

FILED
SUPREME COURT
STATE OF WASHINGTON
5/6/2019 3:08 PM
BY SUSAN L. CARLSON
CLERK

No. 96538-2

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioners/Appellants

Appeal from the Court of Appeals, Division I
of the State of Washington
Cause No. 76310-5-I

**SUPPLEMENTAL BRIEF OF PETITIONER MOTORWAYS
TRANSPORT, LTD**

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I. INTRODUCTION

The issue before this Court is whether RCW 46.44.020 precludes allocation of the State's fault under RCW 4.22.070. Based on the rules of statutory construction and Washington's longstanding distinction between the legal concepts of fault and liability, the answer is: "No."

RCW 46.44.020 and RCW 4.22.070 do not conflict and are easily harmonized. RCW 4.22.070 provides that an immune entity's fault is allocated but not recoverable as damages (i.e. the immune entity is not liable). RCW 46.44.020 provides that no *liability* may attach to the State for damage caused by the existence of certain structures over a public highway. It does not prevent the State's *fault* from being allocated.

The "immunity" the State enjoys under RCW 46.44.020 is not based on a lack of duty, but on immunity from liability under RCW 4.22.070's comparative fault regime. In turn, the State's *fault* is allocated for purposes of RCW 46.44.020, but this fault is not recoverable as damages.

The Court of Appeals blurs the distinction between fault and liability, reasoning that allocation of the State's fault (and the State's resulting inability to obtain a specific portion of damages) is itself a form of liability. This directly contravenes the Tort Reform Act and ignores the many public policy reasons why immune parties are not entitled to recover

for their own fault. In addition, the Court's attempt to characterize the State's immunity under RCW 46.44.020 as a lack of duty is misplaced and runs counter to the established law interpreting the statute.

Motorways respectfully requests that the Court of Appeals' decision be reversed and remanded to the trial court with instructions that the petitioners be permitted to assert claims for contributory negligence against the State.

II. ASSIGNMENTS OF ERROR

1. The trial court and the Court of Appeals erroneously held that the State's fault is not allocated under RCW 46.44.020.
2. The Court of Appeals erroneously characterized the State's immunity under RCW 46.44.020 as a lack of duty rather than immunity from liability.
3. The Court of Appeals' erroneously determined that RCW 46.44.020 applies to vehicles under 14 feet tall that did not impact the overhead structure of the Bridge.
4. The Court of Appeals erroneously addressed issues regarding RCW 46.44.110, which were not before it on appeal. The only issue on appeal concerns RCW 46.44.020. Furthermore, the State never made RCW 46.44.110 claims against Mullen or Motorways at the trial level.

III. STATEMENT OF THE CASE

This matter arises out of the May 23, 2013 Skagit River Bridge collapse that occurred after Mullen hit the overhead trusses of the Bridge. At the time of the accident, Mullen's truck was carrying an oversize load across the Bridge in the right southbound lane. The vertical clearance

above the right-side of the right lane was approximately 15 feet 6 inches. CP 399. The height of Mullen's oversize load was approximately 15 feet 11 inches. CP 324, 338.

The traffic lanes were narrower on the bridge than on the roadway approaching the bridge. The bridge lanes are 11 feet 4 inches wide and the lanes approaching the bridge are 12 feet wide. CP 330, 407. Mullen's trailer was 11 feet 6 inches wide. CP 324. Thus, Mullen's oversize load was wider than the Bridge lane it was traveling in.

At the time of the accident, Motorways' tractor trailer was traveling southbound in the left lane of the Bridge. Motorways' vehicle was under 14 feet tall and did not hit the Bridge. Mullen claims that as Motorways passed by Mullen, it forced Mullen further to the right where there was less vertical clearance, thus contributing to the accident. CP 474.

The State sued Mullen for negligence to recover damages for the cost of the Bridge repair. After Mullen alleged that Motorways was partially liable, the State added Motorways as a defendant. Mullen and Motorways asserted affirmative defenses of contributory negligence, arguing the State's fault for the Bridge collapse should be allocated.

