

Supreme Court No.: 93076-7

Court of Appeals State of Washington Division I - No.: 73964-6-I

Pierce County Superior Court No: 11-2-14979-5

DILLION SMELSER and DERRICK SMELSER,

Petitioners,

vs.

JEANNE PAUL and RONALD SMELSER,

Respondents.

**PETITIONERS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

The Law Offices of Ben F. Barcus & Associates, PLLC
Paul A. Lindenmuth – WSBA #15817
Of Attorneys for Plaintiff
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444/Facsimile: (253)752-1035
paul@benbarcus.com
ben@benbarcus.com
tiffany@benbarcus.com

 ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. INTRODUCTION TO ANSWER.....1

II. ARGUMENT4

A. The Court of Appeals, by Failing to Address RCW
4.22.020, Did Not Properly Apply the Rules of
Statutory Construction.....4

III. CONCLUSION11

Table of Authorities

Cases

<i>Adamson v. Traylor</i> , 60 Wn.2d 332, 334 373 P.2d 961 (1962).....	11
<i>Anderson v. Akzo Nobel Coatngs, Inc.</i> , 172 Wn.2d 593, 614 – 15, 260 P.3d 857 (2011).....	2
<i>Barton v. State</i> , 173 Wn.2d 193, 308 P.3d 597 (2013).....	4
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 926, 784 P.2d 1258 (1990).....	9
<i>Boag v. Farmers Insurance</i> , 117 Wn.App. 116, 123, 69 P.3d 370 (2003) ..	5
<i>Bovenkamp</i> , 179 Wn.App. 794, 320 P.3d 130 (2014)	2
<i>Clark v. Pacificorp</i> , 181 Wn.2d 167, 822 P.2d 162 (1991).....	7, 8
<i>Christensen v. Royal School District</i> , 156 Wn.2d 62, 124 P.3d 283 (2005)	3
<i>Coulter v. Asten Group Inc.</i> , 155 Wn.App. 1, 9, 230 P.3d 169 (2010)....	2, 7
<i>Estate of Kerr v. Ruegg</i> , 134 Wn.2d 328, 338, 949 P.2d 810 (1998)	5, 9
<i>Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grant Aerie of Fraternal Order of Eagles</i> , 148 Wn.2d 224, 243, 59 P.3d 655 (2002).....	5
<i>Gilbert H. Moen Company v. Island Steel Erectors, Inc.</i> , 128 Wn.2d 745, 759 – 60, 912 P.2d 472 (1996).....	4
<i>Hama Hama Co. v. Shorelines Hearing Board.</i> , 85 Wn.2d 441, 446, 536 P.2d 157 (1975).....	5, 6
<i>In Re Marriage of Williams</i> , 115 Wn.2d 202, 796 P.2d 421 (1990).....	5
<i>Topline Builders Inc. v. Bovenkamp</i> , 179 Wn.App. 794, 320 P.3d 130 (2014)	7
<i>Vioen v. Cluff</i> , 69 Wn.2d 305, 418 P.2d 430 (1966).....	2
<i>Wiloughby v. Department of Labor and Industries</i> , 147 Wn.2d 725, 739 n.8, 57, P.3d 611 (2002).....	7

Statutes

RCW 4.22.015	2
RCW 4.22.020	1, 2, 3, 4, 6, 9, 10, 11
RCW 4.22.070	2, 3, 4, 5, 6, 7, 8, 9, 10, 11
RCW 4.22.070(1).....	1, 2, 6, 7, 8, 10
RCW 51.24.060	7

Other Authorities

<i>Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability</i> , 62 Wash. L. Rev. 233, 234 – 35 (1987).....	6
WPI 11.04	2

I. INTRODUCTION TO ANSWER

Petitioners concur in the analysis set forth within the brief of Amicus Curiae Washington State Association for Justice Foundation (hereafter the Foundation). Indeed, to the extent that it is permissible under the Appellate Rules, Petitioners would adopt by reference, and fully incorporate the Foundation's arguments as if they were their own.

In this case the Petitioners are seeking reversal, due to a number of Trial Court rulings, and remand to the Trial Court for a full new trial. The argument set forth within the Foundation's Amicus Brief provides a clear path for this desired result. The argument set forth by the Foundation can be viewed as either an independent path, or a path compatible with the argument set forth by Petitioners not only within their Petition for Review but also within their Supplemental Brief.

