overheight load strikes, combined with the Bridge's fracture criticality, created a greater and unusual hazard that required WSDOT to exercise greater care.

WSDOT also failed to provide any lane-specific information regarding the varying vertical clearances, such as how high a load could clear the right lane’s arch. Thus, considering the totality of the circumstances, a jury could reasonably conclude that WSDOT breached its duty to properly warn motorists of the overhead clearances by failing to place low clearance signs.

3) RCW 4.22 Does Not Preclude a Finding that the State Bears a Percentage of Fault

a. RCW 4.22’s Plain Language Mandates Its Application.

“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); *see also ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 831, 959 P.2d 651 (1998) (“The uniform comparative fault statute applies to any action that is (1) based on fault and (2) seeks recovery for ‘harm to property.’”) (quoting RCW 4.22.005). “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. The State’s Amended Complaint asserts general negligence claims against multiple defendants, and therefore is an

action based on “fault” involving more than one entity. CP 63-83. RCW 4.22 therefore controls it by its plain terms.

b. WSDOT is an “entity” capable of “fault” under RCW 4.22.

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); *see Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 752, 912 P.2d 472 (1996) (describing the intent of RCW 4.22.070 to “apportion fault between the responsible parties and ensure a party generally will not have to bear financial responsibility for the fault of another”). Plainly, RCW 4.22.070 provides no exemption to the State from an allocation of fault in this case.

Thus, the jury must be allowed to consider the State’s fault unless the trial court determines the State is not an “entity” capable of “fault.” *Price v. Kitsap Transit*, 125 Wn.2d at 461 (“Based on the express language of the tort reform act, we conclude an “entity”, as that term is

used in RCW 4.22.070(1), must be a juridical being capable of fault.”); *see also id.* (“[I]t would be inappropriate to inquire as to the amount of fault which should be attributed to a party if such party is incapable of fault as a matter of law. . . . This interpretation agrees with the fundamental practice of not assigning fault to animals, inanimate objects, and forces of nature which are not considered ‘entities’ under RCW 4.22.070(1).”).

Again, the State asserts general negligence claims against multiple defendants. 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 upon the fault of more than one entity, the State established itself as an “entity” within RCW 4.22.070(1). Notably, this Court has at least implicitly held that the State, per WSDOT, is an “entity” for purposes of fault allocation. *Barton v. State, Dep’t of Transp.*, 178 Wn.2d 193, 199, 308 P.3d 597 (2013) (discussing a jury verdict finding the State defendant 95 percent at fault, while another defendant was only five percent at fault).

RCW 4.22.015 provides the only definition of “fault” within RCW 4.22, and Washington courts apply it. *Tegman v. Accident & Med. Investigations, Inc.*, 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.” See *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).

Thus, the State is an entity susceptible to allocations of fault generally, and in the specific context of this case. The trier of fact should be allowed to apportion the percentage of fault commensurate with the State’s wrongdoing.

4) *RCW 46.44 Grants the State Sovereign Immunity but Not Absolute Immunity for Road Accidents*

a. *RCW 46.44.020 and .110 Establish Liability for Vehicle Accidents that Damage Roads or Bridges.*

RCW 46.44, entitled “SIZE, WEIGHT, LOAD,” encompasses the statute at issue, RCW 46.44.020. Essential to interpretation of RCW 46.44.020 is consideration of RCW 46.44.110 within that same RCW chapter. Entitled “Liability for damage to highways, bridges, etc.,” RCW 46.44.110 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 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. . . . [emphasis added]

RCW 46.44.020, entitled “Maximum height—Impaired clearance signs,” provides as follows: “[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.

b. RCW 46.44.020 Does Not Impose Complete Liability on Motorists Driving Overheight Vehicles.

