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No. 76310-5

No. 96538-2

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

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent,

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.

Petitioners.

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

The State devotes the majority of its brief to arguing factual contentions focused on the Mullen Defendants' wrongdoing. These points are irrelevant, not just because they are immaterial to the statutory interpretation issue at bar, but because the Mullen Defendants have conceded they bear a share of responsibility for the accident. However, that concession does not equate to the State being fault free and immune from a comparative fault analysis.

The State's arguments improperly assume the validity of their conclusion as a premise for why the Court should accept them. For example, the State assumes "liability" means "fault" for purposes of arguing the legislature has the right to protect the State from an allocation of fault in RCW 46.44.020, when the assumed premise of the argument is the issue at bar. Such arguments must be rejected.

As the term "liability" is not definitionally synonymous with "fault," it does not follow that the legislature unambiguously intended RCW 46.44.020 to remove the State from a comparative fault analysis. The statute has gone through successive reiterations over several decades without altering use of the term "liability," demonstrating the legislature was not concerned with whether contributory negligence or comparative fault might be applied.

The State fails to rebut the Mullen Defendants' arguments grounded in fundamentals of statutory interpretation and precedents addressing issues similar to those at hand. Thus, the Court should rule that RCW 46.44.020 does not operate as a sword by which the State, as a plaintiff, may defeat defensive counterclaims and affirmative defenses based on the State's fault.

II. ARGUMENT

1) The State Concedes Its Obligations to Maintain Safe Roadways

The State does not respond to, and therefore concedes, the Mullen Defendants' arguments regarding the State's duty to provide safe roadways for the traveling public, and the applicability of precedents holding the State liable for damages resulting from its failure to do so. Brief of Appellants ("Opening Brief") at 10-15.

The State does not explain, or even suggest, how it might ostensibly have discharged its duties in this regard. Instead, it focuses its lengthy factual contentions on the Mullen Defendants' wrongdoing in causing the Bridge collapse. Significantly, the State does not contend it is fault free; rather, it urges that the Court must ignore its fault, i.e., its wrongdoing, in calculating the State's economic recovery.

Of further significance is the State's silence in response to the Mullen Defendants' arguments regarding public policy. *Id.* at 40-41. The

State clearly wants to avoid any exposure to financial responsibility for its failure to post proper signage regarding narrowing lanes and implement an effective permitting process. A legal precedent financially incentivizing the State to fulfill its statutory and common law obligations indisputably would be effective public policy and a faithful interpretation of the statutes at issue. The Court should take this opportunity to rule accordingly.

2) The State's Factual Assertions

The State devotes half its brief to argument regarding factual contentions that have minimal, if any, relevance to the statutory interpretation issues at bar. The Mullen Defendants address these points briefly to prevent any confusion about the circumstances, noting that many of the State's arguments are skewed or misstated contextually.

a. The Bridge was "Fracture Critical" and "Functionally Obsolete"

While conceding the Bridge was fracture critical, the State dismisses that condition as typical. Respondent's Brief at 7-9. Fracture critical bridges may not be illegal, or even uncommon, as the State suggests, but they do impose on the State a heightened duty to guard against potentially catastrophic accidents if it allows them on Washington roadways. The State knew or should have known that a strike on the fracture critical Bridge could be more consequential than a strike on a more durably constructed one. Its duty to avoid strikes was therefore

heightened. *See Owen v. Burlington N. Santa Fe R.R. Co.*, 153 W.2d 780, 788, 108 P.3d 1220 (2005) (noting that unusual hazards may require greater care than would be sufficient in other settings).

Similarly, the State dismisses the fact that the Bridge was functionally obsolete as immaterial to the parties' rights and obligations under the statute at issue because the trial court ruled that status did not contribute to the Bridge's collapse. *Id.* at 8-9. Again, there may be no prohibition against municipalities allowing functionally obsolete bridges (assuming proper maintenance attention to safety), but it cannot be disputed that antiquated technology demands heightened attention to those bridges' use by the public. The State does not suggest it showed any such heightened attention to the Bridge. *See Owen*, 153 Wn.2d at 788.

The State's position on these points demonstrates its concern not with public safety or its duties to ensure it, but with maximizing financial returns through a strained definition of the word "liability" within a statute. This position is glaringly ironic in light of the State's strategy of opposing this appeal primarily by underscoring the Mullen Defendants' failure to comply with safety procedures.

b. The Mullen Defendants' Concession of Partial Responsibility for the Bridge Collapse is Not a Concession that the State Has No Responsibility

The State devotes much attention to asserting that the Mullen Defendants have acknowledged their responsibilities regarding bridge clearance and that they failed to comply with them. *Id.* at 10-19. Again, much of the State's presentation is skewed and at least partially inaccurate, but the Mullen Defendants concede there are steps they could have taken that might have prevented the accident. The Mullen Defendants' wrongdoing is not at issue in this appeal.

However, the Mullen Defendants' concession of a degree of responsibility for the Bridge collapse does not equate to the State being fault free. Washington's comparative fault scheme is predicated on parties' accountability for tort damages being commensurate with their degree of fault in causing a loss. The Mullen Defendants take responsibility for their actions, accept accountability therefor, and do not seek to avoid them by asking courts to distort the meaning of clear statutory language. The State cannot credibly say the same.

c. The Court Should Not Disregard the WSDOT Permit

The State urges that WSDOT's issuance to the Mullen Defendants of a mandatory oversize load permit, after they provided WSDOT required data about their cargo's dimensions and proposed route, is irrelevant. *Id.*

at 15-16. Per the State's argument, the permit's statement "Route OK" and other implications have no meaning or purpose.

