No. 47397-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Basilio Cornelio Carrera, Plaintiff,

v.

Sunheaven Farms and Brent Schulthies, Defendants.

BRIEF OF RESPONDENTS SUNHEAVEN FARMS AND BRENT SCHULTHIES

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I. PRELIMINARY STATEMENT AND QUESTIONS PRESENTED

The Department of Labor and Industries paid worker's compensation benefits to and on behalf of Carrera as a result of a 2009 workplace injury. Any third-party claim by Carrera was subject to a three-year statute of limitations. In 2014 the Department obtained an assignment of Carrera's claim and sued Sunheaven, an alleged third-party liable for the injury. The Department sought recovery not only of its own damages (the amount of worker's compensation benefits payable) but also of Carrera's general damages (*e g.*, pain and suffering) and special damages exceeding the Department's lien. On summary judgment the trial court allowed the Department's lien claim to proceed but dismissed Carrera's time-barred personal claims for amounts above the lien. The Department claims that because of RCW 4.16.160, which immunizes the state from any limitation on claims "for the benefit of the state," the statute of limitations cannot apply to Carrera's claim.

This appeal calls upon the court to decide these questions:

> Assignment: An assignment conveys no greater rights than those of the assignor; under controlling law the assignee's rights depend on the assignor's rights. Carrera assigned his claim to the Department in 2014 after it had become time-barred. May the Department maintain Carrera's time-barred claim?
>
> Statute-of-limitations immunity: RCW 4.16.160 immunizes the Department from statutes of limitation only if its claim

is "for the benefit of the state," and a claim benefits the state only if it arises out of the state's sovereign powers and is for the common good. The Department may retain no part of Carrera's damages in excess of its lien. Is Carrera's private claim "for the benefit of the state" and thus immunized from any limitation bar?

II. STATEMENT OF THE CASE

A. Carrera is injured and sues; his case is dismissed.

Basilio Carrera, an employee of Brent Hartley Farms, LLC, was injured in the course of his employment on August 14, 2009.[1] Carrera retained attorney Thomas Olmstead to pursue third-party claims for his workplace injury. Olmstead brought suit on Carrera's behalf against Carrera's employer and others.[2] Carrera's claims were dismissed on summary judgment in March 2011. Carrera did not appeal.[3] The Department, which had been paying worker's compensation benefits to Carrera and therefore had a lien on any recovery, was notified of this outcome a few months later.[4]

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[1] CP 2, 11-12.

[2] CP 14-15.

[3] CP 15-16, 24-25, 91-92.

[4] CP 2.

B. Carrera's claim is assigned to the Department more than four years after the injury.

In late 2013, the Department sent an election letter to Carrera.[5] When Carrera failed to respond within the statutorily-required 60 days, the Department claimed an assignment of Carrera's third-party claim by operation of law as of March 2014.[6]

C. The Department sues Carrera's lawyer for malpractice and the Sunheaven entities for the injury.

The Department then brought suit alleging Olmstead had committed legal malpractice and alleging the Sunheaven defendants (Sunheaven Farms, Sunheaven Farms LLC and Brent Schulthies – collectively "Sunheaven") had provided safety training services to Carrera's employer and were therefore non-employer third parties at fault for Carrera's injury.[7] Even though the Department has brought this suit in Carrera's name, it has consistently maintained that it is "the only real party in interest," that it is "the sole plaintiff in this lawsuit" and that its attorney "do[es] not represent Mr. Carrera."[8]

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[5] CP 100.

[6] CP 102.

[7] CP 79-95.

[8] CP 114, 119-121, 131, 154, 232, 235-237.

D. The Department claims it is entitled to recover not only its lien, but also Carrera's non-economic damages.

Discovery showed that the Department has paid out $50,847.21 in time loss and $123,439.53 in medical aid and has reserved a pension in the amount of $614,132— a total of $788,418.[9] But in its discovery answers, the Department maintained that it was entitled to recover up to $13 million for Carrera's pain and suffering and other general damages.[10]

E. Sunheaven moves for summary judgment to limit the Department's claim to its lien amount.

Sunheaven moved for a summary-judgment order limiting the Department's recovery to the amount it had paid out and would pay out— the amount of its lien. That was the maximum amount of its loss as the self-avowed real party in interest; any claims in excess of the statutory lien were private claims barred by the three-year statute of limitation.[11]

The Department opposed the motion, claiming that the statutory assignment included damages beyond those sufficient to reimburse the benefit payments, and that it was not subject to the statute of limitations, even for the claims in excess of its lien.[12] Further, according to the

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[9] CP 147.

