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

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STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT  
OF TRANSPORTATION, et al.,

Respondents,

v.

MULLEN TRUCKING 2005, LTD, a Canadian corporation or business  
entity d/b/a MULLEN TRUCKING LP, et al.,

Appellants.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

Like every state in the nation, Washington requires commercial truck drivers to make sure their over legal height load will safely clear all bridges and overpasses on their chosen route *before* they drive on a public road. Commercial truck drivers who disregard this fundamental duty engage in a dangerous game of Russian Roulette in which every bridge and overpass their overheight load is forced under turns into an unpredictable spin of the cylinder and pull of the trigger – will the load fit or will it crash into the bridge?

On May 23, 2013, Appellant William Scott (Scott), a commercial truck driver employed by Appellant Mullen Trucking 2005, Ltd. (Mullen), attempted to haul a large steel casing from Canada to Vancouver, Washington on the state's busiest highway – Interstate 5 (I-5). Scott knew the steel casing exceeded this state's legal height limit. Nevertheless, he remained purposefully ignorant about whether his load would safely clear the bridges and overpasses on his route. Scott's version of Russian Roulette came to an abrupt, violent conclusion at the north portal of the Skagit River Bridge. He drove in the one lane that could never accommodate his over height load. The result was immediate and fierce.

Scott's steel casing rammed through the bridge's first eleven overhead braces, damaging them so severely that an entire span of the

Skagit River Bridge collapsed, throwing the vehicles of three innocent motorists into the river below.<sup>1</sup> CP at 1168. Respondent Washington State Department of Transportation (WSDOT) brought this lawsuit to recover the \$17,585,909.77 it cost to repair the damage caused by Scott's overhead bridge crash. CP at 361.

Recognizing the crippling impact even one overhead bridge crash can inflict on interstate commerce, bridge owners, and Washington taxpayers, the Legislature enacted RCW 46.44.020 in 1937. There are three interdependent legs to this statute:

- (1) The statute establishes a 14 foot height limit for loads driven on Washington's public highways;
- (2) It directs commercial truck drivers to make sure their over legal height loads will safely clear every bridge/overpass on their route; and
- (3) It protects the bridge owner from tort liability when a load crashes into an overhead bridge structure that has at least 14 feet of vertical clearance.

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<sup>1</sup> The three injured motorists separately filed suit against Appellants Scott, Mullen, and Motorways Trucking and Amandeep Sidhu. In addition, like WSDOT, all three motorists also sued Tammy Detray (Detray), the pilot car operator hired by Scott, and Patty Auvil, d/b/a Olympic Peninsula Pilot Service (hereinafter "Auvil"). Neither Auvil nor Detray joined this appeal. *See* CP at 84.

This appeal focuses on the third leg of this statute, which provides “**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 14 feet or more. RCW 46.44.020 (emphasis added). Concluding this statutory language is “about as clear as you can get,” the trial court ordered WSDOT “may not be held liable or financially responsible for any portion of the damages that resulted from the May 23, 2013 bridge collapse.” CP at 1306, 1317-18. Displeased with this ruling, Appellants essentially ask this Court to rewrite RCW 46.44.020. Appellants’ arguments lack merit and should be rejected for at least three reasons.

First, Const. art. II § 26 empowers the Legislature to direct when and under what conditions the state has tort liability. That legislative authority is absolute. *State v. Super. Ct. for Thurston Cty.*, 86 Wash. 685, 688, 151 P. 108 (1915); *Wells Fargo Bank, N.A. v. Dep’t of Revenue*, 166 Wn. App. 342, 358, 271 P.3d 268, (2012), *as corrected* (Apr. 18, 2012), *review denied*, 175 Wn.2d 1009 (2012). Here, as it is constitutionally empowered to do, the Legislature enacted RCW 46.44.020 to protect the state and other bridge owners from tort liability for the specific type of overhead bridge crash at issue in this case. The Legislature’s decision to protect the state from tort liability cannot be altered by the

present appeal. Const., art. II, § 26. Additionally, courts do not construe clear statutory language. *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010); *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). The unambiguous third leg of RCW 46.44.020 protects WSDOT from tort liability for “any damage or injury to persons or property” for Scott’s overhead bridge crash. Thus, as the trial court correctly ruled, WSDOT “may not be held liable or financially responsible for any portion of the damages that resulted from the May 23, 2013 bridge collapse.” CP at 1306, 1317-18. There is no need for the Court to go further.

Second, should the Court address Appellants’ remaining arguments, established law compels the result reached by the trial court. Because “no liability may attach to the state” for this crash, there was no legal duty to breach, and, as a matter of law, no fault can be attributed or apportioned to WSDOT under RCW 4.22.070(1). *Smelser v. Paul*, 188 Wn.2d 648, 656, 398 P.3d 1086 (2017) (where a party has no tort liability, there is no duty to breach, and fault cannot be apportioned to that party under RCW 4.22.070(1)).<sup>2</sup>

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<sup>2</sup> *Smelser v. Paul* was decided on July 7, 2017. As such, this Court did not have the benefit of this case when it accepted review on June 26, 2017.

Third, Appellant Amandeep Sidhu (Sidhu), a commercial truck driver employed by Motorways Transport, LTD,<sup>3</sup> passed Scott's oversized load as they both drove onto the bridge. This forced Scott further to the right of the bridge where less vertical clearance existed. Sidhu's negligence contributed to Scott's overhead bridge crash and the resulting bridge collapse. By statute, Motorways and every other defendant found liable for this overhead bridge crash, are jointly and severally liable to WSDOT for the full amount of its proven damages. RCW 46.44.110; RCW 4.22.030.

For each of these reasons, the Court should affirm the trial court.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Did the trial court correctly rule that RCW 46.44.020 protects WSDOT from tort liability for the damages that resulted from the May 23, 2013 overhead bridge crash?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. Overview of the Skagit River Bridge**

The Skagit River Bridge is a steel through truss bridge (meaning the trusses are above the roadway). It was constructed in the early 1950s and opened for traffic in 1955. Owned by WSDOT, this bridge is part of I-5, and the nation's interstate highway system. The bridge crosses the Skagit

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<sup>3</sup> Hereinafter these two parties are collectively referred to as "Motorways."

River, which separates the cities of Burlington to the north and Mount Vernon to the south. CP at 910 ¶ 5, 1149 ¶ 12.

The bridge has twelve spans, each of which is independent of the remaining spans. This design feature enabled the bridge to withstand the brutal force of Scott's crash without collapsing the entire bridge. At the time of Scott's crash, each bridge span had six upper sway braces. It is undisputed that all of the bridge braces provided more than 14 feet of vertical clearance. CP at 910 ¶ 5, 1149 ¶ 12.

The design of the overhead braces formed a clearly visible arch, the apex of which stood above the left southbound travel lane. As Scott admittedly knew and easily observed, the left southbound lane provided him with the greatest vertical clearance. Conversely, the right lane provided the least. CP at 1141-42.

Generally, in conformance with engineering standards, the width of travel lanes on state highways varies from 10-12 feet. In addition, as one typically finds on bridges, the two lanes that led up to the Skagit River Bridge narrowed from 12 feet to 11' 4" on the bridge deck. CP at 1371 ¶ 5-6, 1372-73 ¶ 8.<sup>4</sup>

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<sup>4</sup> Mullen contends that the travel lanes decreased by 40 percent on the bridge structure. Mullen's Br. at 3. Mullen can only reach this conclusion by treating the shoulder as part of the roadway. It is not. As every driver knows, vehicles are required to be driven in the travel lane, not the shoulder. CP at 1372; *see also* RCW 46.04.500 (the definition of "roadway" excludes the adjacent shoulder).

As Mullen strains to point out, the Skagit River Bridge has “fracture critical” members. *See, for example*, Brief of Petitioners Mullen Trucking 2005, LTD d/b/a Mullen Trucking LP; William Scott and Jane Doe Scott (Mullen’s Br.) at 24. What Mullen does not point out is that this is a normal characteristic of safely designed bridges:

‘Fracture critical’ is an engineering term used to describe a bridge with one or more steel members in tension or with a tension element that does not contain redundant supporting elements. A majority of steel truss bridges have fracture critical members, and even today new steel trusses are constructed with fracture critical members.

CP at 1150 ¶ 14 (Decl. of Abolhassan Astaneh-Asl).<sup>5</sup>

It is undisputed that bridges designed with fracture critical members “are safe, can be found throughout the United States, and are still constructed today.”<sup>6</sup> CP at 910 ¶ 7, 1150 ¶ 14. More to the point here, not every steel member of the Skagit River Bridge was “fracture critical.” Indeed, it is undisputed that the steel members of the Skagit River Bridge

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<sup>5</sup>Dr. Astaneh has a Ph.D. in Civil Engineering (Structures) and a Master of Science in Civil Engineering. He is a registered Professional Engineer in California. In addition to serving as a consultant on issues that concern structural engineering, failure analysis, and impact resistant design of bridges and buildings, Dr. Astaneh is a Professor at the University of California, Berkeley, where he teaches courses on advanced steel design, comprehensive design of structures, and design of steel and composite structures. CP at 1146-48.

<sup>6</sup>Looking to exploit the engineering term “fracture critical,” Mullen suggests that WSDOT should have posted signs ‘warning’ drivers of this engineering characteristic. Mullen’s Br. at 24. It is difficult to imagine what such a sign might say since the term has nothing to do with the bridge’s safety. CP at 910. Appellants were unable to produce evidence that such a sign has ever been posted on any bridge with fracture critical members, and not surprisingly, no traffic engineering standard requires any transportation agency to erect signs that announce this engineering feature. CP at 1371 ¶ 4.

that were struck and fatally compromised by Scott's crash were *not* fracture critical. CP at 1150 ¶ 15.

In addition, the Skagit River Bridge was classified as "functionally obsolete" at the time of this collision. Mullen Br. at 3. Again, this designation has nothing to do with the bridge's safety or its structural integrity.

Rather, that designation means the bridge does not meet one or more current design standards (like an older model vehicle that does not possess all of the features that are available on a vehicle built to today's standards). Again, the Skagit River Bridge collapsed on May 23, 2013 because it was violently struck by an overheight load, not because it was technically viewed as functionally obsolete.

CP at 911 ¶ 11 (Decl. of Glen Scroggins, Washington licensed civil and structural engineer).

Moreover, the bridge received this designation because of the lateral clearance of "one of the little roads that goes *under the bridge*." CP at 626 (emphasis added). Contrary to Mullen's assertions, the label has nothing to do with the vertical clearance, or width of the travel lanes and shoulders on the bridge deck where Appellants crashed. CP at 626

Importantly, based on the unchallenged evidence, the trial court found that neither the condition of the steel members of the Skagit River Bridge nor WSDOT's maintenance of the same caused or contributed to the May 23, 2013 collapse. CP at 1306; *see also* CP at 911-12 ¶¶ 10, 12-13;

1151-52 ¶ 17. Stated more succinctly, had Scott's collision occurred the day after the bridge opened in 1955, it would have forced the exact same bridge collapse. CP at 912 ¶ 13, 1151 ¶ 16. This, too, is undisputed.