On July 21, 2016, the State filed its Motion for Partial Summary Judgment Re: RCW 46.44.020, claiming it could not be found financially

liable for any of the damages resulting from the Bridge collapse under the statute. CP 137-155. The statute states in in relevant 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...No liability may attach to the state... by reason of any damage or injury to persons or property by reason of the existence of any structure over or across any public highway where the vertical clearance above the roadway is fourteen feet or more...[.]

RCW 46.44.020 (a copy of RCW 46.44.020 is provided at Appendix A).

Motorways and Mullen argued that RCW 46.44.020 does not protect the State from defensive counterclaims and affirmative defenses like contributory negligence. CP 400-409; 957-985; 1073-1079. They argued that although RCW 46.44.020 grants the State immunity from *liability*, the statute does not prevent the State's *fault* from being allocated for purposes of determining the comparative fault of the parties.

Motorways also argued that height was not the sole cause of the accident. CP 1075-76. It claimed the State failed to provide adequate signage to warn motorists that the lanes narrowed on the Bridge. It also claimed that the State's permitting process was flawed and that the State failed to adequately warn of the height restrictions on the Bridge. Motorways argued that these were contributing factors to the accident. The State has a common law duty to maintain roadways in a reasonably safe condition. This includes proper signage. Motorways argued that

such duties are not subject to RCW 46.44.020, and thus not subject to immunity protection under the statute. CP 1077-8.

The trial court granted the State's Motion for Partial Summary Judgment, holding that no fault or liability could be attributed to the State for damage resulting from the Bridge strike under RCW 46.44.020. CP 1220-1224; *and see* CP 1318 (Order Denying Reconsideration).

Whereas RCW 46.44.020 provides the State with immunity in certain circumstances, RCW 46.44.110 gives the State a cause of action to recover damages from drivers who damage State property: "Any person operating any vehicle is liable for any damage to any public highway, bridge [or] elevated structure...sustained as the result of any negligent operation thereof." RCW 46.44.110 (a copy of RCW 46.44.020 is provided at Appendix B). The trial court did not address RCW 46.44.110 on summary judgment, nor did the State ever assert RCW 46.44.110 claims against Mullen or Motorways.¹

Appellate review of the summary judgment decision was sought. CP 1320-25. The Court of Appeals granted review on June 23, 2017. The issue on appeal was whether the State's fault can be allocated pursuant to RCW 4.22.070 if the State is immune from liability under RCW

¹ In its Amended Complaint, the State asserted an RCW 46.44.110 claim against co-defendant *Saxon*, the maker of the metal casing shed that was being hauled by Mullen at the time of the accident. CP 79-80. The State has only asserted common law negligence claims against Mullen and Motorways. CP 77-81.

46.44.020. Issues regarding RCW 46.44.110 were not part of the appeal. See CP 1320-1344.

In a published opinion, the Court of Appeals affirmed the summary judgment dismissal of Mullen and Motorways' (hereinafter "Petitioners") contributory negligence claims. *Dep't of Transp. v. Mullen Trucking 2005, Ltd.*, 5 Wn. App. 2d 787, 428 P.3d 401 (2018). The Court reasoned that RCW 46.44.110 and RCW 46.44.020 (hereinafter the "Motorist Liability Statutes") conflict with RCW 4.22.070 and control because they are the more specific statutes. *Mullen*, 5 Wn. App. 2d at 790, 797. The Court also held that apportioning the State's fault under RCW 4.22.070 would effectively shift *liability* to the State in contravention of RCW 46.44.020 because it would reduce the State's recovery. *Id.*

Mullen and Motorways sought review with this Court. On March 6, 2019, Department II of this Court granted review. *Dep't of Transp. v. Mullen Trucking 2005, Ltd.*, 192 Wn.2d 1022 (2019).

