No. 937991

SUPREME COURT OF THE STATE OF WASHINGTON

Basilio Cornelio Carrera, an individual,

Appellant,

v.

Sunheaven Farms, a Washington General Partnership; Sunheaven Farms, LLC, a Washington Limited Liability Company; Brent Schulthies, as general partner of Sunheaven Farms,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

It is well settled that the State may take action that benefits both the State and an individual beyond the statute of limitations period. This Court just reaffirmed this principle to hold that the State may act to benefit private parties when such action has a beneficial effect that promotes the Legislature's goals under the statute. *State v. LG Electronics Inc.*, 186 Wn.2d 1, 15, 375 P.3d 636 (2016). Here, to further important concerns of deterring unsafe workplace conduct and replenishing the workers' compensation trust fund, the Department of Labor & Industries properly sued a negligent company, Sunheaven Farms General Partnership, for severely injuring a worker resulting in an amputated arm. The statute of limitations applicable to workers does not apply to the Department in such "third party" cases, as this Court decided in *State v. Vinther*, 176 Wash. 391, 393-98, 29 P.2d 693 (1934). Sunheaven claims that if the Court of Appeals decision stands, "the proverbial floodgates [will] open." Pet. at 12. But no floodgates opened after *Vinther* and Sunheaven shows no issue of substantial public interest or need to revisit *Vinther* or *LG Electronics*.

Sunheaven also argues that the Court of Appeals decision does not follow Supreme Court precedent regarding noneconomic damages in third party lawsuits. But the Court of Appeals explicitly followed this Court's decisions and Sunheaven shows no basis for review.

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II. COUNTERSTATEMENT OF THE ISSUES

Review should not be granted, but if it is the following issues are presented:

1. RCW 51.24.050 allows the Department to "prosecute" an assigned "cause of action" when a negligent non-employer has injured a worker. Is the Department precluded from claiming noneconomic damages from a negligent non-employer when RCW 51.24.050 allows the Department to prosecute the whole cause of action without limitation?
2. RCW 4.16.160 exempts the statute of limitations from running against the State when an action is brought "in the name or for the benefit of the state." Does RCW 4.16.160 bar application of a three-year statute of limitation against the Department when third party actions serve to replenish state coffers and serve as a deterrent for unsafe workplaces?

III. COUNTERSTATEMENT OF THE CASE

A. The Department Sues Negligent Non-Employers To Replenish the Injured Worker Fund and To Serve as a Deterrent Against Those Who Would Create an Unsafe Workplace

This case is a "third party" action brought by the Department exercising its statutory authority to bring injured worker claims against

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negligent non-employers. RCW 51.24.050 authorizes the Department to sue a third party for damages sustained by injured workers when workers decline to exercise their right to sue on their own behalf. In an action under this statute, the Department sues the negligent non-employer, obtains all damages, and allocates the funds between the Department and worker. *See* RCW 51.24.050.

B. Because of Sunheaven's Actions, Carrera's Arm Was Amputated by an Unsafe Conveyer Belt

Basilio Carrera, the injured worker, was an employee of Brent Hartley Farms, LLC. CP 8-9. At the time Carrera was injured, his employer had a contract with Sunheaven to provide safety compliance services, in addition to other centralized administrative services. CP 7-8. Sunheaven did not employ Carrera. CP 8-9. It is a third party under RCW 51.24.050 and may be sued for negligence that causes a work-related injury. Sunheaven contracted with Carrera's employer to regulate compliance with safety laws and provide safety training at the farm where Carrera worked. CP 7-8. It did neither. CP 47-50. Carrera's arm was cut off when his shirt was caught in a conveyor whose side guards had been removed in violation of state law. CP 48.

WAC 296-307-232, adopted by the Department under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17,

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requires side guards. CP 48. The Department may sue a third party in tort if the third party negligently violates a Department workplace safety regulation. RCW 51.24.050; *Afoa v. Port of Seattle*, 176 Wn.2d 460, 472, 296 P.3d 800 (2013) (an entity who controls or creates a workplace safety hazard under WISHA may be liable in tort even if the injured employee works for a different employer).