Washington courts have not interpreted RCW 46.44.020 in relevant regard. The State's Motion was based on two foreign precedents which the State's Motion urged are comparable to RCW 46.44.020 and preclude defendants from arguing comparative fault: *Farmer v. Christensen*, 229 Mich. App. 417, 581 N.W.2d 807 (Mich. Ct. App. 1998), interpreting Mich. Comp. Laws § 257.719(1); and *New York State Thruway Authority v. Maislin Bros. Transport Limited*, 315 N.Y.S.2d 954 (App. Div. 1970), addressing N.Y. Vehicle and Traffic Law § 385(2). CP 882-85. While in some ways similar to RCW 44.46.110, the statutes these foreign cases address are materially distinguishable. Michigan's statute provides:

A vehicle unloaded or with load shall not exceed a height of 13 feet 6 inches. The owner of a vehicle that *collides* with a lawfully established bridge or viaduct is liable for all damage and injury resulting from a collision *caused by the height of the vehicle*, whether the clearance of the bridge or viaduct is posted or not.

Mich. Comp. Laws § 257.719(1) (emphasis added). Unlike RCW 46.44.110, this statute imposes strict liability on a vehicle operator based solely on the occurrence of a collision caused by the vehicle's height, and is not crafted in terms of Michigan's liability to motorists or others. The

New York statute, Vehicle & Traffic Law Section 385(2), is a similarly distinguishable strict liability statute:

The height of a vehicle from under side of tire to top of vehicle, inclusive of load, shall be not more than thirteen and one-half feet. Any damage to highways, bridges or highway structures resulting from the use of a vehicle exceeding thirteen feet in height where such excess height is the proximate cause of the accident shall be compensated for by the owner and operator of such vehicle.

Like Michigan's, this statute does not predicate liability on illegal or negligent misconduct, and is not concerned with New York's liability to motorists or others. Rather, liability attaches solely by virtue of a vehicle exceeding 13.5 feet in height.²

The State's Motion urged that RCW 46.44.020 and RCW 46.44.110 were passed in the same 1937 legislative act, such that the

² Michigan and New York are outliers in legislating strict liability for highway damage. Alabama, Arizona, California, Kansas, New Mexico and Wyoming, for instance, have statutes comparable to Washington's requiring some form of illegal or negligent operation for liability to attach. Ala. Code § 32-5-9(a) ("Any person driving any vehicle...shall be liable for all damage which the highway or structure may sustain as a result of any *illegal or careless* operation. . . ."); Ariz. Rev. Stat. § 28-1107(A) ("A person driving a vehicle . . . is liable for all damage that the highway or structure may sustain as a result of an *illegal* operation or driving or moving of the vehicle, object or contrivance. . . ."); Cal. Veh. Code § 17300(a) ("A person who *willfully or negligently damages* a street or highway, or its appurtenances . . . is liable for the reasonable cost of repair or replacement thereof."); Kan. Stat. § 8-1913(a) ("Any person driving any vehicle...shall be liable for all damage which said highway or structure may sustain as a result of any *illegal* operation. . . ."); N.M. Code § 66-7-416(B) ("It shall be unlawful for any person to injure or damage any public highway or street or any bridge . . . by any unusual, improper or unreasonable use thereof, or by the careless driving or use of any vehicle thereon, or by willful mutilation, defacing or destruction thereof."); Wyo. Stat. § 31-12-103 ("Any person operating, driving or moving any vehicle . . . is liable for all damages which the street, highway, bridge or appurtenances . . . may sustain, as a result of any *illegal or negligent* operation. . . .").

legislature ostensibly must have intended to impose complete liability on commercial truck drivers who operate overheight loads through bridges for the consequences of their negligence without consideration of the State's fault. This interpretation was erroneous.

As applied to the State, RCW 46.44.020 is a statute of sovereign immunity from liability,³ but not absolute immunity from allocation of fault. The Michigan and New York statutes impose absolute liability on all actors, municipal and private, which strike a bridge. *See Ebasco Servs. v. Pac. Intermountain Express Co.*, 398 F. Supp. 565, 567 (S.D.N.Y. 1975) (citing *Pelkey v. Kent*, 280 N.Y.S.2d 517 (4th Dep't 1967)). In contrast, RCW 46.44.020 establishes sovereign immunity, i.e., the right of government to be free from suit or liability. *See* W. PAGE KEETON, ET

³ While the State and local municipalities own the vast majority of Washington bridges, RCW 46.44.020 provides similar protections for owners of private bridges extending over or across public roadways, provided they reimburse the State for costs it incurs by providing and maintaining adequate signage:

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, it is the duty of the owner thereof when billed therefor to reimburse the state department of transportation or the county, city, town, or other political subdivision having jurisdiction over the highway for the actual cost of erecting and maintaining the impaired clearance signs, but 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.