[10] CP 142-143.

[11] CP 51-60.

[12] CP 148-67.

Department, even if the statute of limitation applied to it, its claim was not time-barred under the three-year statute of limitation because the discovery rule applied and because the proper defendants had not been identified until very recently.[13] It further claimed that Sunheaven was equitably estopped from asserting the statute of limitations.[14]

F. The trial court grants Sunheaven's motion.

The trial court, after careful consideration, ruled that:

(1) The Department, as statutory assignee of any applicable third-party claims, stands in Carrera's shoes and therefore its claims for Carrera's non-economic damages were subject to all defenses available against Carrera, including the statute of limitation, notwithstanding the statute exempting the State from limitations;

(2) The three-year statute of limitation applies to the injured worker's personal-injury claim and the Department's suit had been filed beyond the limitation period;

(3) The discovery rule and equitable estoppel or tolling did not apply under the facts; and

(4) Therefore, the Department's claim was limited to the entitlement paid and to be paid by the Department in the amount of $788,418.[15]

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[13] CP 165.

[14] CP 364, 368.

[15] CP 410-414.

G. The trial court certifies its order.

At the Department's request, the trial court entered a pro forma order finding that its summary-judgment order involved "a controlling question of law as to which there is a substantial ground for a difference of opinion and immediate review of the order may materially advance the ultimate determination of the litigation" and certifying the question under RAP 2.3(b)(4).[16]

H. This court grants discretionary review.

The Department sought discretionary review, which this court's commissioner granted.

III. SUMMARY OF ARGUMENT

The Industrial Insurance Act provides the exclusive source of recovery for workplace injuries, both for Carrera and the Department. The Act removes all litigation over workplace injury from the courts except as provided by the Act, and provides for "sure and certain relief" for injured workers through payment of worker's compensation benefits by the Department.

The Act authorizes an injured worker to bring a third-party action against non-employer third parties at fault for the worker's injury. In the

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[16] CP 415-416.

third-party action the worker may recover a broader array of damages (pain-and-suffering damages and higher special damages) than those paid by the Department under worker's compensation. The Department has a lien on the third-party recovery for the worker's compensation benefits to be paid. But it may not recoup its lien from the worker's general damages (pain and suffering) or from loss-of-consortium damages—as both the Act states and our Supreme Court has held. So the Department's claim is limited to its lien, and it must pay a proportionate share of the attorney's fee and litigation costs out of that lien.

Carrera suffered a workplace injury on August 14, 2009, and received worker's compensation benefits afterwards. The Department obtained a statutory assignment of his third-party claim in March 2014, but by then Carrera's claim—subject to a threeyear statute of limitation—was time-barred.

In April 2014 the Department sued Sunheaven, an alleged third-party at fault for Carrera's injury, claiming not only the amount of its lien but also Carrera's general damages and other damages in excess of the lien. It claims it may recover all of those damages because under RCW 4.16.160 the Department is not subject to the statute of limitations on claims "for the benefit of the state."

But the Department may not maintain the claim for Carrera's personal damages for two reasons.

First, Carrera's assignment of his claim to the Department long after the limitation period had expired conveyed only what he had: A time-barred claim. As our Supreme Court has repeatedly explained, RCW 4.16.160 does not insulate the Department from the time bar in that circumstance.

Second, when the Department is acting "as a conduit through which one private person can conduct litigation against another," it is not exempt from the statute of limitations. By asserting Carrera's general and special damages claims, the Department can benefit only Carrera, since it must—as the Act says—turn over the recovery above its lien to Carrera. Its claim is not "for the benefit of the state."

The only claim the Department may maintain is its own claim for its lien amount. That is the only claim "for the benefit of the state" and the only claim to which RCW 4.16.160 applies.

IV. ARGUMENT

A. The Industrial Insurance Act—the legal source for the Department's claim—consistently provides that in third-party actions the Department may recover only the benefits it must pay, and requires it to pay attorney's fees and costs from that recovery.

