Supreme Court No. 93799-1

Court of Appeals, Division II, No. 47397-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Basilio Cornelio Carrera, Respondent,

v.

Sunheaven Farms and Brent Schulthies, Petitioners.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Sunheaven Farms and Brent Schultheis ("Sunheaven Farms") respectfully ask this Court to accept review of the Court of Appeals decision terminating review designated in Section II of this petition.

II. CITATION TO COURT OF APPEALS DECISION

Sunheaven Farms seeks review of the published Court of Appeals decision reversing partial summary judgment and ruling in favor of Basilio Carrera ("Carrera") and the Department of Labor & Industries ("L&I"), as statutory assignee. *See Carrera v. Sunheaven Farms, et al.*, ___ Wn. App. ___, ___ P.3d ___ (Wn. App. Div. II, Oct. 4, 2016). The Court of Appeals ruled that L&I was entitled to seek all damages potentially recoverable by Carrera, the injured worker, even though the statute of limitations had expired on his personal injury claim, rather than limiting L&I's recovery to the benefits L&I had paid. A copy of the decision is reproduced in the Appendix at pages A-1 to A-19.

III. ISSUES PRESENTED FOR REVIEW

If review is accepted, the Court will be presented with these issues:

1. **Where the Washington Supreme Court already has ruled that L&I is not entitled to recover damages personal to an injured worker in a case prosecuted by the injured worker directly (RCW 51.24.060)—namely, noneconomic damages consisting of loss of consortium and pain and suffering—is it consistent with this legal precedent to allow L&I to recover these same damages**

on behalf of an injured worker in an assigned case against a third party (RCW 51.24.050)?

2. **Is L&I entitled to use the amount of any noneconomic damages recovered in an assigned third party case to enhance its recovery, since the Court of Appeals decision states both that "L&I may not retain noneconomic damages in assigned third party actions" and that "[e]ven if L&I may not retain all the proceeds it requests as damages, it may seek and recover those damages in an assigned third party action and dispense them according to the statutory distribution scheme"?**

3. **Does L&I serve as a mere conduit for a private citizen when it seeks to recover damages that are exclusively personal to an injured worker or does sovereign immunity apply because any potential incidental benefit to others is sufficient to allow RCW 4.16.160 to apply, such that L&I can file a cause of action against third parties years after the expiration of the statute of limitations on the underlying claim?**

4. **Is it appropriate to apply a statute of limitations to an injured worker's claim and a separate statute of limitations to L&I's claim, where the injured worker's claim is time-barred such that it cannot be assigned to L&I in the first instance?**

IV. STATEMENT OF THE CASE

This is a personal injury case brought by the Department of Labor & Industries ("L&I"), on behalf of Basilio Carrera ("Carrera"), an injured worker, ostensibly pursuant to RCW 51.24.050(1). This statutory provision allows L&I to prosecute a claim on behalf of an injured worker where the worker elects not to bring a third party suit. In this case, L&I never should have had the right to bring this cause of action because

Carrera had, in fact, elected to pursue a third party action and did so, in the case entitled *Carrera v. Brent Hartley and Jane Doe Hartley and Hartley Produce, LLC,* Benton County Cause No. 10-2-02367-1. This lawsuit was dismissed and thereafter, L&I took it upon itself to file the instant lawsuit that alleged legal malpractice on the part of the attorney who filed Carrera's personal injury lawsuit, and then amended the complaint to assert liability on the part of Sunheaven Farms, Sunheaven Farms, LLC, Brent Schultheis Farms, LLC, Brent Schultheis and Elaine Schultheis and John Does and Jane Does 1 through 10.[1]

In the currently pending action, L&I is seeking to recover *all* damages available to Carrera, including non-economic damages that L&I cannot retain, notwithstanding the fact that the statute of limitations for Carrera's claim lapsed long before the current lawsuit was filed. Carrera was injured on August 14, 2009; the instant lawsuit was not filed until March 14, 2014. The only reason this case was not dismissed outright based on the statute of limitations is because L&I filed this lawsuit, as the real party in interest, triggering the application of RCW 4.16.160.

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[1] The claims against Brent Schultheis Farms, LLC and Brent and Elaine Schultheis personally were dismissed with prejudice by order entered by Judge Arend on September 15, 2014. The claims against Brent Schultheis as a partner of Sunheaven Farms general partnership were not dismissed.

Sunheaven Farms concedes that the statute of limitations does not apply to a sovereign entity to the extent the suit is being brought in furtherance of its public policy, as distinguished from situations where the sovereign entity is acting as a mere conduit for the benefit of private individuals. Moreover, although L&I is entitled to file suit to seek reimbursement of payments it made on behalf of Carrera, L&I should not be able to recover for noneconomic damages that are personal to Carrera. For this individual claim, L&I is acting purely as a conduit and the statute of limitations should apply to Carrera's personal claim that includes noneconomic damages.

Carrera opted to pursue a third party claim and filed a lawsuit against Brent and Jane Doe Hartley and Hartley Produce, LLC. CP 14. Hartley Produce answered the complaint, alleging that an indispensable party had not been joined—Carrera's employer, Brent Hartley Farms, LLC—so Carrera's counsel amended the complaint to name this entity and asserted that it had acted intentionally. CP 15. Brent Hartley Farms then filed a motion for summary judgment and prevailed. CP 15-16. The court entered an order on March 18, 2011, dismissing claims against all defendants, even though the only arguments pertained to Brent Hartley Farms. CP 24-25.

More than two years later, on December 24, 2013, L&I advised Carrera that he needed to elect whether to pursue a third party action, an erroneous assertion since Carrera already had filed (and lost) such an action. CP 100. Indeed, it is unknown if Carrera was still living in the United States at this time and if he ever received notice.[2] In any event, on March 4, 2014, L&I advised Carrera that his third party action was deemed assigned to L&I. CP 102. L&I then proceeded to file a lawsuit on March 14, 2014, purportedly on Carrera's behalf, seeking both economic and non-economic damages, all the while asserting that it was the only real party in interest. CP 79-95. It amended the complaint on April 7, 2014, to name Sunheaven Farms. CP 1-23.

Sunheaven Farms filed a motion for partial summary judgment, asserting that L&I was only entitled to recover the economic damages it had paid since the statute of limitations had run with respect to Carrera's claim (and for which Carrera had previously filed a third party action). CP 51-60. In other words, Sunheaven Farms sought a ruling that the only viable action L&I could bring was to recover the amount of its lien—a result that is fair to L&I (allowing it to seek reimbursement of its lien, albeit subject to the distribution scheme found in RCW 51.24.050), the

[2] According to discovery answers, in 2013, Carrera was residing in Mexico, where he still lives. CP 127.

injured worker (who already had filed a third party claim and who had opted not to pursue his claim in a timely manner) and the third parties (who should be able to rely on the statute of limitations to preclude stale claims).

The trial granted summary judgment in part, ruling that L&I was limited to recovery of benefits it had paid. CP 402-406. The trial court subsequently granted a motion for certification of appeal. CP 415-417.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals' decision is in conflict with the underlying policy articulated by the Washington Supreme Court in *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994) and *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010), that acknowledges that workers' compensation benefits do not take into account noneconomic damages personal to the injured worker because it held both that even though L&I could not retain noneconomic damages, L&I could pursue such damages in an assigned third party case and "dispense them according to the statutory distribution scheme". (RAP 13.4(b)(1))

The Washington Supreme Court, in *Flanigan* and *Tobin*, *supra*, recognized that in a case brought within the statute of limitations for personal injury actions by the injured worker himself, L&I could not take into account noneconomic damages in determining its recovery because it otherwise would receive an "unjustified windfall". In *Flanigan*, the Washington Supreme Court held that the "recovery" available to L&I

under the distribution scheme set forth in RCW 51.24.060 did not include funds received as damages for a loss of consortium claim. 123 Wn.2d at 426. Recognizing that "workers' compensation benefits do not compensate employees or their beneficiaries for noneconomic damages such as loss of consortium," the court held that L&I was not entitled to reimbursement for those damages and, therefore, allowing a surviving spouse to retain those damages did not result in a double recovery. *Id.* at 425. Subsequent to *Flanigan*, the Legislature amended the statute to define "recovery" for the purposes of chapter 51.24 RCW as "all damages except loss of consortium." RCW 51.24.030(5).