C. The Lawsuit Against Sunheaven Was Assigned to the Department

After being injured, Carrera retained an attorney, Thomas Olmstead, to pursue legal remedies. CP 14. Olmstead sued Carrera's employer, despite its immunity from suit. CP 14-15. The suit was dismissed. CP 292-94. Olmstead, despite requirements under RCW 51.24.030(2) to notify the Department of the filing of a third party workers' compensation action, did not do so until after the action was dismissed. CP 261. After it was informed of dismissal, the Department identified Sunheaven as a potential liable party. CP 220-21. The Department notified Carrera under RCW 51.24.070(2) that it intended to pursue an assigned third party action if he failed to respond within 60 days and pursue the action himself; he did not respond and the Department became the statutory assignee of his action against Sunheaven. CP 2, 263;

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RCW 51.24.050(1). The Department sued Sunheaven more than three years after Carrera's injury. CP 1-23.[1]

D. The Superior Court Barred the Department from Seeking Noneconomic Damages, but the Court of Appeals Reversed, Holding That the Statute of Limitations Applicable to Private Parties Did Not Apply to the Department Because the Action Was to Benefit the State

Sunheaven moved for summary judgment, arguing that the Department may recover all damages from a third party only if the case is filed within three years of the injury. CP 51-74. Sunheaven conceded that the Department is immune from the statute of limitations under RCW 4.16.160 and could bring a cause of action, but it argued that the Department could only collect a class, or portion, of damages. CP 54-58. Sunheaven argued that the court could not award any damages greater than the Department's benefit payments to Carrera because the statute of limitations had expired, somehow, as to those damages. CP 54-58. The *claim* was timely, Sunheaven argued, but in a novel application of the statute of limitations, it argued that some damages in the claim—notably noneconomic damages—were not. CP 54-58. The trial court granted partial summary judgment to Sunheaven, ruling that the Department was time-barred from collecting damages other than its current and projected

[1] Sunheaven states that the Department had no right to file a lawsuit because Carrera sued the wrong parties. Pet. at 2-3. Because Sunheaven did not argue this at the trial court, it has waived such an argument.

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benefit expenditures. CP 402-06. The trial court did not rule the Department's action was untimely. CP 402-06. Instead, the trial court held that a *class of damages* was barred by the statute of limitations. CP 402-06.

The Court of Appeals did not agree. *Carrera v. Sunheaven Farms*, 196 Wn. App. 240, 243, 383 P.3d 563 (2016). Before reaching the statute of limitations issue, the Court of Appeals followed *Flanigan* and *Tobin* and ruled that the Department may not collect noneconomic damages from an injured worker in a third party action. *Id.* at 251 (citing *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010), and *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994)). The Court acknowledged that *Flanigan* and *Tobin* addressed claims brought by an injured worker under RCW 51.24.*060* while this case addresses a claim that the Department brought under RCW 51.24.*050*. *Id*. at 250. But it held that the "general reasoning" of *Flanigan* and *Tobin* applies with equal force to RCW 51.24.050. *Id*. Consistent with that authority, the Department may not retain noneconomic damages as part of the recovery under RCW 51.24.050. The Department does not contest this aspect of the decision.

The Court then turned to a separate question: what may the Department seek from Sunheaven? *Id*. at 251. Unlike a traditional cause of

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action, damages recovered by third party claims are not distributed wholly to the party prosecuting the claim—in this case the Department. Instead, the recovery is distributed under a formula crafted by the Legislature. RCW 51.24.050. The Court of Appeals analyzed the plain language of RCW 51.24.050 to determine what the Legislature intended the Department to obtain from negligent third parties—a question distinct from how that money is distributed. *Carrera*, 196 Wn. App. At 251-53. It concluded that the plain language was unambiguous: the Legislature intended the Department to seek all damages that a negligent third party caused the injured worker. *Id*. at 253.

The Court of Appeals also ruled that the State is immune from the statute of limitations and is not time-barred in this case from bringing its claim for all damages, including noneconomic damages. *Id*. at 260. The Court explained that precedent provides that the State, bringing a claim authorized by statute, is immune from the statute of limitations even if the result also benefits specific members of the public. *See id*. at 259 (citing *Herrmann v. Cissna*, 82 Wn.2d 1, 7, 507 P.2d 144 (1973); *State v. LG Electronics., Inc*., 185 Wn. App. 123, 137, 340 P.3d 915 (2014), *aff'd*, 186 Wn.2d 1 (2016)). The Court of Appeals found that deterrence, as in *Herrmann* and *LG Electronics*, is a state interest supporting immunity from the statute of limitations. *Carrera*, 196 Wn. App. at 259. The Court

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of Appeals also noted that the litigation goal of replenishing the injured workers fund is another public interest that makes the State's lawsuit in this case a proper exercise of sovereign power. *Id*. This Court's precedent controlled and the Court of Appeals ruled that the State is immune from the statute of limitations under RCW 4.16.160.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Followed *Tobin* and *Flanigan* and the Decision Does Not Conflict With Them

The Department properly sought all damages, including noneconomic damages, from Sunheaven, as RCW 51.24.050 authorizes. There is no conflict with *Tobin* and *Flanigan* in doing so, contrary to Sunheaven's claims. Pet. 1-2. These cases deal with an entirely different scenario: what to do with the money after it is obtained. They did not address the question here: what damages may be sought in the first place.

