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STATE OF WASHINGTON
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No. 81946-7

SUPREME COURT
STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This matter is before the Court based upon a petition for review filed by the Department of Labor and Industries to a published decision of the Court of Appeals in the case of *Tobin v. Dep't of Labor & Indus.*, No. 36031-4-II (July 1, 2008). The respondent, Jim Tobin, respectfully asks the Court to deny review.

The Court of Appeals affirmed the decision of Pierce County Superior Court Judge Stephanie A. Arend which was filed on March 2, 2007. Judge Arend reversed a prior decision by the Board of Industrial Insurance Appeals [hereinafter "Board"] that affirmed a September 29, 2005 order issued by the Department of Labor and Industries [hereinafter "Department"]. In the September 29, 2005 Department order, the Department asserted a right to distribute under RCW 51.24.060 the entire amount of Mr. Tobin's third party recovery including the portion designated to compensate Mr. Tobin for pain and suffering. (See CP, 40 – 46).

II. ISSUE

Whether the Court of Appeals was correct in determining that it was improper for the Department of Labor and Industries to assert a right to distribute the entirety of Mr. Tobin's third party recovery, including the portion for pain and suffering, when the Department has not and will not

pay any benefits for pain and suffering under his workers' compensation claim?

III. STATEMENT OF THE CASE

The facts in this case were stipulated to by the parties in a Stipulation of Facts and are, therefore, not in dispute. (See Certified Appeal Board Record [hereinafter CABR], pp. 69 – 72).

Mr. Tobin was injured on June 11, 2003 in the course of his employment with Saybr Contractors, Inc. He filed a claim and it was allowed under claim number Y-647899. Because he was unable to work, he received time loss (wage loss) benefits and eventually, effective March 16, 2005, was placed on a total permanent disability pension. The Department also paid medical benefits under the claim. (CABR, pp. 69 – 70).

Because Mr. Tobin's injuries were caused by the negligence of a third party, he pursued a third party claim, electing to pursue the claim through an attorney, David Snell of Small, Snell, Weiss & Comfort, P.S. (CABR, p. 70).

In September 2005, a third party settlement was reached between Mr. Tobin and the third party. Pursuant to the settlement, Mr. Tobin settled his third party claim for a gross amount of $1,400,000.00. This amount was allocated as follows:

Medical Expenses:	$29,326.84
Future Medical Expenses:	$14,647.00
Total wage loss (past & future):	$562,943.00
Pain and Suffering:	$793,083.16

This settlement agreement was signed by Mr. Tobin and by a representative of the Department. (CABR, p. 70).

As of the date of the Department's third party distribution order, the Department had paid a total of $80,501.40 in benefits. Of these benefits, $25,208.93 were for medical bills, $42,893.89 were for time loss compensation, and $12,398.58 were for pension benefits. No other benefits were paid on this claim, and because Mr. Tobin received a total permanent disability pension, he is not entitled to an award for permanent partial disability. (CABR, p. 71).

The Department's September 29, 2005 distribution order included in its calculation the entire third party settlement amount, including the pain and suffering portion. It distributed the third party settlement proceeds as follows:

Attorney's share:	$472,262.44
Claimant's share:	$874,391.25
Department's share:	$53,346.31

Of Mr. Tobin's $874,391.25 share, $425,735.63 was determined to be

excess recovery and subject to offset against any future claim benefits that would otherwise be paid by the Department. That means that Mr. Tobin would not receive any further pension benefits until the Department would have otherwise paid him $425,735.63 in benefits. (CABR, p. 71).

IV. ARGUMENT

A. THE COURT OF APPEALS DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND THE COURT OF APPEALS.

1. The *Flanigan* case.

The rules for distributing third party recoveries are set out in RCW 51.24.060. It provides that once the attorneys' fees and costs are paid, and the claimant is paid twenty-five (25) percent of the remainder,

> 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...

RCW 51.24.060(c).

The Washington Supreme Court delved into the meaning of this section at length in the case of *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994), a case in which the Department asserted a right to include loss of consortium damages in the calculations under RCW 51.24.060.

In *Flanigan*, the Court noted that, in understanding the meaning of

this statute, it was important to understand the historic background of and the compromises associated with the Act. The Court noted that under this compromise, injured workers do not receive full compensation, and are not compensated for non-economic damages such as their pain and suffering or their spouse's loss of consortium. *Flanigan*, 123 Wn.2d at 423.