The State, and not a private party, owns the Bridge. Moreover, any immunity afforded to private bridge owners would not supplant the State's independent duty to maintain its roadways in a reasonably safe condition and to provide adequate signage of inherently dangerous conditions. This incentivizes such private bridge owners to rely on the State to post proper signage. RCW 46.44.020 merely affords immunity to those private owners whose property extends over or across public roadways and for which the State has an independent duty to provide adequate signage.

AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984).

Per the clause within RCW 46.44.020 “by reason of any damage,” the State need not establish illegal operation or negligence to avoid liability for its acts and omissions that might be causative factors of a claimant’s loss. RCW 46.44.110 enables the State to bring a civil action for damages, perhaps bridge repair costs, but the State must demonstrate a motorist’s negligence or other wrongdoing to prevail.

The legislative history of RCW 46.44.020 further demonstrates its design as a sovereign immunity statute. It was enacted in 1937 when the State enjoyed sovereign immunity protection, but when local government agencies were granted only partial tort immunity. *See* Michael Tardif & Rob McKenna, *Washington State’s 45-Year Experiment In Governmental Liability*, 29 SEATTLE U. L. REV. 1, 6-7 (2005). RCW 46.44.020 extended sovereign immunity to local government agencies. In 1961, Washington broadly waived sovereign immunity, holding the State “liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.” *See* Laws of 1961, Ch. 136 § 1 (codified as RCW 4.92.090). The legislature re-enacted RCW 46.44.020 as an exception to the broad waiver of sovereign immunity. *See* Laws of 1961, Ch. 12 (reenacting Title 46 of the RCW, including 46.44.020). Legislative history demonstrates the provision’s purpose:

“The statute establishing the maximum legal height of motor vehicles at 14 feet also sets forth the minimum and maximum distances from an impaired vertical clearance that warning signs are to be erected and maintained for both in cities and towns [sic] and in rural areas. *This is for purpose of relieving the governmental agency having jurisdiction of the roadway of liability in case an over-legal load attempts to travel through the impaired clearance.*”

Section 1, S.B. 2374 (1977) (emphasis added).

c. The State is Not Immune from Affirmative Defenses and Defensive Counterclaims.

While the State may enjoy some degree of sovereign immunity under RCW 46.44.020, by initiating a suit, it waives its immunity to defensive counterclaims⁴ and affirmative defenses premised on comparative fault. This exception, the “doctrine of recoupment,” provides

⁴ Washington recognizes the concept of defensive counterclaims. As this Court summarized in *Bennett v. Dalton*, 120 Wn. App. 74, 82, 84 P.3d 265, 269, (2004), addressing a statute of limitations issue, “several Washington decisions . . . make a distinction between defensive counterclaims that can be asserted after the statute of limitations has run and affirmative claims that cannot. *Seattle First Nat’l Bank, N.A. v. Siebol*, 64 Wn. App. 401, 824 P.2d 1252 (1992) (defense of recoupment not barred by statute of limitations because main action was timely, but counterclaim for affirmative relief barred); *Warren v. Wash. Trust Bank*, 19 Wn. App. 348, 575 P.2d 1077 (1978), *modified on other grounds and aff’d*, 92 Wn.2d 381, 598 P.2d 701 (1979) (defendant could not assert counterclaim or cross claim for damages for conversion; commencement of main lawsuit tolled statute of limitations only as to defenses); *J.C. Felthouse & Co. v. Bresnahan*, 145 Wn. 548, 260 P. 1075 (1927) (“the statute of limitations never runs against a defense arising out of the same transaction”; after statute of limitations had run defendant could plead defensive counterclaim of fraud in inducement to plaintiff’s claim for contract damages and could offset damages to the extent of plaintiff’s claim, but could not obtain money judgment). See *Bingham v. Lechner*, 111 Wn. App. 118, 45 P.3d 562 (2002), *rev. denied*, 149 Wn.2d 1018, 72 P.3d 761 (2003) (distinguishing *Siebol*).

that while a sovereign may use its immunity from liability as a shield, fairness dictates it cannot use immunity as a sword.