The Washington Supreme Court in *Tobin* went farther, excluding all noneconomic damages from the statutory definition of "recovery" in addition to those arising from loss of consortium claims. 169 Wn.2d at 402. The court reasoned that RCW 51.24.060(1)(c) provides L&I access to recovery "only to the extent necessary to reimburse the department ... for benefits paid." *Tobin,* 169 Wn.2d at 402. Because L&I does not reimburse injured workers for noneconomic damages, such damages do not constitute "benefits paid" and are therefore not recoverable under the statute. *Id.*

Here, the Court of Appeals extended this reasoning to situations where the injured worker elects not to pursue an action against the third

party, as L&I represents occurred here,[3] finding that the reasoning underlying RCW 51.24.060 applies "with equal force" to actions brought pursuant to RCW 51.24.050. The Court of Appeals correctly held that "L&I may not retain noneconomic damages in assigned third party actions." App. at A-9.

The Court of Appeals, however, went on to state that "[e]ven if L&I may not retain all the proceeds it requests as damages, it may seek and recover those damages in an assigned third party action and dispense them according to the statutory distribution scheme." App. at A-11. This statement is at odds with the policy recognized in *Flanigan* and *Tobin* that such damages cannot be recovered by L&I. By stating that these sums are then to be dispensed according to the statutory distribution scheme undermines the Washington Supreme Court's ruling that L&I is not entitled to any amount of the injured worker's noneconomic damages. This is so because the distribution scheme in RCW 51.24.050 first permits L&I to collect attorney's fees based on the amount of damages recovered. RCW 51.24.050(4)(a) (L&I "shall be paid the expenses incurred in making the recovery including reasonable costs of legal services).

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[3] Again, here, Carrera had in fact pursued a third party action.

Moreover, in reaching these internally inconsistent positions, the Court of Appeals decision misconstrues the intent of the distribution scheme. It found that the "scheme anticipates that L&I would pursue assigned third party actions for damages beyond those it could retain" and used this as a basis for concluding that L&I should be able to recover all damages, even those personal to Carrera that were time-barred. App. at A-11. But this analysis overlooks what occurs in the ordinary case that is filed in a timely fashion. In a typical case, where L&I sends the election notice to the injured worker *before* the statute of limitations has run, and the injured worker elects not to pursue his claim *before* the statute of limitations has run, L&I certainly can seek recovery of all economic damages. That is its statutory charge.

The "surplus damages" that the Court of Appeals envisions L&I pursuing would exist in every case brought *prior* to the statute of limitations expiring. The recovery of noneconomic damages is not necessary to give meaning to every provision of the statute. The surplus damages do not refer to damages that are beyond the reach of L&I, but to economic damages that represent amounts beyond those incurred by L&I. For example, L&I does not pay medical benefits one hundred cents on the dollar. Like an insurance company, L&I always pays a discounted amount of every medical bill. Moreover, L&I only pays partial time loss

compensation. Finally, the fact that an injured party has received benefits from L& I is not admissible in a third party action. *See* RCW 51.24.100. Accordingly, in a typical case, where L&I files a third party action within the three year statute of limitations for personal injury claims, L&I will be able to present evidence reflecting the amount of actual medical bills incurred and total wage loss incurred. If L&I prevails on the claim on behalf of the injured worker, and the trier of fact awards all medical bills and time loss, the jury necessarily will have awarded a sum greater than the amount of L&I's lien and it is this surplus that is contemplated by the statute and that would be distributed according to the statutory scheme.

To allow L&I to recover damages that are part of a cause of action that is barred by the statute of limitations, even though L&I is not allowed to retain any such damages per *Flanigan* and *Tobin* (and by extension, here), in effect provides an "unjustified windfall" for the injured worker who did not pursue his claim in a timely manner.[4] Indeed, the Court of Appeals ruling encourages injured workers not to pursue their claims within the statute of limitations, knowing that L&I can step in, literally years later, and attempt to recover damages to which it cannot lay claim.

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[4] Sunheaven Farms, of course, does not mean to imply that Carrera is not deserving of fair compensation for his permanent injury, assuming liability could have been established in a lawsuit that was filed within the statute of limitations.

The injured worker who opts not to retain an attorney can still recover all of his noneconomic damages and, apparently, at no cost and at any time. In this case alone, the unfortunate accident occurred in 2009; the initial third party action was dismissed in 2011; L&I did not notify Carrera of his election rights until 2013; and L&I did not file the amended complaint naming Sunheaven until April 2014—almost five years after the incident occurred and almost two years after the statute of limitations ran.

In the underlying briefing, L&I took the position that it was entitled to seek general damages in an assigned case, arguing that it could then apply these sums to the statutory distribution. L&I was incentivized to pursue general damages, arguing that it could then derive an economic benefit to help replenish its coffers. After all, one need only compare the disparity between the amount of L&I's lien in this case (less than $800,000) with the general damages claimed by Carrera (between 5 and 10 million dollars) to understand L&I's motivation. CP 147, 143. L&I hoped to reap the benefits of running a potentially eight figure award through the distribution scheme set forth in RCW 51.24.050 to increase the attorney's fees it could recover, in addition to recouping more of the benefits it had paid out. The Court of Appeals decision, in stating that L&I may do so, directly contravenes the policy underlying the Washington Supreme Court's decisions in *Flanigan* and *Tobin*.

2. The Court of Appeals' decision involves an issue of substantial public interest because its consequences thwart the very purpose of statutes of limitations and open the door for L&I to file lawsuits for any number of claims for which the statute of limitations has expired, and to seek noneconomic damages solely personal to the injured worker. (RAP 13.4(b)(2))

If the Court of Appeals decision is allowed to stand, L&I can review any and all prior claims and send out notices of election to injured workers, notwithstanding that years, even decades, have passed since the injury occurred and to file lawsuits against third parties, and to recover all damages. This result would be unprecedented and would encourage the proverbial floodgates to open, even if the injured worker has no knowledge of the lawsuit proceeding, as may have occurred here. The Washington Supreme Court, in *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969) (en banc), eloquently explained the policy underlying statutes of limitations:

> There is nothing inherently unjust about a statute of limitations. Limitations on the time in which one may sue also limit the time in which another may be sued. If one cannot bring an action, by the same token he cannot compel another to defend it. Statutes of limitation, although having their origins in legislative proceedings — aside from equitable principles of laches and estoppel — thus contemplate that a qualified freedom from unending harrassment of judicial process is one of the hallmarks of justice. No civilized society could lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims brought in good faith, much less whatever stale,

> illusory, false, fraudulent or malicious accusations of civil wrong might be leveled against him.
>
> In applying the statutes of limitation, the courts have made many assumptions. Stale claims, from their very nature, are more apt to be spurious than fresh; old evidence is more likely to be untrustworthy than new. Time dissipates and erodes the memory of witnesses and their abilities to accurately describe the material events. In time witnesses die or disappear, and the longer the time the more likely this will happen. With the passing of time, minor grievances may fade away, but they may grow to outlandish proportions, too. Finally, and not to be ignored, is the basic philosophy underlying the idea that society itself benefits, except in capital cases, when there comes a time to everyone, be it long or short, that one is freed from the fears and burdens of threatened litigation.
>
> While it has been a long cherished ambition of the common law to provide a legal remedy for every genuine wrong, it is also a traditional view that compelling one to answer stale claims in the courts is in itself a substantial wrong. After all, when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts. Consequently, as a matter of basic justice, the courts usually have a cogent reason to give limitation statutes a literal and rigid reading, and to declare that the right to sue begins with the wrongful acts and ends with the statutory period unless earlier terminated by laches or estoppel.