The Court then turned to exploring the purpose of allowing third party recoveries under the Act. The Court noted that there are two general purposes for allowing such actions. First, it spreads responsibility for compensating the injured worker to third parties who are at fault for the injury. Second, it permits the worker to increase his or her compensation beyond the Act's limited benefits. *Flanigan*, 123 Wn.2d at 424.

The Court also noted that allowing the Department to obtain reimbursement from the proceeds of a third party recovery serves two roles. First, it reduces the burden on the accident and medical funds for damages caused by a third party. Second, it prevents the worker from receiving a double recovery. The Court stated, "*[i]n other words the worker, under [the third party statute], cannot be paid compensation and benefits from the Department and yet retain the portion of damages which would include those same elements.*" (Italics in original) *Flanigan*, 123 Wn.2d at 425; citing *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542,

549, 789 P.2d 75 (1990).

The Court noted that workers' compensation benefits do not compensate workers for non-economic damages. To the extent that a worker recovers such damages from a third party, this recovery, therefore, would not constitute a double recovery. *Flanigan*, 123 Wn.2d at 425.

The Court also looked at the plain language of the statute, noting that RCW 51.24.060 was phrased in terms of "reimbursing" the Department. The Court, citing *Webster's Third New International Dictionary* 1914 (1986), noted that "reimburse" means "to pay back (an equivalent for something taken, lost, or expended) to someone: REPAY." The Court pointed out that one cannot be "paid back" compensation one never paid in the first place. *Flanigan*, 123 Wn.2d at 426.

The Court concluded that allowing the Department to reach such recoveries would give an unjustified windfall to the State at the expense of individual beneficiaries. They noted that this would give the Department a share of damages for which it has provided no compensation. The Court rejected this interpretation stating that the Court did not "interpret statutes to reach absurd and fundamentally unjust results." *Flanigan*, 123 Wn.2d at 425 – 426. The Court ruled that the statutory right to reimbursement under RCW 51.24.060 does not reach such recoveries. *Flanigan*, 123 Wn.2d at 426.

While the Court in *Flanigan* was dealing with loss of consortium damages rather than pain and suffering damages, the Court's interpretation and conclusions can be extended to third party recoveries of pain and suffering damages. Like loss of consortium damages, pain and suffering damages are non-economic damages. The Department does not compensate injured workers for either of these types of damages and it, therefore, should have no right to reimbursement under RCW 51.24.060 for such non-economic damages recovered in a third party action.

The Court of Appeals decision was, therefore, consistent with this Court's decision in *Flanigan* and there has been no contrary decision by this Court or the Court of Appeals.

2. The legal analysis of the Court of Appeals is also consistent with the decisions of this Court and the Court of Appeals.

The Department in its petition for review argues that the Court of Appeals' legal analysis is inconsistent with prior decisions of this Court and the Court of Appeals. To support its argument, the Department suggests that the Court of Appeals failed to look at the plain language of RCW 51.24.030(5) to determine the Legislature's intent in enacting the statute.

The Court of Appeals did, however, look at the plain language of the statute and noted that they are required to read statutes together to

determine their meaning. *Tobin* at 8 (citing *Donovich v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 415, 757 P.2d 1378 (1988)). The Court of Appeals noted that although RCW 51.24.030(5)'s amendment defined recovery as "[a]ll damages except loss of consortium," the third party recovery statute, RCW 51.24.060(1)(c), uses the terms "reimbursing" the Department for "benefits paid." *Tobin* at 7 - 8.

Citing this Court's decision in *Flanigan*, the Court of Appeals noted that "[t]he term 'reimburse' means 'to pay back (an equivalent for something taken, lost, or expended) to someone: to REPAY." *Tobin* at 8, citing *Flanigan* 123Wn.2d at 426. The Court of Appeals noted that the Department did not, and never will, compensate Mr. Tobin for his pain and suffering and that it, therefore, cannot be "reimbursed" for his pain and suffering. *Tobin* at 8.

