No. 47397-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Basilio Cornelio Carrera, an individual,

Appellant,

v.

Sunheaven Farms, a Washington General Partnership; Sunheaven Farms, LLC, a Washington Limited Liability Company; Brent Schulthies, as general partner of Sunheaven Farms,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Basilio Carrera's arm was cut off when his shirt got caught in a conveyor belt. The injury occurred in the course of Carrera's employment with Brent Hartley Farms, LLC, an onion producer. Hartley Farms contracted with Sunheaven Farms, et. al, to oversee operations and ensure compliance with Washington State worker safety standards. Sunheaven failed. Hartley Farms' machinery was illegal and recklessly unsafe. Carrera was directed to load debris onto a conveyor that, in violation of state law, had its safety side guards cut out. Loading was more efficient, but the unsafe conveyor risked amputation. This risk was realized when Carrera lost his arm.

Because Sunheaven was not Carrera's employer, Carerra was not restricted by the Industrial Insurance Act and could sue Sunheaven for its negligence. Carrera declined to exercise his right to sue. The Legislature, anticipating such a scenario, has authorized the Department of Labor and Industries to pursue actions against negligent non-employers on its own when the injured worker does not. RCW 51.24.050. The Department may claim all damages in an action under RCW 51.24.050, including non-economic damages, in order to make the workers' compensation fund whole and deter dangerous conduct

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The Department filed its lawsuit more than three years past the date of injury, which is untimely for a private party but not the State under RCW 4.16.160 when it acts "for the benefit of the state." The trial court erroneously disregarded RCW 4.16.160, and Supreme Court precedent interpreting it, to decide that the statute of limitations barred the Department from seeking all damages under its cause of action, namely, non-economic damages. But RCW 4.16.160 and RCW 51.24.050 allow the Department to claim all damages because the Department acted for the benefit of the State. The Department's whole cause of action benefits the State because the action replenishes the workers' compensation fund for benefits paid, deters unsafe workplaces, provides for statutory offset against payment of future benefits and, by awarding a portion of the award to the injured worker, promotes cooperation with Department investigations of unsafe working conditions and recovery efforts. This Court should reverse the trial court and hold that the Department's claim for general damages is not barred by the statute of limitations.

II. ASSIGNMENT OF ERROR

The superior court erred in entering its *Order Granting in Part Defendants Sunheaven Farms and Brent Schulthies' Motion for Summary Judgment re: Limitation on Recoverable Damages.* The superior court erred in ruling 1) that the Department's claim for the injured worker's

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non-economic damages is subject to the statute of limitations, notwithstanding the provisions of RCW 4.16.160, 2) that the statute of limitations period in RCW 4.16.080 applied to the non-economic damages, and 3) that recovery would be limited to benefits already paid or to be paid in the future. The trial court erred by not adhering to RCW 51.24.050, RCW 4.16.160, and Supreme Court precedent.

III. ISSUES

1. RCW 51.24.050 allows the Department to "prosecute" an assigned "cause of action" when a negligent non-employer has injured a worker. Is the Department precluded from claiming non-economic damages from a negligent non-employer when RCW 51.24.050 allows the Department to prosecute the whole cause of action without limitation?

2. RCW 4.16.160 exempts the statute of limitations from running against the State when an action is brought "in the name or for the benefit of the state." Does RCW 4.16.160 bar application of a three-year statute of limitation against the Department when it brings third party actions to make the injured worker fund whole and to serve as a deterrent for unsafe workplaces?

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IV. STATEMENT OF THE CASE

A. The Department Sues Negligent Non-Employers To Replenish the Injured Worker Fund and To Serve as a Deterrent Against Those Who Would Create an Unsafe Workplace

This case is a third party action brought by the Department of Labor and Industries exercising its statutory authority to bring injured worker claims against negligent non-employers. RCW 51.24.050. In an assigned third party action, the Department sues the negligent non-employer, obtains all damages, and then distributes the recovery according to a formula set forth in RCW 51.24.050. Under the formula, the Department, the worker, and the attorney all receive compensation.