This position begs the question: what are oversize load permits for? What is a permitee intended to understand by receiving one after providing requested information? Why are applicants required to enter their cargo dimensions, proposed route and other information? Why does the State require permitting at all?

In finding that evidence supports the Mullen Defendants' contention that the State's issuance of an oversize load permit was a causal factor of the accident, the trial court ruled that "the permitting process . . . could have, especially in today's modern technology of computers, immediately identified the load size that's requesting the permit and recogniz[ed] the need perhaps for that load to travel other than in the right lane." 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. This conclusion is consistent with logic and materials the trial court considered during summary judgment proceedings. CP 971-74.

While not germane to the statutory interpretation issue at bar, the State's position, again, is revealing about its understanding of, and attitude

toward, its obligations to provide the public with safe roadways. Any motorist indisputably bears responsibilities to operate his/her vehicle safely and at all times to be mindful of roadway circumstances. However, the State bears concurrent obligations, particularly when requiring a permitting process that it knows, or should know, will generate a sense of compliance and safety in a permitee's mind. The Mullen Defendants have taken responsibility for their wrongdoing. The State should do the same.

3) Statutory Interpretation

Summarizing how courts of appeal must interpret statutory language, the Supreme Court has ruled as follows:

> "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. Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." While we look to the broader statutory context for guidance, we "must not add words where the legislature has chosen not to include them," and we must "construe statutes such that all of the language is given effect." If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end.

Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004), *State v.*

Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009), *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

a. Statutes at Issue

RCW 46.44.020 is unambiguous. It specifically abrogates the liability of bridge owners, be they municipal or private owners, using the same clause "no liability may attach" without considering circumstances when bridge owners might be plaintiffs seeking to recover damages from motorists after bridge strikes. Nor would RCW 46.44.020, entitled "**Maximum height--Impaired clearance signs**," logically address motorist liability to bridge owners when a companion statute, enacted concurrently with and in the same chapter as RCW 46.44.020, does just that.

RCW 46.44.110, "**Liability for damage to highways, bridges, etc.**," addresses the exact circumstances at issue in this action, providing specified legal parameters for motorist liability arising,

> . . . as a result of the operation or moving of any vehicle . . . . 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.

The State contends the legislature elected, in 1937, to remove its fault from consideration in contributory negligence analyses not in the bridge strike statute specifically designed for State claims against motorists (and under which contributory negligence would be raised), but in a separate statute addressing height limitations and signage, and by using language that is, at best, contextually inappropos. That contention should be rejected.

The State further contends that "RCW 46.44.110 Supplements and Builds on the Protections in RCW 46.44.020, It Does Not Replace Them." Respondent's Brief at 29. This argument implies that the legislature enacted two separate statutes, both to proclaim that motorists are fully liable for bridge strikes, and that the State cannot be liable at all. It disregards that RCW 46.44.110 requires a finding of a motorist's "illegal operation" or operation of a vehicle in an "illegal or negligent manner or without a special permit" for the motorist to be liable for "all damages that the . . . bridge . . . may sustain ***as the result of any illegal operation***." (emphasis added). Per the State, RCW 46.44.020 abrogates any allocation of fault to the State, regardless of whether a motorist is liable under RCW 46.44.110, such that the motorist is fully liable for all damage despite the State's concurrent fault.

In other words, per the State, a motorist would be liable not only for damage sustained ***as the result of*** his/her own ***illegal operation***, but for damage which was sustained as the result of the State's wrongdoing as well. This strained interpretation, apart from being illogical, would require the Court to conclude that portions of RCW 46.44.110 are superfluous, as it would be irrelevant whether the motorist or the State caused the damage. "Courts should not construe statutes to render any language superfluous and must avoid strained or absurd interpretations." *State v. Riles*, 135 Wn.2d 326, 340, 957 P.2d 655 (1998). That is what the State is asking the Court to do here.

b. "Liability" does Not Mean "Fault"

The State assumes that the term "liability" as used in RCW 46.44.020 means "fault" as a premise for its conclusion that the State's fault may not be considered in a comparative fault analysis. That is the very issue at bar, and the State's assumption is unfounded.

The concepts of "liability" and "fault" are definitionally distinct. "When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning." *Lake*, 169 Wn.2d at 528 (quoting *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010)). Thus, when terms are not defined by the

legislature, courts will "look to a dictionary in use at the time the statute was adopted to give them their plain and ordinary meanings." *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 519-20, 91 P.3d 864 (2004).

The 3rd Edition of Black's Law Dictionary, published in 1933 and in effect at the time RCW 46.44.020 was promulgated in 1937, defined "FAULT" in the "Civil Law" context to mean: "Negligence; want of care. An improper act or omission, injurious to another, and transpiring through negligence, rashness, or ignorance." In contrast, Black's in 1933 defined "LIABILITY" to mean: "The state of being bound or obliged in law or justice to do, pay, or make good something." Copies of relevant pages of the 3rd Edition of Black's Law Dictionary, which state examples of both definitions, are in the Appendix hereto.

Clearly, the terms are not synonymous. Most significantly, "liability" implies a legal responsibility "to do, pay, or make good something," i.e., to an aggrieved party an affirmative obligation derived from an analysis of law or justice. "Fault," on the other hand, while often a basis for "liability," does not connote an affirmative state of obligation to another to "do, pay, or make good something." "When a statute fails to define a term, the term is presumed to have its common law meaning and the Legislature is presumed to know the prior judicial use of the term." *State v. McKinley*, 84 Wn. App. 677, 684, 929 P.2d 1145 (1997).