Federal and state courts across the country uniformly recognize that defendants in actions brought by sovereign plaintiffs may bring counterclaims to defend against a sovereign's claims. A good example is *State v. Hogg*, wherein the Maryland Court of Appeals rejected Maryland's argument that a defensive counterclaim was barred by "absolute immunity." 311 Md. 446, 459 (1988), *overruled on other grounds by Dawkins v. Baltimore City Police Dep't*, 376 Md. 53 (2003). The court found a counterclaim in recoupment permissible because "had the defense been one of recoupment, sovereign immunity would not have prevented the defendant from asserting it." *Id.*

Summarizing jurisprudence from several jurisdictions, the U.S. District Court for the Northern District of Illinois explained regarding defensive counterclaims permissible in response to sovereign actions: "To be cognizable, a counterclaim must 1) arise from the same event underlying the state's action and 2) be asserted 'defensively, by way of recoupment, for the purpose of defeating or diminishing the State's recovery, but not for the purpose of obtaining an affirmative judgment against the State.'" *Woelffer v. Happy States of America, Inc.*, 626 F. Supp. 499, 502 (N.D. Ill. 1985) (citing *Georgia Dep't of Human Res. v.*

Bell, 528 F. Supp. 17, 26 (N.D.Ga.1981); *Burgess v. M/V Tamano*, 382 F. Supp. 351, 356 n. 6 (D. Me. 1974); *Dep't of Transp. v. Am. Commercial Lines, Inc.*, 350 F. Supp. 835, 837–38 (N.D. Ill. 1972); *In re Greenstreet, Inc.*, 209 F.2d 660, 664 (7th Cir. 1954)).

The State itself has previously brought a defensive counterclaim to defend against an otherwise immune sovereign plaintiff, the United States, but was unsuccessful because it failed to adhere to the recoupment doctrine's requirements. In *United States v. Washington*, the United States brought suit against the State to repair roadway culverts. 19 F. Supp. 3d 1317 (W.D. Wash. 2000). Counterclaiming, the State argued that the United States had “unlawfully injured the State of Washington by . . . placing on the State a disproportionate burden to meet any such treaty-based duty” and “managed its lands in such a way as to create a nuisance that unfairly burdens the State of Washington.” *Id.* at 1340-41. The U.S. District Court for the Western District of Washington interpreted the State's arguments as “ask[ing] the court to declare the alleged federal agency actions to be contrary to the treaty right, if such a right exists, and to compel the federal agencies to inventory and fix their own culverts.” *Id.* at 1342. In response, the United States argued that the State “does not merely claim that its own liability should be reduced to account for alleged conduct by the United States, but seeks affirmative relief against the

United States.” *Id.* Citing Fifth Circuit precedent, the court agreed with the United States, explaining that:

When the United States institutes an action, it waives immunity as to the counterclaims of the defendant which assert matters in recoupment -- matters that arise out of the same transaction or occurrence which is the subject matter of the government’s action. Such waivers are limited to the extent of reducing or defeating the government’s claim.” [However,] a judgment which is affirmative in the sense of involving relief different in kind or nature or exceeding the amount of the government’s claim is not authorized.

Id. (citing *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)).

By their purely defensive counterclaim, Mullen and Scott seek no affirmative relief beyond the amount in controversy. Their counterclaim arises from the same events underling the state’s action, for the sole purpose of defeating or diminishing any potential recovery by the State. Here, the totality of the circumstances demonstrates that the State breached its clearly defined duty to safeguard the public from inherently dangerous and misleading conditions on the Bridge. These inherently dangerous and misleading conditions, particularly in view of the fracture critical nature of the bridge and at least nine overheight impacts prior to this accident, include WSDOT’s (1) lack of any warning signage as to the bridge’s narrow lanes, narrow shoulders, and low vertical clearances and (2) inadequate permitting procedures.