Third party actions replenish the injured worker fund that is depleted by benefit payments to injured workers and deter negligent parties who threaten worker safety. Further, by providing part of the award to injured workers, the statute promotes cooperation with the Department in its litigation and investigation efforts. Finally, if the award is substantial enough, the worker's portion of the award is used to offset future workers' compensation payments to prevent further drain on the injured worker fund. RCW 51.24.050(5).

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B. Because of Sunheaven's Actions, Carrera's Arm Was Amputated by an Unsafe Conveyer Belt

Basilio Carrera, the injured worker, was an employee of Brent Hartley Farms, LLC. CP 8-9. At the time Carrera was injured his employer had a contract with Sunheaven Farms General Partnership[1] to provide safety compliance services, in addition to other centralized administrative services. CP 7-8. "Sunheaven" collectively refers to the defendants Sunheaven Farms; Sunheaven Farms, LLC; and Brent Schulthies.

Sunheaven did not employ Carrera. CP 8-9. It is a third party under RCW 51.24.030 and may be sued for negligence that causes a work-related injury. Sunheaven contracted with Carrera's employer to regulate compliance with safety laws and provide safety training at the farm where Carrera worked. CP 7-8. It did neither. CP 47-50. Carrera's arm was cut off when his shirt was caught in a conveyor whose side guards, in violation of state law, had been removed. CP 48. Carrera was neither warned of this safety hazard, nor trained how to avoid it. CP 11-12. Sunheaven "assumed a nondelegable duty of care to employees of [Hartley Farms] in its contract." *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 334, 582 P.2d 500 (1978). Sunheaven breached that duty,

[1] The General Partnership merged into an LLC after Basilio Carrera's industrial injury.

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which proximately caused Carrera's arm to be severed from his body. CP 12.

Soon after the accident, Carrera retained an attorney, Thomas Olmstead, to pursue legal remedies. CP 14. Unfortunately, Olmstead did not bring a suit against Sunheaven but instead sued Carrera's employer. CP 14-15. The suit was dismissed on summary judgment on the basis that a worker may not sue his employer unless injured by an intentional act. CP 292-94. Olmstead, despite requirements under RCW 51.24.030(2) to notify the Department of the filing of a third party workers' compensation action, did not do so until after the action was dismissed. CP 261. After it was informed of dismissal, the Department identified Sunheaven as a potential liable party. CP 220-21.

C. The Lawsuit Against Sunheaven Was Assigned to the Department

The Department issued notice to Carrera under RCW 51.24.070(2) informing him of its intent to pursue an assigned third party action if he failed to respond within 60 days and pursue the action himself; he did not respond and the Department became the statutory assignee of his action against Sunheaven. CP 2; 263; RCW 51.24.050(1). In March 2014, the Department filed a malpractice claim against Olmstead and, by an

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amended complaint filed in April 2014, a negligence claim against Sunheaven. CP 1-23. This was more than three years after the injury.

D. The Department Argued That Under *Vinther*, *Cowlitz County*, *Herrmann*, *LG Electronics*, and RCW 4.16.160, No Statute of Limitations Applies to the Department

Sunheaven moved for summary judgment, arguing that the Department could only recover from Sunheaven an award equal to the injured worker's "entitlement," that is, the benefits it has already paid under the claim and the amount it estimates will be paid in the future. CP 51-60. In this case, the Department estimates past and future benefit payments to Carrera will reach $788,418. CP 55, 147. Sunheaven asked the trial court to instruct the jury it could not award the Department more than that sum. CP 60.

Sunheaven offered two reasons. First, it argued that case law interpreting what the Department may recover *from an injured worker* should govern what the Department may recovery *from a third party*. CP 55-56. The trial court did not grant summary judgment on this basis. CP 402-06. The court's decision was correct. RCW 51.24.050 authorizes the Department to prosecute a cause of action for negligence against a third party. Any award obtained by the Department must first be used to cover litigation costs and attorney fees. Second, 25 percent of the remaining funds must be disbursed to the injured worker. Third, the Department may

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reimburse itself for benefit payments. Fourth, the injured worker receives the remaining funds. RCW 51.24.050(4). However, some of the remaining funds may be used to offset future benefits payable under the claim. RCW 51.24.050(5).

