Supreme Court No. 91737-0

Court of Appeals No. 32177-1-III



**THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**

Virginia Burnett,

Appellant,

v.

State of Washington, Department of Corrections,

Respondents.

# RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

Virginia Burnett was compensated by the Department of Labor and Industries for an injury she received while working in a prison. After she was compensated, she chose to assign her theoretical third-party claim against the Department of Corrections to the Department of Labor and Industries. When the Department of Labor and Industries recognized this cause of action was legally untenable, it exercised its broad discretion under RCW 51.24.050(1) to "prosecute or compromise" assigned claims.

The plain language of RCW 51.24.050(1) and well-established case law regarding assignment of litigation rights do not support Ms. Burnett's request that a "good faith" requirement be added to the statute. Instead, the Department of Labor and Industries acted within the broad authority conferred by the statute and the assignment in seeking dismissal of the appeal.

Finally, Ms. Burnett's due process argument is also meritless, as she had notice of the Department of Labor and Industries' motion to dismiss and an opportunity to respond to it. Since the Court of Appeals' decision comports with the applicable statutes and well-settled case law, this Court should deny review.

## II. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. When a third-party claim is assigned to the Department of Labor and Industries pursuant to RCW 51.24.050(1), the agency has authority to "prosecute or compromise the action in its discretion." Since it is undisputed that Ms. Burnett assigned her case, did the Court of Appeals properly grant the Department of Labor and Industries' motion to dismiss?

B. Due process requires that a party be given notice and an opportunity to be heard. Did the notice and opportunity to be heard afforded to Ms. Burnett satisfy the dictates of due process?

C. Given the Department of Labor and Industries' requested dismissal, and assuming Ms. Burnett lacked standing to disqualify the Attorney General's Office, did the Court of Appeals properly dismiss the appeal without ruling on whether an employee of one state agency should be barred from suing another state agency in tort for a workplace injury?

## III. COUNTERSTATEMENT OF THE CASE

### A. Facts

Virginia Burnett taught inmates at the Washington State Penitentiary while she was employed by Walla Walla Community

College, a state agency. Clerk's Papers (CP) 1; RCW 28B.50.040(20). While she was teaching at the penitentiary, Ms. Burnett was injured. CP 2. She received workers' compensation benefits from the Department of Labor and Industries. CP 2.

When Ms. Burnett's claim was initially evaluated by the Department of Labor and Industries, a staff member thought Ms. Burnett might have a third-party cause of action against the Department of Corrections, the state agency responsible for operating the penitentiary. Pet. for Rev., Appx. N, Ex. 1. The Department of Labor and Industries informed Ms. Burnett that she had 60 days to elect to pursue a third-party claim herself, and that if she did not elect to pursue the case, RCW 51.24.070 would require assignment of the case to the Department of Labor and Industries. Pet. for Rev., Appx. N, Ex. 1. When Ms. Burnett did not respond, the Department of Labor and Industries sent her a letter stating that the third-party action was "deemed assigned to the department to prosecute or compromise in its discretion." Pet. for Rev., Appx. N, Ex. 2. Again, she chose not to respond. Pet. for Rev., Appx. N at 2.

## B. Procedural History

Ms. Burnett filed this lawsuit in Walla Walla Superior Court on March 1, 2012. CP 1-4. The complaint states:

> Plaintiff's cause of action arising out of said injury has been assigned to the Department of Labor and Industries, which is bringing this third party action pursuant to RCW 51.24.050(1).

CP 2. This is the only mention of the Department of Labor and Industries in the complaint. *See* CP 1-4. The Department of Labor and Industries does not appear in the caption of the complaint. CP 1. Instead, Virginia Burnett is identified as the sole plaintiff in the caption and in the complaint. CP 1-2. Also, Ms. Burnett's request for relief is specific to Ms. Burnett herself. CP 4. Nowhere does Ms. Burnett request repayment to the Department of Labor and Industries for the payments it made to compensate her for her workplace injuries. CP 4.