**B. Mullen and Scott Violated Industry Standards by Ignoring the Vertical Clearance on Their Chosen Route**

Mullen, an international trucking company based in Canada, directed its employee, William Scott, to transport a 70' 5" long, 11' 6" wide steel casing box from Canada to Vancouver, Washington. CP at 324, 533-35. The Washington State Patrol later determined the height of Scott's load actually measured 15' 11", two inches taller than Scott's measurement, and almost two feet taller than Washington's legal height limit. CP at 323-24.<sup>7</sup> Mullen and Scott concede it was their responsibility, not WSDOT's, to research and develop a safe route for Scott's overheight steel casing. CP at 295-96, 1137. Mullen and Scott admit they ignored this obligation. Neither made any effort to learn whether Scott's load could safely clear the bridges and overpasses on their chosen route. And, while defendants Motorways, Detray, and Auvil are also at fault for Scott's crash, Mullen concedes "it bears substantial responsibility for the impact on the bridge and the result. There's no question about that." CP at 1287.

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<sup>7</sup> See the first leg of RCW 46.44.020 (*cf.* page 2, above): in Washington vehicles and loads may not exceed a height of 14 feet. In addition, WSDOT is only required to sign the vertical clearance of bridges and overpasses that fall below this 14 foot threshold. RCW 46.44.020.

**1. Scott Never Sought to Determine Whether His Overheight Load Could Clear the Bridges and Overpasses on His Route**

Scott was primarily responsible for making sure his over legal height load could safely clear the Skagit River Bridge *long before he ever attempted to cross that structure*. CP at 276-77.<sup>8</sup> As a licensed commercial truck driver, Scott was the one person who controlled the speed, direction, and travel lane of his over legal height load.

Q. Mr. Scott, I understand what you just said, but here's a simple question. You're supposed to be in charge of this load. Isn't that true?

A. True.

Q. It's your load?

A. Yes.

Q. You're the boss?

A. Right.

Q. You give direction to the pilot cars?

A. True.

Q. You're supposed to know the route that you're going to take with your truck and your load, especially when you're taking an oversized load on a freeway; correct?

A. True.

CP at 201-02.<sup>9</sup>

Scott also knew he was responsible for ensuring that his load could

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<sup>8</sup> This is the second leg of RCW 46.44.020: commercial truck drivers must "exercise due care in determining that sufficient vertical clearance is provided upon the public highways where vehicles or combination of vehicles is being operated."

<sup>9</sup> The record citations here and on the following four pages are taken from the deposition testimony of Scott and from William Long, Mullen's permit manager and designated CR 30(b)(6) witness.

safely clear the overhead braces of the Skagit River Bridge before he ever reached that structure.

Q. Who ultimately has the responsibility to make sure that you make it safely through there?

A. Yeah. Ultimately, I guess, it's my responsibility, yes.

...

Q. Has anybody at Mullen Trucking ever instructed you that as part of your job you are responsible for making sure in advance that there's enough vertical clearance across the bridges on your route to accommodate your overheight load?

A. I don't think anybody at Mullen Trucking directly said that to me, but that's my responsibility. The cargo is on my trailer.

Q. You understand that as part of your responsibilities --

A. Yes.

...

Q. Would you agree with me that you were controlling the oversized load as you travelled southbound on Interstate 5 on the date of the incident?

A. Yes, I would agree I was controlling the oversized load.

Q. And would you agree that you ultimately were responsible for making sure that your route was safe?

A. Yes, it's ultimately my responsibility to make sure the route is safe.

CP at 203, 214, 216-17.

Critically important to this duty, Scott knew he had to learn which bridge lane had sufficient vertical clearance for his load, again, *before* he reached the bridge.

Q. What about your pretrip planning and research? That is investigating the route you're going to take and reviewing the permit that you're given for overheight load under low-clearance obstructions?

- A. It depends on the state that I get the permit from. Every state does it differently. Washington state will give us the route and they'll say the route is okay, right, but they won't guarantee the height.
- Q. And, for example, Washington state, you're not given specific direction about what lane to be in. That's your decision, right?
- A. Washington state, yes. It's our decision what lane to be in.
- Q. And it's up to you to make sure that you're in the right lane so you don't hit an obstruction. Fair enough?
- A. Fair enough, yeah.

CP at 1137.

Scott did nothing to learn what vertical clearance existed on the Skagit River Bridge or which bridge lane he needed to drive in. Instead, Scott "delegated" that duty to Mullen's permit office. Mullen concedes, as it must, that Scott's failure to learn the vertical clearance of the Skagit River Bridge in advance, and his unilateral "delegation" of that responsibility to Mullen's permit office, violated accepted industry standards. CP at 272 (Scott violated industry standards when he drove onto the bridge without knowing its vertical clearance), 276-77 (Scott was required to know the route, read his oversized load permit, and make sure there was sufficient vertical clearance for his load), 315 ("it was not safe for Scott to transport the load over the Skagit River Bridge in the manner he chose to transport it"). Compounding Scott's errors, Mullen made no effort to learn the vertical

clearance of the Skagit River Bridge or inform Scott that he had to drive in the left lane across that structure.

**2. Mullen Selected a Route for Scott's Overheight Load Without Checking the Available Vertical Clearance**

Mullen's permit office exists to help its drivers develop safe routes and obtain oversized load permits from local transportation authorities. CP at 297-98. As allowed by Washington law, Mullen self-issued its own electronic permit for Scott's over legal height load. CP at 283-84, 795; *see also* RCW 46.44.090; WAC 468-38-050. Because it was self-issued, Mullen controlled the route it selected. Still, as it does for every commercial trucker and trucking company, WSDOT provided Mullen with a variety of resources to enable it to plan a safe route.

For example, WSDOT provided Mullen with a "bridge list." The bridge list identifies the maximum and minimum vertical clearance of every bridge and overpass across Washington's state highways, and the specific milepost where each is located. Here, reflecting the clearly visible arch formed by its overhead braces, the bridge list confirmed that the southbound lanes of the Skagit River Bridge had a maximum vertical clearance of 17'3"

and a minimum clearance of 14'5".<sup>10</sup> CP at 264-66, 340, *see also* CP at 399, (another publication available on WSDOT's website entitled "Skagit River Bridge-Vertical Height Clearance," which illustrates how the curvature of the arch relates to vertical clearance on the bridge's southbound lanes). In other words, the bridge list showed that Scott's load was more than a foot taller than the bridges minimum clearance.

In addition, WSDOT gave Mullen a phone number that would have connected Mullen's permit department with trained WSDOT personnel who would have assisted with devising a safe route for Scott's load. CP at 264-66. Although they used these resources on other occasions prior to this accident, and were reminded to use these sources on this specific occasion, Mullen chose not to utilize any of the resources provided by WSDOT. Thus, as Mullen readily concedes:

- It was familiar with WSDOT's bridge list, and frequently used it to develop routes for its overheight loads prior to this crash;

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<sup>10</sup> Mullen attempts to justify its actions by asserting that the Skagit River Bridge had an *average* vertical clearance of at least 15'9". *See* Mullen's Br. at 2. Like most citations in its appellate brief, Mullen relies on the argument section of its trial court brief as authority. First, there are no facts in the record that support Mullen's conclusion. Second, even if support existed, which it does not, an average necessarily implies that some overhead braces were taller and some were lower than the "average." Mullen cannot explain why any competent commercial truck driver or trucking company would ever rely on Mullen's "average vertical clearance" to determine if their overheight load could safely clear that structure. Third, even if Scott relied on Mullen's incorrectly calculated "average" clearance, he could never reasonably expect that his incorrectly measured 15'9" steel casing would ever safely clear a bridge truss that had the exact same vertical height.

- WSDOT reminded Mullen to consult the bridge list when it self-issued the oversized load permit for Scott's load;
- Mullen did not consult the bridge list or contact WSDOT personnel about its planned route. In fact, Mullen took no steps to ensure its chosen route was safe for Scott's load; and
- Mullen concedes its failure to take any steps to learn the vertical clearance of the Skagit River Bridge violated industry standards and led to Scott's overhead bridge strike.

CP at 243, 247, 252, 267-68, 292-93.

Further, Mullen admits its failure to inform Scott to drive in the left lane across the Skagit River Bridge violated industry standards and led to Scott's crash. CP at 292-93, 309, 318 ("that is where we failed").

**3. Mullen and Scott Knew Its Self-Issued Permit Did Not Guarantee the Vertical Clearance of the Skagit River Bridge**

The permit Mullen self-issued contained the very information it inputted into the system, including Scott's incorrect height measurement and the route Mullen's permit department selected. CP at 533-34. Of course, because Mullen never checked the vertical clearance of structures on its route, it already definitively knew its self-issued permit did not guarantee there was sufficient vertical height clearance across the Skagit River Bridge.

Moreover, the permit itself reminded Mullen and Scott *six different times* that WSDOT did not guarantee the height clearance on Mullen's

chosen route, including the section of highway that included the Skagit River Bridge. CP at 533-34. Mullen disingenuously asserts on appeal that it was misled about the vertical clearance on its route because the permit states “Route OK.” Mullen’s Br. at 18-19. First, Mullen can only reach its desired conclusion by omitting the remaining words from the same sentence of the permit. The full text reads: “Route Ok - *WSDOT does not guarantee height clearances.*” CP at 533-34 (emphasis is placed on the portion Mullen intentionally omitted). Again, this sentence was repeated six different times on the permit. Second, the feigned “confusion” Mullen now attributes to this sentence did not exist at the time of Scott’s overhead bridge crash.

- Q. With respect to the permit, on page 2 of the permit it outlines the route. Is this something that you have commonly seen, where it says, for example, I-5 milepost X to milepost Y?
- A. Yes. That’s a standard. It gives your mile markers from highway to highway. Wherever you change to a different highway, its milepost location at that point.
- Q. On the second page of the permit it also states under “Restriction comment: Route okay - WSDOT does not guarantee height clearances.” What does that language mean?
- A. No state takes responsibility for the routing.
- Q. And did Mullen Trucking and Mr. Scott accept the permit with that understanding? There is no way to get a permit without that understanding.
- Q. And was the load transported on Interstate 5 southbound with that understanding?
- A. Yes.

CP at 255-56; *see also* CP at 254.