The Department argued to the trial court that if the Department could only collect the amount of benefit payments made or to be made to the worker, application of the four step distribution scheme would engineer a shortfall to the Department *in all cases*. CP 156-57. The lump sum recovery would be reduced both by attorney fees, and a worker distribution of 25 percent, before benefit payments could be reimbursed to the workers' compensation fund. *Id.* The Department argued that the Legislature would not craft legislation intended to make the workers fund whole yet provide for, at best, half recovery of benefit payments. CP 157. Further, the fourth distribution step would be superfluous as funds would be depleted in all cases before ever reaching that step. *Id.*

Sunheaven advanced a second argument, however, based on the statute of limitations. CP 6-10. It argued that, although the Department may recover all damages in a third party suit, it may not recover damages greater than its benefit payments if its suit is filed beyond three years of the negligent act, that is, after the statute of limitations governing negligence claims, RCW 4.16.080, has run. *Id.* Sunheaven argued state

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immunity from RCW 4.16.080, codified at RCW 4.16.160, did not apply because the Department did not act in its interest in recovering a sum greater than what it paid or expected to pay in benefits, notwithstanding that such "excess" recovery was necessary to replenish its workers' compensation fund. CP 6-10.

Although the trial court considered *Herrmann v. Cissna*, 82 Wn.2d 1, 507 P.2d 144 (1973), and *State v. LG Electronics., Inc.*, 185 Wn. App. 123, 340 P.3d 915 (2014), *review granted*, 183 Wn.2d 1001 (2015), it held that the Department was time-barred from collecting damages other than its current and projected benefit expenditures. CP 402-06. The court did not rule the Department's action was untimely. *Id.* Instead, the trial court held that a *class of damages* was barred by the statute of limitations. *Id.*

Although the trial court found that the State could recover its own benefit payment expenditures, it declined to allow the Department to make itself whole. The distribution scheme in RCW 51.24.050, coupled with the trial court's cap on recovery, would result in a shortfall to the workers' compensation fund of $394,209.

E. The Department Successfully Sought Discretionary Review

The trial court granted the Department's motion for certification of its appeal. CP 415-16. The Department then sought and was granted

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discretionary review. The superior court action is stayed pending the result of this appeal.

V. STANDARD OF REVIEW

An appellate court "reviews summary judgment determinations de novo, engaging in the same inquiry as the trial court." *Durland v. San Juan Cnty.*, 182 Wn.2d 55, 69, 340 P.2d 191 (2014). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The facts are viewed in the light most favorable to the non-moving party, here, the Department. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

VI. ARGUMENT

It is well-established that the statute of limitations does not apply to the Department in a third party action. *See State v. Vinther*, 176 Wash. 391, 393-98, 29 P.2d 693 (1934); *State v. Cowlitz Cnty.*, 146 Wash. 305, 311, 262 P. 977 (1928). Sunheaven does not dispute that the statute of limitations does not run against the Department's own claim. CP 56, 60. The question here is whether the Department may claim general damages and damages beyond what it has paid or expects to pay in benefits to the injured worker. It may on two theories. First, the Department may claim against the negligent party all damages under the plain language of RCW

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51.24.050 as its own claim. It may then distribute the award as directed by statute. Second, even if the general damages are somehow considered Carrera's, the Department may seek such damages unimpeded by the statute of limitations when it acts to benefit the State, as it has here.

A. The Department May Seek All Damages in the Assigned Cause of Action

RCW 51.24.050 allows the Department to "prosecute" an assigned "cause of action" when a negligent non-employer has injured a worker. The Department may seek all damages in an assigned third party case because the whole "cause of action" is assigned to it. RCW 51.24.050. Sunheaven argued to the trial court that the Department could not recover all damages, irrespective of the statute of limitations. The trial court did not grant its motion for summary judgment on these grounds. CP 402-06.

The trial court was correct. RCW 51.24.050 gives the Department the authority to prosecute the "cause of action," which includes seeking a remedy for all damages. The statutory scheme contemplates the Department will obtain more than the benefits it has paid, or will pay, when it pursues a third party claim. Moreover, the case law Sunheaven relied on analyzes a different statute and a different situation. It addresses the Department's efforts to obtain a worker's pain and suffering damages under RCW 51.24.060. It does not apply to limit the Department from

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claiming general damages under RCW 51.24.050. Instead, the applicable Washington case law endorses precisely such relief.