Throughout the litigation, Ms. Burnett held herself out as the sole plaintiff. *See* CP 35-36; CP 90; Pet. for Rev., Appx. V at 24-25, Appx. T at 3. The pleadings filed by Ms. Burnett are silent as to the interests of the Department of Labor and Industries. *See* CP 35-51, Pet. for Rev., Appx. V at 1-25, Appx. T at 1-10. However, Ms. Burnett's counsel, Tom Scribner, was employed as a Special Assistant Attorney General to represent the Department of Labor and Industries. Pet. for Rev., Appx. N

at 2, Ex. 3 at 3. Mr. Scribner's retainer agreement with the Department of Labor and Industries, stated that "[f]or the claims/actions under this agreement, *L&I is the client* and is afforded such rights as are attendant on an attorney-client relationship." *Id.* at 3 (emphasis added).

On December 17, 2014, the Court of Appeals sent a letter to the Department of Corrections and to Ms. Burnett requesting additional briefing on five specific questions. *See* Pet. for Rev., Appx. S. Included in the five questions is the following:

> Should this court give consideration to the fact that the Department of Labor & Industries, the state branch that administers workers compensation law, is the party bringing this lawsuit? Stated differently, should this court give any deference to the Department of Labor & Industries' apparent position that Walla Walla Community College and the Department of Corrections are distinct employers for purposes of RCW 51.24.030.

*Id.* at 1. The Court directed that additional briefing be filed by January 7, 2015. *Id.*

Ms. Burnett moved for an extension of time to file the additional briefing. *See* Pet. for Rev., Appx. R at 1-2. Again, Ms. Burnett held herself out as the sole appellant. *Id.* The motion for extension suggested that the Department of Labor and Industries and Ms. Burnett might have different responses to the Court's questions:

> Counsel for appellant has been in communication with representatives of the Department of Labor & Industries

> and with appellant herself in an effort to get answers to the five questions raised by the court in the December 17 letter referenced herein.

*Id.*at 2.

After the extension request was filed, Anastasia Sandstrom, Assistant Attorney General, filed a Notice of Appearance on behalf of the Department of Labor and Industries and a Motion to Dismiss the appeal in its entirety. *See* Pet. for Rev., Appx. P, Q. Ms. Burnett objected to dismissal. In objecting to dismissal, Ms. Burnett's counsel stated for the first time he represented both Ms. Burnett and the Department of Labor and Industries. Pet. for Rev., Appx. O. at 1-3.

The Department of Labor and Industries filed a Supplemental Brief regarding its Motion to Dismiss and a Motion to Compel Withdrawal of Counsel. *Id.*, Appx. K, L, M, N. In support of these filings, the Department of Labor and Industries submitted the Declaration of Debra Hatzialexiou, Legal Services Program Manager for the Department of Labor and Industries. *Id.*, Appx. N. Ms. Hatzialexiou declares this action was assigned to the Department of Labor and Industries when Ms. Burnett did not respond to the Department's demand for election in the matter on May 19, 2009. *Id.* at 2, Ex. 1, Ex. 2. Importantly, Ms. Burnett's complaint concedes this cause of action was assigned to the Department of Labor and Industries. CP 2.

Upon review of the Court's December 17, 2014, letter, Ms. Hatzialexiou decided, in consultation with Victoria Kennedy, Assistant Director for Insurance Services with the Department of Labor and Industries, that the Department of Labor and Industries should dismiss the assigned appeal in this case. Pet. for Rev., Appx. N at 3. This is because the Department of Labor and Industries' position is that:

> [A] state employee's employer is the State of Washington. Further, it is the [Department of Labor and Industries'] position that under RCW 51.24.030, a state employee from one agency cannot sue an employee from another state agency for conduct arising out of a work place injury. For the reasons stated in the brief of respondent filed by the Department of Corrections, the State of Washington did not waive Title 51 immunity.

*Id.* at 3.

## IV. ARGUMENT AGAINST REVIEW

### A. Burnett's Desire to Amend the Plain Language of RCW 51.24.050(1) to Constrain Department of Labor and Industries' Authority to Prosecute or Compromise an Assigned Case Does Not Raise an Issue Meriting Review

Ms. Burnett had full authority to pursue a third-party claim. That authority ended, however, when she chose to assign the case to the Department of Labor and Industries. Under Washington's Industrial Insurance Act, when an assignment is made, the Department of Labor and Industries "may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative."