### C. The Bridge Crash

Because Scott's load exceeded 14 feet in height, he was required to hire a pilot car vehicle equipped with a "height measuring device (pole)." *See* WAC 468-38-100(1)(h). Scott hired defendant Detray.<sup>11</sup> Scott and Detray traveled from the border at Sumas to I-5, then continued southbound towards the Skagit River Bridge. CP at 334

Detray, who was slightly ahead of Scott, drove onto the Skagit River Bridge in the right lane. Unfortunately, Detray chose that specific moment to engage in a telephone conversation with her husband. Detray did not notice her height warning pole repeatedly slap the overhead bridge braces, and never warned Scott to stop or move into the left lane.<sup>12</sup> CP at 345-49, 352-54 (Detray dep. excerpts). Oblivious to the danger he presented to everyone else on or near the bridge, Scott drove his overheight load in the right lane as he entered the bridge; the lane he knew provided the least vertical clearance. CP at 525, (Scott knew the right lane provided the least vertical clearance), CP at 1140 (Scott always intended to drive in the right

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<sup>11</sup> Again, Detray chose not to seek review of the trial court order or join Mullen's present appeal.

<sup>12</sup> Washington State Patrol's Major Accident Investigation Team concluded that Scott followed so closely behind Detray, that even if she had warned him about the bridge height, Scott did not have enough time to "mitigate speed and avoid striking the structure." CP at 338.

lane – he never considered crossing the bridge in the left lane or straddling the bridge’s two southbound lanes).

Approximately 1/2 to 1 mile before the bridge, Scott saw Sidhu’s commercial tractor and trailer approach very quickly from behind in the adjacent left lane. Despite the “oversized load” banner on the back of Scott’s load, Sidhu made the decision to pass Scott as the two commercial rigs entered the restricted truss structure of the Skagit River Bridge. As he drove onto the bridge deck, Sidhu allowed his rig to drive onto the white dash line that separated the two southbound lanes. Sidhu’s maneuver “squeezed” Scott further to the right where less vertical clearance existed. CP at 207-09, 521.

Scott entered the bridge’s truss structure traveling 50-55 miles per hour.<sup>13</sup> Scott did not realize his load could not clear the overhead bridge braces until it was too late. He never slowed down. CP at 1168 ¶ 6. The result was both violent and catastrophic.

Q. What happened next?

A. Next there was a giant bang. And then in my world everything got violent. The truck went --

A. Everything got violent. Right. All I did from that moment on was hold on and get on the brake pedal. There was a huge bang. There was another bang after that. Things were thrown all over the place and shook around.

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<sup>13</sup> At 55 MPH Scott’s steel casing slammed into the bridge at a speed of more than 81 feet per second. At that speed Scott’s over legal height load traveled the length of a professional football field every 3.7 seconds. CP at 1168-69.

- ...
- Q. What happened to you or to the tractor or the trailer? Was there any kind of motion or rocking or lifting of tires, anything like that?
- A. Oh, yes. My truck was very violent. I'm sure the tires on my trailer and the truck came off the ground.

CP at 210-11.

The steel casing on Scott's trailer bent, twisted, and tore through the first eleven overhead bridge braces he encountered. CP at 1168; *see also* 1149-50.

As he drove onto the bridge Mr. Scott's load, repeatedly and violently struck the lateral overhead sway braces near the west truss in Span 8 and caused the collapse of this span. The initiating cause of the failure was the buckling of the top compression chord as a result of the impact of Mr. Scott's steel shed load.

CP at 1149 ¶ 13, *see also* CP at 910-11.

Unable to stop, three motorists plunged off the suddenly collapsed bridge span, down to the river below. CP at 86.

No party disputes that it cost WSDOT \$17,585,909.77 to clear the collapsed bridge span from the river, and build first a temporary, then a permanent replacement span. CP at 361.

#### **D. Procedural History**

WSDOT filed suit in Skagit County seeking to recover the damages caused by the May 23, 2013 overhead bridge crash. CP at 1. On July 20, 2016, WSDOT moved for partial summary judgment contending,

in part, that RCW 46.44.020 precludes a finding that WSDOT was at fault or otherwise financially responsible for the property damage caused by this crash. CP at 137. In its oral ruling the trial court stated:

In my mind this really comes down to the interpretation of RCW 46.44.020 and the term no liability and whether no liability means no liability or opens the door to separating contributory negligence from the term liability. . . . In this case I believe no liability is about as clear as you can get. I also would find that contributory negligence is simply apportioning of liability and that encompasses that argument. So for that reason I will find under the statute that the State is entitled to its partial summary judgment.

CP at 1305.

The court's October 6, 2016 order correctly ruled that "no 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 at 1223. Mullen moved for reconsideration. Following additional briefing and argument, the trial court issued a new order that further detailed the basis for its earlier ruling:

[WSDOT] may not be held liable or financially responsible for any portion of the damages that resulted from the ... bridge collapse. The Court further rules that the amount of WSDOT's recovery in this matter may not be reduced by WSDOT's negligence in causing the bridge collapse, if any; and defendant's collective liability to WSDOT, if any, may not be diminished by any finding of fault on WSDOT's part

... The Court interprets [RCW 46.44.020] to ensure that the State shall not be held liable for any of the proven damages in the event of a strike to a bridge over fourteen feet high regardless of whether its own fault contributed to the strike.

CP at 1318.

Mullen alone sought discretionary review, which this Court granted on June 26, 2017. CP at 1366. Although it did not join Mullen's motion for discretionary review, Motorways filed an opening brief after review was granted.

#### IV. STANDARD OF REVIEW

This appeal presents an issue of statutory construction. This question of law is reviewed de novo. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162 (2009); *see also Cummins v. Lewis Cty.*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006) (whether a tort duty exists also presents a question of law that is reviewed de novo).

#### V. ARGUMENT

##### A. **RCW 46.44.020 Clearly and Unambiguously Eliminates WSDOT's Tort Liability for This Overhead Bridge Crash**

RCW 46.44.020 protects bridge owners from tort liability for damages caused by an over legal height load that crashes into an overhead bridge brace that has at least 14 feet of vertical clearance. RCW 46.44.020 provides, in applicable part:

It is unlawful for any vehicle unladen or with load to exceed a height of fourteen feet above the level surface upon which

the vehicle stands ... The provisions of this section do not relieve the owner or operator of a vehicle or combination of vehicles from the exercise of due care in determining that sufficient vertical clearance is provided upon the public highways where the vehicle or combination of vehicles is being operated; *and no liability may attach to the state* or to any county, city, town, or other political subdivision *by reason of any damage or injury to persons or property by reason of the existence of any structure over or across any public highway where the vertical clearance above the roadway is fourteen feet or more*; or, where the vertical clearance is less than fourteen feet, if impaired clearance signs of a design approved by the state department of transportation are erected and maintained on the right side of any such public highway in accordance with the manual of uniform traffic control devices for streets and highways as adopted by the state department of transportation under chapter 47.36 RCW ....

(Emphasis added).

The limitations and conditions this statute places on the state's tort liability fall squarely within the Legislature's express constitutional authority, and are not subject to alteration in this legal action. Const., art. II, § 26. Furthermore, the statute's plain language compels the result reached by the trial court below. For these reasons alone, the Court should affirm the trial court order.

**1. The Legislature Is Empowered to Enact Statutes That Limit and Condition the State's Tort Liability**

Const., art. II, § 26 empowers the Legislature to direct when and under what conditions the state can be held liable in tort. That authority is absolute.

It is well settled that an action cannot be maintained against the state without its consent, and that the state, when it does so consent, can fix the place in which it may be sued, limit the causes for which the suit may be brought, and define the class of persons by whom it can be maintained. In other words, the state being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it may annex such condition as it deems wise, and no person has power to question or gainsay the conditions annexed.

*State v. Super. Ct.*, 86 Wash. at 688; *see also State ex rel. Thielicke v. Super. Ct. for Thurston Cty.*, 9 Wn.2d 309, 310, 114 P.2d 1001, (1941) (“A sovereign state cannot be sued without its consent. The immunity is absolute, and, when consent is given, it may be qualified or conditional and may specify a particular court in which the permitted actions may be maintained.”); *Wells Fargo Bank, N.A.*, 166 Wn. App. at 358 (“Because RCW 4.92.010 created the right to sue the State, it is not a fundamental right; thus, because the State gave the right to sue it, the State can prescribe limitations on that right.”).

Acting within this Constitutional authority, the Legislature determined that “no liability may attach to the state” for any damages caused by the type of overhead bridge crash that occurred here. RCW 46.44.020. That directive is conclusive, and Appellants cannot attack or modify that determination through this appeal. *Id.*; *see also Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 666, 771 P.2d 711 (1989) (“It is entirely

within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability.”<sup>14</sup>

**2. RCW 46.44.020's Plain Language Eliminates WSDOT's Tort Liability for This Overhead Bridge Crash**

RCW 46.44.020: (i) establishes a 14 foot height limit for loads, (ii) directs drivers to make sure their overheight loads will safely clear bridges on their selected route, and (iii) protects bridge owners from tort liability when a driver crashes into an overhead bridge brace that is at least 14 foot tall. As the trial court observed, it is difficult to imagine how the Legislature could have made RCW 46.44.020 clearer: “no liability may attach to the state” for “any damage or injury to persons or property” caused by an overheight load crashing into a bridge that has at least 14 feet of vertical clearance. *See Ottis Holwegner Trucking v. Moser*, 72 Wn. App. 114, 863 P.2d 609 (1993) (state has no tort liability where

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<sup>14</sup> Mullen also contends it is allowed to pursue a “defensive counterclaim” against the state. Mullen’s Br. at 35. Mullen is mistaken. First, again, the Legislature’s authority to place conditions on the state’s liability is absolute, and not subject to change in this appeal. Const., art. II, § 26. Second, the “defensive counterclaim” rule Mullen relies upon applies to the toll the statute of limitations and has nothing to do with the issues presented here. The cases Mullen cites stand for the unremarkable rule that, when a plaintiff timely brings a claim, the defendant can file a counterclaim that arises out of the same transaction or occurrence in the complaint, even if the statute of limitations for that defensive counterclaim has already lapsed. *See Bennet v. Dalton*, 120 Wn. App. 74, 82, 84 P.3d 265 (2004). That issue is not before this court.

vertical clearance or sign conditions of RCW 46.44.020 are satisfied).<sup>15</sup> Courts do not construe such clear, unambiguous statutory language; they apply the language as written. *Marohl*, 170 Wn.2d at 698 (“Where statutory language is unambiguous, we accept the Legislature means exactly what it says.”); *Kilian*, 147 Wn.2d at 20-21 (“If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.”). This plain statutory language protects WSDOT from tort liability for this specific overhead bridge crash.