1. *Overview: The Act provides for payment of worker's benefits by the Department and authorizes third-party actions by both the worker and the Department as the worker's assignee.*

The Industrial Insurance Act ("Act") provides the exclusive means of recovery for workplace injury. Litigation over workplace injuries is authorized only as provided in the Act.[17]

The original Act required an injured worker to choose between receiving worker's compensation benefits from the state fund and suing responsible parties.[18] The current Act allows the injured worker to both receive worker's compensation benefits from the Department and sue non-employer liable third parties.[19] The third-party suit permits recovery of a broader array of damages than is provided under the worker's

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[17] RCW 51.04.010. *See Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994).

[18] *State v. Cowlitz County*, 146 Wash. 305, 307, 262 P. 977 (1928) (quoting the statute).

[19] RCW 51.24.030(1), (2).

compensation benefits scheme.[20] And if the suit is successful, the Act generally requires the worker to reimburse the Department's fund for the benefits received.[21]

If the worker elects not to pursue a third-party claim, the Department may obtain an assignment of the claim.[22]

2. *In a third-party claim pursued by a worker, the Department may be reimbursed only for its lien, but not from the worker's general damages.*

An injured worker electing to pursue a third-party claim on account of his injury "for which benefits and compensation are provided for under this title" must give notice of the claim to the Department. The Department may then file a notice or intervene as a party to protect "its statutory interest in recovery."[23] If the action is successful, the Act provides the distribution priority:

1) Costs and attorney's fees must be paid "proportionally by the injured worker . . . and the Department";

2) The worker receives 25% of the balance of the award;

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[20] *Flanigan*, 123 Wn.2d at 424 (a third-party suit "permits the employee to increase his or her compensation beyond the Act's limited benefits.").

[21] RCW 51.24.060(1).

[22] RCW 51.24.070.

[23] RCW 51.24.030(1), (2).

3) The Department is then paid the balance of the recovery "but only to the extent necessary to reimburse the Department . . . for benefits paid;" the Department's reimbursement share is determined "by subtracting [its] proportionate share of the costs and reasonable attorney's fees from the benefits paid amount."

4) "Any remaining balance" is then paid to the injured worker.[24]

The statute further characterizes the Department's share as a "lien" on the recovery.[25]

3. *In a third-party claim assigned to the Department, the Department may retain only the amount of the lien.*

If the injured worker elects not to proceed against a third party, the "action" is, after notice to the worker, deemed assigned to the Department.[26] The Department may then prosecute or compromise the assigned "action".[27]

If the action is successful, the recovery-distribution scheme parallels that for the worker-initiated suit:

1) The Department (as the only party prosecuting the action) is paid the legal fees and expenses of the action;

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[24] RCW 51.24.060(1).

[25] RCW 51.24.060(2).

[26] RCW 51.24.070(2).

[27] RCW 51.24.050(1)

2) The injured worker is paid 25% of the balance (but the worker can agree to a lesser percentage);

3) The Department must then be paid "the compensation and benefits paid to or on behalf of the injured worker . . . by the Department";

4) The worker then receives "any remaining balance".[28]

As the foregoing discussion shows, the Act consistently provides that the Department's only protected interest is its lien. The Department has no right to retain the worker's recovery for any damages for which it did not pay benefits. The Act—which must be read as a whole, interpreting the various provisions in light of one another, and not read piecemeal[29]— makes this clear in several places:

- An injured worker pursuing a third-party claim must give notice of the action to the Department.[30] The Department may then file "a notice of statutory interest in recovery" and may also intervene – an evident reference to its interest in recovering the amount of the benefits paid.[31]
- The worker's compromise of his third-party action resulting in a payment of less than the "entitlement under this title" is void unless made with the written approval of the Department. "Entitlement" means "benefits and

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[28] RCW 51.24.050(4).

[29] *Western Petroleum Importers Inc. v. Friedt*, 127 Wn.2d 420, 428, 899 P.2d 792 (1995); *Kmart Corp. v. Cartier Inc.*, 486 U.S. 281-291 (1988); *MastroPlastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 285 (1956).

[30] RCW 51.24.030(1).

[31] RCW 51.24.030(2).

compensation paid and estimated to be paid by the Department in the future"[32] – clarifying that the Department's protected interest is limited to the amount it pays in benefits.