These basic policies obviously run counter to the concept of sovereign immunity. Washington recognizes that when the State is acting in its sovereign capacity, statutes of limitations do not apply. RCW 4.16.160. However, as this Court acknowledged in *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 687, 202 P.3d 924 (2009), "[t]he

principal test for determining whether a municipal act involves a sovereign or proprietary function is whether the act is for the common good or whether it is for the specific benefit or profit of the . . . entity." Division II, in holding that noneconomic damages cannot be retained by L&I, confirms that L&I's actions in prosecuting Carrera's personal claim for these damages is for his specific benefit. Whereas the statute of limitations does not bar L&I's cause of action seeking recovery for the benefits it paid, it does bar Carrera's cause of action and, derivatively, L&I's right to seek recovery for damages that are for Carrera's specific benefit.[5]

Furthermore, this is not a situation where different statutes of limitations apply to different categories of damages of the same claim.

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[5] In addition, the Court of Appeals' ruling would lead to the absurd result of allowing L&I to bring a lawsuit after the statute of limitations had lapsed and then allowing the injured worker to exercise the right of reelection and to resurrect a claim that was time-barred. The statute authorizing the election form does not require that the form be sent prior to the statute of limitations expiring. RCW 51.24.070(2). Strikingly, the statute contemplates that even in a situation where L&I has taken assignment under an election process, the injured worker may, at the discretion of L&I, "exercise a right of reelection and assume the cause of action subject to reimbursement of litigation expenses incurred by the department or self-insurer." RCW 51.24.070(4). This sequence of events would allow an injured worker to completely circumvent the statute of limitations that applied to his claim since L&I can take assignment after the statute of limitations has lapsed, as occurred here.

Instead, there are two separate claims, one by Carrera, that is time-barred, and one by L&I, that is not. The proper way to consider the situation is as follows: Carrera had the right to pursue a claim for all of his damages. L&I had a protected interest in its lien from any recovery Carrera obtained. However, the entirety of Carrera's claim is time-barred because the current complaint was filed more than three years after the date of the injury. Carrera had no claim left to assign. L&I, however, retains the right to pursue a cause of action to seek repayment of the benefits it paid out and the statute of limitations does not apply to this claim because for these damages only, L&I is acting in its sovereign capacity. Indeed, L&I went to great lengths to emphasize that it was the only real party in interest in this litigation and that Carrera was not a party. CP 114, 118-123, 127, 131. Accordingly, allowing L&I to pursue its statutory right to reimbursement is not akin to applying two different statutes of limitation to different elements of damages in the same cause of action; rather, it is the application of two different statutes of limitations to two different claims (no statute of limitation to L&I's right to seek reimbursement and three years to Carrera's personal injury claim, respectively).

3. The Court of Appeals decision involves an issue of substantial public interest because it expands the breadth of situations where the State can claim it is acting for the benefit of the State under RCW 4.16.160

to an unrecognizable extent, stripping the phrase of "mere conduit" of all meaning. (RAP 13.4(b)(2))

The Court of Appeals decision renders the notion that the State could ever serve as a mere conduit for a private citizen a nullity. According to the Court of Appeals decision, L&I is immune from the statute of limitations because the action it filed in bringing what would otherwise have been a very stale claim against third parties was saved by virtue of RCW 4.16.160, sovereign immunity. This statute allows a public entity to bring actions "in the name of the benefit of the state," notwithstanding the expiration of any statute of limitations.

There is a relatively small universe of cases in which the application of sovereign immunity has been explored in Washington jurisprudence. The few cases that do exist draw a clear line between actions taken "for the benefit of the state" versus those situations where the state is "a mere formal plaintiff in a suit . . . to form a conduit through *which one private person* can conduct litigation against *another private person.*" (Emphasis added.) *See, e.g., State v. Vinther*, 176 Wash. 391, 393, 29 P.2d 693 (1934); *Herrmann v. Cissna*, 82 Wn.2d 1, 507 P.2d 144 (1973); *State v. LG Electronics*, __ Wn.2d __, 375 P.3d 636 (2016). The Court of Appeals concluded that even though Carrera, the injured worker, would reap the most benefit (because he can now attempt to recover for

his general damages, by far the largest component of damages) by allowing L&I to prosecute this otherwise time-barred action, the action served a greater good because it allowed L&I to replenish its coffers and acted as a deterrent to negligent third parties. Neither reason, even if accurate, is enough to render L&I anything other than a mere conduit for Carrera's personal claim for noneconomic damages.

First, the Court of Appeals' own decision seems to confirm that as in *Flanigan* and *Tobin*, L&I cannot retain any of the noneconomic damages it recovers because those damages belong exclusively to Carrera.[6] Accordingly, unless the Court of Appeals is also stating that the noneconomic damages become part of the sums distributed through the statutory scheme, L&I would not be using the noneconomic damages to replenish its coffers in any event and this recovery does not redound to L&I's benefit. Moreover, Sunheaven Farms has always agreed that L&I can bring this cause of action—only that it is limited to recovering the amounts L&I has paid. The fact that the Legislature opted to first pay L&I's counsel, and then pay 25% of the remaining recovery to the injured worker is simply a function of how the Legislature decided to distribute the funds and is by definition how L&I is "made whole". It also means,

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[6] However, the Court of Appeals also inconsistently states that these monies should be dispensed according to the distribution scheme. App. at A-11.

though, that in this case, Carrera, who otherwise would have zero chance of recovery of any funds due to the passage of time, not only was benefitted by payment of his medical bills and a portion of his time loss compensation through the worker's compensation system, but that he is also entitled to 25% of L&I's recovery.

In other cases in which sovereign immunity has been applied, it is not a single individual who has benefitted. *See, e.g., State v. LG Electronics*, __ Wn.2d __, 375 P.3d 636 (2016) (State filed suit on behalf of itself and as *parens patriae* seeking damages and restitution for citizens of Washington); *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 691 P.2d 178 (1984) (school districts act on behalf of the State when they build and maintain school buildings, affecting numerous students and their families); *Hermann, supra* (insurance commissioner was acting to regulate negligent and fraudulent conduct by officers and directors of insurance companies); *Wash. State Major League Baseball Stadium, supra* (constructing public baseball stadium, a public recreational space). This factual scenario is qualitatively different, because it involves the claims of a single individual, Carrera, who opted not to pursue an election (even though he already had pursued a third party action).

The appellate court also concluded that allowing L&I to bring what would otherwise be time-barred claims for general damages belonging

exclusively to the injured worker acts as a deterrent to the allegedly negligent third party. App. at A-17. As dissenting Justice Gordon McCloud noted in the *LG Electronics* case, "when the State seeks to collect on private claims against private entities for the benefit of private parties, the result is less clear as to whether such cases are 'for the benefit of the state' under RCW 4.16.160. This is because there is always some conceivable public benefit (such as general deterrence) when the State enforces its laws, regardless of whether the lawsuit is brought on its own behalf or on behalf of others." 375 P.3d at 636.