IV. ARGUMENT

Questions of statutory construction are reviewed de novo. *King Cty. Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 825, 872 P.2d 516 (1994). When construing a statute, the fundamental objective is to ascertain and carry out the legislature's intent. *State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 789, 432 P.3d 805 (2019). The court

looks to the entire “context of the statute in which the provision is found, as well as related provisions, amendments to the provision, and the statutory scheme as a whole.” *Id.* (quoting *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015)).

A. RCW 46.44.020 Does Not Displace RCW 4.22.070 Under the Rules of Statutory Construction

The Court of Appeals held that RCW 46.44.020 conflicts with RCW 4.22.070 and RCW 46.44.020 applies because it is the more specific statute. *Mullen*, 5 Wn. App. 2d at 797-798. This reasoning is in error.

Under the general-specific rule of statutory construction, where a specific statute conflicts with a general one, the specific statute prevails. *Residents Opposed to Kittitas Turbines v. EFSEC State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008). Before applying the general-specific rule, however, courts must identify a conflict between the relevant statutes that cannot be harmonized by a plain reading of the statutory language in context. *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 832-33, 399 P.3d 519 (2017). Only when a conflict is presented, does the more specific statute prevail. *Id.*

Even if two statutes seem to conflict:

[I]t is the *duty* of the court to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used.

State ex rel. Royal v. Bd. of Yakima County Comm'rs, 123 Wn.2d 451, 459-60, 869 P.2d 56 (1994) (emphasis added).

In the present case, the general-specific rule does not apply because there is no conflict between RCW 46.44.020 and RCW 4.22.070. RCW 4.22.070 provides that *fault* will be allocated to and between every entity that caused the damage, including immune entities.² RCW 46.44.020 does not address fault, instead providing that “no *liability* may attach to the state...” RCW 46.44.020 (emphasis added).

The Washington Supreme Court has held that immune parties’ fault is allocated but is not recoverable as damages (i.e. immune parties are not *liable*). *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992).³

In turn, RCW 46.44.020 and RCW 4.22.070 are easily harmonized. Both statutes preclude *liability* from attaching to immune parties. Under RCW 46.44.020, no liability may attach to the State as an immune party. Under RCW 4.22.070, fault can be allocated to immune parties, whereas

² “Immunity” is not specifically defined in the Tort Reform Act. For purposes of statutory construction, words are given their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *In re Estate of Blessing*, 174 Wn.2d 228, 231, 273 P.3d 975 (2012). When a statutory term is undefined, the court may look to a dictionary for its ordinary meaning. *Id.* “Immunity” is defined in relevant part as “[a]ny exemption from a duty, *liability*, or service of process...” Black’s Law Dictionary (10th ed. 2014) (emphasis added).

³ “[RCW 4.22.070] evidences legislative intent that fault be apportioned and that generally an entity be required to pay that entity's proportionate share of damages only. The statute also evidences legislative intent that certain entities' share of fault not be at all recoverable by a plaintiff; for example, the proportionate shares of immune parties.” *Washburn*, 120 Wn.2d at 294.

liability cannot. As such, the State's fault can be allocated but damages for that fault are not recoverable.

B. RCW 46.44.020 Addresses Immunity from Liability, Not A Lack of Duty

The Court of Appeals holds that RCW 46.44.020 is not a grant of "immunity," per se, but rather a limit on the scope of the State's duty. *Mullen* 5 Wn. App. at 798. The Court contends that where the clearance of the overhead structure is over 14 feet, the State has no further duty of care. *Id.* Because the Skagit River Bridge clearance was over 14 feet, the State had no further duty to Petitioners under RCW 46.44.020. Without a duty, the Court reasoned, the State cannot be at fault or otherwise liable for the resulting damage. *Id.* at 798-99. Therefore, the State was not "immune" for purposes of RCW 4.22.070 allocation of fault.