This provision was particularly important for the state and every other entity that owned a bridge across a public highway in 1937. At that time contributory negligence served as a complete bar to recovery.<sup>16</sup> *See Hynek v. City of Seattle*, 7 Wn.2d 386, 395-98, 111 P.2d 247 (1941). Without the protection this statute provided, even a small percentage of liability attributed to the bridge owner would completely destroy its ability to recover for the bridge damage caused by a negligent truck driver. *Id.* RCW 46.44.020 prevents such a windfall to the truck driver. Instead, when

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<sup>15</sup> Mullen selectively cites a partial sentence from this case as authority for its assertion that a jury could find the State negligent in this case for failing to adhere advisory language in the Manual of Uniform Traffic Control devices (MUTCD). Mullen Br. at 21. Misleadingly excluded from Mullen’s quote is the *Ottis* Court’s qualification: “If RCW 46.44.020 did not exist...” *Ottis*, 72 Wn. App. at 122. Of course, that statute does exist. And, rejecting the same argument Mullen makes here, the Court 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 that crash. *Ottis* at 122-23.

<sup>16</sup> This bar to recovery remained until 1973 when comparative fault was enacted. Laws of 1973, ch. 128 § 1, 1st. Ex.Sess.

the overhead braces are at least 14 feet above the roadway, the negligent truck driver, not the bridge owner, is liable for the resulting damage. RCW 46.44.020, RCW 46.44.110.

Here, applying the clear language in RCW 46.44.020, the trial court correctly ruled no part of the property damage that resulted from Scott's bridge crash can be attributed to WSDOT. CP at 1318. That order should be affirmed.<sup>17</sup>

**a. RCW 46.44.020's Elimination of Tort Liability Applies to Actions Commenced by the State**

Ignoring the statute's plain language, Appellants argue that RCW 46.44.020's protection from tort liability applies only when the state is sued. Mullen's Br. at 33-34; Brief of Appellant Motorways Transport, LTD's (Motorways' Br.) at 8. But nothing in the statute limits the bridge owner's tort protection in that way, and the court cannot "add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it." *Kilian*, 147 Wn.2d at 20-21.

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<sup>17</sup> Mullen cites *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978), for the proposition that, irrespective of RCW 46.44.020, WSDOT can still be found responsible for a portion of the damages caused by an overhead bridge crash. Mullen's Br. at 15. Mullen's reliance on that authority is, at best, misleading. As the opinion in that case makes clear, RCW 46.44.020 was not raised at the trial court, and the Supreme Court refused to consider the statute's impact on the state's liability for the first time on appeal. *Id.* at 451. Obviously, that same concern is not present here.

Moreover, the statutory construction Appellants invite renders the phrase “no liability may attach to the state” superfluous and meaningless. The state already enjoyed sovereign immunity from suit in 1937, the year RCW 46.44.020 was enacted. *See Riddoch v. State*, 68 Wash. 329, 332-33, 123 P. 450 (1912) (“The doctrine that a sovereign state is not liable for the misfeasance, malfeasance, nonfeasance, or negligence of its officers, agents, or servants, unless it has voluntarily assumed such liability, is established by authority so cogent and uniform that isolated expressions which might be construed as tending to the contrary are negligible.”). Thus, according to Appellants’ strained reading, the Legislature enacted this provision to eliminate the state’s already nonexistent tort liability. Such indifference to clear statutory language is not permitted in Washington. *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (“[T]he drafters of legislation . . . are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.”).

Mullen next contends that the statute’s protections from tort liability were *really* directed at local governmental entities that did not enjoy sovereign immunity in 1937, and any reference to the state was surplusage. Mullen’s Br. at 34. Initially, Mullen’s argument disregards the clear, unambiguous protection from tort liability the statute affords the state when

it brings an action like this one. RCW 46.44.020 prevents defendant truck drivers from asserting, either through an affirmative defense in their answer or a counterclaim, that the state was contributorily negligent for an overhead bridge crash where the vertical clearance was at least 14 feet. For this reason alone, Mullen's argument should be rejected. *Marohl*, 170 Wn.2d at 698.

Further, even if the court could construe this statute's unambiguous language, which it cannot do, courts are prohibited from construing a statute in a way that renders any portion meaningless or superfluous. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (“[W]e may not delete language from an unambiguous statute: Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”).

The trial court was right. RCW 46.44.020 is “about as clear as it gets.” CP at 1305. “No liability may attach to the state” for the damages caused by Scott's overhead bridge strike. RCW 46.44.020. The Court should reject Appellants' invitation to disregard this statute's clear, unambiguous language, and affirm the trial court order.

**b. RCW 46.44.110 Supplements and Builds on the Protections in RCW 46.44.020, It Does Not Replace Them**

Underscoring the Legislature's desire to protect state property that is negligently damaged or destroyed by others, the Legislature enacted RCW 46.44.110. Enacted at the same time as RCW 46.44.020, RCW 46.44.110 is a broad recovery statute. Laws of 1937, ch. 189, § 57. *See* Laws of 1937, ch. 189, § 57. Unlike .020, which protects the state from liability for overhead bridge crashes like Scott's, RCW 46.44.110 makes vehicle operators liable for "*any* damage to any public highway, *bridge, elevated structure*, or other state property sustained as a result of any negligent operation thereof." (Emphasis added).

Ensuring that Washington taxpayers recover the full amount of damages for overhead bridge crashes like Scott's, RCW 46.44.110 directs that WSDOT's measure of damages "is prima facie the amount of damage caused thereby and is presumed to be the amount recoverable in any civil action thereof." This strong presumption, in conjunction with the protection against tort liability in RCW 46.44.020, establishes the Legislature's intent to protect Washington taxpayers from the consequences of overheight bridge crashes that damage "any structure over or across any public highway." RCW 46.44.020. In addition, the history of RCW 46.44.020

shows it was intended to protect the state from liability in cases like this one where the state is the plaintiff.

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. This clearly demonstrates the Legislature's ongoing commitment to protect the state and every other bridge owner from tort liability for this type of overhead bridge crash.

**c. The Recoupment Doctrine Does Not Trump or Limit the Legislature's Constitutional Authority**

Characterizing RCW 46.44.020 as a "sovereign immunity statute," Mullen argues it is subject to the "doctrine of recoupment" adopted by some federal and state jurisdictions. Mullen's Br. at 35. This doctrine, which has never been adopted in Washington, has no application here. Initially, RCW 46.44.020 is not a sovereign immunity statute. As Mullen concedes,

the statutory protection from tort liability in RCW 46.44.020 applies to all entities, public and private, that own bridges that cross public highways.<sup>18</sup> As this statute illustrates, the Legislature can extend protection from tort liability to other entities—not as an extension of sovereign immunity but as an exercise of its plenary law-making authority. *Sofie*, 112 Wn.2d at 666; RCW 46.44.020; Mullen Br. at 33. RCW 46.44.020 is an exercise of the Legislature’s general law-making power, not an attempted extension of sovereign immunity. Therefore, it is a tort liability protection statute, not a sovereign immunity statute.

Moreover, application of the recoupment doctrine would impermissibly negate the Legislature’s plenary constitutional authority to protect the state from tort liability for the damages caused by the isolated type of collision at issue in this case. Const., art. II, ¶ 26. As set forth above, the doctrine would also improperly render the Legislature’s clear directive that “no liability may attach to the state” for “any damage or injury to persons or property” meaningless by making the state financially

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<sup>18</sup> The final section of RCW 46.44.020 provides:

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.

(Emphasis added).

responsible for a portion of the property damages caused by Scott's overhead bridge crash. *Roggenkamp*, 153 Wn.2d 614, 624.

Finally, the Court should reject Mullen's invitation to use the recoupment doctrine to defeat constitutionally protected legislation power, plain statutory language, and public policy that has existed in Washington for 70 years. With the simultaneous enactment of RCW 46.44.020 and 46.44.110 in 1937, the Legislature announced to drivers who crash into overhead bridge structures that are at least 14 feet tall that they, not WSDOT and not Washington taxpayers, are financially responsible for the full amount of the resulting damage. While Appellants obviously disagree with this policy determination, the Legislature, not the courts, sets the public policy in Washington:

[T]he Legislature is the fundamental source for the definition of this state's public policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington. "This court should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that 'the drafting of a statute is a legislative, not a judicial, function.' "

*Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)); *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987) (the drafting of a statute is a legislative, not a judicial function).

**d. RCW 46.44.020 Controls This Appeal, Not RCW 4.22.070(1)**

Appellants conclude that RCW 4.22.070 (enacted in 1993) amended the state's protection from tort liability provided by RCW 46.44.020 (enacted in 1937). There is nothing in the legislative history that suggests that the Legislature intended for RCW 4.22.070 to repeal or amend any portion of RCW 46.44.020, and implied amendments are disfavored in the law. *Misterek v. Wash. Mineral Prod., Inc.*, 85 Wn.2d 166, 168, 531 P.2d 805 (1975) (repeal or amendment by implication is not favored); *Wash. State Welfare Rights Org. v. State*, 82 Wn.2d 437, 439, 511 P.2d 990, 991 (1973) (same).

Furthermore, RCW 46.44.020 controls the specific subject matter of this case whereas RCW 4.22.070 is a statute of general application. As the more specific statute, RCW 46.44.020 controls this case.

It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.

*Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Coun. (EFSEC)*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) (citing *State ex rel. Dep't. of Pub. Serv. v. N. Pac. Ry. Co.*, 200 Wn. 663, 668, 94 P.2d 502 (1939)).

For these reasons as well, the Court should affirm the trial court.

**B. WSDOT Has No Tort Liability for This Overhead Bridge Crash, and, Therefore, Fault Cannot Be Attributed or Apportioned To It Under RCW 4.22.070(1)**

As it did below, Appellants try to use RCW 4.22.070(1) to accomplish indirectly what they could not achieve by direct challenge to the plain language of RCW 46.44.020. Appellants concede that, to the extent it applies, RCW 46.44.020 protects WSDOT from tort liability and financial responsibility for Scott's bridge crash.<sup>19</sup> See Mullen Br. at 41. (RCW 46.44.020 insulates WSDOT from liability and financial responsibility. Nevertheless, Appellants argue that fault must be apportioned to WSDOT pursuant to RCW 4.22.070(1) even though it has no tort liability for the subject crash.<sup>20</sup> See also Motorways' Br. at 11. This precise argument was considered and rejected by the Supreme Court in *Smelser*, 188 Wn.2d at 656 (reconsideration denied Sept. 1, 2017).

Like the present case, *Smelser* concerned the intersection of a party with no tort liability and the system of proportionate liability under

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<sup>19</sup> "Liability" means "responsibility." See, e.g., *Wash. Pub. Ports Ass'n v. State, Dep't of Rev.*, 148 Wn.2d 637, 647-49, 62 P.3d 462 (2003) (applying Black's definition of "liable" as "[b]ound or obliged in law or equity, responsible; chargeable; answerable; . . ." and equating "liability" with "responsibility").