The modern definitions of "fault" and "liability" are similar to these older definitions, and still are not synonymous. The legislature has defined "fault," for purposes of comparative fault, to "include[] acts or omissions . . . that are in any measure negligent or reckless toward the person or property of the actor or others . . . . and [an] unreasonable failure to avoid an injury or to mitigate damages." RCW 4.22.015. "Liability," on the other hand, still means a "legal responsibility ***to another*** or to society, enforceable by civil remedy," i.e., money damages the defendant owes the plaintiff or an injunction. Liability, *Black's Law Dictionary* (10th ed. 2014) (emphasis added); *see also Id.*, Remedy. Liability also means "[a] financial or pecuniary obligation in a specified amount." *Id.*, Liability. While "fault" is still a basis for liability, per RCW 4.22.015 ("Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault"), fault does not impose an affirmative obligation to pay another party. Case law confirms that being protected from incurring liability is distinguishable from being "at fault," and that a party protected from liability may still have its fault taken into account in the comparative fault analysis. *Humes v. Fritz Cos., Inc.*, 125 Wn. App. 477, 491-92, 105 P.3d 1000 (2005) (concluding the Tribe's fault could be allocated in a negligence action against a separate party in accordance with RCW 4.22.070 because the "Tribe is a juridical being clearly capable

of fault" and although "[s]overeign immunity protects the Tribe from being subject to suit *or incurring liability*, . . . it does not render the Tribe incapable of fault" (emphasis added)).

"Courts should assume the Legislature means exactly what it says in a statute and apply it as written." *Densley v. Department of Retirement Systems*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). The Court should do so here. The State's case is premised entirely on these terms being synonymous. As they never have been, the Court should conclude that the legislature did not intend to bar defendants in State claims to recover damages from asserting defenses based on the State's wrongdoing.

4) RCW 46.44.020 was Not Designed or Intended to Protect the State from Contributory Negligence Defenses

The State argues that RCW 46.44.020's negation of bridge owner liability for structures over 12 feet 6 inches in height (increased to 14 feet in subsequent versions of the statute) "was particularly important for the state and every other entity that owned a bridge across a public highway in 1937." Respondent's Brief at 25. This is probably true, but not for the reason the State suggests, i.e., that "[a]t that time contributory negligence served as a complete bar to recovery." *Id.*

As the State demonstrates, when RCW 46.44.020 was enacted in 1937, Washington law provided for contributory negligence as a complete

bar to recovery. Respondent's Brief at 25. At that time, the State enjoyed sovereign immunity. *Id.* at 27. Thus, the State argues "no liability shall attach to the State" must mean, "no finding of negligence may be made against the State" given that (1) it would have been senseless for the legislature to abrogate the State's "liability," as the term is ordinarily used, when the State was statutorily immune from liability anyway; and (2) when the concern in 1937 was that contributory negligence would defeat the State's ability to recover any damages at all. This argument ignores, and is inconsistent with, the fact that the legislature did not alter RCW 46.44.020's clause "no liability shall attach to the State" in successive iterations of the statute enacted after sovereign immunity was waived, and after comparative fault replaced contributory negligence for allocations of tort liability. As the State points out:

> The state waived its sovereign immunity in 1961. *See* RCW 4.92.090. But the Legislature did not use that opportunity to repeal or amend RCW 46.44.020. Quite the opposite, the same year it waived sovereign immunity, the Legislature re-codified RCW 46.44.020 without modifying the state's protection from tort liability. Laws of 1961, ch. 12. Since 1961, the Legislature has amended RCW 46.44.020 five times without modifying the state's protection from tort liability. Laws of 1984, ch. 7 § 52; Laws of 1977, ch. 81 § 1; Laws of 1975-76 2nd ex. s., ch. 64 § 7; Laws of 1971 ex. s., ch. 248 § 1; Laws of 1965, ch. 43 § 1.

Respondent's Brief at 30. Were the legislature concerned only with protecting the State from contributory negligence defenses which might defeat the State's claims against motorists who damage roadways, then the legislature surely would have modified RCW 46.44.020 to say "no ***fault*** may be ascribed to the State" during enactments of the statute after comparative fault replaced contributory negligence. As RCW 4.22.070 itself shows, the Legislature is clearly capable of excluding entities from the comparative fault determination, when it so intends. *See* RCW 4.22.070 (specifically excluding "entities immune from liability to the claimant under Title 51 RCW" from the comparative fault analysis). The Legislature did not amend RCW 4.22.020 to state that no "fault" may be ascribed to the State in bridge-strike cases, nor did it include such a provision in RCW 4.22.070. "The legislature is presumed to enact laws with full knowledge of existing laws." *Thurston County v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1975). Thus, the Legislature is presumed to know that (1) RCW 46.44.020 does not prevent fault from being ascribed to the state; and (2) that such fault will be taken into account in a comparative fault analysis under RCW 4.22.070.

Moreover, were contributory negligence RCW 46.44.020's concern, the statute would have been worded precisely so as to bar it as a defense, allowing the State to recover notwithstanding its own negligence,

i.e., its "fault." It would not be crafted in terms of "liability" not "attach[ing] to the State," phraseology that connotes a burden or obligation which may not be imposed on it.