This reasoning is flawed and ignores the Court of Appeals' own precedent in *Ottis Holwegner Trucking v. Moser*, 72 Wn. App. 114, 863 P.2d 609 (1993). In *Ottis*, the Court of Appeals specifically held that the State "has immunity for its negligence, if any, pursuant to RCW 46.44.020." *Ottis* at 124. The Court thus recognized that RCW 46.44.020 grants immunity in the specific sense that it shields the State from liability for a breach of a duty, rather than simply nullifying the existence of a duty in the first place.

Yet in the present case, the Court held that the State is not immune from liability, but rather lacks a duty to motorists under RCW 46.44.020. *Mullen* at 798-99. This directly contradicts its interpretation of the statute in *Ottis*.

The State attempts to characterize the holding in *Ottis* as one of mere “nomenclature” and “of no consequence in this case.” Respondent’s Answer to Pet. for Rev., p. 12. This argument is unavailing. If portions of judicial decisions can simply be written off as mere “nomenclature,” there would be little to no binding precedent in Washington case law. The *Ottis* court specifically states that RCW 46.44.020 grants the State “immunity” from its negligence. The immunity analysis in *Ottis* is clearly on point.

Immune parties are capable of fault and that fault is allocated for purposes of RCW 4.22.070. *Washburn*, 120 Wn.2d 246 (immune entity’s fault can be allocated, but damages for that fault are not recoverable); *Humes v. Fritz Companies, Inc*, 125 Wn. App. 477, 105 P.3d 1000 (2005) (immune parties’ portion of fault is allocated but they are protected from liability). In turn, the State is immune from liability under RCW 46.44.020, but its fault is allocated and not recoverable as damages.

1. Smelser v. Paul is Distinguishable

In *Mullen*, the Court of Appeals makes no mention of *Ottis* and does not analyze the findings in *Humes*. Instead, the Court bases its

decision on the reasoning in *Smelser v. Paul*, 188 Wn.2d 648, 398 P.3d 1086 (2017), a parental immunity doctrine case. *Smelser* is distinguishable and the Court of Appeals' reliance on the case is in error.

Smelser involved the interpretation of a statute and a common law doctrine whereas *Mullen* involves the interpretation of two statutes with one another. In turn, the *Smelser* Court was less constrained by the process with which it interpreted the law. In the present case, however, the Court of Appeals had a duty to harmonize and to give effect to both statutes if it could do so without distorting the plain language. As noted above, the Court failed to do so.

In *Smelser*, this Court held that fault could not be apportioned to the child's father because parental immunity precluded recovery against a parent for negligent supervision. *Smelser*, 188 Wn.2d at 654-9. The *Smelser* Court clarified that in Washington "parental immunity" is not a form of immunity at all. Rather, courts simply recognize that negligent supervision is not a valid cause of action against a parent. "Simply stated, it is not a tort to be a bad, or even neglectful, parent." *Smelser* at 653-54. "Parental immunity" is a doctrine that certain conduct is simply not tortious. *Id.* at 659. The *Smelser* Court held that immunity is only determined *after* a duty has been established. Because the parent owed no duty, the Court reasoned, there was no immunity from liability. *Id.*

Applying the reasoning in *Smelser*, the Court of Appeals in *Mullen* held that under RCW 46.44.020 the State does not owe an additional tort duty to motorists in collisions involving overhead structures with over 14 feet of clearance. *Smelser*, 188 Wn.2d at 653-54. Without a duty, the Court reasoned, the State cannot be liable, at fault, or in any way responsible for the resulting damage. In turn, RCW 4.22.070 allocation of fault did not apply.

Unlike parental immunity, there is no case law or other authority to suggest that the State's protection under RCW 46.44.020 is based on a lack of duty instead of immunity from liability. In fact, the only decision addressing the issue acknowledges that the State's protection under RCW 46.44.020 is based on immunity from liability. See *Ottis*, supra.

Because *Mullen* involves a duty whereas *Smelser* does not, the cases are distinguishable. In turn, the State is capable of fault as an immune party under RCW 46.44.020 and its fault is allocated under RCW 4.22.070.