- In any worker-prosecuted third-party action the Department may recover (after its payment of a proportionate share of the attorney's fees and costs) only an amount "to the extent necessary to reimburse the Department . . . for benefits paid." In calculating the reimbursement amount, the Department's share of attorneys' fees and costs must be subtracted from the benefits-paid amount.[33]
- Similarly, in a Department-prosecuted action, the amount it may retain (after payment of attorney's fees and costs) is "the compensation and benefits paid to or on behalf of the injured worker . . . by the Department."[34]

The Act must be read as a whole to construe its meaning.[35] When read as a whole, the Act clarifies that the Department's interest or claim that it may recover in the third-party action—whether denominated a "statutory interest in recovery" or "entitlement" or "lien"—is at most the amount of benefits it must pay to or on behalf of the injured worker.

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[32] RCW 51.24.090(1).

[33] RCW 51.24.060(1)(c).

[34] RCW 51.24.050(4).

[35] *Maziar v. Washington State Dept. of Corrections*, 183 Wn.2d 84, 87-88, 349 P.3d 826 (2015).

Contrary to the Department's position,[36] the Act does not allow the Department to recover more than it has paid out.

4. *Following the Act's language, the Supreme Court has consistently held that the Department may not retain any part of the third-party recovery that is not reimbursement for benefits paid.*

Under the earlier version of the Act, the Department could sue only for the amounts paid out to the injured worker.[37] It could not recover more than the benefit amount; amounts above the benefit were the worker's private claim.

Under the current Act, the Supreme Court has consistently held that the Department's right of reimbursement extends only to those damage categories for which the Department has actually paid compensation and benefits. In *Flanigan*,[38] the court held that the Department's right of reimbursement for worker's compensation benefits paid under RCW 51.24.060 did not extend to a deceased worker's spouse's third-party recovery for loss-of-consortium damages. This

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[36] *See* Brief of Appellant at 11 (Department claims the "statutory scheme contemplates that the Department will obtain more than the benefits it has paid, or will pay, when it pursues a third-party claim.").

[37] *E.g. State v. Vinther*, 176 Wash. 391, 29 P.2d 693 (1934) (suit for "an amount equal to the liability imposed on the accident fund").

[38] *Flanigan v. Dept. of Labor and Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994).

followed because "worker's compensation benefits do not compensate employees or their beneficiaries for non-economic damages such as loss of consortium."[39] As a result no danger of double recovery existed. Indeed, said the court, allowing the Department to reach the loss-of-consortium award "would give an unjustified windfall to the State" because it would permit the Department to "share in damages for which it has provided no compensation."[40] The Department could not be "reimbursed," *i.e.*, paid back, for damages it had never paid in the first place.[41]

More recently, the Supreme Court reached the same result with respect to an injured worker's recovery of general (*i.e.*, pain-and-suffering) damages. As in *Flanigan*, in *Tobin*,[42] the court held that the Department cannot share in damages for which it has provided no compensation. Because worker's compensation benefits compensate only for economic losses (and only in part), the Department could not reimburse itself out of the worker's recovery of general (non-economic) damages.

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[39] *Flanigan*, 123 Wn.2d at 425.

[40] 123 Wn.2d at 425–426.

[41] 123 Wn.2d at 426.

[42] *Tobin v. Dept. of Labor and Industries*, 169 Wn.2d 396, 239 P.3d 544 (2010).

While *Flanigan* and *Tobin* are RCW 51.24.060 (*i.e.*, worker-initiated) cases and refer to the language in that provision "reimbursing" the Department, the same limitation exists in RCW 51.24.050. That provision does not use the word "reimburse" but still limits the Department's recovery to "the compensation and benefits paid to . . . the injured worker."[43] Whether the Department seeks to recover under its right of reimbursement or its subrogation right, it cannot seek to recover damages that are not "compensation" or "benefits." The result under both RCW 51.24.060 and 51.24.050 is the same.

In sum, the statutory and caselaw pattern is consistent: The Department's interest or right of recovery is only for the benefits it pays, and no more.

B. Only the Department's own claim is not subject to a limitations bar; the statute of limitations applies to the Department's pursuit of Carrera's private claim—a derivative claim dependent on Carrera's rights.