This is precisely the trap the Court of Appeals fell into: The argument of general deterrence. As it happens, here the allegedly negligent third party, Sunheaven Farms, is still in business but that is unlikely to be true in all or even most cases, especially since L&I argues that the statute of limitations never runs against the potentially responsible parties in such cases and entities go out of business every day.

If the recovery of general damages for an injured worker, that L&I cannot retain, is not the very definition of the State acting as a mere conduit for a private citizen, then there is no situation that will ever meet this criteria. Clearly, however, the Washington Supreme Court contemplated that there would be such situations. The Court of Appeals decision distorts what it means to be a "mere conduit" and potentially

expands the number of cases in which the State can invoke sovereign immunity.

VI. CONCLUSION

Sunheaven Farm asks this Court to grant this petition for review and to reverse the Court of Appeals, finding that L&I is limited to recovery only of the benefits it paid and that all other causes of action are time-barred.

RESPECTFULLY SUBMITTED this 3rd day of November, 2016.

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CERTIFICATE OF SERVICE

I, Sally Phillips, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

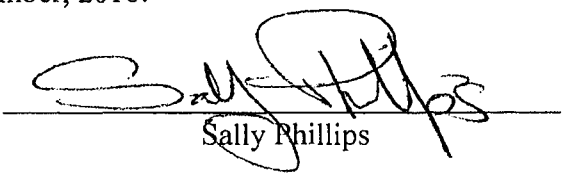
2) By the end of the business day on November 3, 2016, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **PETITION FOR REVIEW and Certificate of Service.**

Counsel for Plaintiff Basilio Cornelio Carrera Herbert G. Farber Law Offices of Herbert G. Farber, Inc. PS 400 - 108th Ave NE Ste 500 Bellevue, WA 98004	☐ U.S. Mail ☑ Hand Delivery ☐ Facsimile ☐ Overnight ☐ E-mail
Counsel for Plaintiff Basilio Cornelio Carrera Bryan Doran Doran Law, PS 400 - 108th Ave NE Ste 500 Bellevue, WA 98004	☐ U.S. Mail ☑ Hand Delivery ☐ Facsimile ☐ Overnight ☐ E-mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of November, 2016.



Sally Phillips

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two
October 4, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BASILIO CORNELIO CARRERA, an unmarried individual; DEPARTMENT OF LABOR & INDUSTRIES, as statutory assignee of Basilio Cornelio Carrera, Petitioners, v. SUNHEAVEN FARMS, a Washington general Partnership; SUNHEAVEN FARMS, LLC, a Washington limited liability company; BRENT SCHULTHIES FARMS, LLC, a Washington limited liability company; BRENT SCHULTHIES and ELAINE SCHULTHIES, husband and wife, and the marital community comprised thereof, individually and as general partner of Sunheaven Farms; and JOHN DOES and JANE DOES 1 through 10 inclusive, Respondents, THOMAS S. OLMSTEAD and BARBRA E. OLMSTEAD, husband and wife, and the marital community comprised thereof; LAW OFFICE OF THOMAS S. OLMSTEAD, a Washington sole proprietorship; JOHN DOES and JANE DOES 1 through 10 inclusive, Defendants.	No. 47397-6-II PUBLISHED OPINION

BJORGEN, C.J. — The Department of Labor and Industries (L&I) appeals the superior court's order granting partial summary judgment in a third party action brought under the Industrial Insurance Act (IIA), title 51 RCW, against farming conglomerate Sunheaven Farms and certain persons associated with its operations. The action arose from injuries to Basilio Carrera, an employee of Sunheaven's member company Brent Hartley Farms LLC. The

superior court ruled that L&I could not seek damages in an assigned third party action beyond the amount L&I had paid to Carrera for workers' compensation benefits because the statute of limitations had run on his claims. L&I argues that this ruling was in error because (1) it may seek noneconomic damages in an assigned third party action and (2) it was acting in the State's interest and, therefore, was not subject to the statute of limitations due to statutory and sovereign immunity.

We hold first that L&I may seek and recover, but may not retain, noneconomic damages in an assigned third party action. Instead, it must disburse those damages through the distribution formula prescribed by statute. Second, we hold that when L&I seeks such damages in an assigned third party action, it does so in part on behalf of the State and is, therefore, not subject to any statute of limitations. Accordingly, we reverse the superior court's order of summary judgment in favor of Sunheaven and remand for proceedings consistent with this opinion.

FACTS

In the summer of 2009, Carrera was hired by Brent Hartley Farms, one of Sunheaven's constituent farms, to perform seasonal agricultural labor. Sunheaven contracted to provide safety compliance services at the farm but was not Carrera's direct employer. On August 14, Carrera was grievously injured while working with a conveyor belt. According to the complaint, Carrera had not been properly trained to use the machine, and the machine's safety features did not meet state standards.

Carrera brought a negligence suit against his employer, but the suit was dismissed because such claims are not allowed under the IIA. L&I was notified of the suit after the dismissal and identified Sunheaven and other entities as potential third party defendants subject

to suit under the IIA's third party action statutes. As required by those statutes, L&I notified Carrera on December 24, 2013 that he must elect whether he would pursue a third party action. When he failed to respond within 60 days as required, the action was assigned to L&I by operation of law.

Choosing to prosecute the assigned action, L&I filed an amended complaint against Sunheaven, Brent Hartley Farms and others on April 7, 2014, more than four years after Carrera was injured, asserting negligence claims and seeking both economic and noneconomic damages. This amended complaint included legal malpractice claims against Carrera's counsel in the earlier action against his employer. Among its affirmative defenses, Sunheaven claimed that a statutory three-year statute of limitations period had run and that applicable statutes allowed L&I to pursue Carrera's claims to recover only the amount it had paid Carrera for workers' compensation benefits.

Sunheaven sought summary judgment on the statute of limitations defense. The superior court granted the motion in part, barring L&I from seeking noneconomic damages and limiting economic damages to the amounts L&I paid or would pay in benefits. The superior court based its ruling on its "finding" that

> [t]he State of Washington Department of Labor & Industries, as statutory assignee of any applicable third party claims, stands in the shoes of the injured worker Basilio Carrera in asserting the third party claims made herein, and therefore the State's claims for the injured worker's non-economic damages claimed against Defendants Sunheaven Farms and Brent Schulthies herein are subject to all of the defenses available against the injured worker, including the statute of limitations, notwithstanding the provisions of RCW 4.16.160.

Clerk's Papers (CP) at 404. The superior court determined that L&I had paid or would pay $788,418 in total benefits and, therefore, ordered that its damages be limited to that amount.

L&I appeals the superior court's grant of partial summary judgment.

ANALYSIS

We review a grant of summary judgment de novo, engaging in the same inquiry as the court granting the motion. *Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 435, 359 P.3d 753 (2015). Summary judgment is proper if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). This appeal presents no genuine issue of fact that is material to the order of partial summary judgment. Therefore, our analysis is confined to issues of law.

To determine whether the superior court erred, we must assess the scope and nature of assigned third party claims under the IIA. We look first to the statutory scheme authorizing third party actions and their assignment. Within the context of this statutory scheme, we then consider L&I's right to prosecute assigned third party actions in light of the damages it may retain. Finally, we examine the operation of statutes of limitation on third party claims and whether L&I enjoys sovereign immunity in its prosecution of such claims.

I. STATUTORY SCHEME

This case involves a challenge to an action brought by L&I against third parties allegedly liable for Carrera's injuries. We begin by considering the statutes and case law treating the nature and operation of third party actions generally, as well as the State's right of recovery in such actions.