The Industrial Insurance Act allows either an injured worker or the Department to sue a negligent third party if the worker is injured while working. RCW 51.24.030, .050. There are two steps to this process. First, the statutes establish what the worker and Department may seek in damages. Second, the statutes establish what the worker and Department may retain after money is obtained in a judgment or settlement. In the first step, both a worker and the Department may seek all damages possible in

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a "cause of action." RCW 51.24.030;[2] RCW 51.24.050.[3] In the second step, once a judgment or settlement is reached, there are limitations on the Department's and worker's share of those monies. RCW 51.24.030, .050, .060.

Under the second step, the worker's recovery is subject to the Department's claim for reimbursement of benefits paid. RCW 51.24.050, .060. The Department receives its share to satisfy the amount of benefits it has paid, but, as determined by *Tobin* and *Flanigan*, it cannot use money obtained for pain and suffering or loss of consortium to reimburse the benefits the Department has paid because it does not pay these types of benefits to the worker. *Tobin*, 169 Wn.2d at 402; *Flanigan*, 123 Wn.2d at 425. Sunheaven argues that there is a conflict with the Court's decision in *Flanigan* and *Tobin*, but, to the contrary, the Court of Appeals directly applied these cases to hold in the context of the statute at issue here, RCW 51.24.050, that "L&I may not retain noneconomic damages in assigned third party actions." *Carrera*, 196 Wn. App. at 251. Thus, it ruled that in the second step the Department may not retain noneconomic damages

[2] "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." RCW 51.24.030(1).

[3] "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 in the name of the injured worker, beneficiary or legal representative." RCW 51.24.050(1).

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recovered from a negligent party.[4] But it is a different question what can or cannot be sought from a negligent party in the first step. Neither *Tobin* nor *Flanigan* addressed what damages can be obtained from negligent defendants.

It would actually be inconsistent with *Tobin* and *Flanigan* to allow a negligent third party to argue that he or she does not have to pay for all damages it created by its negligence because the Department cannot ultimately retain the funds. Both of those cases interpret the Industrial Insurance Act to benefit workers consistent with the Act's mandate to minimize economic suffering. RCW 51.12.010. Nothing in *Tobin* or *Flanigan* directs this unjustified windfall to negligent third parties that Sunheaven argues for here.

The plain language of RCW 51.24.050 confirms that the Legislature has authorized the Department to seek all damages in a third party action. Sunheaven argues that "[T]he recovery of noneconomic damages is not necessary to give meaning to every provision of the

[4] Under the second step, noneconomic damages are not part of the "recovery" subject to "distribution" under RCW 51.24.030, .050, or .060. Sunheaven points to some general language in the Court of Appeals decision, where the court suggested that the funds would be dispersed through the distribution scheme. Pet. at 8. The Court of Appeals was using the distribution scheme in a more general sense in that, under the scheme, noneconomic damages go straight to the worker while special damages are shared between the worker and the Department as the statute specifies. RCW 51.24.050. So this general language does not change the Court of Appeals' holding that the Department is not entitled to a share of noneconomic damages.

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statute." Pet. at 9. But it ignores that the statute assigns the whole "cause of action" to the Department:

> 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 in the name of the injured worker, beneficiary or legal representative.

RCW 51.24.050(1). "Cause of action" is defined as "A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a *remedy* in court from another person." *Black's Law Dictionary* 266 (10th ed. 2014). By using the term "cause of action," the Legislature understood that it gave the Department authority to seek a remedy, namely, all damages. *See Associated Grocers, Inc. v. State*, 114 Wn.2d 182, 189, 787 P.2d 22 (1990) (stating Legislature is presumed to understand the meaning of ordinary and precise terms). By using that term, it did not limit the damages the Department may seek.

The Court of Appeals' reasoning that the Department may seek all damages under RCW 51.24.050 is sound. Far from defying this Court's precedent in *Tobin* and *Flanigan*, the Court of Appeals applied those cases to benefit injured workers. Review under RAP 13.4(b)(1) is not warranted.

B. The Court of Appeals Followed This Court's Decisions in *Vinther*, *Herrmann*, and *LG Electronics* and Appropriately Applied RCW 4.16.160

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The Court of Appeals decision is consistent with established parameters on the limits on the State's exercise of sovereign power in bringing a cause of action. *Contra* Pet. at 19-20. Less than six months ago, in *LG Electronics*, this Court explained the contours of state immunity, which is consistent with the Court of Appeals decision here. 186 Wn.2d at 13-16. In *LG Electronics*, this Court explained that the question of whether the State is exercising its sovereign power is answered by analyzing "the statutory provisions that authorized the actions to determine whether they were for the benefit of the public generally, even if private individuals might benefit specifically." *Id.* at 14. The Court of Appeals did exactly that, conforming to well-established precedent in *Vinther* and *Herrmann*.