The Court of Appeals decision is also consistent with the rule that when interpreting the Industrial Insurance Act, the Act is to "be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. To that end, "all doubts as to the meaning of the Act are to be resolved in favor of the injured worker." *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996); Citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 883

P.2d 1370 (1994); *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987). This means that "where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker..." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

B. THE *TOBIN* DECISION DOES NOT THWART THE POLICIES THAT UNDERLY THE THIRD PARTY RECOVERY STATUTE.

The Department argues that if pain and suffering damages were excluded from the Department's calculations of the offset and excess subject to offset, it would somehow defeat the purpose of the statute. This simply is not true.

As noted in *Flanigan*, the Department under RCW 51.24.060(1) is only entitled to the portion of the recovery necessary to "reimburse" it for benefits paid on the claim. Since no pain and suffering benefits were paid or will be paid on the claim, this portion of the third party settlement cannot be used to "reimburse" the Department.

The fact that the portion of Mr. Tobin's third party recovery that pertained to his wage loss does not fully cover the potential pension costs is not at all surprising. The Department pays pension benefits to a claimant for the remainder of the claimant's life. Conversely, in a third

party action, wage loss damages can only be claimed for the period that the injured party would have likely worked if not for the injury. See *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, 151 Wn.2d, 203, 210-211, 87 P.3d 757 (2004).

The difference between the amount that the Department would recover from the portion of the third party settlement related to medical and wage loss and the amounts that the Department has and will pay for these benefits is also a result of the statutory scheme.

RCW 51.24.060(1) dictates that the attorneys' fees and costs from the third party recovery are taken off the top of any recovery. The statute then directs that twenty-five (25) percent of the remainder be given to the claimant. Only after that, is the Department entitled to take its share, less its proportionate share of the attorneys' fees and costs.

In fact, the Department's medical and estimated wage loss costs on the claim and the portion of Mr. Tobin's settlement resulting from his medical and wage loss are quite close. The Department's estimate of its past and future costs is $643,233.40 ($80,501.40 past and $562,732.00 future). Meanwhile, Mr. Tobin recovered a total of $606,916.84 for medical and wage loss ($43,973.84 medical and $562,943.00 wage loss).

The portion of the recovery dedicated to medical and wage loss would, therefore, cover nearly ninety-five (95) percent of the

Department's costs if not for the statutory mandate that attorneys' fees and costs be deducted as well as the requirement that the claimant receive twenty-five (25) percent of the remainder.

The Department's argument that it would be unfair that it would not be "reimbursed" for the full amount of its damages if pain and suffering damages were excluded from the recovery calculation lacks merit since the very reason that the remainder of the damages would not fully reimburse the Department is largely a function of the statutory requirements of RCW 51.24.060(1).

The Department's argument, in fact, attempts to reverse the equity argument in an absurd way to try to distract from the harm being done to the claimant by its interpretation of RCW 51.24.060(1). As the United States Supreme Court recently pointed out in citing *Flanigan*, "the department could not 'share in damages for which it has provided no compensation' because such a result would be 'absurd and fundamentally unjust.'" *Arkansas Dept. of Health and Human Servs. V. Ahlborn*, 164 L. Ed. 2d 459,126 S. Ct. 1752, (2006), citing *Flanigan v. Dep't of Labor & Indus.,* 123 Wn.2d 418, 426, 869 P.2d 14 (1994).

C. THE DEPARTMENT'S ASSERTION OF A STATUTORY LIEN AGAINST MR. TOBIN'S PAIN AND SUFFERING RECOVERY IS AN UNCONSTITUTIONAL TAKING.

Article 1 Section 3 of the Washington State Constitution provides, "[n]o person shall be deprived of life, liberty, or property without due process of law." This is a functional equivalent of the Fifth Amendment to the U.S. Constitution which provides, in relevant part, "nor shall any person...be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." Section 1 of the Fourteenth Amendment to the U.S. Constitution similarly states, "nor shall any state deprive any person of life, liberty, or property without due process of law..."

1. Mr. Tobin's third party recovery of pain and suffering damages is his private property, and is, therefore, constitutionally protected against a taking without due process of law.

A chose in action is property that may be sold or otherwise assigned. *See* RCW 4.08.080.

Case law has also established, unequivocally, that an individual's chose in action for damages against another is property. Most significantly for the case at hand, negligence claims, whether liquidated or reduced to judgment, constitute property. *Wody's Olympic Lumber, Inc. v. Roney*, 9 Wn.App. 626, 513 P.2d 849 (1973).