As noted in the Foundation's Brief at Page 2, the Petitioners in support of their Motion for Summary Judgment, before the trial court, regarding the issue of whether or not an immune's parents' alleged negligence can be the subject of a fault allocation pursuant to RCW 4.22.070(1), clearly addressed the impact and operation of RCW 4.22.020. It is further noted that the Petitioners, before the Court of Appeals, squarely addressed the operation of RCW 4.22.020 in the context of needing to harmonize its terms when addressing the construction and the

operation of RCW 4.22.015 and 4.22.070. Appellant's Opening Brief at

Pages 23 and 24, provided in part:

Additionally, such construction is necessary in order to harmonize the terms of RCW 4.22.070, with prior common law and RCW 4.22.020, which despite not being a model of clarity, has been consistently interpreted to mean that the negligence of a parent cannot be imputed onto their children. See WPI 11.04; see also, *Vioen v. Cluff*, 69 Wn.2d 305, 418 P.2d 430 (1966). It has long been recognized that statutes which are in derogation of the common law must be strictly construed. See *Topline Builders, Inc. v. Bovenkamp*, 179 Wn.App. 794, 320 P.3d 130 (2014). Well-recognized rules of statutory construction provide that when interpreting [a] statute the Court should read it in its entirety, and if possible each provision be harmonized with other provisions, and statutes must be construed in a manner as to give effect to the entirety of the language, rendering none of it meaningless or superfluous. See *Coulter v. Asten Group Inc.*, 155 Wn.App. 1, 9, 230 P.3d 169 (2010). It is respectfully suggested that the only way to interpret RCW 4.22.070(1)'s immunity language in a manner consistent with the common law and which harmonizes it with RCW 4.22.020, is to recognize that "immunity" under its terms, **does not include "parental immunity"**, which is nothing more than a shorthand method of stating that a parent violates no legal action and duty by failing to supervise their children. Otherwise, it is respectfully suggested that the statute would be in conflict with not only the common law but also the provision of RCW 4.22.020 which has not been abrogated and which according to a recent Supreme Court opinion continues to have vitality. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 614 – 15, 260 P.3d 857 (2011). (Emphasis original).

On review of the Foundation's Brief, what is evident is that, the common law notion that parental negligence cannot be imputed to a child,

which is also embodied in RCW 4.22.020, involves a strong and profound statement of public policy, that the Court of Appeals was remiss in failing to consider.

In the past the Supreme Court has recognized that such profound statements of public policy, particularly as they relate to the protection and care provided to our children, can serve to inform and influence determinations as what can or cannot be "fault" within the meaning of RCW 4.22.015. See *Christensen v. Royal School District*, 156 Wn.2d 62, 124 P.3d 283 (2005).

Given the facts and legal issues in this case, RCW 4.22.020 can be considered both independently, and in the context of how RCW 4.22.070 should be interpreted, and applied, in a case involving an injury to children. These issues were clearly before both the Trial Court and the Court of Appeals. Given the obvious interplay between RCW 4.22.020 and RCW 4.22.070, when a defendant is attempting to allocate responsibility to an "immune" parent, it is inexplicable and puzzling for the Court of Appeals, having RCW 4.22.020 before it, to not have addressed this highly relevant statute when analyzing this case.

II. ARGUMENT

A. **The Court of Appeals, by Failing to Address RCW 4.22.020, Did Not Properly Apply the Rules of Statutory Construction.**

As emphasized at page 4 of the Foundation's Brief, the Court of Appeals, in its opinion, failed to even mention RCW 4.22.020. It is noted that in the past, this Court has had little difficulty looking to other provisions within RCW 4.22.et.seq. when interpreting the meaning of the terms set forth within RCW 4.22.070. See, e.g., *Barton v. State*, 173 Wn.2d 193, 308 P.3d 597 (2013). Similarly, this Court has also looked at other statutory schemes when interpreting RCW 4.22.070, in order to harmonize them and determine whether or not RCW 4.22.070 in fact controls. See, *Gilbert H. Moen Company v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 759 – 60, 912 P.2d 472 (1996). Such an approach was not utilized by the Court of Appeals. Such a failure was inconsistent with the proper application of a number of well-established rules of statutory construction.

As explored below, the singular rule of statutory construction applied by the Court of Appeals i.e., the doctrine of "*expressio unius est exclusio alterius*", (inclusion of one item in a category implies that other items were excluded), was erroneously applied, and the Court of Appeals ultimate holding was inconsistent with the application of a wide variety of

other rules of statutory construction. As noted in *Hama Hama Co. v. Shorelines Hearing Board.*, 85 Wn.2d 441, 446, 536 P.2d 157 (1975) (“oftentimes, as in this case, this principle of statutory construction operates inconsistently with itself, and applying it positively but blindly actually produces inconsistent results”); see also, *Estate of Kerr v. Ruegg*, 134 Wn.2d 328, 338, 949 P.2d 810 (1998) (it is error to use the above quoted maxim of statutory construction if it serves to defeat legislative intent).