The State argues that *Ottis Holwegner Trucking v. Moser*, 72 Wn. App. 114, 122-24, 863 P.2d 609 (1993), "held that RCW 46.44.020 prevents a truck driver who crashes into an overhead structure from asserting that the State's negligence contributed to the crash." Respondent's Brief at 25, n.15. *Ottis* involved a fourth party action against the State after property damage resulted from a tunnel strike. Whether the tunnel exceeded 14 feet in height was an unresolved factual issue, but the court granted the State summary judgment because it had placed signage required by RCW 46.44.020. Still, the court concluded that the State might be found negligent:

> If RCW 46.44.020 did not exist or if it mandated compliance or at least consideration of all MUTCD provisions regarding low clearance signs, Stevens's affidavit would create a genuine issue of material fact for a jury as to the State's compliance with the MUTCD. Even though much of the MUTCD language is advisory, a jury could find that the State was negligent in failing to properly sign the tunnel. However, this conclusion follows only if RCW 46.44.020 requires the State to comply with the MUTCD low clearance sign provisions.
>
> We interpret RCW 46.44.020 to require only that the State place a warning sign on the right side of the road at the proper distance in advance of the tunnel. … Here, RCW 46.44.020, which requires only impaired clearance signs on

> the right side of the road in advance of the tunnel, takes precedence over other MUTCD standards on low clearance signs. . . .
>
> Phillips asserts that a jury could find that the State's failure to place a second impaired vertical clearance sign on the face of the tunnel was a proximate cause of his injuries. . . . [I]n light of our conclusion that the State has immunity for its negligence, if any, pursuant to RCW 46.44.020, we need not address that issue.

A determination in the matter at hand that the State may not be found negligent, or at fault, would be inconsistent with *Ottis*'s observation. Also noteworthy is the State's mistaken understanding of the clause "[i]f RCW 46.44.020 did not exist." Response Brief at 25, n.15. That clause clearly addressed RCW 46.44.020's provisions regarding signage, and not abrogation of the State's liability.

5) Recoupment Doctrine

The State resists consideration of the recoupment doctrine, ostensibly because (1) Washington "has never [] adopted" it; (2) RCW 46.44.020 "is not a sovereign immunity statute"; and (3) application of it would "impermissibly negate the Legislature's plenary constitutional authority to protect the state from tort liability." Respondent's Brief at 30-32. These arguments fail.

While possibly a matter of first impression within the state judiciary, the State itself addressed its rights under the recoupment

doctrine before the U.S. District Court for the Western District of Washington in *United States v. Washington*, 19 F. Supp. 3d 1317 (W.D. Wash. 2000). Opening Brief at 37-38. Numerous jurisdictions throughout the country have applied the doctrine of recoupment to circumstances similar to those at hand. *Id.* at 36-38. All such jurisdictions share the same concerns about their legislatures' plenary constitutional authority. The recoupment doctrine would not threaten legislative authority, because the legislature could always legislate around it through statutory language.

The State rejects classification of RCW 46.44.020 as a "sovereign immunity statute." While possibly just a semantic contention, RCW 46.44.020 clearly grants immunity to the State, a sovereign, within its specified context. This point is no basis for rejection of a concept so broadly applied and well established as the recoupment doctrine. Furthermore, whether RCW 46.44.020 is technically a "sovereign immunity statute" or a "tort liability protection statute" (which essentially just carves out an exception to the State's broad waiver of sovereign immunity) is beside the point. As the authority the State cites demonstrates, sovereign immunity protects the state from being sued, from having an action brought against it, i.e., from liability. *See* Respondent's Brief at 23; *Humes*, 125 Wn. App. at 491-92 ("Sovereign immunity protects the Tribe from being subject to suit or incurring liability."). Here,

no action is being pursued against the State. Rather, the Mullen Defendants ask the Court to effectuate the legislature's intent by holding all parties accountable for their proportionate shares of fault, including that of the claimant, per RCW 4.22.070. *See Edgar v. City of Tacoma*, 129 Wn.2d 621, 627 n.4, 919 P.2d 1236 (1996) (noting RCW 4.22.070(1) "requires the trier of fact to determine the allocation of fault.").

6) General-Specific Rule

The State argues that because RCW 46.44.020 is more specific than RCW 4.22.070, RCW 46.44.020 "controls this case." Respondent's Brief at 33. While "[t]he general-specific rule is undoubtedly a sound principle of statutory construction where applicable[,] . . . before applying the general-specific rule," there must be "a conflict between the relevant statutes that cannot be resolved or harmonized by reading the plain statutory language in context." *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 833, 399 P.3d 519 (2017). Absent that conflict, the general-specific rule does not apply. *Id.*

There is no such "conflict" here. One would arise only if the Court adopts the State's argument that (1) because the State may not be "liable" under RCW 46.44.020; (2) the State may not be at "fault" for purposes of 4.22.070; such that (3) the State cannot be at fault because it cannot be

liable. This reasoning is illogical and flawed. Again, it assumes its conclusion as a premise.

Moreover, to apply the general-specific rule, the Court must ignore the statutes' plain meanings. As explained above, the plain meaning of "liable," used in RCW 46.44.020, prevents motorists from recovering damages from the State. It does not prohibit the State's fault from being allocated in a comparative fault analysis as required by RCW 4.22.070, or even under a contributory negligence analysis as required in 1937. Again, "liability" is not the same as "fault."