1. A "Cause of Action" in RCW 51.24.050 Includes the Right to Claim the Remedy of All Damages

The Legislature has authorized the Department to seek all damages in a third party action if the worker has declined to pursue damages against a negligent third party. RCW 51.24.050. The statute assigns the whole "cause of action" to the Department:

> 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.

RCW 51.24.050 (1). "Cause of action" is defined as "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a *remedy* in court from another person." *Black's Law Dictionary* (10th ed. 2014). By using the term "cause of action," the Legislature would have properly understood that it gave the Department the authority to seek a remedy, namely, all damages. *See Associated Grocers, Inc. v. State*, 114 Wn.2d 182, 189, 787 P.2d 22 (1990) (stating Legislature is presumed to understand the meaning of ordinary and precise terms). It would not have understood that "cause of action" limited the damages the Department may seek.

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2. RCW 51.24.050's Distribution Formula Contemplates the Department Will Obtain More Money Than Will Be Its Share

RCW 51.24.050 authorizes the Department to prosecute a cause of action for negligence against a third party and allows the Department to claim all damages that result from that negligence. Under the statute, a jury may award damages in excess of past and projected benefit payments. This recovery is then distributed according to a formula set forth in the statute:

> (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.

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RCW 51.24.050.

Thus, under this statute any award obtained by the Department must first be used to cover litigation costs and attorney fees. Second, 25 percent of the remaining funds must be disbursed to the injured worker. Third, the Department may reimburse itself for benefit payments. Fourth, the injured worker receives the remaining funds. RCW 51.24.050 (4). However, some of the remaining funds may be used to offset future benefits payable under the claim if the award is substantial. RCW 51.24.050(5).

Sunheaven argued before the trial court that the Department could only recover the amount of benefits it paid, even if its claim was timely. Sunheaven's argument in favor of imposing the statute of limitations relies on the premise that the Department's claim for damages is limited to reimbursement of benefit payments and thus recovery of additional funds is a conduit for Carrera. It is a false premise.

First, no language in any section of the Industrial Insurance Act suggests any limitation on third party lawsuits brought by the Department. The trial court's order cites a statute, RCW 51.24.090(1), which does not apply to claims brought by the Department under RCW 51.24.050. CP 405. Instead, it applies to claims brought by the injured worker. It defines

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entitlements as amounts the Department has paid or will pay on a claim. This is significant to a claim brought by an injured worker because the Department's lien against that recovery is limited to that entitlement and the Department, under RCW 51.24.090, may object to settlement *by an injured worker* that fails to recover an amount sufficient to satisfy that lien.

But, RCW 51.24.090 does not address damages obtained *by the Department*. The statute does not provide any direction to limit the Department's claim for damages when injured workers abandon their claims under RCW 51.24.050 and the Department is the sole plaintiff pursuing damages.

RCW 51.24.090 does not limit damages sought by the Department and neither does the statute authorizing Department third party lawsuits, RCW 51.24.050(1), which broadly gives the Department the right to prosecute the "cause of action." Nor does any limit to entitlement appear in RCW 51.24.050(4), which orders the Department to distribute its recovery as directed by the Legislature. In short, there is no language anywhere in RCW 51.24.090 imposing any limitation on the Department's ability to obtain damages when it pursues a claim abandoned by an injured worker and assigned to it by statute. Language cannot be added to the statute, *see Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001),

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but only by adding language can the courts entertain Sunheaven's argument to impose any limitation on the Department's recovery.

Second, in order for RCW 51.24.050 to make any sense and reflect legislative intent, the Department must be able to recover more than its benefit payments to make itself whole and to avoid rendering the fourth distribution step (excess recovery) superfluous legislation. Absent recovery of damages in excess of benefit payments, *in all cases* the Department would at best recover only half of its reimbursement of benefit payments.[2] It is a mathematical certainty that the Department would be unable to reimburse itself in full absent recovery of damages beyond its benefit payments. In this case, recovery of benefit payments alone results in a $394,209 shortfall for the injured workers fund—even before deductions for litigation costs.