1. ***Any claim by Carrera is time-barred.***

Carrera's injury occurred on August 14, 2009.[44] With benefit of counsel Olmstead, Carrera timely sued his employer but his case was

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[43] RCW. 51.24.050(4)(c)

[44] CP 2.

dismissed on summary judgment and not appealed.[45] Olmstead told the Department about the dismissal on August 2, 2011.[46]

The Department obtained by operation of law an assignment of Carrera's claim on March 6, 2014, sued Olmstead on March 14, 2014, and added Sunheaven as defendant by Amended Complaint on April 7, 2014—more than four years after Carrera's injury.[47]

The Department does not challenge the trial court's ruling that (1) the worker's claim is subject to the three-year statute of limitations of RCW 4.16.080(2), and (2) neither the discovery rule nor equitable estoppel applies to toll that limitation period.[48] Carrera's personal claim was indisputably time-barred after August 14, 2012.

2. *The Department claims it can pursue Carrera's personal damages.*

But the Department claims that all of Carrera's claim is, by virtue of the statutory assignment, now the Department's claim, and the statute of limitations cannot apply as against the Department because this action is "for the benefit of the state" within the meaning of RCW 4.16.160.[49] It

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[45] CP 14-16.

[46] CP 239.

[47] CP 1-23, 102.

[48] CP 412-413; Brief of Appellant.

[49] Brief of Appellant at 10–11.

claims its pursuit of Carrera's general and other damages beyond the Department's $788,418.00 lien is not pursuit of a private claim but one "for the benefit of the state." We turn to those claims – pure questions of law that this court reviews de novo.

3. *RCW 4.16.160 does not apply to Carrera's private claim that became time-barred while in private hands.*

Because the Department's own claim is for reimbursement of the benefits paid and to be paid, any excess recovery represents Carrera's personal claim for amounts not compensated by worker's compensation benefits—his general damages and special damages above the benefit payments. The Department here is presenting two different parties' claims in the guise of one. But different rules apply to the two different claims.

The Department's claim for recoupment of benefits paid derives from its own direct rights. By contrast, the Department's right, if any, to Carrera's non-economic damages derives from and depends on the statutory assignment.

An assignment conveys no greater rights than those of the assignor.[50] Carrera's assignment to the Department conveyed only what he

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[50] *Havsy* v. *Flynn*, 88 Wn. App. 514, 519, 945 P.2d 221 (1997)(assignee steps into shoes of assignor and cannot recover more than the assignor could recover).

had on the date of the assignment: A time-barred claim. The Department's immunity to the statute-of-limitations bar applies only to its own claim for the entitlement, which it possessed from the outset, but not to Carrera's personal claims, assigned to the Department only after they were time-barred.

Two Supreme Court decisions confirm this outcome. First, in *Gorman*,[51] the record owner of a property tract conveyed the property to the City of Woodinville after another person had allegedly acquired title by adverse possession. The city claimed that RCW 4.16.160 barred the adverse possessor from acquiring title against the government because an adverse-possession claim is "predicated upon the lapse of time."[52] But the court unanimously disagreed because the grantor could convey only the interest that he had at the time he conveyed to the city. If adverse possession had extinguished his title before the transfer to the city, "he had nothing to convey."[53] The adverse possessor's claim was not predicated upon the lapse of time against the city—the type of claim barred by RCW 4.16.160—because the time period had already run against the

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[51] *Gorman v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012).

[52] 175 Wn.2d at 72.

[53] 175 Wn.2d at 72.

private owner. Title was not lost because of the city's failure to monitor its property; it was lost because the adverse possessor had acquired title before the assignment to the city.[54]

These principles apply to all forms of property to which the State (or the Department acting as the State) may seek to lay claim. For example, in *Pacific Northwest Bell*,[55] the State asserted title to abandoned property held by other private parties. But the owners' claims against the holders were barred by the statute of limitations. Our Supreme Court rejected the State's claim because the State's rights were derivative of the owners' rights. The State therefore stood in the position of the owners.[56] Because the holders possessed a valid statute-of-limitations defense as against the owners, the holders could successfully apply that time-bar against the State standing in the position of the owners.

> The rights of the State are not independent of the rights of the owner and are therefore no greater than those of the person to whose rights it succeeds. That being so, RCW 4.16.160, which states that there shall be no

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[54] 175 Wn.2d at 73-75.

[55] *Pacific Northwest Bell Tel. Co. v. Department of Revenue*, 78 Wn.2d 961, 481 P.2d 556 (1971).

[56] 78 Wn.2d at 964-965 ("The State's right is purely derivative; it takes only the interest of the unknown or absentee owner.").

> limitation to actions brought in the name of the State is not applicable.[57]

The same principles apply here: Carrera's claim became time-barred while in his hands. Thus, when the Department obtained the assignment, it did not take Carrera's claim free of that pre-existing infirmity. RCW 4.16.160 cannot apply to revive the claim that became time-barred in private hands.