Our courts have recognized that a chose in action for personal injuries contains various, specifically identifiable categories of property.

Elements of a negligence claim which relate to damages for pain and suffering are the separate property of the injured person whereas wage loss and injury-related expenses are damage components which are community property. *See Marriage of Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984).

Since a chose in action for personal injuries arising out of a claim based on negligence of another constitutes property, whether or not the claim is reduced to judgment, the protections of our Washington State Constitution Article I, Section 3, apply.

2. Attaching a lien pursuant to RCW 51.24.060(1)(e) on Mr. Tobin's third party recovery pain and suffering damages constitutes an unconstitutional taking of property.

In *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, cert. denied 498 U.S. 911 (1990), the state Supreme Court set out the criteria for establishing a substantive due process violation in the context of a land use regulation. The Court explained:

> To determine whether the regulation violates due process, the court should engage in a three-prong due process test and ask:
>
> (1) Whether the regulation is aimed at achieving a legitimate public purpose;
> (2) Whether it uses means that are reasonably necessary to achieve that purpose; and
> (3) Whether it is unduly oppressive on the landowner.

Id. at 330.

The *Presbytery* substantive due process test has been applied in the workers' compensation context in *Rafn Co. v. Dep't of Labor & Indus.*, 104 Wn.2d 947, 17 P.3d 711 (2001).

In applying the *Presbytery* criterion to the facts in Mr. Tobin's case, element one, addressing a legitimate public purpose, is satisfied. Prevention of double recovery in tort claims is certainly an appropriate public goal as is the goal of reducing the burden on the accident fund by allowing the Department to be "reimbursed" for benefits paid from at fault third parties. It is prong two, requiring use of reasonably necessary means to achieve the public purpose, and prong three, relating to undue oppression, which trigger the substantive due process violation in this case.

The Act provides no compensation in any form for an injured worker's pain and suffering sustained in an industrial injury. Even permanent partial disability awards are granted solely because such an award anticipates a certain lost earning capacity associated with a percentage of loss in any given bodily function. *See Davis v. Bendix*, 82 Wn.App. 267, 917 P.2d 586 (1996).

Under Mr. Tobin's worker's compensation claim, the Department has paid medical benefits. They have also paid wage loss benefits (time loss and pension) and will continue to pay these benefits. Mr. Tobin,

however, will never be paid a permanent partial disability award or any other type of benefits other than wage loss benefits and medical benefits. There have not and will not be any benefits paid for pain and suffering.

The Department in this case is asserting that it has a right to include Mr. Tobin's third party pain and suffering damages recovery in its calculations under RCW 51.24.060(c). In other words, the Department is asserting a right to take a portion of these damages from Mr. Tobin. This is an unconstitutional taking and a substantive due process violation.

Since the Department never has paid and never will pay Mr. Tobin pain and suffering damages, there is no need for the Department to take these benefits from him to prevent a double recovery. Similarly, as the Supreme Court pointed out in *Flanigan*, since the Department did not pay any such general damages, the Department cannot be "reimbursed" damages that it never paid in the first place. Both of the purposes of RCW 51.24.060 could be met by including the portion of the third party recovery relating to medical expenses and wage loss while excluding the pain and suffering portion from the calculation under RCW 51.24.060.

The Department's use of RCW 51.24.060 to take from Mr. Tobin a portion of his pain and suffering damages is not reasonably necessary to achieve the purposes of RCW 51.24.060. It, therefore, violates the second prong of the *Presbytery* test.

Since the Department is attempting to take from Mr. Tobin his property (his third party recovery) to "reimburse" itself for benefits that it never in fact paid, this is also "unduly oppressive" and violates the third prong of the *Presbytery* test.

D. THE PORTION OF THE COURT OF APPEAL'S ANALYSIS DEALING WITH THE DUE PROCESS ISSUE IS DICTUM AND, THEREFORE, NEED NOT BE REVIEWED.

In the *Tobin* decision, the Court of Appeals made its decision that pain and suffering damages are not subject to the third party distribution statute based upon an analysis of the case law and relevant statutes. It was only once this decision was made that the Court of Appeals added in its due process analysis. This portion of the decision was, therefore, dictum. See *Barron's Law Dictionary* 143 (1996) (Dictum is "a statement, remark, or observation in a judicial **opinion** not necessary for the decision of the case.") (Emphasis in original).