That the State may have complied with its baseline duties regarding bridge signage under RCW 46.44.020 does not bar the trier of fact from concluding the State breached its duty by failing to eliminate inherently dangerous conditions. *Wuthrich v. King County*, 185 Wn.2d at 26 (clarifying that the duty to provide reasonably safe roadways is *not* limited to “complying with applicable law and eliminating inherently dangerous conditions”). To the contrary, “[w]hether the [Bridge] was reasonably safe and whether it was reasonable for the [State] to take (or not take) any corrective actions are questions of fact that must be answered in light of the totality of the circumstances.” *Id.* at 27 (citing *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d at 788; *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. at 901). Thus, the trier of fact may ascribe whatever percentage of fault is proximately attributable to the State for its own negligence in failing to address the inherently dangerous conditions posed by the impaired clearance (height and width) of a fracture critical bridge. In making this determination, the trier of fact should be able to consider WSDOT’s failure to improve its permitting process and to place signage regarding height and width given the numerous previous bridge strikes.

d. A Grant of Absolute Immunity Would Contravene Public Policy.

Application of statutes like RCW 46.44.020 as both a shield and a sword would contravene public policy. In *Department of Public Safety v. Parker*, the 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 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). Attached as Appendix A hereto is a lengthy list of citations to, and quotations from, courts around the country which reject the notion that similar applications of sovereign immunity may be used as both shield and sword.

The State's interpretation of RCW 46.44.020 would endanger the traveling public so as to benefit its coffers. It would disincentivize the

State from correcting known hazards. As Alaska’s Supreme Court explained when evaluating the validity of an indemnification clause in an airport lease, the public duty exception must bar the State from seeking indemnity because allowing indemnification would “reduce[] the State’s incentive to avoid negligence, not only with respect to [the appellee] and other major carriers with similar lease provisions, but also with respect to the travelling public.” *State v. Korean Air Lines Co.*, 776 P.2d 315, 318 (Alaska 1989).

e. RCW 46.44.020 Does Not Insulate WSDOT from “Fault,” Only “Liability” and “Financial Responsibility,” which are Distinct Concepts.

At the heart of the trial court’s error is its conflation of the concepts of “liability” and “fault.” Again, RCW 46.44.020 addresses only the State’s “liability” for bridge strike accidents. It is not concerned with “fault” that might be ascribed to the State in a comparative fault analysis.

The trial court effectively ruled that because RCW 46.44.020 protects the State from “financial responsibility” when it fulfills its statutory duty of building a bridge beyond the required vertical clearance, the State also is insulated from any ascription of “fault” relating to a bridge collapse. None of the State’s cited authorities support such a position. Rather, Washington courts and courts around the country have

held that a party, though immune from liability, may still be held to be at “fault.”

The legal concepts of “fault” and “liability” differ significantly. “Fault,” as defined by Washington’s comparative fault scheme in RCW 4.22.015, encompasses:

. . . 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.

Nowhere in RCW 4.22 is there a definition of “fault” separate from that in RCW 4.22.015. Thus, this Court has ruled that “immune 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.”).

Many other jurisdictions likewise recognize the critical distinction between “liability” and “fault,” especially when applied to damages analyses and fault allocation. *See, e.g., Pinnacle Bank v. Villa*, 100 P.3d 1287, 1293 (Wyo. 2004) (“[I]mmunity’ does not mean that a party is not at fault; it simply means that the party cannot be sued. Allocating a portion of an immune party’s fault to other ‘actors’ thwarts the intent of the

comparative fault scheme.”); *Mack Trucks, Inc. v. Tackett*, 841 So.2d 1107, 114 (Miss. 2003) (“Fault and liability are not synonyms . . . [t]here is nothing logically or legally inconsistent about allocating fault but shielding immune parties from liability for that fault.”); *Y.H. Invs. v. Godales*, 690 So.2d 1273, 1278 (Fla. 1997) (holding that the fact a mother was immune from liability was no bar to the jury’s consideration of her fault in causing an accident). Indeed, as explained by the Supreme Court of Tennessee, the “vast majority of comparative fault jurisdictions” permit allocation of fault to all entities responsible in an injury-causing event, including those immune from liability. *Carroll v. Whitney*, 29 S.W.3d 14, 21 (Tenn. 2000).

The State’s Motion itself acknowledged that “the respective percentage of fault of each defendant is a matter for the jury to determine,” while noting that “RCW 46.44.020 prohibits any finding holds [sic] WSDOT financially responsible for any part of the damages the bridge sustained in this collision.” CP 872.