RCW 51.24.050(1). As the Court of Appeals held, RCW 51.24.050(1) "omits any reference to any veto power in the injured worker." *Burnett v. Dep't of Corr.*, __ Wn. App. __, 349 P.3d 42, 49 (2015).

It is well settled that "the word 'may' is permissive only and operates to confer discretion." *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940). For example, this Court held that a statute stating that the Department of Corrections "may...call for bids and award contracts" for prison construction projects is "permissive." *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999); RCW 72.01.110. In the absence of any statutory language limiting this authority, the Court rejected the argument that the Department of Corrections had a duty to solicit private bids rather than use inmate labor. *Id.* The Court's consistent reasoning is directly applicable to this case. Because nothing in RCW 51.24.050(1) limits Department of Labor and Industries' discretion to decide whether to prosecute or compromise the assigned third-party claim, there is no statutory limit on the agency's authority. There is no reason for this Court to revisit this well-settled area of statutory interpretation.

Despite the consistent case law, Ms. Burnett contends that the Court should advance public policy and protect her right to due process by

inserting a limitation into the statute and creating authority for her to resurrect her ability to pursue a third-party claim. Pet. For Rev. at 12..

In support of this argument, Ms. Burnett contends that RCW 51.04.062 imposes a duty of good faith to achieve the best outcomes for workers. This argument is misleading at best. RCW 51.04.062 applies to structured settlements, under which injured workers' claims are paid by the Department of Labor and Industries or a self-insured employer. *See also* RCW 51.04.063. This statute does not address the Department of Labor and Industries' duties after the worker has received workers' compensation benefits, or limit the Department of Labor and Industries' authority when the worker chooses to assign a third-party action to the Department of Labor and Industries.

Ms. Burnett improperly takes RCW 51.04.062 out of context and uses it to import a good faith requirement into RCW 51.24.050(1). As the Court of Appeals correctly noted, were Ms. Burnett's interpretation of the statute accepted, "[w]e would be reading additional language into the statute." *Burnett*, 349 P.3d at 49. RCW 51.24.050(1) confers upon the Department of Labor and Industries the discretion whether to pursue third-party claims that are assigned to it at all. This discretion necessarily extends to the ability to dismiss a lawsuit, an ability Ms. Burnett would

have retained had she not chosen to assign the case to the Department of Labor and Industries.

### B. The Decision of The Court Of Appeals Is Consistent With Case Law Interpreting Assignment Of Litigation Rights In Other Contexts

The Court of Appeals followed established case law in deciding to grant the Department of Labor and Industries' motion to dismiss and not reach the merits of this appeal. *Burnett*, 349 P.3d at 48-51. As the Department of Labor and Industries was the assignee of Ms. Burnett's cause of action, the decision that it had authority to dismiss this appeal is consistent with case law interpreting assignment of litigation rights. "As assignee of the claim, the Department [of Labor and Industries] was real party in interest." *Dep't of Labor & Indus. v. Wendt*, 47 Wn. App. 427, 431, 735 P.2d 1334 (1987) *overruled on different grounds by State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). The Industrial Insurance Act grants the Department of Labor and Industries broad authority, as an assignee of a third-party claim, to prosecute an action against a third party: "An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion." RCW 51.24.050(1). This broad authority includes the ability to bring a cause of action in its own name, instead of in the name of the injured

worker. *See Wendt*, 47 Wn. App. at 431. This broad authority includes the ability to settle a cause of action independent of the injured worker where the injured worker has assigned a cause of action to the Department. *See Duskin v. Carlson*, 136 Wn.2d 550, 965 P.2d 611 (1998).