Based on their plain meanings, it is possible to read both statutes in harmony "giv[ing] effect to each of them." *Tommy P. v. Bd. of County Comm'rs of Spokane County*, 97 Wn.2d 385, 392, 645 P.2d 697 (1982). Thus, the Court must do so, and the general-specific rule may not be applied. *See Id.* at 391-92 ("it is the duty of the court to reconcile apparently conflicting statutes and to give effect to each of them if this can be achieved without distortion of the language used"); *Univ. of Wash.*, 188 Wn.2d at 833.

Should the Court determine that RCW 4.22.070 and RCW 46.44.020 cannot be harmonized, the later-enacted statute, RCW 4.22.070, must control. *See City of Spokane v. Rothwell*, 166 Wn.2d 872, 877, 215 P.3d 162, 164 (2009) ("[W]here the conflict is irreconcilable, a more

recent statute takes priority over an older statute.”). Thus, even if the statutes are irreconcilable, the Court still should take the State’s fault into account in a comparative fault analysis.

7) Smelser v. Paul

The State relies heavily on *Smelser v. Paul*, 188 Wn.2d 648, 398 P.3d 1086 (2017), to support its argument that because RCW 46.44.020 precludes finding the State liable for the accident, the State’s share of fault may not be factored into RCW 4.22.070’s comparative fault analysis. Respondent’s Brief 34-38.

Smelser is distinguishable from the case at bar for three reasons. First, in *Smelser*, the defendant father’s fault could not be factored into the comparative fault analysis because he bore no legal duty he could have breached. Here, the State has extensive legal duties to maintain safe roadways which it could (and did) breach.

The issue in *Smelser* was “[w]hether, consistent with the parental immunity doctrine, a parent can be assigned fault under chapter 4.22 RCW based on negligent supervision.” 188 Wn.2d at 652. Before the court could answer this question, it first had to determine “whether a tort duty exists from which fault can be found for negligent parenting.” *Id.* at 653.

The court answered that question in the negative, concluding that a parent does not have a duty not to be negligent. *Id.* at 653-54 (“[W]hat the

cases establish is that no tort liability or tort duty is actionable against a parent for negligent supervision. Simply stated, it is not a tort to be a bad, or even neglectful, parent.”). Because there is no tort of negligent parental supervision, “no tort exists, no legal duty can be breached and no fault attributed or apportioned under RCW 4.22.070(1).” *Id.* at 656. Thus, *Smelser*’s holding was premised on the fact that it is not a tort to be a bad parent; that a parent has no legal duty to not negligently supervise his own child. This same principle also underlies the court’s holding that an entity cannot be “at fault” absent a recognized tort duty. *Id.* at 657-58 (“[B]ecause 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 . . . .”).

Unlike *Smelser*, where the father had no duty not to be negligent, the State concedes it has statutory and common law duties to maintain roadways in conditions safe for travel, including addressing dangerous or misleading conditions like those of the Bridge.

The State apparently misunderstands the Mullen Defendants’ argument regarding the State’s fault as being premised on RCW 46.44.020. Respondent’s Brief at 34, 37. It is not. The Mullen Defendants base their argument—that the State’s fault can be taken into account in a comparative fault analysis—on the State’s common law duty

"to maintain its roadways in a condition safe for ordinary travel," including implementing permitting procedures and providing adequate signage to address dangerous or misleading conditions. *Wuthrich v. King County*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016). Unlike the father in *Smelser*, the State has a duty on which its fault may be predicated.

The State also appears to argue that by operation of RCW 46.44.020, it is not an entity to which fault can be attributed. *See* Respondent's Brief at 37. Entities that are not capable of fault include animals, inanimate objects, forces of nature, and young children that "lack[] the mental capacity to understand a duty of care." *Humes*, 125 Wn. App. at 491. The State does not fall into any of these categories, and *Smelser* does not establish any new category of "entity" to which fault cannot be attributed. *Smelser* merely solidifies the fact that "in order to be an 'at fault' entity, one must have negligent or reckless conduct breaching some recognized duty." 188 Wn.2d at 657. As the State concedes, it has a "recognized duty" to maintain the roadways. Thus, its actions with regard to the Bridge fall squarely within the legal definition of "fault" as applied under RCW 4.22.070.

Second, in *Smelser*, there was no dispute "that the two-year-old child is fault free." 188 Wn.2d at 658. As the court recognized, the fault-

free plaintiff is an "important principle in chapter 4.22 RCW." Here, the State is not "fault free." Opening Brief at 16-26.

Finally, the underlying issue in *Smelser* was whether the child could recover damages from both his father's girlfriend and his father. 188 Wn.2d at 650 (explaining, "the trial court refused to enter judgment against the father based on the parental immunity doctrine. The result was that the child's recovery against the driver was reduced by 50 percent."). Here, the Mullen Defendants do not seek to recover from the State. They seek only to reduce damages the State may recover from them by the State's proportionate level of fault. In other words, unlike the *Smelser* plaintiff, the Mullen Defendants are not seeking damages from the State; rather, they seek only to reduce the recoverable damages they might owe the State by the proportionate degree of the State's fault, consistent with Washington's comparative fault scheme. RCW 4.22.070.

Thus, *Smelser* is distinguishable from the case at bar, and the State's arguments on this issue fail.

III. CONCLUSION

RCW 46.44.020 is designed to shield bridge owners from liability for damage to trucks and other personal property by establishing a threshold height above which they may rest assured that they will not have to pay for such damage. There is no basis for the Court to define the term

"liability" any differently than its dictionary meaning. While the State complains that the Mullen Defendants offer a "strained reading" of the statute (Respondent's Brief at 27), it points to no authority or precedent defining or interpreting "liability" to mean, for example, "fault which may not be considered in a contributory negligence analysis." Were that the legislature's intention, it certainly could have phrased the statute more precisely.