A. Third Party Actions under the IIA

The IIA grants workers injured on the job "speedy and sure relief" in the form of workers' compensation benefits, but prohibits them from bringing negligence actions against their employers. *See Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 422-23, 869 P.2d 14

(1994) (citing RCW 51.04.010). However, the IIA does not exempt third parties from liability in this manner, providing that

> [i]f a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

RCW 51.24.030(1).

A worker may initiate a third party action, RCW 51.24.030(1); but where, as here, the worker fails to elect whether to do so, the right to bring the action is assigned to L&I or the worker's self-insuring employer by operation of law. RCW 51.24.050(1).[1] L&I or the self-insurer may bring suit in the injured worker's name or compromise the claim as it sees fit. RCW 51.24.050(1). Any resulting damages award is subject to the following distribution arrangement: (1) L&I or the self-insurer is paid expenses incurred in making the recovery, including reasonable costs and attorney fees, RCW 51.24.050(4)(a); (2) 25 percent of the remaining balance goes to the injured worker, RCW 51.24.050(4)(b); (3) L&I or the self-insurer is then "paid the compensation and benefits paid to or on behalf of the injured worker or beneficiary," RCW 51.24.050(4)(c); and (4) any remaining balance is paid to the injured worker, RCW 51.24.050(4)(d). Any such remaining balance paid to the injured worker is counted against the worker's future benefits. RCW 51.24.050(5).

B. L&I's Right of Recovery in Assigned Third Party Actions

To determine the boundaries of the State's right of recovery in assigned third party actions, we must interpret the opinions of our Supreme Court in *Flanigan*, *supra*, and *Tobin v.*

[1] If a worker has made no election, L&I may send a written demand under RCW 51.24.070(1). If the worker does not make the election within 60 days of receiving that demand, the action is assigned to L&I by operation of law. RCW 51.24.070(2).

Department of Labor & Industries, 169 Wn.2d 396, 239 P.3d 544 (2010), and decide whether those cases apply to recovery under RCW 51.24.050.

1. *Flanigan* and *Tobin*

Our Supreme Court has clarified that worker-initiated third party actions under RCW 51.24.060 may be brought seeking noneconomic damages that exceed the sums paid for workers' compensation benefits, but that L&I is not entitled to any resulting noneconomic damages. *Tobin*, 169 Wn.2d 396; *Flanigan*, 123 Wn.2d 418. Because workers' compensation benefits "cannot take into account noneconomic damages, such as an employee's own pain and suffering," allowing a worker to recover such damages was intended to "increase his or her compensation beyond the Act's limited benefits." *Flanigan*, 123 Wn.2d at 423-24. However, "where the Department has not paid out benefits for a type of damages, it cannot seek reimbursement from that type of damages." *Tobin*, 169 Wn.2d at 401.

In *Flanigan*, the court addressed whether L&I's right of reimbursement under the distribution formula extended to damages awarded in a private third party action for loss of consortium. 123 Wn.2d at 422. The court held that L&I was not entitled to distribution of such noneconomic damages because the workers' compensation benefits "[a]t the most . . . cover only certain out-of-pocket expenses, such as a portion of lost wages." *Id.* at 423. It reasoned that if L&I could reach an injured worker's recovery for loss of consortium, it would receive "an unjustified windfall" for a "share in damages for which it has provided no compensation." *Id.* at 425-26. Therefore, while "third party actions for loss of consortium are indeed covered by the Act . . . the statutory right of reimbursement under RCW 51.24.060 does not reach these recoveries." *Id.* at 426.

Following the *Flanigan* decision, the legislature amended the IIA to clarify that "'recovery' includes all damages except loss of consortium." RCW 51.24.030(5). In *Tobin*, the court considered the effect of that amendment and whether the reasoning in *Flanigan* should be extended to bar L&I from seeking its statutory share from other noneconomic damages awarded in a third party action to compensate an injured worker for pain and suffering. 169 Wn.2d at 401. As in *Flanigan*, the court reviewed a private third party action rather than one prosecuted by L&I. *Id.* at 398. The court interpreted the amendment and concluded that "the legislature intended to codify the holding of *Flanigan* and left the reasoning of *Flanigan* undisturbed." *Id.* at 402. On this basis, the court reasoned that, under RCW 51.24.060, L&I was not entitled to distribution of damages awarded for noneconomic harm like pain and suffering because, as in *Flanigan*, it had not paid any benefits as compensation for such harm. *Id.* at 402-03. It held that "chapter 51.24 RCW does not authorize the Department to subject pain and suffering damages to its reimbursement calculation." *Id.* at 404.

2. Applicability of *Flanigan* and *Tobin* to Assigned Third Party Actions

The parties disagree as to whether *Flanigan* and *Tobin* apply to assigned third party actions under RCW 51.24.050. According to Sunheaven, under *Flanigan* and *Tobin* L&I may not recover money awarded to an injured worker for noneconomic damages in *any* third party action under chapter 51.24 RCW. Our Supreme Court in *Tobin* repeatedly mentioned that, under chapter 51.24 RCW, L&I was not entitled to money awarded for noneconomic damages. The court stated, for example, that "[t]he central issue in this case is whether chapter 51.24 RCW authorizes the Department to include Tobin's pain and suffering damages in the distribution calculation," 169 Wn.2d at 400, and that "chapter 51.24 RCW does not authorize the Department to subject pain and suffering damages to its reimbursement calculation." *Id.* at 404. This

suggests, at least, that its holding extended generally to all third party actions under chapter 51.24 RCW. *Tobin*, 169 Wn.2d at 404, 406-07. The dissent in that case so interpreted the majority's holding. *See id.* at 407-09 (Fairhurst, J., dissenting).[2]

According to L&I, *Flanigan* and *Tobin* apply exclusively to worker-initiated third party actions under RCW 51.24.060. Key to the court's holdings in both cases was language in RCW 51.24.060 entitling L&I to payment of a portion of damages "'only to the extent necessary to reimburse'" it for benefits paid. *Tobin*, 169 Wn.2d at 402 (quoting RCW 51.24.060(1)(c)). As L&I points out, this language is not present in RCW 51.24.050. In addition, even if the Supreme Court did decide that L&I was limited to reimbursement recovery in all actions under chapter 51.24 RCW, that decision would be dictum as to recovery under RCW 51.24.050 because the recovery in both *Flanigan* and *Tobin* was governed only by RCW 51.24.060.

L&I is correct that in their holdings *Flanigan* and *Tobin* did not interpret RCW 51.24.030(5) or RCW 51.24.050, but instead only interpreted RCW 51.24.060 in light of the legislature's amendment. The court in *Tobin* also included language that indicates its holding is limited to RCW 51.24.060:

> The legislature amended the definitional section of the statute that codified the explicit holding of *Flanigan*. . . . [T]he legislature did not revise RCW 51.24.060(1)(c), the section restricting the Department to recovery "to the extent necessary . . . for benefits paid" or clearly define what types of damages the statute intends to provide compensation for. Because *Flanigan*'s reasoning rested on this unaltered section of the statute, damages for 'pain and suffering,' like loss of consortium, constitute noneconomic damage that the workers' compensation statutes do not compensate for.

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[2] The dissenters even stated that "[i]t is now the legislature's turn to undo what the majority has done." *Id.* at 418 (Fairhurst, J., dissenting). The legislature has not done so in the six years that have elapsed since issuance of the decision in *Tobin*.

169 Wn.2d at 406. Moreover, interpreting RCW 51.24.030(5) as amended to define "recovery" as generally excluding noneconomic damages for all purposes of chapter 51.24 RCW would have barred not only L&I but also injured workers from recovering such damages. *See* RCW 51.24.050(4); RCW 51.24.060(1). Yet the court in *Flanigan*, 123 Wn.2d at 424, clearly stated that third party actions under the IIA were intended to allow such recovery by workers, and in *Tobin*, 169 Wn.2d at 403 expressly followed the reasoning of *Flanigan*.