But the Department insists that all of Carrera's rights were converted into the State's rights upon assignment and RCW 4.16.160 therefore applies to them as well.[58] That position is untenable in light of *Gorman* and *Pacific Northwest Bell*. Furthermore, as the distribution statutes and the case law reveal, any amounts the Department recovers above its lien must be tendered to Carrera because they do not belong to the Department. So, even after the assignment the Department has no right to Carrera's personal damages. Applying the State's limitations immunity here would revive an expired claim for Carrera's benefit only.

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[57] 78 Wn.2d at 964.

[58] Brief of Appellant at 10–11; 25 (claiming that the Department is still the State when it stands in Carrera's shoes).

C. The Department's pursuit of Carrera's claim is not a claim "for the benefit of the state" to which RCW 4.16.160 applies.

1. *Recovery of Carrera's private claim, all proceeds of which belong to Carrera, is not "for the benefit of the State" within the meaning of RCW 4.16.160.*

Not only can the Department not pursue its derivative claim dependent on Carrera's time-barred rights, but RCW 4.16.160 cannot reinstate Carrera's claim because by its own terms that statute does not apply to the situation here. That statute provides that "there shall be no limitation to actions brought in the name of or for the benefit of the state." Here, the Department's pursuit of Carrera's claim is not "for the benefit of the state."

Our courts have explained that a claim is "for the benefit of the state" only when the action arises out of the exercise of the sovereign powers of the state.[59] "Benefit of the state" does not mean merely "beneficial effect."[60] As a result, when the state is seeking to enforce its proprietary interests, its claim does not arise out of the exercise of sovereign powers and is subject to the limitations bar.[61] This result inheres even more clearly when the state pursues a private party's claim, since

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[59] *Washington Public Power Supply Sys. v. General Electric Co.*, 113 Wn.2d 288, 295, 778 P.2d 1047 (1989).

[60] 113 Wn.2d at 293.

[61] 113 Wn.2d at 296.

such a claim also is not for "the benefit of the state." Thus, our courts have found that the state's immunity from limitations applied when, for example, the state brought a claim rooted in the notion of state sovereignty such as a *parens patriae* claim;[62] and to a suit based on sovereign conduct such as school construction,[63] or taxation.[64] But our courts have not applied immunity to circumvent the limitations period when the state's rights under a statute are derivative and the state succeeds only to whatever rights its predecessor might have;[65] or the claim was based on proprietary acts, such as a city's tort claims related to its operation of a municipal water system[66] or contracting for electric power.[67]

The principal test for determining whether a state 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 [a private

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[62] *State v. LG Electronics, Inc.*, 185 Wn. App. 123, 147, 340 P.3d 915 (2014).

[63] *Bellevue School District No. 405 v. Brazier Construction Co.*, 103 Wn.2d 111, 115–16, 691 P.2d 178 (1984).

[64] *See Allis–ChalmersCorp. v. City of North Bonneville*, 113 Wn.2d 108, 112, 775 P.2d 953 (1989).

[65] *Pacific Northwest Bell Tel. Co. v. Department of Revenue*, 78 Wn.2d 961, 481 P.2d 556 (1971).

[66] *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1177–78 (E.D. Wash. 2006).

[67] *Washington Public Power Supply Sys. v. General Elec. Co.*, 113 Wn.2d 288, 778 P.2d 1047 (1989).

person]."[68] Each case must be determined "in light of the particular facts involved."[69]

Here, nothing in the Act or the facts of this case supports a conclusion that the Department's recovery of Carrera's personal damages is anything other than an act for Carrera's private benefit. As a matter of fact and law, all such damages must be handed over to Carrera.[70] The recovery of those damages is not an act for the common good; rather the Department is acting as a mere conduit of a private claim—a claim that is subject to the statute of limitation. RCW 4.16.160 does not insulate the Department from the limitation bar.

2. *None of the Department's authorities permits the application of RCW 4.16.160 here.*

Citing *Vinther*[71] and *Cowlitz County*,[72] the Department nevertheless claims that the statute of limitation does not apply to its pursuit of Carrera's private claim.[73] The Department is incorrect. *Vinther*

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[68] *Washington State Major League Baseball. Stadium Public Facilities Dist. v. Huber, Hunt and Nicholes – Kiewit Construction Co.*, 165 Wn.2d 679, 687, 202 P.3d 924 (2009).