2. The Dissent in Smelser Correctly Interprets the Law

In the alternative, to the extent *Smelser* holds that immune parties, including those under RCW 4.22.070, do not have a tort duty for which fault can be allocated, the case runs contrary to established legal precedent. As Justice Yu notes in her dissent (in which she is joined by

three other justices), fault can be allocated to an entity under RCW 4.22.070 without establishing that the entity has a duty. The entity need only be a juridical being *capable* of fault. *Smelser*, 188 Wn.2d at 660 (Yu, J., dissenting) (citing *Price v. Kitsap Transit*, 125 Wn.2d 456, 461, 886 P.2d 556 (1994)).

The State is an entity *capable of fault* pursuant to RCW 4.22.070. It is well established that the State can be negligent for breaching its duty to make roadways safe for the traveling public. See, e.g., *Wuthrich v. King Cty.*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016); *and see* Motorways’ Pet. for Review, p. 14, fn. 5 (collecting cases). Therefore, it is not necessary to establish whether the State had a particular duty in this matter. Its fault is still allocated as an immune party capable of fault.

C. Other Cases Relied Upon by the State are Inapposite or Otherwise Distinguishable

The State relies on *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 247 P.3d 18 (2011) to argue that allocation of fault under RCW 4.22.070 is precluded when another statute imposes liability on a specific defendant to pay all damages. See Resp. Answer, p. 13.⁴ The State’s reliance on *Johnson* is unavailing.

⁴ The statute at issue in *Johnson* is RCW 7.72.040(2)(e) of the Washington Products Liability Act (“WPLA”). Under RCW 7.72.040(2)(e), a product seller shall have the liability of the product manufacturer if the product was marketed under a brand name of the product seller.

First, the State erroneously assumes that RCW 46.44.020 imposes 100 percent of all damages on parties other than the State. As previously discussed, RCW 46.44.020 does not require motorists to pay “all damages,” but rather those damages not attributable to the State’s fault.

Second, *Johnson* noted that RCW 7.72.040(2)(e) creates *vicarious liability* of the product seller for defects caused by the manufacturer. In turn, there was no proportional allocation to begin with because vicarious liability is an assumption of all (100 percent) of another entity’s fault.

Third, as the *Johnson* Court notes, RCW 4.22.070 did not apply because it would have rendered RCW 7.72.040(2)(e) meaningless. If the seller could simply attribute all fault to the manufacturer, the product seller would never assume the vicarious liability that the legislature intended it to under RCW 7.72.040(2)(e). In the present case, by contrast, there is no risk that RCW 4.22.070 will abrogate RCW 44.46.020. The statutes can be harmonized based on the well-established distinctions between fault and liability.

Fourth, the WPLA presumes the existence of a contractual relationship between the seller and manufacturer such that the parties allocate risk themselves. According to the *Johnson* Court, legislatively imposing a means of risk allocation would have upset “three decades of

reliance on a statute that allows product sellers and manufacturers to themselves determine how best to allocate risk.” *Johnson*, at 950-51.

In the present case, by contrast, there is no contractual relationship between the parties and RCW 46.44.020 does not presume that the State has a contractual relationship with motorists. Therefore, legislative imposition of risk allocation *is* appropriate.

The State also relies on an out-of-state case, *New York State Thruway Auth. v. Maislin Bros. Transport, Ltd.*, 35 A.D. 2d 301, 315, NYS 2d 954 (1970), to argue that RCW 46.44.020 imposes absolute liability for all Bridge damages on Mullen and Motorways. The State’s reliance on this case is misplaced. *Maislin Bros* is a New York case interpreting a New York statute. It has no relevance for interpreting Washington law.

D. The Court of Appeal’s Determination that RCW 46.44.020 Applies to Motorists Who Do Not Strike Overhead Structures with Over 14 Feet of Clearance is in Error

The Court of Appeals held that RCW 46.44.020 can apply to entities like Motorways even though such entities are not themselves over 14 feet tall and did not hit the Bridge.