However, the general reasoning of *Flanigan* and *Tobin* does apply with equal force to RCW 51.24.050. That statute provides that "[t]he department and/or self-insurer shall be paid the compensation and benefits paid to or on behalf of the injured worker or beneficiary by the department and/or self-insurer." RCW 51.24.050(4)(c). This describes a reimbursement scheme, even though it does not use the language of RCW 51.24.060. The court in both *Flanigan* and *Tobin* held that interpreting such a scheme to allow L&I distribution of noneconomic damages was inconsistent with chapter 51.24 RCW, because workers' compensation benefits compensate an injured worker exclusively for economic harm. 123 Wn.2d at 426; 169 Wn.2d at 401. We extend that reasoning to RCW 51.24.050 and hold that L&I may not retain noneconomic damages in assigned third party actions.

II. PROSECUTION OF ASSIGNED THIRD PARTY ACTIONS SEEKING DAMAGES L&I MAY NOT RETAIN

L&I argues that it may prosecute an assigned third party action seeking all available damages, even those it may not retain under the statutory distribution scheme. We agree.

To determine whether L&I is limited in its ability to pursue certain types of damages in assigned third party actions, we must interpret RCW 51.24.050, the statute authorizing L&I to bring such actions. When interpreting a statute, we must determine and give effect to the legislature's intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). We look

first to the plain language of the statute. *Id.* "When the legislature has expressed its intent in the plain language of a statute, we cannot substitute our judgment for the legislature's judgment." *Protect the Peninsula's Future v. Growth Mgmt. Hr'gs Bd.*, 185 Wn. App. 959, 972, 344 P.3d 705 (2015). To assess the meaning of the plain language, we consider the text of the provision in question, the context of the statute in which the provision is found, and related statutes. *In re Estate of Mower*, 193 Wn. App. 706, 713, 374 P.3d 180 (2016). Where a statutory term is not expressly defined in the statute, we will look to its usual and ordinary meaning. *Id.*

If the plain meaning of a statute is unambiguous, we must apply that plain meaning as an expression of legislative intent without considering extrinsic sources. *Jametsky*, 179 Wn.2d at 762. Statutory language is ambiguous if it is open to more than one reasonable interpretation. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). We will not add language to an unambiguous statute. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

RCW 51.24.050(1) provides:

> An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.

"Any recovery" that results from prosecution or compromise is then distributed according to the scheme described in part I(A), above. RCW 51.24.050(4). L&I is entitled to, at most, the amount required to compensate it for its legal fees and the workers' compensation benefits it has paid. If the amount awarded or paid in compromise exceeds the amount L&I may retain plus the 25 percent distributed to the injured worker, the injured worker or beneficiaries "shall be paid any remaining balance," RCW 51.24.050(4)(d), which then counts against future workers' compensation benefits, RCW 51.24.050(5).

This scheme anticipates that L&I would pursue assigned third party actions for damages beyond those it could retain. Simply to fully compensate L&I for the benefits it paid, the amount awarded would need to cover the injured worker's 25 percent distribution. Further, the statute provides for a specific distribution of remaining sums, clearly indicating that L&I may pursue such surplus damages. However, L&I is not entitled to *retain* any such surplus damages. Because these implications are plain on any reasonable reading of the statute, they are unambiguous.

Therefore, based on the plain meaning of RCW 51.24.050, we hold that L&I is not barred from seeking and recovering damages greater than the amount it may retain in an assigned third party action under the IIA. *See Duskin v. Carlson*, 136 Wn.2d 550, 555, 965 P.2d 611 (1998) (approving settlement of an assigned third party action that included an amount payable to L&I for the benefits paid and a greater amount payable to the injured worker). Even if L&I may not retain all the proceeds it requests as damages, it may seek and recover those damages in an assigned third party action and dispense them according to the statutory distribution scheme.

III. Sovereign Immunity from Statutes of Limitation

L&I argues that the superior court erred by concluding that it was time barred under the applicable statute of limitations from seeking any damages it could not retain. L&I does not dispute that third party actions under the IIA may be subject to a statute of limitations or that the statutory period ran before it brought the third party action. Instead, it argues that the superior court should not have effectively split the cause of action by limiting the available damages and that sovereign immunity rendered the statute of limitations inapplicable. We agree.

A. The Statute of Limitations

Carrera's claims against Sunheaven, had he brought them privately, would have been barred by the applicable statute of limitations. Under RCW 4.16.080(2),[3] the following must be brought within three years:

> An[y] action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated.

This statute of limitations applies generally "to any other injury to the person or rights of another not enumerated in other limitation sections." *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 720, 709 P.2d 793 (1985).

A statute of limitations period for third party actions under the IIA is not among those enumerated elsewhere, so this three-year limitations period applies.[4] Because L&I raised Carrera's claims in a third party action more than three years after he was injured, it acted outside of this limitations period. Therefore, this third party action would be time barred, unless L&I is immune from operation of the statute.

B. Separation of the Cause of Action

L&I argues that by barring some but not all recovery under the statute of limitations, the superior court in effect separated the third party action into two different actions seeking different classes of damages, and that it was error to do so. We agree.

RCW 51.24.030 grants the injured worker the right to pursue a third party action. This statutory right vests in the worker but is subject to valid election. RCW 51.24.030(1). If the

[3] RCW 4.16.080 was amended in 2011. The amendment does not affect the issues in this case.

[4] L&I does not dispute the applicability of RCW 4.16.080(2) or contend that the statute of limitations period was tolled.

worker brings the action, L&I or the worker's self-insuring employer has a "statutory interest in recovery" that entitles it to notice and an opportunity to intervene to protect its interest. RCW 51.24.030(2). Plainly, in such an action neither L&I nor a self-insurer has a separate claim against the third party by which it may seek its own damages, but rather has an interest in any resulting recovery.

However, if the injured worker elects not to pursue a third party action, that election "operates as an assignment of the cause of action to the department or self-insurer." RCW 51.24.050(1). For purposes of such an action, L&I or the self-insurer becomes the real party in interest controlling the prosecution or settlement of the cause of action. *Burnett v. Dep't of Corr.*, 187 Wn. App. 159, 172, 349 P.3d 42 (2015). At that point, pursuant to the statutory scheme for distribution, the injured worker possesses a statutory interest in any resulting recovery. *See* RCW 51.24.050(4).

The plain meaning of this statutory language, considered in the context of the larger statutory scheme, authorizes assignment of the underlying claims and does not create any new and independent cause of action. Chapter 51.24 RCW does not give an injured worker any particular legal claim against a third party. Instead, chapter 51.24 RCW operates as an exemption to the general rule under the IIA that an injured worker is limited in his or her recovery to workers' compensation benefits, allowing an injured worker to bring claims against third parties "liable to pay damages on account of a worker's injury for which benefits and compensation are provided." RCW 51.24.030(1). As the complaint in this case makes clear, the underlying source of such third party liabilities are the injured worker's claims resulting from the injury. By assigning the "cause of action" to L&I or a self-insuring employer, RCW 51.24.050(1) operates to assign the right to bring these underlying claims.

No language in the statute creates a new and independent cause of action that L&I may bring on its own behalf or indicates that the worker's underlying claims for damages L&I cannot retain should be transformed into a separate cause. Instead, the plain language of RCW 51.24.050(1) shows that L&I or a self-insurer may prosecute or compromise the underlying claims if the worker elects not to bring a third party action to litigate and redress those claims. Accordingly, we hold that L&I brings a single action when prosecuting or compromising an assigned third party action and has no separate cause of action that it may pursue independently.[5]

Statutes of limitations like RCW 4.16.080 attach to claims. *In re Estates of Palmer*, 145 Wn. App. 249, 258, 187 P.3d 758 (2008). Sunheaven points to no authority allowing operation of the statute of limitations to bar particular classes of damages. Therefore, the superior court erred by applying the statute of limitations to allow L&I to prosecute Carrera's claims but bar recovery of certain damages.