For these reasons and those presented in the Opening Brief, the Court should reverse the trial court's order on partial summary judgment and rule that RCW 46.44.020 does not foreclose consideration of the State's fault in a comparative fault analysis.

DATED this 14th day of February, 2018.

s/ Steven W. Block

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APPENDIX

BLACK'S LAW DICTIONARY

CONTAINING

DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN

AND INCLUDING

THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, ECCLESIASTICAL AND COMMERCIAL LAW, AND MEDICAL JURISPRUDENCE, WITH A COLLECTION OF LEGAL MAXIMS, NUMEROUS SELECT TITLES FROM THE ROMAN, MODERN CIVIL, SCOTCH, FRENCH, SPANISH, AND MEXICAN LAW, AND OTHER FOREIGN SYSTEMS, AND A TABLE OF ABBREVIATIONS

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square feet. Nahaolelua v. Kaaahu, 9 Hawaii, 601.

FATUA MULIER. A whore. Du Fresne.

FATUITAS. In old English law. Fatuity; idiocy. Reg. Orig. 266.

FATUM. Lat. Fate; a superhuman power; an event or cause of loss, beyond human foresight or means of prevention.

FATUOUS PERSON. In Scotch law. One entirely destitute of reason; *is qui omnino desipit.* Ersk. Inst. 1, 7, 48. An idiot. Jacob. One who is incapable of managing his affairs, by reason of a total defect of reason. He is described as having uniform stupidity and inattention of manner and childishness of speech. Bell's Law Dict.

FATUUM JUDICIUM. A foolish judgment or verdict. As applied to the latter it is one rather false by reason of folly than criminally so, or as amounting to perjury. Bract. f. 289.

FATUUS. An idiot or fool. Bract. fol. 420*b*. Foolish; silly; absurd; indiscreet; or ill considered. See *Fatuum judicium.*

Fatuus, apud jurisconsultos nostros, accipitur pro non compos mentis; et fatuus dicitur, qui omnino desipit. 4 Coke, 128. Fatuous, among our jurisconsults, is understood for a man not of right mind; and he is called "*fatuus*" who is altogether foolish.

Fatuus præsumitur qui in proprio nomine errat. A man is presumed to be simple who makes a mistake in his own name. Code, 6, 24, 14; Van Alst v. Hunter, 5 Johns. Ch. (N. Y.) 148, 161.

FAUBOURG. In French law, and in Louisiana. A district or part of a town adjoining the principal city; a suburb. See City Council of Lafayette v. Holland, 18 La. 286.

FAUCES TERRÆ. (Jaws of the land.) Narrow headlands and promontories, inclosing a portion or arm of the sea within them. 1 Kent, Comm. 367, and note; Hale, De Jure Mar. 10; The Harriet, 1 Story, 251, 259, Fed. Cas. No. 6,099; 16 Yale L. J. 471.

FAULT.

In the Civil Law

Negligence; want of care. An improper act or omission, injurious to another, and transpiring through negligence, rashness, or ignorance.

There are in law three degrees of faults,—the gross, the slight, and the very slight fault. The *gross* fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud. The *slight* fault is that want of care which a prudent man usually takes of his business. The *very slight* fault is that which is excusable, and for which no responsibility is incurred. Civil Code La. art. 3556, par. 13.

In American Law

Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude; any shortcoming, or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act. Railroad Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714; Railway Co. v. Austin, 104 Ga. 614, 30 S. E. 770; School Dist. v. Boston, H. & E. R. Co., 102 Mass. 553, 3 Am. Rep. 502; Dorr v. Harkness, 49 N. J. Law, 571, 10 A. 400, 60 Am. Rep. 656; Cochrane v. Forbes, 257 Mass. 135, 153 N. E. 566, 570.

The word "fault," the primary lexical meaning of which is defect or failing, in the language of the law and in the interpretation of statutes signifies a failure of duty, and is the equivalent of negligence. Milliken v. Fenderson, 110 Me. 306, 86 A. 174, 175; Marston v. Pickwick Stages, 75 Cal. App. 526, 243 P. 930, 933; Scott v. Sciaroni, 66 Cal. App. 577, 226 P. 827, 829. But see Liberty Highway Co. v. Callahan, 24 Ohio App. 374, 157 N. E. 708, 714.

In Commercial Law

Defect; imperfection; blemish. See With All Faults.

In Mining Law

A dislocation of strata; particularly, a severance of the continuity of a vein or lode by the dislocation of a portion of it.

FAUTOR.

In Old English Law

A favorer or supporter of others; an abettor. Cowell; Jacob. A partisan. One who encouraged resistance to the execution of process.

In Spanish Law

Accomplice; the person who aids or assists another in the commission of a crime.

FAUX.

In Old English Law

False; counterfeit. *Faux action,* a false action. Litt. § 688. *Faux money,* counterfeit money. St. Westm. 1, c. 15. *Faux peys,* false weights. Britt. c. 20. *Faux serement,* a false oath. St. Westm. 1, c. 38.

In French Law

A falsification or fraudulent alteration or suppression of a thing by words, by writings, or by acts without either. Biret.