Further, if the statute is interpreted to mean the Department may only seek from negligent non-employers benefit payment reimbursement, the fourth step in distribution is superfluous. This step requires distribution of excess or leftover funds to the injured worker. But, no funds could ever be "left over" when the first three distributions exhaust the recovery. This interpretation would make the fourth step mandated by the Legislature

[2] The 50 percent or less recovery assumes, as is the Department's practice, retention of a private contingency fee attorney charging an industry standard rate.

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unnecessary and meaningless. And, "[the Legislature] does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment." *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976).

3. Case Law Confirms That the Department May Seek General Damages in a RCW 51.24.050 Case

The courts have recognized that the Department may seek general damages in assigned cases under RCW 51.24.050. The Supreme Court in 1998 approved a settlement of an action brought by the Department against a negligent third party under RCW 51.24.050 that included an award of general damages. *See Duskin v. Carlson*, 136 Wn.2d 550, 956 P.2d 611 (1998) (court approved settlement of an assigned Department action against third party that included $10,000 in general damages). This case reveals the long-standing practice of the Department, which is by itself persuasive. Substantial weight is accorded to the agency's view of the law if it falls within the agency's expertise in a specialized area of the law. *Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife*, 182 Wn. App. 857, 867, 332 P.3d 1046 (2014).

The Court of Appeals has confirmed the Department is a real party in interest when it pursues an injured worker's action in an assigned third

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party action under RCW 51.24.050. *Burnett v. Dep't of Corr.*, 187 Wn. App. 159, 167, 349 P.3d 42 (2015) ("DLI has the right to use [injured worker's] name under RCW 51.24.050(1). DLI is a real party in interest.").

Contrary to Sunheaven's arguments before the trial court and repeated in its opposition to review, *Tobin v. Department of Labor & Industries*, 169 Wn.2d 396, 239 P.3d 544 (2010), and *Flanigan v. Department of Labor & Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994), do not apply to cases under RCW 51.24.050 to prevent the Department from seeking general damages.

Tobin and *Flanigan* limit what the Department may recover from an award *obtained by an injured worker* in accord with RCW 51.24.030 and .060. The issue in both cases is the State taking what belongs to an injured worker who, unlike Carrera, did not abandon his or her claim but instead obtained an award that became his or her personal property. Sunheaven relies on statutory language not found in the statute enabling third party assigned actions brought by the Department when an injured worker has abandoned his or her claim. Indeed, in *Tobin*, the Court found "compelling" the argument the Department was not entitled to a share of pain and suffering damages because of the statutory provision not found in RCW 51.24.050 and inapplicable here. It relied on RCW 51.24.060(1)(c),

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which gives the Department access to recovery "'only to the extent necessary to reimburse the department . . . for benefits paid'." *Tobin*, 169 Wn.2d at 402 (quoting RCW 51.24.060(1)(c)). RCW 51.24.050 does not contain such language.

Neither *Tobin* nor *Flanigan* address what the Department may seek *from a negligent third party* under RCW 51.24.050. These decisions address a different context, a different statute, and a different cause of action, and have no application to the question before the Court. They do not hold that the Department may not obtain general damages *from a negligent third party*. Moreover, they say nothing of the statute of limitations.

It is a separate question whether the Department may then keep a portion of the general damages it obtained from the negligent third party. The Department believes RCW 51.24.050(4) authorizes it to get its share from the whole amount of damages obtained. But it is up to Carrera to dispute this methodology. Sunheaven has no standing to challenge this. *See Burnett*, 187 Wn. App. at 171 (party may not raise other party's claim). Certainly, Sunheaven cannot use Carrera's hypothetical argument as a shield for payment of damages for its negligent behavior. To claim relief under *Tobin* and *Flanigan* is to ignore that both cases maximized the workers' interest. Neither the worker's interest, nor the Department's, is

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served by allowing a company whose negligent actions resulted in an amputated arm to escape responsibility for all the damage it caused. Nor does such an outcome make the workers' compensation fund whole or deter dangerous behavior in the future.