5) *Under RCW 4.22.070, Mullen is Entitled to Present Evidence that WSDOT Bears Some Portion of “Fault” for the Bridge Collapse*

Improper conflation of “liability” or “financial responsibility” with “fault” could impact the collective defendants’ liability as it would dictate whether “several” or “joint and several” liability applies. Generally,

liability amongst joint tortfeasors and a plaintiff is “several,” meaning each of two or more defendants is liable only for its proportionate share of the plaintiff’s damages. *Barton v. State, Dep’t of Transp.*, 178 Wn.2d at 202; RCW 4.22.070. When a plaintiff is even 1% at fault, the default rule is several liability. *See Moe v. Graber*, 162 Wn. App. 1055 (2011); *Anderson v. City of Seattle*, 123 Wn.2d 847, 853, 873 P.2d 489 (1994). Only rarely does “joint and several” liability attach, such that each defendant is liable for the plaintiff’s damages, i.e., each defendant is responsible to pay the plaintiff’s entire damages award regardless of proportionate shares of fault. *Moe v. Graber*, 162 Wn. App. 1055 (2011). This fault allocation analysis, which includes analysis of the “plaintiff’s comparative fault,” applies even under “strict liability” statutes. *Lundberg v. All-Pure Chem. Co.*, 55 Wn. App. 181, 186–87, 777 P.2d 15 (1989).

The State’s purported immunity from “liability” for damages resulting from a bridge strike should not dictate whether the current defendants are jointly and severally liable, or severally liable. RCW 4.22.070(1) states that joint and several liability attaches only when:

- (a) the defendants were acting in concert or in an agency relationship; or
- (b) the court determines that the Plaintiff was not “at fault.”

Although the State cannot be “liable” for its role in the crash, RCW 4.22.070 expressly states that “fault” will 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).”⁵ *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d at 111 (emphasis added).

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. *See also Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 884 (9th Cir. 2002) (“Wash. Rev. Code § 4.22.070(1) requires that the fault of every entity that caused Geurin’s damages shall be considered, except those immune under Title 51”); *cf. Munoz v. City of Union City*, 148 Cal. App. 4th 173, 181, 55 Cal. Rptr. 3d 393, 399 (2007) (holding that under California’s comparative fault scheme, “fault will be allocated to an entity that is immune from paying for its tortious acts”).

Thus, while RCW 46.44.020 might immunize the State from liability and financial responsibility, it does not insulate the State from its

⁵ Title 51 refers to Washington’s Workman’s Compensation statute. RCW 4.22.070 exempts “only entities immune from liability under Title 51 RCW,” which does not include WSDOT. *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 937–38, 15 P.3d 188 (2000).

inclusion in a RCW 4.22.070 comparative fault analysis. By construing RCW 46.44.020 to insulate the State from both “liability” and “fault,” the trial court essentially mandates joint and several liability amongst the defendants. No authority precludes from consideration in a comparative fault analysis the State’s actions regarding signage and permitting. Indeed, the RCW 4.22.070’s text mandates such consideration.

VI. CONCLUSION

RCW 46.44.020 is a shield, and not a sword. It is inapplicable because the State is the plaintiff alleging other entities are liable. The Mullen Defendants should be entitled to demonstrate to the trier of fact the extent to which the State’s own negligence caused its damages. Washington’s several liability scheme should not be disturbed so as to empower the State to collect all of its damages from the Mullen Defendants.

DATED this 2nd day of November, 2017.

s/ Steven W. Block

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of
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Executed at Seattle, Washington, on November 2, 2017.

s/ Steven W. Block
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APPENDIX A

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).

STATE CASE LAW

Highest

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).

Intermediate-Appellate

Warrick Cty. v. Waste Mgmt. of Evansville, 732 N.E.2d 1255, 1261 (Ind. Ct. App. 2000); *People ex rel. Ill. Dep't of Cent. Mgmt. Servs. v. 3500 W. Grand (Chi.), LLC*, 2014 IL App (1st) 132332-U; *State Office of Child Support Enf't v. Mitchell*, 954 S.W.2d 907 (1997); *Mo. Highway & Transp. Comm'n v. Kan. City Cold Storage*, 948 S.W.2d 679 (Mo. Ct. App. 1997).

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