"*Faux* may be understood in three ways. In its most extended sense it is the alteration of truth, with or without intention; it is nearly synonymous with 'lying.' In a less extended sense, it is the alteration of truth, accompanied with fraud, *mutatio veritatis cum dolo facta.* And lastly, in a narrow, or rather the legal, sense of the word, when it is a question to know if the *faux* be a crime, it is the fraudulent alteration of the truth in those cases ascertained and punished by the law." Toullier, t. 9, n. 188.

—Ley civile. In old English law. The civil or Roman law. Yearb. H. 8 Edw. III. 42. Otherwise termed *"ley escripte,"* the written law. Yearb. 10 Edw. III. 24.

—Ley gager. Law wager; wager of law; the giving of gage or security by a defendant that he would make or perfect his law at a certain day. Litt. § 514; Co. Litt. 294b, 295a. An offer to make an oath denying the cause of action of the plaintiff, confirmed by compurgators, which oath was allowed in certain cases. When it was accomplished, it was called the "doing of the law," *"fesans de ley."* *Termes de la Ley;* 2 B. & C. 538; 3 B. & P. 297.

LEY. Sp. In Spanish law. A law; the law; law in the abstract.

LEYES DE ESTILO (or ESTILLO). In Spanish law. Laws of the age. A collection of laws usually published as an appendix to the Fuero Real; treating of the mode of conducting suits, prosecuting them to judgment, and entering appeals. Schm. Civil Law, Introd. 74. Formed under the authority of Alonzo X. and his son Sancho, and of Fernando el Emplazado, and published at the end of the 13th century or beginning of the 14th; some of them are inserted in the New Recopilacion. 1 New Recop. 354.

LEZE MAJESTY, or LESE MAJESTY. An offense against sovereign power; treason; rebellion.

LIABILITY. The state of being bound or obliged in law or justice to do, pay, or make good something. Feil v. City of Cœur d'Alene, 129 P. 643, 649, 23 Idaho, 32, 43 L. R. A. (N. S.) 1095; Breslaw v. Rightmire, 196 N. Y. S. 539, 541, 119 Misc. 833. Legal responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. State v. Thompson's Malted Food Co., 152 N. W. 458, 459, 160 Wis. 671; Harper v. Adams, 106 So. 354, 356, 141 Miss. 806; International-Great Northern R. Co. v. Texas Co. (Tex. Civ. App.) 280 S. W. 282, 285; Wood v. Currey, 57 Cal. 209; McElfresh v. Kirkendall, 36 Iowa, 225; Benge v. Bowling, 106 Ky. 575, 51 S. W. 151; Joslin v. New Jersey Car-Spring Co., 36 N. J. Law, 145.

The condition of being exposed to the upspringing of an obligation to discharge or make good an undertaking of another, or a loss or deficit, or the being exposed or subject to a given contingency, risk, or casualty which is more or less probable. First National Bank of East Islip v. National Surety Co., 228 N. Y. 469, 127 N. E. 478, 480; United States Fidelity & Guaranty Co. v. Haney, 166 Minn. 403, 208 N. W. 17.

Any obligation which one is bound in law or justice to perform. Murphy v. Chicago League Ball Club, 221 Ill. App. 120, 126; Ex parte Lamachia (D. C.) 250 F. 814, 816.

The term is therefore broader than the word "debt," or "indebtedness," Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939, 940; Lowery v. Fuller, 221 Mo. App. 495, 281 S. W. 968, 972; and includes in addition existing obligations, which may or may not in the future eventuate in an indebtedness, Daniels v. Goff, 192 Ky. 15, 232 S. W. 66, 67; Irving Bank-Columbia Trust Co. v. New York Rys. Co. (D. C.) 292 F. 429, 433. The word has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely, and has been defined as the condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden. Wentz v. State, 108 Neb. 597, 188 N. W. 467, 468.

The word is not synonymous with "loss" or "damage," and under an automobile insurance policy insuring against "liabilities," there may be recovery without allegation or proof that insured has been required to pay any sum, whereas under a policy covering "actual loss or damage," no obligation arises till insured has suffered loss or damage. Ducommun v. Strong, 193 Wis. 179, 214 N. W. 616; Stag Mining Co. v. Missouri Fidelity & Casualty Co. (Mo. App.) 209 S. W. 321, 323.

Liability Bond

One which is intended to protect the assured from liability for damages or to protect the persons damaged by injuries occasioned by the assured as specified, when such liability should accrue, and be imposed by law, as by a court, as distinguished from an indemnity bond, whose purpose is only to indemnify the assured against actual loss by way of reimbursement for moneys paid or which must be paid. Fenton v. Poston, 195 P. 31, 33, 114 Wash. 217.

Liability Created by Statute

One depending for its existence on the enactment of the statute, and not on the contract of the parties. Dietrich v. Copeland Lumber Co., 154 P. 626, 628, 28 Idaho, 312. One which would not exist but for the statute. Frank Shepard Co. v. Zachary P. Taylor Pub. Co., 138 N. E. 409, 410, 234 N. Y. 465; Hocking Valley R. Co. v. New York Coal Co. (C. C. A.) 217 F. 727, 730.

Legal Liability

A liability which courts of justice recognize and enforce as between parties litigant. Royal Ins. Co. v. St. Louis-San Francisco Ry. Co. (C. C. A.) 291 F. 358, 360. See, also, Brooklyn Clothing Corporation v. Fidelity-Phenix Fire Ins. Co., 200 N. Y. S. 208, 211, 205 App. Div. 743.

Secondary Liability

A liability which does not attach until or except upon the fulfillment of certain conditions; as that of a surety, or that of an accommodation indorser.