RCW 51.24.050 unambiguously reveals legislative intent to authorize the Department to seek general and other damages beyond its benefit payments as the real party in interest. All damages in this case derive from the Department's cause of action and, contrary to Sunheaven's argument, "belong" to the Department. Carrera has no claim for damages; he abandoned his claim and the Department exercised its statutory authority to pursue *its own action* against Sunheaven. Because it is the State's own action, the action—and all damages awarded under it—is immune from the statute of limitations.

B. The State Is Immune From the Statute of Limitations When Exercising Its Statutory Authority To Pursue Parties That Negligently Cause Workplace Injuries

Washington authority addressing state immunity from the statute of limitations, and specific applications of that immunity, confirms the Department is not subject to the statute of limitations in this case. As explained above, the Legislature authorized the Department to seek all damages in a third party action if the worker declined to pursue damages against a negligent third party. RCW 51.24.050.

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The Legislature authorized the Department to pursue negligent third parties threatening worker safety for laudable policy reasons. Department third party lawsuits replenish the workers' compensation fund for benefits already paid, provide for offset against payment of future benefits, deter unsafe practices, and promote worker cooperation with investigation and litigation. Because these lawsuits are authorized by statute for state benefit, they are immune from the statute of limitations. The Supreme Court ruled in *Herrmann v Cissna*, a case indistinguishable from this case, that the statute of limitations did not bar the State under such facts as present here. The trial court's disregard for this authority compels its reversal.

1. The State is Immune from the Statute of Limitations When Acting "For the Benefit of the State"

The statute of limitations only applies to the State if the Legislature authorizes it. The Washington Supreme Court observed 107 years ago "[t]he statute of limitations, it must be remembered, does not run against the state except with the state's consent." *Brace & Hergert Mill Co. v State*, 49 Wash. 326, 334-35, 95 P. 278 (1908).

In RCW 4.16.160, the Legislature mandates no time limitations for actions brought "for the benefit of the state":

> The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county

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> 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 . . .

The Supreme Court has "found an action to be 'for the benefit of the state' under RCW 4.16.160 where it involves a duty and power inherent in the notion of sovereignty or embodied in the state constitution." *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co* , 165 Wn.2d 679, 689-90, 202 P.3d 924 (2009). In deciding whether a cause of action "involves a duty and power inherent in the notion of sovereignty," the Court looks to the constitution and statutes for an indication that the matter sued upon relates to a sovereign duty of the State. *Washington Pub. Power Supply v. GE Co.*, 113 Wn.2d 288, 300-01, 778 P.2d 1047 (1989). In this case, the Department's cause of action against a negligent party for worker injuries is not merely "indicated" as relating to sovereign authority. The lawsuit itself is identified by statute as an exercise of the State's sovereign power. RCW 51.24.050.

Washington courts overwhelmingly support holding that the Department may pursue all damages in this lawsuit. Two cases directly state that assigned third party actions are immune from the statute of

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limitations. *Vinther*, 176 Wash. at 393-98; *Cowlitz Cnty.*, 146 Wash. at 311.[3] And two address analogous lawsuits original to a private plaintiff that, by statute, are assigned to the State but result in enrichment of a private party. Both hold that the statute of limitations does not apply and does not bar recovery of any damages. *Herrmann*, 82 Wn.2d 1; *LG Elecs., Inc.*, 185 Wn. App. 123.

2. *Herrmann* and *LG Electronics* Compel a Holding That When the State Acts To Further Important Public Policy Goals—as Here—It Is Acting for the Benefit of the State

Various statutory mechanisms authorize the State to pursue a private citizen's claim as its own cause of action. The third party action assignment in RCW 51.24.050 is one such mechanism. *Herrmann* and *LG Electronics* examine two others. In both cases the Court held the statute of limitations *did not* apply to such government action under RCW 4.16.160.

RCW 4.16.160 provides that statutes of limitations do not apply to the State when the action is "for the benefit of the state." Sunheaven argued that Carrera's pecuniary interest in recovery by the State meant the State was not pursuing its own action when it sought general damages, but instead was acting as a conduit for Carrera's action. CP 59. The trial court

[3] In both cases, the Industrial Insurance Act at that time limited Department recovery in third party suits to its subrogation interest in recovering worker benefits. *See also State v. Starr*, 185 Wash. 18, 22, 52 P.2d 897 (1936). The Act was amended in 1977 to allow Department recovery of all damages. Laws of 1977 Ex. Sess., ch. 85, § 3

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ruled that the Department "stands in the shoes of the injured worker" and "therefore the State's claims for the injured worker's non-economic damages claimed against" Sunheaven was "subject to all of the defenses available against the injured worker, including the statute of limitations." CP 402-406.