The State’s claim is that Motorways drove its truck negligently by overtaking Mullen’s truck on a narrow bridge, proximately causing Mullen to strike the overhead structures of the Skagit River Bridge. Because this claim concerns damage “by reason of the existence of any

structure over or across any public highway,” RCW 46.44.020 applies [to Motorways].

Mullen, 5 Wn. App. at 799.

This interpretation is in error and runs contrary to the rules of statutory construction. It takes the quoted portion of the statute out of context and renders the first sentence of the statute meaningless.

RCW 46.44.020 is only intended to protect the State from liability from vehicles over 14 feet tall. The first sentence of the statute states: “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.” RCW 46.44.020. Reading the sentences of the statute together, the clear implication is that the State is not liable for damage caused by vehicles at least 14 feet tall that either: (1) impact overhead structures with at least 14 feet of clearance; or (2) impact overhead structures that have less than 14 feet of clearance and lack proper clearance warning signs.

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 170, 252 P.3d 909 (2011). If, as the Court of Appeals claims, the statute shields the State from liability from *all vehicles* that cause damage to overhead structures that have over 14 feet of clearance, the first sentence of the statute (which

restricts vehicle height to 14 feet) would be meaningless. “All vehicles” necessarily includes vehicles over 14-feet tall. Under the Court of Appeals’ interpretation, there would be no reason to specify the 14-foot height requirement.⁵ In turn, a complete reading of RCW 46.44.020 shows that the State’s protection from liability only applies to damages caused by vehicles that are themselves over the 14-foot height limit.

The State also has a common law duty to maintain highways in a reasonably safe condition. As a vehicle under 14 feet tall that did not impact the Bridge, Motorways is entitled to assert that the State’s fault for failure to properly warn of the lane narrowing on the Bridge (as well as the State’s failure to adequately mark the Bridge height and maintain a safe permitting process for oversize loads) contributed to the accident and can be allocated. In turn, even if the Court finds that the State’s fault cannot be allocated as to Mullen under RCW 46.44.020, the statute does not prevent the State’s fault from being allocated for purposes of determining Motorways liability (if any).

E. RCW 46.44.110 Was Not Properly Before the Court of Appeals and Should Not Have Been Considered

The Court of Appeals declined to address Petitioners’ arguments regarding joint and several liability on the basis that the issue was beyond

⁵ Furthermore, the title of the statute: “Maximum height—Impaired Clearance Signs” (emphasis added) suggests that the statute only applies to vehicles whose height exceeds the 14-foot limit.

the scope of its review. *Mullen* 5 Wn. App. 2d at 799. The court noted that the issue was not raised in the petition for discretionary review and the trial court made no ruling on the question. *Id.* Despite this, (and over Motorways' objections) the Court of Appeals addressed questions pertaining to RCW 46.44.110, even though issues pertaining to the statute were not raised in the petition and were not ruled on by the trial court. Moreover, the State never even asserted RCW 46.44.110-based claims against Mullen and Motorways at the trial court level. The only claims the State specifically made against Petitioners were common law negligence claims. CP 81.⁶

Motorways raised these objections with the Court of Appeals, but the Court did not address them in its decision. RCW 46.44.110, like the issue of joint and several liability, was beyond the Court's scope of review. It should not have been considered and should not be considered by this Court.

F. RCW 46.44.110 Does Not Displace RCW 4.22.070 or Prevent Allocation of the State's Fault

Even if RCW 46.44.110 is considered, the statute does not displace RCW 4.22.070. The Court of Appeals erroneously held that comparative

⁶ The only RCW 46.44.110 claim the State made was against co-defendant *Saxon*, the maker of the metal casing shed that was being hauled by Mullen at the time of the accident. CP 79-80. The State also asserts that *Saxon* is jointly and severally liable with Mullen for the damages caused by the collision under RCW 46.44.110. *Id.*

fault does not apply because motorists are liable for “all damages” to public roadways under RCW 46.44.110. *Mullen* at 796-7. This is an incomplete and inaccurate reading of the statute. RCW 46.44.110 specifies that motorists are liable for all damages *resulting from the motorist’s negligence*. “Any person operating any vehicle is liable for any damage to any public highway, bridge, elevated structure, or other state property sustained as the result of any negligent operation thereof.” RCW 46.44.110. In turn, under the plain language of the statute, a motorist is only liable for the damages attributable to its own negligence. To make this determination, the State’s comparative fault must be determined. There is no conflict between RCW 46.44.110 and RCW 4.22.070.