<sup>20</sup> Appellants assert that RCW 4.22.070(1) requires the factfinder to attribute fault to every "immune" entity. See Mullen's Br. at 44-45; Motorways' Br. at 12-13. Actually, RCW 4.22.070(1) states "The entities whose fault shall be determined include...and entities immune from liability to the claimant..." (Emphasis added). The statute does not address the situation faced here where the claimant is the "immune" party.

RCW 4.22.070(1). That case arose from a negligence action filed on behalf of two-year old Derrick Smelser who was run over while playing in the yard of his father, Ronald Smelser. Ronald's then girlfriend, Jeanne Paul, was parked in the Smelser driveway. As she went to drive away Derrick was pulled under her vehicle and dragged along the road, severely injuring the child. *Smelser*, 188 Wn.2d. at 650-51.

In addition to admitting the basic facts of the accident, Paul's answer asserted an affirmative defense that the child's father was either partially or entirely responsible for the injuries based on a theory of negligent supervision. Derrick moved for summary judgment on the ground that, as a matter of law, no fault could be apportioned to his father. The court denied summary judgment, and Derrick amended his complaint to add his father as a defendant. An order of default was entered against the father. *Id.*

At trial the jury found both Paul and the father negligent, and attributed 50 percent of the damages to each. Paul proposed a judgment against her for 50 percent of the damages. Derrick objected and proposed a judgment that held Paul and his father jointly and severally liable for the full amount of damages. Paul argued that no judgment could be entered against the father due to parental immunity, and joint and several liability is only permitted where there are two or more "defendants against whom judgment is entered." *Id.* at 651 (quoting RCW 4.22.070(1)(b)). The trial

court entered Paul's judgment, and the Court of Appeals affirmed. The Supreme Court granted review and reversed.

Critical to its analysis, the Supreme Court held that common law parental immunity closely follows the reasoning that supports and justifies "discretionary governmental decision-making under the doctrine of 'discretionary immunity.'"<sup>21</sup> *Smelser*, 188 Wn.2d at 656. The Court relied heavily on *Evangelical*, the seminal case on governmental discretionary immunity, to hold that, just as it is "not a tort for government to govern, it is not a tort for parents to parent. Bad parenting cannot be subject to 'judicial second-guessing....through the medium of a tort action.'"

The Court held because a parent owes no duty based on negligent supervision, "there is no actionable 'fault' to bring the parent within the scope of RCW 4.22.070 and RCW 4.22.015, regardless of whether the child or another person or entity seeks to blame the parent." *Smelser*, 188 Wn.2d

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<sup>21</sup> Explaining the public policy that drives discretionary immunity for high level government decision making, the Court explained:

Practically all jurisdictions that have broken varying amounts of ground in the abdication of governmental immunity from tort liability have judicially, if not statutorily, recognized that *the legislative, judicial, and purely executive processes of government*, including as well the essential quasi-legislative and quasi-judicial or discretionary acts and decisions within the framework of such processes, *cannot and should not, from the standpoint of public policy and the maintenance of the integrity of our system of government, be characterized as tortious however unwise, unpopular, mistaken, or neglectful a particular decision or act might be.*

*Smelser*, at 657 (quoting *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965)) (emphasis added).

at 657-58. Where no tort liability exists, “no legal duty can be breached and no fault attributed or apportioned under RCW 4.22.070(1).” *Id.* at 656-57.

Like the parental immunity in *Smelser*, for the past 70 years the Legislature has directed that “no liability may attach to the state” for “any damage or injury to persons or property” caused when an overheight load crashes into overhead bridge braces that have at least 14 feet of vertical clearance. RCW 46.44.020. In *Smelser*, the Supreme Court held that parental immunity is “similar” enough to discretionary immunity for high level governmental decisions to eliminate a parent from consideration as an “entity” capable of “fault.” *Id.* at 656. Here, there is an express legislative directive that protects the state from tort liability for this specific crash. Like the parent in *Smelser*, without tort liability for this incident, WSDOT is not an “entity” capable of fault there was no legal duty for the state to breach, and no fault can be attributed or apportioned to the state under RCW 4.22.070(1). *Smelser*, 188 Wn.2d at 656. That is precisely what the trial court ruled below. CP at 1318.

Appellants complain this will result in joint and several liability for all liable defendants for WSDOT’s proven damages. Mullen’s Br. at 9; Motorways’ Br. at 13. But that is precisely what the Legislature intended. When, like here, RCW 4.22.070 does not apply and “more than one person is liable to a claimant on an indivisible claim for the same injury, death or

harm, the liability of such persons shall be joint and several.”  
RCW 4.22.030.

For this reason as well, the trial court order should be affirmed.

**C. Motorways Is Jointly and Severally for the Bridge Crash Proximately Caused by Its Negligence**

Motorways asserts, without citation to authority, that because it did not physically hit the bridge, RCW 46.44.020 does not apply to it. Motorways’ Br. at 13. According to Motorways, this statute applies only to Mullen and Detray.<sup>22</sup> Motorways fundamentally misunderstands RCW 46.44.020, and its application to this case.

Motorways is not liable because of RCW 46.44.020. It is liable because the negligence of its driver proximately caused Scott to more squarely strike, and, ultimately, destroy the overhead braces of the Skagit River Bridge.<sup>23</sup> CP at 207-09, 521. Simply stated, Motorways is liable for WSDOT’s damages because its negligence proximately caused the bridge crash and resulting damages. RCW 46.44.110 (“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

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<sup>22</sup> Detray did not hit the bridge either, yet Motorways claims she is subject to RCW 46.44.020. Motorways does not explain the inconsistency of its argument.

<sup>23</sup> Much of Motorways’ argument appears to be directed at showing that it was not negligent. Motorways’ negligence was not the legal issue decided by the trial court order on appeal, was not the basis for Mullen’s motion for discretionary review, and is not before this Court.

operation thereof.”); *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 371, 197 P.3d 127 (2008) (there may be multiple proximate causes of an event, anyone of which may trigger liability); *Jonson v. Chicago, M., St. P. and P.R. Co.*, 24 Wn. App. 377, 380, 601 P.2d 951 (1979) (same); *see* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (6th ed.) (“There may be more than one proximate cause of an event”).

RCW 46.44.020 does not establish the liability of Motorways or any other defendant. Rather, it protects bridge owners, like WSDOT, from tort liability for this specific type of overhead bridge crash. Thus, WSDOT is not an entity capable of fault for this bridge crash, and no fault can be attributed to the state under RCW 4.22.070 and RCW 46.44.020; *see discussion of Smelser*, 188 Wn.2d at 657-58, *supra* at 33-37.

Finally, Motorways is jointly and severally liable for the full amount of WSDOT’s damages because more than one entity “is liable to a claimant on an individual claim for the same injury...” RCW 4.22.030.

For each of these reasons, the Court should reject Motorway’s argument.

## VI. CONCLUSION

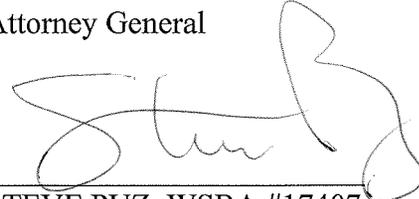
This case is controlled by the plain language of RCW 46.44.020 which protects WSDOT from tort liability for “any damage or injury to

persons or property” for this specific type of overhead bridge crash. For this reason alone, the Court should affirm the trial court order.

In addition, fault cannot be attributed or apportioned to WSDOT because, without tort liability, it could not breach any duty, and, thus, no fault can be apportioned to it under RCW 4.22.070(1). *Smelser*, 188 Wn.2d 657-58. Finally, as a matter of law, every defendant found liable for the May 23, 2013 overhead bridge crash is jointly and severally liable for the full amount of WSDOT’s damages. RCW 4.22.030. Because that is precisely what the trial court ruled, this Court should now affirm that order.

RESPECTFULLY SUBMITTED this 22nd day of December, 2017.

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**CERTIFICATE OF FILING AND SERVICE**

I certify under penalty of perjury in accordance with the laws of the state of Washington that on the undersigned date the original of the preceding document was filed in the Washington State Court of Appeals, Division I according to the Court's Protocols for Electronic filing.

That a copy of the preceding document was served on Respondent and his counsel via the Court's Electronic filing system at the following e-mail address:

Brian Del Gatto ([Brian.DelGatto@wilsonelser.com](mailto:Brian.DelGatto@wilsonelser.com))  
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DATED this 22nd day of December, 2017, at Olympia, WA.

  
DIANE NEWMAN, Legal Assistant

# **APPENDIX**

## **A**

**CONSTITUTION OF THE STATE OF WASHINGTON**

**ARTICLE II  
LEGISLATIVE DEPARTMENT**

**SECTION 26 SUITS AGAINST THE STATE.** The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.

# **APPENDIX**

## **B**

**RCW 4.22.070****Percentage of fault—Determination—Exception—Limitations.**

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[ 1993 c 496 § 1; 1986 c 305 § 401.]

**NOTES:**

**Effective date—1993 c 496:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [ 1993 c 496 § 3.]

**Application—1993 c 496:** "This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993." [ 1993 c 496 § 4.]

**Preamble—Report to legislature—Applicability—Severability—1986 c 305:** See notes following RCW **4.16.160**.

# **APPENDIX**

## **C**

**RCW 46.44.110****Liability for damage to highways, bridges, etc.**

Any person operating any vehicle or moving any object or conveyance upon any public highway in this state or upon any bridge or elevated structure that is a part of any such public highway is liable for all damages that the public highway, bridge, elevated structure, or other state property may sustain as a result of any illegal operation of the vehicle or the moving of any such object or conveyance or as a result of the operation or moving of any vehicle, object, or conveyance weighing in excess of the legal weight limits allowed by law. This section applies to any person operating any vehicle or moving any object or contrivance in any illegal or negligent manner or without a special permit as provided by law for vehicles, objects, or contrivances that are overweight, overwidth, overheight, or overlength. Any person operating any vehicle is liable for any damage to any public highway, bridge, elevated structure, or other state property sustained as the result of any negligent operation thereof. When the operator is not the owner of the vehicle, object, or contrivance but is operating or moving it with the express or implied permission of the owner, the owner and the operator are jointly and severally liable for any such damage. Such damage to any state highway, structure, or other state property may be recovered in a civil action instituted in the name of the state of Washington by the department of transportation or other affected state agency. Any measure of damage determined by the department of transportation to its highway, bridge, elevated structure, or other property under this section is prima facie the amount of damage caused thereby and is presumed to be the amount recoverable in any civil action therefor. The damages available under this section include the incident response costs, including traffic control, incurred by the department of transportation.

[ **2009 c 393 § 1**; **1984 c 7 § 59**; **1961 c 12 § 46.44.110**. Prior: **1937 c 189 § 57**; RRS 6360-57.]

