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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JIM A. TOBIN,

Claimant/Respondent,

vs.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF  
WASHINGTON,

Petitioner.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons seeking legal redress under the civil justice system, including the rights of claimants under the Industrial Insurance Act, Title 51 RCW (IIA).

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This appeal involves the proper interpretation of RCW 51.24.060(1)(c), and the scope of the Department of Labor & Industries' (Department) right of reimbursement from a worker's settlement in a third party tort action. The worker, Jim A. Tobin (Tobin), was injured in the course of employment. He received workers' compensation benefits and pursued a third party action under

RCW 51.24.030. The underlying facts are drawn from the Court of Appeals' opinion and the briefing of the parties. See Tobin v. Labor & Indus., 145 Wn.App. 607, 187 P.3d 780 (2008), *review granted*, 165 Wn.2d 1016 (2009); Department Br. at 5-10; Tobin Br. at 1-4; Department Pet. for Rev. at 3-9; Tobin Ans. to Pet. for Rev. at 2-4; Tobin Supp. Br. at 2.

For purposes of this amicus curiae brief the following facts are relevant: Tobin sustained serious injuries in the course of employment and he was awarded workers' compensation for time loss, medical benefits and a pension. Tobin's third party action resulted in a substantial settlement, including an amount allocated for pain and suffering. The allocation does not appear to be disputed.

The Department's order for reimbursement for benefits paid under RCW 51.24.060(1) included reimbursement from the amount allocated for pain and suffering damages. Tobin challenged this order, contending that the Department is not entitled to reimbursement from the amount allocated for pain and suffering damages. The Board of Industrial Insurance Appeals upheld the Department order.

Tobin appealed to the superior court, which reversed. The court reasoned that under Flanigan v. Department of Labor & Industries, 123 Wn.2d 418, 869 P.2d 14 (1994), the amount allocated for pain and

suffering is not subject to the Department's right of reimbursement under RCW 51.24.060(1)(c).

The Department appealed to the Court of Appeals, which affirmed. Again, relying on the rationale of Flanigan, the Court of Appeals held that pain and suffering damages, like the loss of consortium damages involved in Flanigan, are a specie of noneconomic damages for which no IIA benefits are paid, and on this basis are not subject to reimbursement. See Tobin, 145 Wn.App. at 614-18. In the course of its analysis, the Court rejected the Department's argument that the holding in Flanigan had been superseded by a 1995 amendment to RCW 51.24.030, 1995 Laws, ch. 199 §2. See Tobin, 145 Wn.App. at 615-16 (concluding 1995 amendment removed loss of consortium damages from definition of recovery, but did not supersede the Flanigan interpretation of RCW 51.24.060(1)(c)). The court also found that RCW 51.24.060 violated due process of law because it did not adequately apprise workers that the portion of a third party judgment or settlement representing pain and suffering is subject to reimbursement. See id., 145 Wn.App. at 618-20.<sup>1</sup>

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<sup>1</sup> This conclusion appears to be premised upon the notion that the Legislature intended pain and suffering damages to be included in computing Department reimbursement, a premise rejected in the forepart of the court's opinion. See Tobin, 145 Wn.App. at 615-17. This amicus curiae brief only addresses the statutory construction issue.

The Department sought review by this Court, challenging the Court of Appeals' construction of the relevant statutes and its finding of unconstitutionality. See Department Pet. for Rev. at 3. This Court granted review.

### III. ISSUE PRESENTED

Under RCW 51.24.060(1)(c), in determining the extent of the Department of Labor & Industries' right of reimbursement for benefits paid from a third party settlement, are those damages representing the worker's pain and suffering subject to reimbursement?

### IV. SUMMARY OF ARGUMENT

In Flanigan v. Labor & Industries, this Court addressed interpretation and application of RCW 51.24.030 and 51.24.060, and the scope of the Department's right to reimbursement from workers or their beneficiaries. The Court interpreted RCW 51.24.060(1)(c), governing the Department's right of reimbursement, to exclude noneconomic damages for loss of consortium because these damages are not part of the benefits paid to workers or beneficiaries. Under governing rules of statutory construction, this interpretation became part of this statutory provision as if it were originally included in the provision.

The 1995 amendment to RCW 51.24.030 did not alter the Flanigan interpretation of RCW 51.24.060(1)(c) that the Department has no right of reimbursement from noneconomic damages. Instead, the amendment

excluded loss of consortium from recovery under RCW 51.24.030, leaving the reimbursement provision, RCW 51.24.060(1)(c), intact. As a consequence, under Flanigan noneconomic damages for pain and suffering are not subject to the Department's right of reimbursement under RCW 51.24.060(1)(c).