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[5] Sunheaven argues that the claims underlying an assigned third party action may be time barred prior to assignment and thereby rendered inherently invalid. However, at most the third party action and its underlying claims are assigned subject to a possible statute of limitations defense. *See Pac. Nw. Bell Tel. Co. v. Dep't of Revenue*, 78 Wn.2d 961, 964-67, 481 P.2d 556 (1971). The claims are not inherently nullified by the possibility that they are time barred. *See* CR 8(c) (grouping statutes of limitations among "matter[s] constituting an avoidance or affirmative defense"). Therefore, for us to determine whether an assigned third party action is time barred we must first determine whether L&I is protected by sovereign immunity when it brings such an action.

We recognize that *Gorman v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012), held that title extinguished by adverse possession is invalid, and *Pacific Northwest Bell Telephone Co.*, 78 Wn.2d at 964, noted that the State takes derivative property rights subject to any valid statute of limitations defense. These cases, though, are factually distinguishable. A property right by its nature is one that would be extinguished under the circumstances of *Gorman* and *Pacific Northwest Bell*. The assigned right to a monetary recovery, on the other hand, would be barred by a statute of limitations only if it were applicable against the plaintiff.

C. Sovereign Immunity

L&I takes the position that assigned third party actions under the IIA are not subject to statutes of limitations because it enjoys sovereign immunity from those limitations. We agree.

L&I argues that it was not subject to the limitations period because it was acting in the interests of the state. RCW 4.16.160 provides that when a public entity brings an action,

> except as provided in RCW 4.16.310, there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: AND . . . no previously existing statute of limitations shall be interposed as a defense to any action brought in the name or for the benefit of the state.

This statute applies the common law doctrine of sovereign immunity to statutes of limitations. *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 686, 202 P.3d 924 (2009).

Under that common law doctrine, a public entity enjoys immunity from statutes of limitations for actions "aris[ing] from an exercise of powers traceable to delegated sovereign state powers." *Id.* Where a public entity acts for the benefit of the State pursuant to delegated authority, it exercises such sovereign powers. *Id.* at 686-87. Even where a statutory scheme allows private prosecution of certain claims, a public entity acting for the benefit of the State may enjoy sovereign immunity when it brings the same or similar claims. *See State v. LG Elec., Inc.*, 185 Wn. App. 123, 144, 340 P.3d 915 (2014), *review granted*, 183 Wn.2d 1001 (2015).

An action is taken "for the benefit of the state" if it is taken "for the common good." *Wash. State Major League Baseball Stadium Pub. Facilities Dist.*, 165 Wn.2d at 687. "The fact that the state may be exercising a right derived by assignment or operation of law from a private individual is not determinative." *Herrmann v. Cissna*, 82 Wn.2d 1, 7, 507 P.2d 144 (1973). However, if the action is "for the specific benefit or profit" of a private entity, it is taken on

that's entity's behalf rather than on behalf of the State. *Wash. State Major League Baseball Stadium Pub. Facilities Dist.*, 165 Wn.2d at 689. Where such actions are authorized by statute, they are immune from statutes of limitations unless the authorizing statute includes an express provision abrogating immunity. *LG Elec.*, 185 Wn. App. at 137; *see also Herrmann*, 82 Wn.2d at 7.

In the context of third party actions under the IIA, the issue turns on "whether the state, in suing for the benefit of the accident fund, is acting in its sovereign capacity in furtherance of its public policy, or merely suing . . . for the benefit of private individuals." *State v. Vinther*, 176 Wash. 391, 393, 29 P.2d 693 (1934). An otherwise applicable statute of limitations, therefore, "will apply when the state is a mere formal plaintiff in a suit, not for the purpose of asserting any public right or protecting any public interest, but merely to form a conduit through which one private person can conduct litigation against another private person." *Id.*; *accord Herrmann*, 82 Wn.2d at 5.

In *Vinther*, our Supreme Court addressed an earlier workers' compensation statute that limited the State's recovery to a subrogation amount when a worker or his beneficiaries elected to take workers' compensation benefits. 176 Wash. at 391-92. At the time, the State was not allowed to seek damages beyond this subrogation amount. *Vinther* stands for the proposition that the State is not bound by statutes of limitations when it seeks statutorily authorized repayment for sums paid to an injured worker or his beneficiaries under a workers' compensation statute. Under *Vinther*, L&I may bring third party claims outside of the otherwise applicable limitations period to the extent those claims seek authorized repayment of benefits.

If L&I is not authorized to retain damages, it is necessarily seeking those damages not as repayment but rather on behalf of the injured worker. However, this does not necessarily make

L&I merely a conduit for the injured worker, since actions taken on behalf of private entities may still further important statutory purposes for the benefit of the State and its people.

In *Hermann*, our Supreme Court addressed a similar situation regarding an action brought by the state insurance commissioner on behalf of a defunct insurer against its former officers and directors. 82 Wn.2d at 2. The court held that the action was exempt from the statute of limitations because the commissioner was acting in part to regulate negligent and fraudulent conduct by the officers and directors of insurance companies. *Id.* at 7. It noted that

> [t]he legislature reasonably could have concluded that the deterrent effect of such proceedings by the commissioner, upon other parties charged with the responsibility of managing insurance companies, is a factor tending to benefit the public in general.

Id.

As L&I points out, it is similarly reasonable to believe the legislature intended third party actions under the IIA to have a deterrent effect on dangerous workplace conduct and conditions. Tort law has a deterrent effect on negligence, and exemptions from tort liability can weaken that deterrent effect. *See Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007). While the IIA exempts employers from such liability, it specifically excludes third party tortfeasors from that exemption by authorizing third party actions. By allowing L&I to prosecute or compromise third party actions that an injured worker cannot or does not want to pursue, the IIA strengthens the threat of liability to negligent third parties. In this way, the assignment of third party actions creates a deterrent that can be considered a form of workplace regulation.

Further, L&I has no separate cause of action in assigned third party claims. Therefore, L&I can replenish its coffers only by bringing the injured worker's assigned underlying claims.

Such replenishment clearly benefits the State, as it reduces fiscal strain and promotes the continued viability of the workers' compensation system. More importantly, the legislature clearly contemplated that L&I would be able to seek replenishment in this manner, as it gave L&I a statutory interest in the damages awarded in any third party action for repayment of the benefits amount. *See* RCW 51.24.050(4); RCW 51.24.060(1).

L&I acts for the benefit of the State when it prosecutes or compromises assigned third party actions pursuant to the authority granted in RCW 51.24.050.[6] Although it may not retain all damages it may seek, it is not pursuing the action merely as a conduit for the injured worker. Its actions promote a deterrent effect as well as replenish its coffers. As such, L&I is acting on behalf of the State in ensuring the efficacy and vitality of the workers' compensation system. Because nothing in chapter 51.24 RCW expressly abrogates or limits sovereign immunity, RCW 4.16.160 insulates L&I from application of the statute of limitations found in RCW 4.16.080(2). The superior court erred by granting summary judgment on grounds that it was time barred under that statute.