# **APPENDIX**

## **D**

**RCW 4.22.030****Nature of liability.**

Except as otherwise provided in RCW **4.22.070**, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

[ **1986 c 305 § 402; 1981 c 27 § 11.**]

**NOTES:**

**Preamble—Report to legislature—Applicability—Severability—1986 c 305:** See notes following RCW **4.16.160**.

# **APPENDIX**

## **E**

**RCW 46.44.090****Special permits for oversize or overweight movements.**

The department of transportation, pursuant to its rules with respect to state highways, and local authorities, with respect to public highways under their jurisdiction, may, upon application in writing and good cause being shown therefor, issue a special permit in writing, or electronically, authorizing the applicant to operate or move a vehicle or combination of vehicles of a size, weight of vehicle, or load exceeding the maximum set forth in RCW **46.44.010**, **46.44.020**, **46.44.030**, **46.44.034**, and **46.44.041** upon any public highway under the jurisdiction of the authority granting such permit and for the maintenance of which such authority is responsible.

[ **2006 c 334 § 17**; **2001 c 262 § 1**; **1977 ex.s. c 151 § 30**; 1975-'76 2nd ex.s. c 64 § 13; **1961 c 12 § 46.44.090**. Prior: **1951 c 269 § 34**; prior: 1949 c 221 § 3, part; 1947 c 200 § 7, part; 1945 c 177 § 1, part; 1937 c 189 § 55, part; Rem. Supp. 1949 § 6360-55, part.]

**NOTES:**

**Effective date—2006 c 334:** See note following RCW **47.01.051**.

**Federal requirements—1977 ex.s. c 151:** See RCW **47.98.070**.

**Effective dates—Severability—1975-'76 2nd ex.s. c 64:** See notes following RCW **46.16A.455**.

# **APPENDIX**

## **F**

## WAC 468-38-050

### Special permits for extra-legal loads.

#### (1) **When can the department or its agents issue a permit for an extra-legal move?**

The following general conditions must be met:

(a) Application can be made in face-to-face over-the-counter transactions with the department or its agents and the applicant has shown there is good cause for the move. The requestor may self-issue a special motor vehicle permit for their vehicles when applicable. Application may be made in written or electronic format to the department's agents.

(b) The applicant has shown the configuration is eligible for a permit.

(c) The vehicle, vehicle combination and/or load has been thoroughly described and identified.

(d) The points of origin and destination and the route of travel have been stated and approved.

(e) The move has been determined to be consistent with public safety. The permit applicant has indicated that appropriate safety precautions will be taken as required by state law, administrative rule or specific permit instruction.

(2) **How must a vehicle(s), including load, be configured to be eligible for a special permit to move on the state highways?** A vehicle(s), including load, that can be readily or reasonably dismantled must be reduced to a minimum practical size and weight. Portions of a load may be detached and reloaded on the same hauling unit when the separate pieces are necessary to the operation of the machine or equipment which is being hauled: Provided, that the arrangement does not exceed special permit limits. Detached and reloaded pieces must be identified on the special permit. Permit requests for specific divisible loads are authorized under WAC [468-38-071](#).

(3) **Are there any exceptions to dismantling the configuration?** Yes. A vehicle, vehicle combination or load may stay assembled if by separating it into smaller loads or vehicles the intended use of the vehicle or load would be compromised (i.e., removing the boom from a self-propelled crane), the value of the load or vehicle would be destroyed (i.e., removing protective packaging), and/or it would require more than eight work hours to dismantle using appropriate equipment. The permit applicant has the burden of proof in seeking an exception. Configurations that fall under the exception must not exceed special permit limits.

(4) **What does the applicant affirm when he/she signs the permit?** The permit applicant affirms:

(a) The vehicle or vehicle combination and operator(s) are properly licensed to operate and carry the load described in accordance with appropriate Washington law and administrative code.

(b) They will comply with all applicable requirements stipulated in the permit to move the extra-legal configuration.

(c) The move (vehicle and operator) is covered by a minimum of seven hundred and fifty thousand dollars liability insurance: Provided, that a noncommercial move (vehicle and operator) shall have at minimum three hundred thousand dollars liability insurance for the stated purpose.

(d) Except as provided in RCW [46.44.140](#), the official department special permit signed by the permittee, or a copy of the signed permit, must be carried on the power unit at all times

while the permit is in effect. Moves made by designated emergency vehicles, receiving departmental permit authorization telephonically, are exempt from this requirement.

(e) A copy of a signed permit as noted in (d) of this subsection includes the electronic display of the signed permit on an electronic device with the following requirements:

(i) When a permittee chooses to display the permit electronically, the permittee accepts all liability for any damage or loss of display to the device during transport, inspection by enforcement personnel, or other times that the permit is to be displayed.

(ii) The displayed permit must be verifiable by law enforcement through the Washington state permitting system known as the electronic system network overweight oversize permit information (eSNOOPI) system.

(iii) The permittee agrees to authorize law enforcement to have physical control of the device for inspection of the permit when requested.

(iv) Permits containing routing information require the electronic device to have a screen display of no less than three and a half inches by five inches. Other permit types may have smaller screen displays.

(v) Display of the permit must be legible or the electronic device must have the ability to zoom the image so it is legible.

(vi) The permittee must comply with the requirements for electronic display of a permit or must have a paper copy of the permit carried on the power unit at all times while transporting the permitted load.

**(5) What specific responsibility and liability does the state assign to the permit applicant through the special permit?** Permits are granted with the specific understanding that the permit applicant shall be responsible and liable for accidents, damage or injury to any person or property resulting from the operation of the vehicle covered by the permit upon public highways of the state. The permit applicant shall hold blameless and harmless and shall indemnify the state of Washington, department of transportation, its officers, agents, and employees against any and all claims, demands, loss, injury, damage, actions and costs of actions whatsoever, that any of them may sustain by reason of unlawful acts, conduct or operations of the permit applicant in connection with the operations covered by the permit.

**(6) When and where can a special permit be acquired?** The following options are available:

(a) Special permits may be purchased at any authorized department of transportation office or agent Monday through Friday during normal business hours.

(b) Companies that would like to self-issue permits for their own vehicles may apply to the department for this privilege. Department representatives will work with the company to determine if self-issuing is appropriate.

(c) The department will maintain and publish a list of authorized permit offices and agents.

[Statutory Authority: RCW **46.44.090**. WSR 16-11-011, § 468-38-050, filed 5/5/16, effective 6/5/16. Statutory Authority: RCW **46.44.090**, **46.44.0915**, and **46.44.101**. WSR 11-17-130, § 468-38-050, filed 8/24/11, effective 9/24/11. Statutory Authority: RCW **46.44.090**. WSR 05-04-053, § 468-38-050, filed 1/28/05, effective 2/28/05. Statutory Authority: RCW **46.44.090** and **47.01.071**. WSR 91-10-023 (Order 71), § 468-38-050, filed 4/23/91, effective 5/24/91. Statutory Authority: RCW **46.44.090**. WSR 89-23-110 (Order 68), § 468-38-050, filed 11/22/89, effective 12/23/89; WSR 82-18-010 (Order 31, Resolution No. 156), § 468-38-050, filed 8/20/82. Formerly WAC 468-38-150. Statutory Authority: 1977 ex.s. c 151. WSR 79-01-033 (DOT Order 10 and Comm. Order 1, Resolution No. 13), § 468-38-050, filed 12/20/78. Formerly WAC 252-24-050.]

# **APPENDIX**

## **G**

## WAC 468-38-100

### Pilot/escort vehicle and operator requirements.

(1) A certified pilot/escort operator, acting as a warning necessary to provide safety to the traveling public, must accompany an extra-legal load when:

(a) The vehicle(s) or load exceeds eleven feet in width: Two pilot/escort vehicles are required on two lane highways, one in front and one at the rear.

(b) The vehicle(s) or load exceeds fourteen feet in width: One escort vehicle is required at the rear on multilane highways.

(c) The vehicle(s) or load exceeds twenty feet in width: Two pilot/escort vehicles are required on multilane undivided highways, one in front and one at the rear.

(d) The trailer length, including load, of a tractor/trailer combination exceeds one hundred five feet, or when the rear overhang of a load measured from the center of the rear axle exceeds one-third of the trailer length including load of a tractor/trailer or truck/trailer combination: One pilot/escort vehicle is required at the rear on two-lane highways.

(e) The trailer length, including load, of a tractor/trailer combination exceeds one hundred twenty-five feet: One pilot/escort vehicle is required at the rear on multilane highways.

(f) The front overhang of a load measured from the center of the front steer axle exceeds twenty feet: One pilot/escort vehicle is required at the front on all two-lane highways.

(g) The rear overhang of a load on a single unit vehicle, measured from the center of the rear axle, exceeds twenty feet: One pilot/escort vehicle is required at the rear on two-lane highways.

(h) The height of the vehicle(s) or load exceeds fourteen feet six inches: One pilot/escort vehicle with height measuring device (pole) is required at the front of the movement on all highways.

(i) The vehicle(s) or load exceeds twelve feet in width on a multilane highway and has a height that requires a front pilot/escort vehicle: One rear pilot/escort vehicle is required.

(j) The operator, using rearview mirrors, cannot see two hundred feet to the rear of the vehicle or vehicle combination when measured from either side of the edge of the load or last vehicle in the combination, whichever is larger: One pilot/escort vehicle is required at the rear on all highways.

(k) In the opinion of the department, a pilot/escort vehicle(s) is necessary to protect the traveling public. Assignments of this nature must be authorized through the department's administrator for commercial vehicle services.

(2) **Can a pilot/escort vehicle be temporarily reassigned a position relative to the load during a move?** When road conditions dictate that the use of the pilot/escort vehicle in another position would be more effective, the pilot/escort vehicle may be temporarily reassigned. For example: A pilot/escort vehicle is assigned to the rear of an overlength load on a two-lane highway. The load is about to enter a highway segment that has curves significant enough to cause the vehicle and/or load to encroach on the oncoming lane of traffic. The pilot/escort vehicle may be temporarily reassigned to the front to warn oncoming traffic.

(3) **Can a certified flag person ever substitute for a pilot/escort vehicle?** In subsection (1)(d) and (e) of this section, the special permit may authorize a riding flag person, in lieu of a pilot/escort vehicle, to provide adequate traffic control for the configuration. The flag person is

not required to ride in the pilot/escort vehicle but may ride in the transport vehicle with transporter's authorization.

**(4) Must an operator of a pilot/escort vehicle be certified to operate in the state of Washington?** Yes. To help assure compliance with the rules of this chapter, consistent basic operating procedures are needed for pilot/escort vehicle operators to properly interact with the escorted vehicle and the surrounding traffic. Operators of pilot/escort vehicles, therefore, must be certified as having received department-approved base level training as a pilot/escort vehicle operator and must comply with the following:

(a) A pilot/escort vehicle operator with a Washington state driver's license must have a valid Washington state pilot/escort vehicle operator certificate/card which must be on the operator's person while performing escort vehicle operator duties.