The Supreme Court considered and rejected these very arguments in *Herrmann*. *Herrmann* addressed the authority of the Insurance Commissioner under RCW 48.99.020 (formerly RCW 48.31.120) to pursue claims on behalf of a delinquent insurance company. As with the Department's pursuit of an injured worker's claim, the Insurance Commissioner "stands in the shoes" of the delinquent company. It asserts claims against company officers related to mismanagement of the company. Any award goes directly to the delinquent company. *Herrmann*, 82 Wn.2d at 5 (explaining RCW 48.31.120).

In *Herrmann*, if the claims brought by the Commissioner had instead been brought by the company, they would have been time-barred. The defendants in *Herrmann* argued, in the same manner as Sunheaven here, that because the State was a "mere conduit" for the private insurance company it stood in the shoes of that company and was subject to the statute of limitations defense. The Supreme Court rejected that argument. *Id* at 7.

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The Court explained that although the State "stood in the shoes" of the Insurance Company it remained the State despite those shoes. *Id.* at 8. It did not lose its immunity from the statute of limitations under RCW 4.16.160. The Court held that the action was for the benefit of the State because the Legislature had in mind the possibility that an insurer may have been victim of a bad actor and "the legislature reasonably could have concluded that the deterrent effect of such proceedings by the commissioner . . . is a factor tending to benefit the public in general." *Id.* at 7.

The Court acknowledged, "the proceeds of the commissioner's suit, if any, will inure to the benefit of the company and its policyholders," but found the State was nonetheless acting in its official capacity because such disbursement is "in accord with the legislative intent." *Id.* at 5. *Herrmann* is controlling, and the trial court was obligated to honor its holding. It is true that the Department stands in the shoes of Carrera, but it is still the State when it does so. In this case, the Department is acting in its official capacity under authority conferred upon it by RCW 51.24.050. In addition to other valid public interests, the action serves the important purpose of providing a "deterrent" effect against negligent actors, as endorsed in *Herrmann*.

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The Legislature withdrew workplace negligence cases from common law tort liability and created the Industrial Insurance Act. RCW 51.04.010. In doing so, however, it did not want to prevent the important deterrent effect of tort actions against negligent third parties, so it allowed the Department to bring suit against such parties. Equally important, third party actions directly replenish public money and, by compensating injured workers, provide an incentive for workers' cooperation with the Department's investigation and recovery efforts as well as a safeguard against future expenditures. Although a portion of the proceeds of this suit are distributed to the injured worker this is "in accord with legislative intent" and serves a public purpose, as in *Herrmann*.

The *Herrmann* Court provided a clear metric for resolving this case: does RCW 51.24.050 contain an "express provision" abrogating state immunity from the statute of limitations? The Supreme Court explained that because there is "no express provision subjecting the commissioner to all the defenses which would be available to a defendant in a private action," the Legislature intended state immunity from the statute of limitations to apply to the Commissioner's action. *Herrmann*, 82 Wn.2d at 7. No provision of RCW Title 51 even hints at abrogation of RCW 4.16.160. Consistent with *Herrmann*, the Department is immune from the statute of limitations.

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In addition, the Court of Appeals recently confirmed that the State is not subject to the statute of limitations when its cause of action results in an award to a private citizen. In *LG Electronics*, the Attorney General exercised his authority under RCW 19.86.080(1) and brought suit as parens patriae on behalf of direct and indirect purchasers victimized by an alleged price-fixing scheme, seeking restitution for citizens under RCW 19.86.080(2). 185 Wn. App. at 128. The defendants moved to dismiss the claims as untimely. The Court held that RCW 4.16.160 exempted the State from the statute of limitations because the Consumer Protection Act did not contain an explicit abrogation of RCW 4.16.160 and because a cause of action awarding restitution to private persons was for the public benefit. *Id.* at 923 (citing *Seaboard Sur. Co. v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 746, 504 P.2d 1139 (1973)). Under *Herrmann* and *LG Electronics*, the Court should hold that the Department's claim for all damages is "for the benefit of the state" such that RCW 4.16.160 immunity applies.