LIABLE. 1. Bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution. Hannibal Trust Co. v. Elzea, 286 S. W. 371, 377, 315 Mo. 485; State

v. Albert, 133 A. 693, 694, 125 Me. 325. Obligated; accountable for or chargeable with. Wilhelm v. Parkersburg, M. & I. Ry. Co., 82 S. E. 1089, 1091, 74 W. Va. 678.

2. Exposed or subject to a given contingency, risk, or casualty, which is more or less probable. Jennings v. National American (Mo. App.) 179 S. W. 789. Exposed, as to damage, penalty, expense, burden, or anything unpleasant or dangerous; justly or legally responsible or answerable. Breslaw v. Rightmire, 196 N. Y. S. 539, 541, 119 Misc. 833.

The term is not the equivalent of "probably," but refers rather to a future possible or probable happening which may not actually occur, and relates to an occurrence within the range of possibility. Alabama Great Southern R. Co. v. Smith, 209 Ala. 301, 96 So. 239, 240; Saylor v. Taylor, 42 Cal. App. 474, 183 P. 843, 844. Compare Adams v. Moberly Light & Power Co. (Mo. App.) 237 S. W. 162, 165.

Limited Liability

The liability of the members of a joint-stock company may be either unlimited or limited; and, if the latter, then the limitation of liability is either the amount, if any, unpaid on the shares, (in which case the limit is said to be "by shares,") or such an amount as the members guaranty in the event of the company being wound up, (in which case the limit is said to be "by guaranty.") Brown.

Personal Liability

The liability of the stockholders in corporations, under certain statutes, by which they may be held individually responsible for the debts of the corporation, either to the extent of the par value of their respective holdings of stock, or to twice that amount, or without limit, or otherwise, as the particular statute directs.

LIARD. An old French coin, of silver or copper, formerly current to a limited extent in England, and there computed as equivalent to a farthing.

LIBEL, *v.*

In Admiralty Practice

To proceed against, by filing a libel; to seize under admiralty process, at the commencement of a suit.

In Torts

To defame or injure a person's reputation by a published writing.

LIBEL, *n.*

In Practice

The initiatory pleading on the part of the plaintiff or complainant in an admiralty or ecclesiastical cause, corresponding to the declaration, bill, or complaint.

A written statement by a plaintiff of his cause of action, and of the relief he seeks to obtain in a suit. Ayliffe, Par. 346; Shelf. Marr. & D. 506; Dunl. Adm. Pr. 111.

In Scotch Law

The form of the complaint or ground of the charge on which either a civil action or criminal prosecution takes place. Bell.

In Torts

That which is written or printed, and published, calculated to injure the character or reputation of another by bringing him into ridicule, hatred, or contempt. Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605; Negley v. Farrow, 60 Md. 175, 45 Am. Rep. 715; Collins v. Dispatch Pub. Co., 152 Pa. 187, 25 A. 546, 34 Am. St. Rep. 636; Hartford v. State, 96 Ind. 463, 49 Am. Rep. 185; 15 M. & W. 344; Oklahoma Pub. Co. v. Kendall, 96 Okl. 194, 221 P. 762, 765; Hughes v. Samuels Bros., 179 Iowa, 1077, 159 N. W. 589, 590, L. R. A. 1917F, 1088.

A false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Civ. Code Cal. § 45; Penal Law N. Y. (Consol. Laws, c. 40) § 1340; Civ. Code S. D. § 29 (Rev. Code 1919, § 95); Comp. Laws N. D. 1913, § 4352. This definition includes almost any language which upon its face has a natural tendency to injure a man's reputation, either generally or with respect to his occupation. Stevens v. Snow, 191 Cal. 58, 214 P. 968, 969. See, also, Rem. & Bal. Code Wash. § 2424 (Rem. Comp. Stat. § 2424); Rev. St. Mo. 1909, § 4818 (Mo. St. Ann. § 4366); Vernon's Ann. Civ. St. Tex. art. 5430; Cr. Code Ill. § 177 (Smith-Hurd Rev. St. 1931, c. 38, § 402); McClellan v. L'Engle, 74 Fla. 581, 77 So. 270, 272.

A malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule. Pen. Code Cal. § 248; Bac. Abr. tit. "Libel;" 1 Hawk. P. C. 1, 73, § 1; Ryckman v. Delavan, 25 Wend. (N. Y.) 198; Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961, 962, L. R. A. 1915E, 275, Ann. Cas. 1916E, 631; Riley v. Askin & Marine Co., 134 S. C. 198, 132 S. E. 584, 586, 46 A. L. R. 558; Smith v. Lyons, 142 La. 975, 77 So. 896, 900, L. R. A. 1918E, 1; Willetts v. Scudder, 72 Or. 535, 144 P. 87, 89; Commonwealth v. Szliakys, 254 Mass. 424, 150 N. E. 190, 191.

A publication, without justification or lawful excuse, of words calculated to injure the reputation of another, and expose him to hatred or contempt. Whitney v. Janesville Gazette, 5 Biss. 330, Fed. Cas. No. 17,590; O'Brien v. Clement, 15 Mees. & W. 435. Or a written statement, injurious to his trade. 7 App. Cas. 741.

A censorious or ridiculing writing, picture, or sign

CERTIFICATE OF SERVICE

I, the undersigned, declare that on February 14, 2018, I served this upon the following parties via e-mail and first class mail:

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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 February 14, 2018.

s/ Steven W. Block
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