(b) A pilot/escort vehicle operator with a driver's license from a jurisdiction other than the state of Washington may acquire a Washington state escort vehicle operator certificate/card, or operate with a certification from another jurisdiction approved by the department, subject to the periodic review of the issuing jurisdiction's certification program. A current list of approved programs will be maintained by the department's commercial vehicle services office.

(c) A pilot/escort vehicle operator certification does not exempt a pilot/escort operator from complying with all state laws and requirements of the state in which she/he is traveling.

(d) Every applicant for a state of Washington pilot/escort operator certificate shall attend an eight-hour classroom training course offered and presented by a business, organization, government entity, or individual approved by the department. At the conclusion of the course, the applicant will be eligible to receive the certification card after successfully completing a written test with at least an eighty percent passing score. State of Washington pilot/escort vehicle operator certification cards must be renewed every three years.

**(5) What are the pretrip procedures that must be followed by the operator of a pilot/escort vehicle?**

(a) Discuss with the operator of the extra-legal vehicle the aspects of the move including, but not limited to, the vehicle configuration, the route, and the responsibilities that will be assigned or shared.

(b) Prerun the route, if necessary, to verify acceptable clearances.

(c) Review the special permit conditions with the operator of the extra-legal vehicle. When the permit is a single trip extra-legal permit, displaying routing information, the pilot/escort operator(s) must have a copy of the permit, including all special conditions and attachments.

(d) Determine proper position of required pilot/escort vehicles and set procedures to be used among the operators.

(e) Check mandatory equipment, provided in subsections (9) and (10) of this section. Each operator is responsible for his or her own vehicle.

(f) Check two-way communication system to ensure clear communications between the pilot/escort vehicle(s) and the transport vehicle and predetermine the channel to be used.

(g) Acknowledge that nonemergency electronic communication is prohibited except communication between pilot/escort operator(s) and the transport vehicle during movement.

(h) Adjust mirrors, mount signs and turn on lights, provided in subsections (8)(e) and (9)(a) and (b) of this section.

**(6) What are the responsibilities of the operator of a pilot/escort vehicle when assigned to be in front of the extra-legal movement?** The operator shall:

(a) Provide general warning to oncoming traffic of the presence of the permitted vehicle by use of signs and lights, provided in subsection (9) of this section;

(b) Notify the operator of the extra-legal vehicle, and the operator(s) of any trailing pilot/escort vehicle(s), about any condition that could affect either the safe movement of the extra-legal vehicle or the safety of the traveling public, in sufficient time for the operator of the extra-legal vehicle to take corrective action. Conditions requiring communication include, but are not limited to, road-surface hazards; overhead clearances; obstructions; traffic congestion; pedestrians; etc.;

(c) Provide guidance to the extra-legal vehicle through lane changes, egress from one designated route and access to the next designated route on the approved route itinerary, and around any obstacle;

(d) In the event of traffic buildup behind the extra-legal vehicle, locate a safe place adjacent to the highway where the extra-legal vehicle can make a temporary stop. Notify the operator of the extra-legal vehicle, and the operator(s) of any trailing pilot/escort vehicle(s), in sufficient time for the extra-legal vehicle to move out of the traffic flow into the safe place, allowing the following traffic to pass safely;

(e) In accordance with training, be far enough in front of the extra-legal vehicle to allow time for the extra-legal vehicle to stop or take corrective action as necessary when notified by the front pilot/escort operator. Be far enough in front of the extra-legal vehicle to signal oncoming traffic to stop in a safe and timely manner before entering any narrow structure or otherwise restricted highway where an extra-legal vehicle has entered and must clear before oncoming traffic can enter;

(f) In accordance with training, do not be any farther ahead of the extra-legal vehicle than is reasonably prudent, considering speed of the extra-legal vehicle, other traffic, and highway conditions. Do not exceed a distance between pilot/escort vehicle and extra-legal vehicle that would interfere with maintaining clear two-way radio communication; and

(g) Assist in guidance to a safe place, and/or traffic control, in instances when the extra-legal vehicle becomes disabled.

**(7) What are the responsibilities of the operator of a pilot/escort vehicle when assigned to be at the rear of the extra-legal movement?** The operator shall:

(a) Provide general warning to traffic approaching from the rear of the extra-legal vehicle ahead by use of signs and lights, provided in subsection (9) of this section;

(b) Notify the operator of the extra-legal vehicle, and the operator(s) of any leading pilot/escort vehicle(s), about any condition that could affect either the safe movement of the extra-legal vehicle or the safety of the traveling public, in sufficient time for the operator of the extra-legal vehicle to take corrective action. Conditions requiring communication include, but are not limited to, objects coming loose from the extra-legal vehicle; flat tires on the extra-legal vehicle; rapidly approaching traffic or vehicles attempting to pass the extra-legal vehicle; etc.;

(c) Notify the operator of the extra-legal vehicle, and/or the operator of the lead pilot/escort vehicle, about traffic buildup or other delays to normal traffic flow resulting from the extra-legal move;

(d) In the event of traffic buildup behind the extra-legal vehicle, notify the operator of the extra-legal vehicle, and the operator(s) of any pilot/escort vehicle(s) in the lead, and assist the extra-legal vehicle in its move out of the traffic flow into the safe place, allowing the following traffic to pass safely;

(e) In accordance with training, be far enough behind the extra-legal vehicle to provide visual warning to approaching traffic to slow or stop in a timely manner, depending upon the action to be taken by the extra-legal vehicle, or the condition of the highway segment (i.e., limited sight distance, mountainous terrain, narrow corridor, etc.);

(f) Do not follow more closely than is reasonably prudent, considering the speed of the extra-legal vehicle, other traffic, and highway conditions. Do not exceed one-half mile distance between the pilot/escort vehicle and the extra-legal vehicle in order to maintain radio communication, except when necessary to safely travel a long narrow section of highway; and

(g) Pilot/escort operators shall not perform tillerman duties while performing escorting duties. For this section, tillerman refers to an individual that operates the steering of the trailer or trailing unit of the transport vehicle; and

(h) Assist in guidance to a safe place, and/or traffic control, in instances when the extra-legal vehicle becomes disabled.

(8) **What kind of vehicle can be used as a pilot/escort vehicle?** In addition to being in safe and reliable operating condition, the vehicle shall:

(a) Be either a single unit passenger car, including passenger van, or a two-axle truck, including a nonplacarded service truck;

(b) Not exceed a maximum gross vehicle weight or gross weight rating of sixteen thousand pounds;

(c) Have a body width of at least sixty inches but no greater than one hundred two inches;

(d) Not exceed the legal limits of size and weight, as defined in chapter **46.44** RCW; and

(e) Be equipped with outside rear-view mirrors, located on each side of the vehicle.

(f) Not tow a trailer while escorting.

(9) **In addition to equipment required by traffic law, what additional equipment is required on the vehicle when operating as a pilot/escort, and when is it used?**

(a) A minimum of one flashing or rotating amber (yellow) light or strobe, positioned above the roof line, visible from a minimum of five hundred feet to approaching traffic from the front or rear of the vehicle and visible a full three hundred sixty degrees around the pilot/escort vehicle. Light bars, with appropriately colored lights, meeting the visibility minimums are acceptable. Lights must only be activated while escorting an extra-legal vehicle, or when used as traffic warning devices while stopped at the side of the road taking height measurements during the prerunning of a planned route. The vehicle's headlights must also be activated while escorting an extra-legal vehicle.

(b) A sign reading "OVERSIZE LOAD," measuring at least five feet wide, ten inches high with black lettering at least eight inches high in a one-inch brush stroke on yellow background. The sign shall be mounted over the roof of the vehicle and shall be displayed only while performing as the pilot/escort of an extra-legal load. When the vehicle is not performing as a pilot/escort, the sign must be removed, retracted or otherwise covered.

(c) A two-way radio communications system capable of providing reliable two-way voice communications, at all times, between the operators of the pilot/escort vehicle(s) and the extra-legal vehicle(s).

(d) Nonemergency electronic communications is prohibited except communication between the pilot/escort vehicle(s) and the transport vehicle during movement.

(10) **What additional or specialized equipment must be carried in a pilot/escort vehicle?**

(a) A standard eighteen-inch STOP AND SLOW paddle sign.

(b) Three bi-directional emergency reflective triangles.

(c) A minimum of one five-pound B, C fire extinguisher, or equivalent.

(d) A high visibility safety garment designed according to Class 2 specifications in ANSI/ISEA 107-1999, *American National Standard for High Visibility Safety Apparel*, to be

worn when performing pilot/escort duties outside of the vehicle. The acceptable high visibility colors are fluorescent yellow-green, fluorescent orange-red or fluorescent red.

(e) A highly visible colored hard hat, also to be worn when performing pilot/escort duties outside of the vehicle, per WAC **296-155-305**.

(f) A height-measuring device (pole), which is nonconductive and nondestructive to overhead clearances, when required by the terms of the special permit. The upper portion of a height pole shall be constructed of flexible material to prevent damage to wires, lights, and other overhead objects or structures. The pole may be carried outside of the vehicle when not in use. See also subsection (14) of this section.

(g) First-aid supplies as prescribed in WAC **296-800-15020**.

(h) A flashlight in good working order with red nose cone. Additional batteries should also be on hand.

(11) **Can the pilot/escort vehicle carry passengers?** A pilot/escort vehicle may not contain passengers, human or animal, except that:

(a) A certified individual in training status or necessary flag person may be in the vehicle with the approval of the pilot/escort operator.

(b) A service animal may travel in the pilot/escort vehicle but must be located somewhere other than front seat of vehicle.

(12) **Can the pilot/escort vehicle carry any other items, equipment, or load?** Yes, as long as the items, equipment or load have been properly secured; provided that, no equipment or load may be carried in or on the pilot/escort vehicle that:

(a) Exceeds the height, length, or width of the pilot/escort vehicle, or overhangs the vehicle, or otherwise impairs its immediate recognition as a pilot/escort vehicle by the traveling public;

(b) Obstructs the view of the flashing or rotating amber lights, or "OVERSIZE LOAD" sign on the vehicle;

(c) Causes safety risks; or

(d) Otherwise impairs the performance by the operator or the pilot/escort vehicle of the duties required by these rules.

(13) **Can a pilot/escort vehicle escort more than one extra-legal load at the same time?** No, unless the department determines there are special circumstances that have resulted in an express authorization on the special permit.