When determining legislative intent, a court may look to legislative history and other statutes. . The Court may also look to the rules of statutory construction and any relevant case law. See, *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grant Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 243, 59 P.3d 655 (2002). Finally, with respect to general rules of statutory construction, it is presumed that the legislature was aware of prior judicial construction of a statute, so absent indication of an intent to overrule common law, new legislation will presume to be consistent with prior judicial decisions. See, *In Re Marriage of Williams*, 115 Wn.2d 202, 796 P.2d 421 (1990).

As suggested by Professor Peck's comprehensive article on the subject relevant matter, there is nothing within the legislative history related to adoption of RCW 4.22.070, which in any way suggests that the

legislature intended to abolish the common law principle, embodied by RCW 4.22.020, that the negligence of a parent cannot be imputed to a child. See, C. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 Wash. L. Rev. 233, 234 – 35 (1987).

Also, as adroitly pointed out by the Foundation at page 8 of its Brief, the legislative history of RCW 4.22.020, includes a 2008 amendment. (A copy of the amendment is set forth as Appendix No. 1). Such an amendment occurred years after the last substantive amendment of RCW 4.22.070(1), which is explored below. It has been previously recognized when engaging in statutory construction, it is proper, under appropriate circumstances, to look to the sequencing of statutory adoption or amendment in order to determine legislative intent. See *Hama Hama Co. v. Shorelines Hearing Board*, 85 Wn.2d at 450. Here the sequence of events shows a legislative intent of preserving the doctrine that parental negligence cannot be imputed to a child, despite the earlier passage of RCW 4.22.070(1) and its vague and ambiguous use of the word “immune”.

The Court of Appeals' interpretation of RCW 4.22.070, without consideration of RCW 4.22.020, and the common law construing it, also defied the rule of statutory construction which recognized that statutes,

which are derogation of the common law must be strictly construed. See, *Topline Builders Inc. v. Bovenkamp*, 179 Wn.App. 794, 320 P.3d 130 (2014). Also, *sub silentio*, by ignoring RCW 4.22.020, when interpreting RCW 4.22.070, the Court of Appeals effectively rendered RCW 4.22.020 partially meaningless and superfluous. See, *Coulter v. Asten Group, Inc.*, 155 Wn.App. 1, 9, 230 P.3d 169 (2010).

In stark contrast, the Court of Appeals' adoption of the notion that the exclusion of workers' compensation immunity infers the inclusion of all other immunities, is unsupportable by legislative history, which belies such a proposition. As pointed out in this Court's opinion in *Clark v. Pacifcorp*, 181 Wn.2d 167, 822 P.2d 162 (1991), the original version of RCW 4.22.070, which was adopted in 1986, did not include an exception for workers' compensation, in its provision relating to allocation of fault to "immune" entities. Likely in response to the *Clark* opinion, the legislature in 1993 promptly passed "emergency" legislation amending RCW 4.22.070(1) to include an exclusion of entities entitled to "immunity" under our workers' compensation law. (RCW 51.24.060 was also amended at the same time, arguably in order to maintain consistency). As recognized in *Wiloughby v. Department of Labor and Industries*, 147 Wn.2d 725, 739 n.8, 57 P.3d 611 (2002) the impact of the 1993 statutory

amendment served to supersede the Supreme Court's prior holding in *Clark*.

What at most can be discerned by this statutory history, is an intent on the part of the legislature to specifically exclude parties immune under our workers' compensation law from an allocation of fault under the terms of RCW 4.22.070 and no more. The 1993 amendment was undoubtedly a response to the *Clark* opinion, and likely lobbying from the State asserting that as a result of *Clark*, there was an "emergency" need for amendment in order to preserve the fiscal integrity of our workers' compensation systems. There is nothing within such legislative history which suggests that the purpose of the workers' compensation exclusion was intended to communicate a legislative intent to include in RCW 4.22.070(1)'s term "immune", literally anything and everything else which could be characterized as an "immunity".

If anything, *Clark* and the 1993 "emergency" amendment to RCW 4.22.070(1), should be viewed as a "real world" example of the kind of unintended consequences created by the hastily and ill-considered passage of RCW 4.22.070 – the kind of unintended consequences Professor Peck warned of as early as 1987.