[69] *Id.*

[70] RCW 51.24.050.

[71] *State v. Vinther*, 176 Wash. 391, 29 P.2d 693 (1934).

[72] *State v. Cowlitz County*, 146 Wash. 305, 262 P. 977 (1928).

[73] Brief of Appellant at 23, 28.

and *Cowlitz County* each involved claims by the Department for "an amount equal to the liability imposed upon the accident fund" (*i.e.*, the entitlement) for a worker's death. The defendants claimed the suit was time-barred. The court held because the State was suing for the benefit of the fund, it was exercising the government's sovereign police power and therefore was "for the benefit of the state" within the meaning of RCW 4.16.160. At the same time, however, the court recognized that the rule exempting the State from the statute of limitation was qualified: If the State had been suing not to assert any "public right" or to protect any "public interest" but "merely to form a conduit through which one private person can conduct litigation against another private person," the action would not be for the benefit of the state and the statute of limitations would apply.[74]

Herrmann,[75] on which the Department also heavily relies, contains the same limitation:

> We have said that if the state is a mere formal plaintiff in a lawsuit, acting only as a conduit through which one private person can conduct litigation against another, the state is not exempt from the defense that the statute of limitations has run on the action. [Citing *Vinther*].[76]

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[74] *Vinther*, 176 Wash. at 393.

[75] *Herrmann v. Cissna*, 82 Wn.2d 1, 507 P.2d 144 (1973).

[76] 82 Wn.2d at 5.

The question, then, is whether by asserting Carrera's personal claim, the entire proceeds of which it must turn over to Carrera, the Department is acting as a conduit through which Carrera is conducting private litigation against Sunheaven. The answer is an unequivocal yes.

Here, RCW 51.24.050 leaves no dispute that the Department must turn over all of the proceeds of Carrera's private claim (*i.e.*, all amounts above the entitlement) to Carrera. Carrera's claim above the entitlement is not the Department's claim and is not for the benefit of the fund. The public does not benefit; only Carrera does. A clearer instance of private litigation is hard to imagine. The Department, acting for and furthering Carrera's private interest, is therefore not immune from the statute of limitation bar.

But the Department insists that it must be able to recover more than its benefit payments in order to "make itself whole". It will not be "made whole," says the Department, because it must pay attorney's fees and costs out of its recovery and must pay 25% of the balance after attorney's fees and costs to Carrera.[77] But that is what the Act requires. The Act gives the Department only a right to recover the entitlement, not the entitlement plus its fees and costs.

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[77] Brief of Appellant at 16.

Nor is the Act's fourth step in distribution to the injured worker made "superfluous," as the Department argues. When a claim is not time-barred, there would be a need to distribute any remaining funds.[78]

The Department confuses "recovery" and "net recovery". The Department is "made whole" by being awarded the amount of its lien (its damages), just as any other tort plaintiff is made whole by being awarded the amount of his or her damages. The Department's responsibility to pay its attorneys—a responsibility it shares with any other litigant—for achieving that recovery does not make it any less "whole". It is "made whole" when it recovers what the legislature has authorized it to recover: The entitlement less attorney's fees and costs and payment of a share to Carrera.

What the Department really wants is to make a profit. It repeatedly insists in different ways—all while avoiding analysis of the statutory language—that the legislature "would not craft legislation intended to make the workers fund whole yet provide for, at best, half recovery of benefit payments,"[79] and that it "believes" that RCW 51.24.050(4) "authorizes it to get its share from the whole amount of damages

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[78] RCW 51.24.050(4)(d).

[79] Brief of Appellant at 8.

obtained."[80] And it even suggests that this court should defer to the Department's view of the law.[81] But the simple fact is that the statutes do not say what the Department wishes, and this court need not defer to the Department over the meaning of statutes, unlike the agency's own rules.[82]

Nevertheless the Department, citing *Herrmann*[83] and *LG Electronics*,[84] claims that its assertion of Carrera's claim is for the common good. The Department takes *Herrmann* out of context.[85] That decision rode on the context of the insurance statute authorizing the insurance commissioner to rehabilitate insolvent insurance companies by taking control of their assets. The purposes of the insurance code are not comparable to the Industrial Insurance Act.