This decision is consistent with case law interpreting assignment of litigation rights in other contexts and from other jurisdictions. An assignee of a chose in action assumes those rights coextensive with those of the assignor at the time of the assignment. *Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 227, 741 P.2d 1054 (1987). Indeed, an assignee "steps into the shoes of the assignor" and, therefore, obtains all rights of the assignor. *Puget Sound Nat'l Bank v. Dep't of Rev.*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994); *City of Cincinnati ex rel. Ritter v. Cincinnati Reds, LLC*, 150 Ohio App. 3d 728, 2002-Ohio-7078, 782 N.E.2d 1225, 1234 (2002). An assignment "confers a complete and present right in the subject matter to the assignee." *Foley v. Grigg*, 144 Idaho 530, 164 P.3d 810, 813 (2007). As such, an assignor no longer retains control over the subject matter of the assignment. *Id.*

The Court of Appeals' decision is consistent with this authority. There does not seem to be any dispute that had Ms. Burnett not assigned her cause of action, she would have had the authority to dismiss her

appeal. However, when she chose to assign her cause of action, she conferred a complete and present right in her theoretical claim to the Department of Labor and Industries. As such, Ms. Burnett no longer retained control over her claim against the Department of Corrections, and the Department of Labor and Industries was within its authority to request dismissal of the action. As the Court of Appeals' decision is consistent with established case law regarding assignments, Ms. Burnett presents no issue which merits review by this Court.

### C. The Notice and Opportunity to Be Heard Afforded to Ms. Burnett Fully Comported With State and Federal Due Process Case Law

Ms. Burnett contends that in holding that she had assigned the case to the Department of Labor and Industries, and therefore lacked standing to file the motion to dismiss, the Court of Appeals denied her due process right to object to the Attorney General's Office's motion to dismiss. Pet. for Rev. at 13-16. "The fundamental requirement of due process is notice and an opportunity to be heard." *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). So long as the party is given adequate notice and an opportunity to be heard and any alleged procedural irregularities do not undermine the fundamental fairness of the proceedings, there is no due process violation. *Sherman*, 128 Wn.2d

at 184. Here, Ms. Burnett was given notice and an opportunity to be heard with regard to the Department of Labor and Industries' motion to dismiss.

The Court of Appeals did not find Ms. Burnett lacked standing to challenge the Department of Labor and Industries' motion to dismiss. *Burnett*, 349 P.3d at 46-48. Instead, the Court of Appeals properly found Ms. Burnett lacked standing to disqualify the Attorney General's Office. *Id.* at 46-47. The Court of Appeals also properly found Ms. Burnett lacked standing to assert that the State failed to satisfy the requirements of RCW 2.44.040. *Id.* at 47-48. As Ms. Burnett was given notice and an opportunity to be heard with regard to the Department of Labor and Industries' motion to dismiss, these ancillary decisions do not violate Ms. Burnett's rights to due process. As such, Ms. Burnett fails to identify any constitutional due process issue which merits review by this Court.

The *Sherman* case is instructive. There, the plaintiff challenged the University of Washington's decision to terminate him from its anesthesiology residency program. *Sherman*, 128 Wn.2d at 168-69. The trial court elevated six minor procedural irregularities to the level of due process violations, invalidated the termination decision, and awarded damages to the plaintiff. *Id.* at 184. The Supreme Court found that since none of the procedural irregularities actually affected the plaintiff's due

process rights, the termination hearing was procedurally valid and the vacation of the termination decision was unjustified. *Id.*

As in *Sherman*, Ms. Burnett was given notice of the Department of Labor and Industries' motion to dismiss. *See* Pet. for Rev. Appx. P, K. The Court of Appeals encouraged Ms. Burnett to file a response to the motion to dismiss. Ms. Burnett did, in fact, file a response to the Department of Labor and Industries' motion to dismiss on February 3, 2015. Pet. for Rev., Appx. I. Since she was given notice and an opportunity to be heard, the Court of Appeals' decision fully comported with State and federal case law setting forth the requirements of due process.

### D. The Department of Labor and Industries Properly Moved To Dismiss Because The Cause Of Action Is Legally Untenable

Ms. Burnett argues the Court of Appeals' decision permits the State to "continue to assert its position that an injured state worker cannot assert a claim against a third-party state tortfeasor merely because of his or her employment." Pet. For Rev. at 17. However, the Department of Labor and Industries moved to dismiss the appeal because it recognized that a state employee's employer is the State of Washington. Pet. For Rev., Appx. N at 3. Further, the Department of Labor and Industries recognized that a state employee from one agency cannot sue another state