C. No Authority Exists Supporting the Application of the Statute of Limitations To Bifurcate the Types of Damages the Department May Seek Under RCW 51.24.050.

In addition to contradicting clear precedent, the trial court's application of the statute of limitations to a class of damages, but not the predicate action, is without precedent and contrary to the legislative intent

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underpinning the statute of limitations. The trial court did not rule that the negligence claim against Sunheaven was barred by the statute of limitations. CP 402-06. This was consistent with precedent. *See Vintner*, 176 Wash. 391; *Cowlitz Cnty*, 146 Wash. 305. In both cases, the Court explained that the third party action is original to the State and is not a derivative claim. This precedent was correctly followed by the trial court because the negligence claim before the court *is the State's claim*, and is not subject to the statute of limitations. This should end the inquiry. But, the trial court nevertheless held that a class of damages was subject to the statute of limitations. CP 402-06. Although the underlying action was timely, certain "damages," somehow, were not.

Neither the Department, nor Sunheaven, nor the trial court, despite extensive research, could find any authority from any court applying the statute of limitations to bar a class of damages, but not an action. The purpose of a statute of limitations is to give defendants certainty by eliminating the fear of litigation past a certain point in time and to protect against stale claims. *Ruth v Dight*, 75 Wn.2d 660, 664-65, 453 P.2d 631 (1969). These interests prevail over a plaintiff's right to justice and access to the courts. *Id*

Yet, the trial court's application of the statute of limitations to a *class of damages* results in the worst of both worlds—the benefits of a

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time bar are not realized but the interest in redressing tortious conduct is frustrated. This case demonstrates why the Legislature applies the statute of limitations to actions, not a class of damages. In this case, the purported "stale claims" are already before the court. The policy interest in preventing such alleged stale actions, and assuring a defendant certainty that it is free from litigation, have not and cannot be served. Indeed, the most "fresh" evidence in this case is the general damages the trial court excluded. Carrera's current and future pain and suffering, based on life without an arm, could not be more current. The purported "stale" aspects of the case, the facts that establish liability, require inquiry into the historical events before injury. These older facts will be litigated whether general damages are or are not excluded. Protection from stale claims and evidence is not served, and all that remains is the sacrifice of justice.

Sunheaven should have to pay for its negligence, the workers' compensation fund should be replenished and safeguarded, and the State's policy interests in deterrence should be served. Application of the statute of limitations is nonsensical if it simply limits how much negligent defendants must pay when they are already before the court. That is why the statute of limitations applies to stale claims, but not damages based on live claims. Moreover, "the Legislature has expressly instructed us that the State shall not be subject to the policies of preventing stale claims inherent

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in statutes of limitation." *Bellevue Sch Dist v. Brazier Constr. Co.*, 103 Wn.2d 111, 120, 691 P.2d 178 (1984) (citing RCW 4.16.160).

VII. CONCLUSION

RCW 51.24.050 broadly authorizes the Department to prosecute the whole "cause of action" when a non-employer such as Sunheaven negligently injures a worker. This broad grant of authority gives the Department an unfettered remedy and does not limit the type of damages the Department may seek. Such a limitation would frustrate the goals of the Legislature to replenish the workers' compensation fund while deterring dangerous conduct threatening worker safety. Unambiguous precedent exempts the State from the statute of limitations when it acts as a statutory assignee for the benefit of the State. Here, the Department seeks all damages in an action to further its interest in replenishing the workers' compensation fund, in discouraging negligent parties from injuring Washington workers, in guarding against shortfalls in the recovery, and in obtaining the cooperation of workers in the litigation. Moreover, the bifurcation of damages and application of the statute of

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limitations to one class of damages, but not another, is not authorized by the statute of limitations. The Department asks this Court to reverse the superior court.

August 31, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing to the parties mentioned below as indicated:

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DATED this 31st day of August, 2015.

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