The court in *Herrmann* relied on statutory language when it explained that while the commissioner's statutory responsibilities undoubtedly benefit some private parties, they are taken primarily in the

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[80] Brief of Appellant at 19.

[81] Brief of Appellant at 17.

[82] *Waste Mgmt of Seattle, Inc. v. Utilities and Transp Comm'n.*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994).

[83] *Herrmann v. Cissna*, 82 Wn.2d 1, 507 P.2d 144 (1973).

[84] *State v. LG Electronics, Inc.*, 185 Wn. App.123.

[85] RCW 48.31.120 (recodified as § 48.99.020 by Laws 1993, ch. 462, § 81. *See* RCW 48.99, Uniform Insurers Liquidation Act.

public interest.[86] The legislature reasonably could have concluded that such proceedings by the commissioner had a deterrent effect upon other parties charged with the responsibility of managing insurance companies, which benefits the public in general.[87] Therefore, the commissioner acted for the benefit of the state under RCW 4.16.160. Pursuit of Carrera's general and special damages, in contrast, would have no such deterrent effect, nor is it primarily in the public interest.

LG Electronics[88] is equally unhelpful to the Department. There the court considered whether the Attorney General's *parens patriae* action under the Consumer Protection Act was "for the benefit of the state" within the meaning of RCW 4.16.160. A *parens patriae* action is one by the state in its sovereign capacity as a provider of protection to those unable to care for themselves.[89] As the court explained, "[*p*]*arens patriae* authority . . . is itself a defining feature of sovereignty."[90] As a result, the court had no difficulty concluding that the action was "indeed sovereign in

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[86] *Herrmann* v. *Cissna*, 82 Wn.2d 1, 6, 507 P.2d 144 (1973) (emphasis added).

[87] 82 Wn.2d at 7.

[88] *State v. LG Electronics, Inc.*, 185 Wn. App. 123.

[89] Black's Law Dictionary (10th ed. 2014) at 1287; *LG Electronics*, 185 Wn. App. at 148.

[90] *LG Electronics*, 185 Wn. App. at 147.

nature and thus 'for the benefit of the state'."[91] But, as the court recognized and the Attorney General conceded, when the state seeks to recoup damages as a consumer under RCW 19.86.090, it is not exercising a sovereign function.[92]

Here, in seeking damages for Carrera's private benefit, the Department is not exercising a sovereign power for the common good. The Department's action bears no likeness to a *parens patriae* action—quite the contrary. The Act explicitly recognizes that workers such as Carrera are not in need of the state's protection—the hallmark of a *parens patriae* claim—in bringing suit. The Act specifically clothes them with authority to sue on their own behalf.[93] Nor has the Supreme Court declared that a third-party action plaintiff acts for the benefit of the public, as it has done with respect to an action by the Attorney General under the CPA.[94] RCW 4.16.160, therefore, cannot apply.

V. CONCLUSION

Under any circumstance, the amount the Department is entitled to recover is limited to its lien; any amount above the lien is a private claim.

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[91] *LG Electronics*, 185 Wn. App. at 149.

[92] *LG Electronics*, 185 Wn. App. at 149 n.35.

[93] *See* RCW 51.24.030(1), 51.24.060.

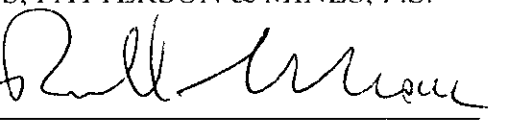
[94] *See Lightfoot v. MacDonald*, 86 Wn.2d 331, 334, 544 P.2d 88 (1976); *LG Electronics*, 340 P.3d at 922, 925.

RCW 4.16.160 cannot save the Department from the limitations bar on Carrera's private claim because the Department received by assignment already time-barred rights. Moreover, the recovery of Carrera's private claim, the proceeds of which must be returned to Carrera, is not a claim "for the benefit of the State" to which the statute applies.

This court should affirm the trial court's decision and award Sunheaven its costs.

RESPECTFULLY SUBMITTED this 15th day of October, 2015.

BETTS, PATTERSON & MINES, P.S.

By 

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CERTIFICATE OF SERVICE

I, MICHELLE TEMPLE, 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, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

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

- **Brief of Respondents Sunheaven Farms and Brent Schulthies; and**
- **Certificate of Service.**

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

DATED this 15th day of October, 2015.

Michelle Temple, Legal Assistant