## V. ARGUMENT

### A. **Overview Of The *Flanigan* Holding That Loss Of Consortium Damages Are Not Subject To The Department's Right Of Reimbursement Under RCW 51.24.060(1)(c), On Grounds That Noneconomic Damages Are Not Included In Benefits Paid By The Department.**

RCW 51.24.030 authorizes a worker receiving benefits under the IIA also to pursue a third party tort action against others responsible for the injury. When a worker brings a third party action, the Department (or self-insurer) is alerted and in turn notifies the worker of its "statutory interest in recovery." See RCW 51.24.030(2).<sup>2</sup>

When a worker obtains a third party judgment or settlement, RCW 51.24.060(1) dictates how "any recovery made shall be distributed." Under this statutory formula costs and legal fees are paid to counsel first, with the Department responsible for its proportionate share. See RCW 51.24.060(1)(a), (c) (i-iii). Second, up to twenty-five percent of the

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<sup>2</sup> The current version of RCW 51.24.030 is reproduced in the Appendix to this brief.

balance (net costs and legal fees) is set aside for distribution to the worker. See RCW 51.24.060(1)(b). Third, the Department is entitled to 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." RCW 51.24.060(1)(c). If there is anything left, it is paid to the worker. See RCW 51.24.060(1)(d). The statute also delineates the circumstances under which the worker continues to be eligible for IIA benefits. See RCW 51.24.060(1)(e).<sup>3</sup>

In Flanigan v. Labor & Industries, *supra*, this Court was asked to determine whether, under the then current versions of RCW 51.24.030 and RCW 51.24.060, that portion of a deceased worker's spouse's recovery in a third party action for loss of consortium is subject to reimbursement under RCW 51.24.060(1)(c). At that time, the text of this provision was the same as the current version, which entitles the Department to reimbursement to the extent of benefits paid.<sup>4</sup>

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<sup>3</sup> The current version of RCW 51.24.060 is reproduced in the Appendix to this brief.

<sup>4</sup> RCW 51.24.060 has been amended twice since it was interpreted in Flanigan. See 1995 Laws, ch. 199 §4; 2001 Laws, ch. 146 §9. Neither amendment altered RCW 51.24.060(1)(c).

At the time Flanigan was decided, the text of RCW 51.24.030 was based on the 1987 version of the statute. See 1987 Laws, ch. 212 §1701. That version of RCW 51.24.030 is the same as the current version, except for the addition of sub-section (5) in 1995, discussed infra. See 1995 Laws, ch. 199 §2. Thus, at the time Flanigan was decided, neither RCW 51.24.030 nor RCW 51.24.060 defined what constitutes a "recovery" in a third party action.

In Flanigan, a 5-4 opinion, this Court held that "third party actions for loss of consortium are indeed covered by the Act, but the statutory right of reimbursement under RCW 51.24.060 does not reach these recoveries." 123 Wn.2d at 426. The basis for this holding was that "workers' compensation benefits do not compensate employees or their beneficiaries for noneconomic damages such as loss of consortium." Id. at 425. The majority explained:

Even when an employee is killed or seriously injured on the job, the employee is entitled only to workers' compensation benefits, and these benefits are calculated on a lesser percentage of the employee's salary. *See* RCW 51.32.050, .060, .090.

Benefits calculated in this manner by their very nature do not provide full compensation for the damages incurred. At the most, the benefits cover only certain out-of-pocket expenses, such as a portion of lost wages. *They cannot take into account noneconomic damages, such as an employee's own pain and suffering or a spouse's loss of consortium.* The extent

of a spouse's loss of consortium depends in no way upon the employee's salary level.

Id. at 423 (footnote omitted; emphasis added).

The dissent in Flanigan challenged the perceived underlying premise of the majority "that workers' compensation benefits compensate injured workers only for economic damages." See 123 Wn.2d at 430 (Madsen, J., dissenting). It contended that "reimbursement is based on the *amount* rather than the *nature* of the recovery," and that a recovery includes consideration of noneconomic damages. Id. at 437. The majority rejected this analysis, concluding that use of the term "reimburse" and the phrase "benefits paid" in RCW 51.24.060(1)(c) limited the Department's right of reimbursement to the amount of benefits it had paid. See 123 Wn.2d at 425-26.

After Flanigan, the Legislature amended RCW 51.24.030, governing third party tort actions by workers, adding a sub-section (5), which provides "[f]or the purposes of this chapter, 'recovery' includes all damages except loss of consortium." See Laws 1995, ch. 199 §2 (codified as RCW 51.24.030(5)). The question before the Court is whether, as a result of this 1995 amendment, Flanigan's interpretation of RCW 51.24.060(1)(c) that noneconomic damages are not taken into

account in determining the amount of the Department's reimbursement has been superseded.