G. Allocating the State’s Fault Promotes Accountability and Driver Safety

From a policy perspective, it is in the public interest to allocate the State’s fault under the Motorist Liability Statutes because it promotes accountability and driver safety. The State has a common law duty to provide and maintain roadways in a reasonably safe condition, including the duty to maintain proper signage on public highways. But the Court of Appeals’ decision would effectively insulate the State from *any* adverse consequences in situations where the Motorist Liability statutes are implicated. This holds true even if the State fails to meet its duties in

other respects completely unrelated to bridge height, such as the failure to provide adequate warning signs about lane narrowing on the Bridge. Petitioners specifically argue that this signage was inadequate and contributed to the accident. Motorways also contends that the oversize load and bridge list protocol should be vastly improved. A jury should decide these issues.

The State should not be permitted to avoid its duties to maintain safe roadways simply because those failures happen to occur in a situation involving an overhead structure with more than 14 feet of vertical clearance. Recognizing the State's capacity for *fault* under the Motorist Liability Statutes incentivizes the State to ensure roadways are maintained in a reasonably safe condition while still protecting the State from *liability* in situations where the Statutes apply.

V. CONCLUSION

Petitioners have the right to argue at trial that if the State is at fault for the Skagit River Bridge accident, the State should not be able to recover for its portion of fault. Motorways respectfully requests that the Court of Appeals' decision be reversed and remanded to the trial court with instructions that Petitioners be allowed to assert claims for contributory negligence against the State.

//

RESPECTFULLY SUBMITTED this 10th day of May, 2019.

SCHEER, HOLT, WOODS & SCISCIANI, LLP

By 

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APPENDIX – A

RCW 46.44.020

Maximum height—Impaired clearance signs.

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. This height limitation does not apply to authorized emergency vehicles or repair equipment of a public utility engaged in reasonably necessary operation. 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. 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.

[**1984 c 7 § 52**; **1977 c 81 § 1**; 1975-'76 2nd ex.s. c 64 § 7; **1971 ex.s. c 248 § 1**; **1965 c 43 § 1**; **1961 c 12 § 46.44.020**. Prior: **1959 c 319 § 26**; **1955 c 384 § 1**; **1953 c 125 § 1**; **1951 c 269 § 20**; **1937 c 189 § 48**; RRS § 6360-48.]

NOTES:

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

APPENDIX – B

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.]

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer, Holt, Woods & Scisciani, LLP.

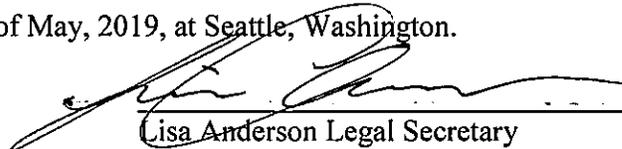
At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

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<u>CO Defendants</u> <u>Tammy J. Detray and Gregory S. Detray</u> <u>and G&T Crawlers Service</u> Aaron Dean Merrick, Hofstedt & Lindsey, P.S. 3101 Western Ave, Suite 200 Seattle, WA 98121	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Email
<u>CO Defendants</u> <u>Mullen Trucking 2005, Ltd., William D.</u> <u>Scott and Jane Doe Scott</u> Brian Del Gatto	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Email

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DATED this 6 day of May, 2019, at Seattle, Washington.



 Lisa Anderson Legal Secretary

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