agency for conduct arising out of a workplace injury. *Id.* The Court of Appeals agreed with the Department of Labor and Industries, stating: "The overwhelming rule, if not the universal rule, from other jurisdictions is that employees of separate state agencies are within the same employment, and an injured worker employed by one agency may not bring a third party complaint for negligence against an employee of another state agency." *Burnett*, 349 P.3d at 50. *See also State v. Purdy*, 601 P.2d 258 (Alaska 1979); *Colombo v. State*, 3 Cal. App. 4th 594, 5 Cal.Rptr.2d 567 (1991); *Rodriguez v. Bd. of Dirs. of the Auraria Higher Educ. Ctr.*, 917 P.2d 358 (Colo. Ct. App. 1996); *Indiana State Highway Dep't v. Robertson*, 482 N.E.2d 495 (Ind. Ct. App. 1985); *State v. Coffman,* 446 N.E.2d 611 (Ind. Ct. App 1985); *Green v. Turner,* 437 So.2d. 956 (La. Ct. App. 1983); *McGuire v. Honeycutt,* 387 So.2d 674 (La. Ct. App. 1980); *Wright v. Moore*, 380 So.2d 172 (La. Ct. App. 1979); *Maggio v. Migliaccio,* 266 N.J. Super. 111, 628 A.2d 814 (1993); *Linden v. Solomacha,* 232 N.J. Super. 29, 556 A.2d 346 (1989); *Singhas v. New Mexico State Highway Dep't*, 120 N.M. 474, 902 P.2d 1077 (1995); *Linzee v. State of New York,* 122 Misc. 2d 207, 470 N.Y.S.2d 97 (Ct. Cl. 1983); *Kincel v. Department of Transportation*, 867 A.2d 758 (Pa. Commw. Ct. 2005); *Osborne v. Commonwealth*, 353 S.W.2d 373 (Ky. 1962).

This Court has twice considered this question in the analogous context of city and county government and concluded that the bar applies. *See Thompson v. Lewis County*, 92 Wn.2d 204, 205-07, 595 P.2d 541 (1979) (rejecting the argument that the county functions in dual capacities as employer and builder of roads in an action by an employee of the county roads department against the county; *Spencer v. City of Seattle*, 104 Wn.2d 30, 32-34, 700 P.2d 742 (1985) (rejecting the argument that the city functions in dual capacities as employer and builder of streets in an action brought by a city employee against the city. Although *Spencer* dealt with a municipality, it cited to *Wright v. Moore*, 380 So.2d 172 (La. Ct. App. 1979), with approval. *Spencer*, 104 Wn.2d at 34. In *Wright*, an employee of the Louisiana Department of Health and Human Services attempted to sue the Loiusiana Department of Transportation for injuries she sustained in a traffic accident within the course and scope of her employment. *Wright*, 380 So.2d at 172. The court held her suit was barred because the State of Louisiana was the real party in interest and was indistinguishable from its executive departments. *Id.* at 173-74. *Spencer* characterized *Wright* as "an almost identical factual setting." *Spencer*, 104 Wn.2d at 34. Thus, even though *Spencer* involved a city, the Supreme Court appears to endorse the analysis that

two state agencies are considered the "same employ" under RCW 51.24.030(1).

Since the Department of Labor and Industries properly exercised its authority to request dismissal of the case, the Court of Appeals had no reason to reach the merits of the case. If it had reached the merits, Ms. Burnett's arguments directly conflict with Washington State and national case law holding that an injured worker employed by one state agency may not bring a third-party complaint for negligence against an employee of another state agency. Therefore, the case does not present an issue meriting this Court's review.

## V. CONCLUSION

None of the bases asserted by Ms. Burnett satisfy the standards for review under RAP 13.4(b). Therefore, review should be denied.

RESPECTFULLY SUBMITTED this 8th day of July, 2015.

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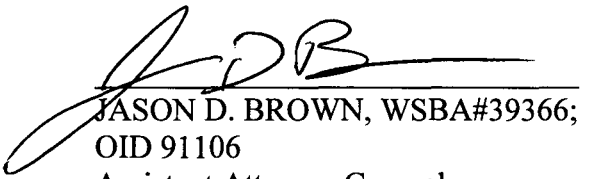

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## CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding was hand delivered and filed at the following address:

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