The erroneous nature of the approach taken by the Court of Appeals becomes even more telling when applying more specific rules of

statutory construction. As correctly pointed out by the Foundation's Brief at Pages 12 and 17, RCW 4.22.020 is a more specific statute than RCW 4.22.070, when addressing the issue of whether or not the negligence of a parent can be "imputed" to a child. Indeed unless one includes "parental immunity" as falling within the vague and ambiguous terms "immune" used in RCW 4.22.070, RCW 4.22.070 does not address the same subject matter.

Assuming, for the sake of discussion, that RCW 4.22.070, by using the term "immune" within its text, is a statute involving the same subject matter i.e., the allocation and/or imputation of parental fault in a case involving injury to a child, the Court of Appeals also failed to apply the well-recognized principle of statutory construction which provides "that statutes relating to the same subject matter are to be considered together to ascertain legislative policy and intent." See, *Bennett v. Hardy*, 113 Wn.2d 912, 926, 784 P.2d 1258 (1990). Here, the Court of Appeals' failure to even consider RCW 4.22.020 violated this well-established principle.

The principles and rules discussed in the case of *Estate of Kerr v. Ruegg*, 134 Wn.2d at 335-6, are instructive. The *Estate of Kerr* case provides, commencing at Page 335:

Historically, this Court has followed the rule that each provision of a statute should be read together with other provisions in order to determine legislative intent. The

purpose of reading statutory provisions in pari materia with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provisions 'as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes. (footnotes omitted).

In furtherance of such goals, statutes generally should be read as complementary, instead of as in conflict with each other. *Id.* It is only when statutes are in conflict that a more specific statute controls over the general. *Id.*

"On their face", RCW 4.22.020 and RCW 4.22.070 do not necessarily "conflict". It is only when one includes the notion that "parental immunity" i.e., the actions of an "immune" parent can be considered as a damage-reducing consideration under RCW 4.22.070, that a conflict exists. It is suggested that in order to appropriately harmonize the two statutes, and avoid conflict, the operation of RCW 4.22.020 should be viewed as controlling and be construed to prohibit the use of any form of parental fault as a damage-reducing consideration in a claim involving injury to a child. Otherwise the statutes are in conflict, and the more specific statute (RCW 4.22.020) controls over the general (RCW 4.22.070(1)).

Either way the result is the same -- it was error for the trial court to place the issue of parental negligence before the jury.

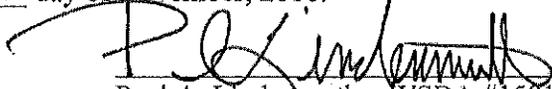
III. CONCLUSION

For the reasons stated above the Petitioners in this action embrace the arguments provided by the Foundation. RCW 4.22.020 is a highly significant statute, and in and of itself should have been viewed by both the trial and appellate courts as precluding what transpired in this case, i.e., the jury's consideration of parental fault when determining the nature and extent of injury suffered by a child. RCW 4.22.020 singularly, or in the context of construing RCW 4.22.070, is an important consideration that should not have been ignored by the Court of Appeals.

The arguments of the Foundation relating to RCW 4.22.020, as with those made by Petitioners, establish that this case should be subject to a reversal and remand for a full new trial. This Court has previously recognized that in cases involving injuries to children that a new trial is warranted when a jury is erroneously permitted to consider parental negligence. *Adamson v. Traylor*, 60 Wn.2d 332, 334 373 P.2d 961 (1962). Consideration of parental fault in a case involving injury to a child is "improper and highly prejudicial". *Id.* It is so prejudicial, that it serves to deny the injured child "a fair trial". *Id.*

For the reasons, stated previously by Petitioners, and by the
Foundation, or both, this case should be remanded for a new – fair trial.

Dated this 3rd day of November, 2016.



Paul A. Lindenmuth – WSBA #15817
Of Attorneys for Plaintiff
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444/Facsimile:(253)752-1035
paul@benbarcus.com

DECLARATION OF SERVICE

I, Tiffany Dixon, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years and am not a party to this case.