**B. The 1995 Amendment To RCW 51.24.030, Excluding Loss Of Consortium Damages From The Recovery Subject To Reimbursement, Left RCW 51.24.060(1)(c), As Interpreted By *Flanigan*, Intact; Noneconomic Damages Such As Pain And Suffering Are Excluded In Computing the Department's Reimbursement.**

In determining the effect of the 1995 amendment, the Court of Appeals correctly held that under Flanigan, for purposes of calculating reimbursement under RCW 51.24.060(1)(c), pain and suffering damages are not subject to reimbursement because, as a type of noneconomic damages, they are not included in benefits paid. See Tobin, 145 Wn.App. at 615-16.

Two well-established rules of statutory construction support the Court of Appeals' analysis. First, the 1995 Legislature is presumed to have been aware of the Flanigan interpretation of RCW 51.24.060(1)(c). See Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Second, it is also understood that once a statutory provision has been construed by this Court, that construction operates as if it were originally included in the provision. See Johnson v. Morris, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976).

The 1995 amendment did not amend RCW 51.24.060(1)(c), governing the Department's right of reimbursement. As interpreted by Flanigan, this provision excludes noneconomic damages from the Department reimbursement computation. The 1995 amendment only amended RCW 51.24.030, removing loss of consortium damages from "recovery." That is all. Under Flanigan, noneconomic damages such as pain and suffering remain excluded from the "balance of the recovery" subject to reimbursement under RCW 51.24.060(1)(c). See Flanigan, 123 Wn.2d at 423.

The Department argues that this Court has a free hand in examining whether a worker's pain and suffering damages are subject to reimbursement under RCW 51.24.060(1)(c) because the statement in Flanigan regarding pain and suffering damages is dicta. See Department Supp. Br. at 10. While this particular reference may be dicta, because Flanigan only involved loss of consortium, this focus disregards the Court's underlying rationale that the reimbursement provision excludes noneconomic damages. See 123 Wn.2d at 423; Tobin, 145 Wn.App. at 613, 614-15. When an interpretation of a statute is essential to the decision, it is not dicta. See City of West Richland v. Ecology, 124 Wn.App. 683, 692, 103 P.3d 818 (2004) (recognizing that an interpretation of a statute essential to a decision is not dicta); Wagg v.

Estate of Dunham, 146 Wn.2d 63, 72-73, 42 P.3d 968 (2002) (same); see also State v. Nicolich, 137 Wash. 62, 66, 241 Pac. 664 (1925) (holding that "a deliberate expression of the court upon the meaning of the statute" should not be disregarded as dicta).

The Department further argues that after the 1995 amendment to RCW 51.24.030 all noneconomic damages except loss of consortium damages are subject to the RCW 51.24.060 distribution scheme. See Department Supp. Br. at 7-9; see also Flanigan at 426. However, this argument does not answer the question whether noneconomic damages are taken into account under sub-section (1)(c) in determining the Department's right to reimbursement. Under the settled interpretation of this sub-section they are not. See Flanigan.

The interpretation of RCW 51.24.060(1)(c) in Flanigan must stand, as the 1995 amendment did not alter it. If the Legislature is dissatisfied with this result, it may amend the statute.

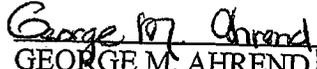
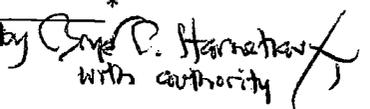
## VI. CONCLUSION

This Court should adopt the argument advanced in this amicus curiae brief, and resolve the statutory construction issue accordingly.

DATED this 19th day of October, 2009.

\*  
BRYAN P. HARNETIAUX

On Behalf of WSAJ Foundation

  
GEORGE M. AHREND by \*  
with authority

\*Brief transmitted for filing by email; signed original retained by counsel.

# Appendix

## **RCW 51.24.030**

### **Action against third person — Election by injured person or beneficiary — Underinsured motorist insurance coverage.**

(1) If 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.

(2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.

(3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

(4) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

(5) For the purposes of this chapter, "recovery" includes all damages except loss of consortium.

[1995 c 199 § 2; 1987 c 212 § 1701; 1986 c 58 § 1; 1984 c 218 § 3; 1977 ex.s. c 85 § 1.]

## **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 registered or certified mail, 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 certified mail, return receipt requested; 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.

[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.]