(14) **When and how must a pilot/escort vehicle use a height-measuring device?** The height-measuring device (pole) must be used when escorting an extra-legal load in excess of fourteen feet six inches high, unless an alternative authorization has been granted by the department and stated on the special permit. The height pole must extend between three and six inches above the maximum height of the extra-legal vehicle, or load, to compensate for the affect of wind and motion. The height measuring device (pole) shall be mounted on the front of the lead pilot/escort vehicle. When not in the act of escorting an extra-legal height move, or prerunning a route to determine height acceptance, the height pole shall be removed, tied down or otherwise reduced to legal height.

(15) **Do the rules change when a uniformed off-duty law enforcement officer, using official police car or motorcycle, performs the escorting function?** While the spirit of the rules remains the same, specific rules may be modified to fit the situation.

[Statutory Authority: RCW **46.44.090** and **46.44.093**. WSR 17-11-001, § 468-38-100, filed 5/3/17, effective 6/3/17; WSR 16-11-012, § 468-38-100, filed 5/5/16, effective 6/5/16. Statutory Authority: RCW **46.44.090**. WSR 06-07-025, § 468-38-100, filed 3/7/06, effective 4/7/06; WSR

05-04-053, § 468-38-100, filed 1/28/05, effective 2/28/05; WSR 89-23-110 (Order 68), § 468-38-100, filed 11/22/89, effective 12/23/89; WSR 82-18-010 (Order 31, Resolution No. 156), § 468-38-100, filed 8/20/82. Formerly WAC 468-38-180. Statutory Authority: 1977 ex.s. c 151. WSR 79-01-033 (DOT Order 10 and Comm. Order 1, Resolution No. 13), § 468-38-100, filed 12/20/78. Formerly WAC 252-24-100.]

# **APPENDIX**

## **H**

**RCW 4.92.090**

**Tortious conduct of state—Liability for damages.**

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

[ 1963 c 159 § 2; 1961 c 136 § 1.]

# **APPENDIX**

## **I**

**6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (6th ed.)**

Washington Practice Series TM | December 2017 Update  
 Washington Pattern Jury Instructions--Civil  
 Washington State Supreme Court Committee on Jury Instructions

Part II. Negligence—Risk—Misconduct—Proximate Cause  
 Chapter 15. Proximate Cause

**WPI 15.01 Proximate Cause—Definition**

The term “proximate cause” means a cause which in a direct sequence [unbroken by any superseding cause,] produces the *[injury]* *[event]* complained of and without which such *[injury]* *[event]* would not have happened.

[There may be more than one proximate cause of an *[injury]* *[event]*.]

**NOTE ON USE**

This instruction is the standard definition of proximate cause. For alternative wording, see [WPI 15.01.01](#), Proximate Cause—Definition—Alternative.

When the substantial factor test of proximate causation applies, use [WPI 15.02](#), Proximate Cause—Substantial Factor Test, instead of [WPI 15.01](#) or [WPI 15.01.01](#).

Use bracketed material as applicable. Use the bracketed phrase about a superseding cause when it is supported by the evidence. If this bracketed phrase is used, then [WPI 15.05](#), Negligence—Superseding Cause, must also be used.

The last sentence in brackets should be given only when there is evidence of a concurring cause. If the last sentence is used, it may also be necessary to give [WPI 15.04](#), Negligence of Defendant Concurring with Other Causes.

**COMMENT**

**Elements of proximate cause.** Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. See [Christen v. Lee](#), 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); [Hartley v. State](#), 103 Wn.2d 768, 698 P.2d 77 (1985), and cases cited therein. Cause in fact refers to the “but for” consequences of an act — the physical connection between an act and an injury. [WPI 15.01](#) describes proximate cause in this factual sense. [Hartley v. State](#), 103 Wn.2d at 778. The question of proximate cause in this context is ordinarily for the jury unless the facts are undisputed and do not admit reasonable differences of opinion, in which case cause in fact is a question of law for the court. [Baughn v. Honda Motor Co., Ltd.](#), 107 Wn.2d 127, 142, 727 P.2d 655 (1986); [Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections](#), 122 Wn.App. 227, 95 P.3d 764 (2004) (estate could not show that, but for negligent supervision, parolee would have been in jail and unable to kill plaintiff decedent); [Estate of Jones v. State](#), 107 Wn.App. 510, 15 P.3d 180 (2000) (jury question whether had juvenile offender’s score been non-negligently calculated, he would have been in prison and unable to murder plaintiff decedent).

Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d at 478–79. This inquiry depends on “mixed considerations of logic, common sense, justice, policy, and precedent.” See *Hartley v. State*, 103 Wn.2d at 779; *Tyner v. State Dept. of Social and Health Services, Child Protective Services*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The existence of a duty does not necessarily imply legal causation. Although duty and legal causation are intertwined issues (see *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992)), “[l]egal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise. Thus, legal causation should not be assumed to exist every time a duty of care has been established.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d at 479–80.

There have been many attempts to define “proximate cause.” In Washington it has been defined both as a cause which is “natural and proximate,” *Lewis v. Scott*, 54 Wn.2d 851, 341 P.2d 488 (1959), and as a cause which in a “natural and continuous sequence” produces the event, *Cook v. Seidenverg*, 36 Wn.2d 256, 217 P.2d 799 (1950). Some jurisdictions, in an effort to simplify the concept of proximate cause for jurors, have substituted the term “legal cause.” See, e.g., Connecticut's civil jury instruction 3.1-1 and *Restatement (Second) of Torts § 9* (1965). However, the “direct sequence” and “but for” definition adopted in this instruction is firmly entrenched in Washington law. See *Alger v. City of Mukilteo*, 107 Wn.2d 541, 730 P.2d 1333 (1987) (“direct sequence”); *Tyner v. State Dept. of Social and Health Services, Child Protective Services*, 141 Wn.2d at 82 (“but for”).

**Superseding cause.** The pattern instruction includes the bracketed phrase “unbroken by any superseding cause.” Prior to 2009, this phrase was worded as “unbroken by any new independent cause.” The committee rewrote this phrase so that the instruction better integrates with the wording of *WPI 15.05*. No change in meaning is intended — the phrase “unbroken by any new independent cause” is an expression of the doctrine of superseding cause. See *Humes v. Fritz Companies, Inc.*, 125 Wn.App. 477, 499, 105 P.3d 1000 (2005). The bracketed phrase should be used only when there is evidence of the doctrine's applicability. See *Humes v. Fritz Companies, Inc.*, 125 Wn.App. at 499 n.5.

**Negligence concurring with other causes.** An instruction combining parts of *WPI15.01* and *WPI15.04* 15.04, Negligence of Defendant Concurring with Other Causes, was approved in *Stevens v. Gordon*, 118 Wn.App. 43, 74 P.3d 653 (2003) (*WPI 15.04* was previously numbered as *WPI 12.04*).

**Substantial factor test.** Section 431 of the *Restatement (Second) of Torts* sets forth the substantial factor test of proximate cause, under which a defendant's conduct is a proximate cause of harm to another if that conduct is a substantial factor in bringing about the harm. In *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954), the Supreme Court rejected this approach in favor of the “but for”

definition contained in [WPI 15.01](#) for general negligence actions. Courts continue to reject the substantial factor test except in limited circumstances. [Fabrique v. Choice Hotels Intern., Inc.](#), 144 Wn.App. 675, 183 P.3d 1118 (2008) (salmonella exposure); [Gausvik v. Abbey](#), 126 Wn.App. 868, 107 P.3d 98 (2005) (negligent investigation of child abuse). For a more detailed discussion of the substantial factor test and the types of cases to which it applies, see [WPI 15.02](#), Proximate Cause—Substantial Factor Test.

**Multiple proximate causes.** Using [WPI 15.01](#) without the last paragraph is error if there is evidence of more than one proximate cause. [Jonson v. Chicago, M., St. P. and P. R. Co.](#), 24 Wn.App. 377, 601 P.2d 951 (1979).

An instruction setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation. [Goucher v. J.R. Simplot Co.](#), 104 Wn.2d 662, 709 P.2d 774 (1985); [Brashear v. Puget Sound Power & Light Co., Inc.](#), 100 Wn.2d 204, 667 P.2d 78 (1983). Failure to give [WPI 15.04](#), Negligence of Defendant Concurring with Other Causes, may be reversible error even though [WPI 15.01](#) is given including the bracketed last paragraph. [WPI 15.01](#) does not inform the jury that the act of another person does not excuse the defendant's negligence unless the other person's negligence was the sole proximate cause of the plaintiff's injuries. [Brashear v. Puget Sound Power and Light Co., Inc.](#), supra (failure to give [WPI 15.04](#) was reversible error); [Jones v. Robert E. Bayley Const. Co., Inc.](#), 36 Wn.App. 357, 674 P.2d 679 (1984) (failure to give [WPI 15.04](#) was error, but harmless given the jury's special verdict findings), overruled on other grounds in [Brown v. Prime Const. Co., Inc.](#), 102 Wn.2d 235, 684 P.2d 73 (1984). In [Torno v. Hayek](#), 133 Wn.App. 244, 135 P.3d 536 (2006), it was not error to refuse [WPI 15.04](#) where both defendants admitted liability (successive car accidents) but disagreed on which defendant caused particular medical expenses.

**Foreseeability.** It is error to add to [WPI 15.01](#) the words “even if such injury is unusual or unexpected.” [Blodgett v. Olympic Sav. and Loan Assoc'n](#), 32 Wn.App. 116, 646 P.2d 139 (1982). It is improper to inject the issues of foreseeability into the definition of proximate cause. [State v. Giedd](#), 43 Wn.App. 787, 719 P.2d 946 (1986); [Blodgett v. Olympic Sav. and Loan Association](#), supra.

**Whether to supplement the pattern instructions on proximate cause.**

The preferred practice is to use the proximate cause language from the applicable pattern instruction or instructions. See [Stevens v. Gordon](#), 118 Wn.App. at 53; [Humes v. Fritz Companies, Inc.](#), 125 Wn.App. at 498. Washington case law has occasionally approved instructions that supplement [WPI 15.01](#) with more specific language as to what does, or does not, constitute proximate cause. See, e.g., [Vanderhoff v. Fitzgerald](#), 72 Wn.2d 103, 107–08, 431 P.2d 969 (1967); [Young v. Group Health Co-op. of Puget Sound](#), 85 Wn.2d 332, 340, 534 P.2d 1349 (1975); [Richards v. Overlake Hosp. Medical Center](#), 59 Wn.App. 266, 277–78, 796 P.2d 737 (1990); [Safeway, Inc. v. Martin](#), 76 Wn.App. 329, 885 P.2d 842 (1994).

Practitioners should use care in deciding whether to expand upon the standards in the pattern instructions. Such modifications are not always necessary, and they need to be written neutrally so as to avoid unduly emphasizing one party's theory of the case. See [Ford v. Chaplin](#), 61 Wn.App. 896, 899–901, 812 P.2d 532 (1991).

[Current as of June 2009.]

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