"Dictum differs from the **holding** in that it is not binding on the courts in subsequent cases." *Barron's Law Dictionary* 143 (1996) (Emphasis in original).

Since the Court of Appeals' due process analysis was merely dictum and, therefore, not binding precedent, the Court need not review the Court of Appeals' decision.

E. MR. TOBIN'S ATTORNEYS SHOULD BE ENTITLED TO AN AWARD OF FEES FOR WORK DONE AT SUPERIOR COURT AS WELL AS WORK DONE AT THE COURT OF APPEALS.

1. The attorneys' fees previously awarded should be upheld.

Mr. Tobin's attorneys were awarded fees of $12,375 for work done at Superior Court (CP 44-46). The Department has not objected to this amount. The Court of Appeals also awarded Mr. Tobin's attorneys reasonable fees for work done at that level. *Tobin* at 12 - 13. These awards should be affirmed.

2. Mr. Tobin's attorneys should also be awarded fees for work done before the Supreme Court.

Rule 18.1 of the Rules of Appellate Procedure provides that, "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP 18.1.

RCW 51.52.130 provides that in workers' compensation cases, if a party other than the worker appeals a decision of the Board to superior or appellate court and the worker's right to relief is sustained, the worker is entitled to attorneys' fees for the work done before that court. RCW 51.52.130.

Mr. Tobin's attorneys, therefore, request that should the Supreme Court uphold the Court of Appeals' decision, they be awarded reasonable fees for work done on this appeal before this Court.

V. CONCLUSION

In interpreting the meaning of the Act, all doubts as to the meaning of the Act are to be resolved in favor of the injured worker. That means that if reasonable minds can differ over the meaning of provisions in the Act, the benefit of the doubt belongs to the injured worker.

Because the Department does not pay pain and suffering damages under the Act, allowing Mr. Tobin to keep this portion of his third party recovery will not result in a double recovery. Similarly, since the Department does not pay pain and suffering benefits they cannot be "reimbursed" by taking a portion of such damages out of the third party recovery. The Department, therefore, does not have a right to include the pain and suffering portion of Mr. Tobin's third party recovery in its calculations under RCW 51.24.060. The Court of Appeals' decision affirming this position was consistent with the *Flanigan* decision and the rule that statutes must be read together to determine their meaning.

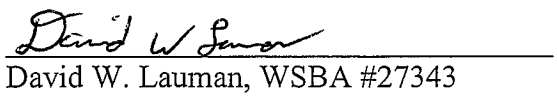
The Court of Appeals' decision was correctly decided in line with existing case law and the proper interpretation of the relevant statutes. There is, therefore, no need for this Court to review the decision of the

Court of Appeals.

For the above reasons, the Court should deny review.

DATED this 26TH day of August, 2008.

SMALL, SNELL, WEISS & COMFORT, P.S.
Attorneys for Respondent, Jim A. Tobin

By: 
David W. Lauman, WSBA #27343

SUPREME COURT
STATE OF WASHINGTON

JIM A. TOBIN, Respondent, v. DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Appellant.	)))))))))))))	No. 81946-7 DECLARATION OF SERVICE

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STATE OF WASHINGTON)
: ss.
County of Pierce)

DAVID W. LAUMAN, being first duly sworn on oath, deposes and says:

1. That I am now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness therein.

2. That on August 26, 2008, I personally filed the original Respondent's Answer to Petition for Review in the above-captioned matter with the Washington State Supreme Court at 415 12th Ave. SW, Olympia, Washington 98512.

3. That on August 26, 2008, I personally served a copy of Respondent's Answer to Petition for Review in the above-captioned matter to Michael Hall, AAG, at the Office of the Attorney General in Olympia, Washington.

4. That on August 26, 2008, I sent a copy of the Respondent's Answer to Petition for Review in the above-captioned matter by Untied States Mail, first-class postage prepaid, properly addressed envelopes addressed as follows:

Jim A. Tobin
PO Box 1651
Milton, WA 98354

David W Lauman
DAVID W. LAUMAN

SIGNED AND SWORN TO before me this 26th day of August, 2008.

Jerri G. Beebe
NOTARY PUBLIC in and for
the State of Washington,
residing at Bonney Lake
My appointment expires: 3-30-09