On this ^{31st} day of November, 2016, I caused to be served and delivered to the attorney for the Respondents, below-listed, a copy of PETITIONERS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION; and

I Filed with the Supreme Court of the State of Washington, via email:

Supreme Court via: SUPREME@COURTS.WA.GOV

These documents were provided to the attorneys listed below either, via email and/or delivery via US Mail:

Sandra Bobrick
Sloan Bobrick, PS
4810 Pt. Fosdick Drive NW #83
Gig Harbor, WA 98335
sbobrick@sloanbobricklaw.com

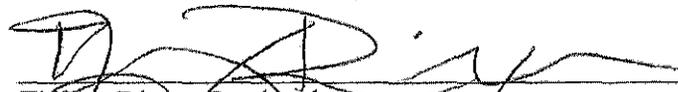
Joanne Henry
Attorney at Law
4128 N. Mason Ave.
Tacoma, WA 98407-4934
Joannehenry1@outlook.com

Daniel E. Huntington
422 W. Riverside, Suite 1300
Spokane, WA 99201
danhuntington@reichter-wimberley.com

Gary N. Bloom
422 W. Riverside, Suite 1300
Spokane, WA 99201
garyb@hblaw2.com

Valerie D. McOmie
4549 NW Aspen St.
Camas, WA 98607
valeriemcomie@gmail.com

DATED this ^{31st} day of November, 2016, at Tacoma, Pierce County, Washington.


Tiffany Dixon, Paralegal
The Law Offices of Ben F. Barcus & Associates, PLLC

Appendix No. 1

1993 Wash. Legis. Serv. Ch. 496 (H.B. 1264) (WEST)

WASHINGTON 1993 LEGISLATIVE SERVICE
53rd Legislature, 1993 Regular Session

Additions are indicated by <<+ Text +>>
Deletions by <<- Text ->>
Changes in tables are made but not highlighted. Vetoed provisions
within tabular material are not displayed.

CHAPTER 496
H.B. No. 1264
WORKERS' COMPENSATION—THIRD PARTY RECOVERIES

AN ACT Relating to third party recoveries in workers' compensation cases; amending RCW 4.22.070 and 51.24.060; creating a new section; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 4.22.070 and 1986 c 305 s 401 are each amended to read as follows:

<< WA ST 4.22.070 >>

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages<<-, including->> <<+ except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include+>> the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, <<+entities with any other individual defense against the claimant, and+>> entities immune from liability to the claimant <<-and entities with any other individual defense against the claimant->><<+, but shall not include those entities immune from liability to the claimant under Title 51 RCW+>>. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant's total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Sec. 2. RCW 51.24.060 and 1987 c 442 s 1118 are each amended to read as follows:

<< WA ST 51.24.060 >>

(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 <<-compensation and->> 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 <<-or payable->> under this title: PROVIDED, That the department<<+'s+>> <<-or->> <<+and/or+>> self-insurer<<+'s+>> <<-may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and->> <<-+proportionate share shall not exceed one hundred percent of the costs and reasonable+>> attorneys' fees<<-.->><<+;+>>

(ii) <<-The sum representing the department's and/or self-insurer's proportionate share shall not be subject to subsection (1)(d) and (e) of this section.->> <<+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<<-;->>

<<- (f) If the employer or a co-employee are determined under RCW 4.22.070 to be at fault, (c) and (e) of this subsection do not apply and 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 the case of an employer not qualifying as a self-insurer, the department shall make a retroactive adjustment to such employer's experience rating in which the third party claim has been included to reflect that portion of the award or settlement which is reimbursed for compensation and benefits paid and, if the claim is open at the time of recovery, applied against further compensation and benefits to which the injured worker or beneficiary may be entitled.

(5) 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.

(6) 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.

(7) 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 of five dollars, 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.

(8) 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, 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.

<<+NEW SECTION.+>> Sec. 3. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993.

<<+NEW SECTION.+>> Sec. 4. This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993.

Approved May 18, 1993.

Effective July 1, 1993.

WA LEGIS 496 (1993)

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, November 03, 2016 2:04 PM
To: 'Tiffany Dixon'
Cc: Paul Lindenmuth
Subject: RE: Cause No. 93076-7 Petitioners' Answer to Brief

Received 11-3-16.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

From: Tiffany Dixon [mailto:Tiffany@benbarcus.com]
Sent: Thursday, November 03, 2016 2:00 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Paul Lindenmuth <Paul@benbarcus.com>
Subject: Cause No. 93076-7 Petitioners' Answer to Brief

Attached for filing is Petitioners' Answer to Brief of Amicus Curiae of Washington State Association for Justice Foundation.

Tiffany Dixon
Paralegal
Law Offices of Ben F. Barcus and Associates, PLLC
4303 Ruston Way
Tacoma, WA 98402
(253) 752-4444
tiffany@benbarcus.com

This email is confidential. If you receive this email in error, please delete immediately. This email is not provided for any tax purposes.