CONCLUSION

We hold that L&I may seek and recover, but not retain, noneconomic damages in an assigned third party action. Instead, it must dispense those damages through the statutory distribution formula. We also hold that when L&I seeks such noneconomic damages in an assigned third party action, it does so in part on behalf of the State and is, therefore, not subject

[6] Due to the factual scope of this case, we do not address whether this holding should extend to self-insuring employers who prosecute or compromise assigned third party actions under RCW 51.24.050.

to any statute of limitations. Accordingly, we reverse the superior court's order of summary judgment in favor of Sunheaven and remand for proceedings consistent with this opinion.

BJORGEN, C.J.

We concur:

WORSWICK, J.

LEE, J.

APPENDIX B

RCW 51.24.050

Assignment of cause of action—Disposition of recovered amount.

(1) An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.

(2) If an injury to a worker results in the worker's death, the department or self-insurer to which the cause of action has been assigned may petition a court for the appointment of a special personal representative for the limited purpose of maintaining an action under this chapter and chapter 4.20 RCW.

(3) If a beneficiary is a minor child, an election not to proceed against a third person on such beneficiary's cause of action may be exercised by the beneficiary's legal custodian or guardian.

(4) Any recovery made by the department or self-insurer shall be distributed as follows:

(a) The department or self-insurer shall be paid the expenses incurred in making the recovery including reasonable costs of legal services;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the recovery made, which shall not be subject to subsection (5) of this section: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the compensation and benefits paid to or on behalf of the injured worker or beneficiary by the department and/or self-insurer; and

(d) The injured worker or beneficiary shall be paid any remaining balance.

(5) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(6) When the cause of action has been assigned to the self-insurer and compensation and benefits have been paid and/or are payable from state funds for the same injury:

(a) The prosecution of such cause of action shall also be for the benefit of the department to the extent of compensation and benefits paid and payable from state funds;

(b) Any compromise or settlement of such cause of action which results in less than the entitlement under this title is void unless made with the written approval of the department;

(c) The department shall be reimbursed for compensation and benefits paid from state funds;

(d) The department shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the self-insurer in obtaining the award or settlement; and

(e) Any remaining balance under subsection (4)(d) of this section shall be applied, under subsection (5) of this section, to reduce the obligations of the department and self-insurer to pay further compensation and benefits in proportion to which the obligations of each bear to the remaining entitlement of the worker or beneficiary.

[1995 c 199 § 3; 1984 c 218 § 4; 1983 c 211 § 1; 1977 ex.s. c 85 § 3.]

NOTES:

Severability—1995 c 199: See note following RCW **51.12.120**.

Applicability—1983 c 211: "Sections 1 and 2 of this act apply to all actions against third persons in which judgment or settlement of the underlying action has not taken place prior to July 24, 1983." [**1983 c 211 § 3.**] "Sections 1 and 2 of this act" consist of the 1983 amendments of RCW **51.24.050** and **51.24.060**.

Severability—1983 c 211: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1983 c 211 § 4.**]

RCW 51.24.060

Distribution of amount recovered—Lien.

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer: PROVIDED, That the department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;

(i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid under this title: PROVIDED, That the department's and/or self-insurer's proportionate share shall not exceed one hundred percent of the costs and reasonable attorneys' fees;

(ii) The department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees shall be determined by dividing the gross recovery amount into the benefits paid amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary;

(iii) The department's and/or self-insurer's reimbursement share shall be determined by subtracting their proportionate share of the costs and reasonable attorneys' fees from the benefits paid amount;

(d) Any remaining balance shall be paid to the injured worker or beneficiary; and

(e) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance. This proportionate share shall be determined by dividing the gross recovery amount into the remaining balance amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

(3) The department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

(a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person;

(b) Factual and legal issues of liability as between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

(4) In an action under this section, the self-insurer may act on behalf and for the benefit of the department to the extent of any compensation and benefits paid or payable from state funds.

(5) It shall be the duty of the person to whom any recovery is paid before distribution under this section to advise the department or self-insurer of the fact and amount of such recovery, the costs and reasonable attorneys' fees associated with the recovery, and to distribute the recovery in compliance with this section.

(6) The distribution of any recovery made by award or settlement of the third party action shall be confirmed by department order, served by a method for which receipt can be confirmed or tracked, and shall be subject to chapter **51.52** RCW. In the event the order of distribution becomes final under chapter **51.52** RCW, the director or the director's designee may file with the clerk of any county within the state a warrant in the amount of the sum representing the unpaid lien plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of such worker or beneficiary mentioned in the warrant, the amount of the unpaid lien plus interest accrued and the date when the warrant was filed. The amount of such warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the injured worker or beneficiary against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW **36.18.012**(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the injured worker or beneficiary within three days of filing with the clerk.

(7) The director, or the director's designee, may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice and order to withhold and deliver property of any kind if he or she has reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property which is due, owing, or belonging to any worker or beneficiary upon whom a warrant has been served by the department for payments due to the state fund. The notice and order to withhold and deliver shall be served by the sheriff of the county or by the sheriff's deputy; by a method for which receipt can be confirmed or tracked; or by any authorized representatives of the director. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the director or the director's authorized representative upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full

amount claimed by the director in the notice together with costs. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer to all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

[2011 c 290 § 4; 2001 c 146 § 9; 1995 c 199 § 4; 1993 c 496 § 2; 1987 c 442 § 1118; 1986 c 305 § 403; 1984 c 218 § 5; 1983 c 211 § 2; 1977 ex.s. c 85 § 4.]

NOTES:

Severability—1995 c 199: See note following RCW 51.12.120.

Effective date—Application—1993 c 496: See notes following RCW 4.22.070.

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

Applicability—Severability—1983 c 211: See notes following RCW 51.24.050.

RCW 4.16.160

Application of limitations to actions by state, counties, municipalities.

The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW **4.16.310**, there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: AND FURTHER PROVIDED, That no previously existing statute of limitations shall be interposed as a defense to any action brought in the name or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to February 27, 1903, nor shall any cause of action against the state be predicated upon such a statute.

[**1986 c 305 § 701; 1955 c 43 § 2.** Prior: **1903 c 24 § 1;** Code 1881 § 35; 1873 p 10 §§ 34, 35; 1869 p 10 §§ 34, 35; **1854 p 364 § 9;** RRS § 167, part.]

NOTES:

Preamble—1986 c 305: "Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available." [**1986 c 305 § 100.**]

Report to legislature—1986 c 305: "The insurance commissioner shall submit a report to the legislature by January 1, 1991, on the effects of this act on insurance rates and the availability of insurance coverage and the impact on the civil justice system." [1986 c 305 § 909.]

Application—1986 c 305: "Except as provided in sections 202 and 601 of this act and except for section 904 of this act, this act applies to all actions filed on or after August 1, 1986." [1986 c 305 § 910.]

Severability—1986 c 305: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1986 c 305 § 911.]

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Sent: Thursday, November 03, 2016 2:11 PM
To: 'Sally Phillips'
Cc: Karen Bamberger; Denise Wolfard; Karen Pritchard
Subject: RE: PETITION FOR REVIEW -- Carrera v. Sunheaven Farms and Brent Schulthies [Court of Appeal No. 47397-6-II]

Received 11-3-16.

Supreme Court Clerk's Office

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From: Sally Phillips [mailto:sphillips@bpmlaw.com]
Sent: Thursday, November 03, 2016 2:02 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Karen Bamberger <kbamberger@bpmlaw.com>; Denise Wolfard <dwolfard@bpmlaw.com>; Karen Pritchard <kpritchard@bpmlaw.com>
Subject: PETITION FOR REVIEW -- Carrera v. Sunheaven Farms and Brent Schulthies [Court of Appeal No. 47397-6-II]

Dear Court Clerk:

For the Court's information, attached is the ***Petition for Review*** that was filed in the Washington Court of Appeals, Division II, today in the referenced matter.

Please call with any questions.

Respectfully,

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