In 1934, this Court recognized that the Department may bring third party lawsuits after the statute of limitations runs. *Vinther*, 176 Wash. at 393-98. "'[T]he act, as a whole, is the exercise of a governmental function in the fullest sense of the word, having its support in the police power of the state.'" *LG Electronics*, 186 Wn.2d at 14-15 (quoting *Vinther*, 176 Wash. at 394-95). Replenishing the workers' compensation

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trust fund benefits the State. *Vinther*, 176 Wash. at 393-98.[5] Ignoring *Vinther*, Sunheaven raises the chimera that "the proverbial floodgates" will open. Pet. at 12. No floodgates have opened since *Vinther* held that the statute of limitation did not bar Department third party actions. The two year delay in this case is not the many year delay Sunheaven warns about. But, in any event, other defenses such as laches might apply to an unduly delayed Department claim if a party can demonstrate the defense's elements. *See Housing Auth. v. Ne. Lake Wash. Sewer & Water Dist.*, 56 Wn. App. 589, 593, 784 P.2d 1284 (1990).

Consistent with Supreme Court precedent, the Court of Appeals required evidence that the lawsuit served a state interest. In *Herrmann*, this Court addressed the Insurance Commissioner's authority under RCW 48.99.020 (formerly RCW 48.31.120) to pursue claims on behalf of a delinquent insurance company. Under that statute, the Commissioner asserted claims related to mismanagement against company officers. The Commissioner stood in the company's shoes. The delinquent company was entitled to any financial award the Commissioner obtained. *Herrmann*, 82 Wn.2d at 5 (explaining RCW 48.31.120). The State got nothing.

[5] In *LG Electronics*, the Court noted with approval *Vinther*'s holding that the State was immune from the statute of limitations when administering workers' compensation statutes through third party lawsuits. 186 Wn.2d at 14-15 (citing *Vinther*, 176 Wash. at 393).

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This Court held that the action was for the benefit of the State because the Legislature had in mind the possibility that an insurer may have been the victim of a bad actor and "the legislature reasonably could have concluded that the deterrent effect of such proceedings by the commissioner . . . is a factor tending to benefit the public in general." *Id.* at 7. The Court acknowledged, "the proceeds of the commissioner's suit, if any, will inure to the benefit of the company and its policyholders," but found the State was nonetheless acting in its official capacity because such disbursement is "in accord with the legislative intent." *Id*. at 5. In short *Herrmann* rejected the notion that private benefit equates automatically to "mere conduit" status provided there is benefit to the State. *See Herrmann*, 82 Wn.2d at 5-7.

Sunheaven argues under that the Court of Appeals decision "there is no situation that will ever meet [the "mere conduit"] criteria." Pet. at 19. But it ignores factual scenarios where the State is only a mere conduit. For example, a private party could assign a claim to the State, without any additional benefit to the State that can be identified by statute. In other cases, the court has recognized that there are limitations to RCW 4.16.160. *E.g.*, *Pac. Nw. Bell Tel. Co. v. Dep't of Revenue*, 78 Wn.2d 961, 964, 481 P.2d 556 (1971) (government rights under former unclaimed property statute merely derivative). But here the Department is bringing a lawsuit

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as it is authorized to do by legislation and that legislation promotes the public benefits this lawsuit serves. This is not a case where a private citizen is manipulating a state agency by using it as a mere conduit to avoid the statute of limitations.

Here, there is a benefit to the State for two reasons. First, the Department's lawsuit against Sunheaven must be viewed in its entirety: the Department will obtain funds from economic damages to replenish state coffers and will obtain noneconomic damages to provide to Carrera. Sunheaven's arguments rest on its assumption that a statute of limitation can apply to one class of damages but not the other. There is no case law that supports such a novel theory, and Sunheaven has cited none. *Vinther* allows the Department to file an action to recover funds to replenish the state fund for expenditures on the part of the worker. 176 Wash. at 393-98. This benefits the State. The fact that there are additional monies recovered that benefit the worker does not create a statute of limitation problem as a statute of limitations only applies to bar the filing of a lawsuit completely—not to preclude a specific damage sought in the lawsuit.

Second, even if the Court were willing to entertain Sunheaven's novel statute-of-limitation-damages-splitting theory, there is a benefit to the State in seeking and obtaining noneconomic damages. The Legislature's provision of financial and reputational incentives for

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companies, such as Sunheaven, to not remove important safety equipment that workers rely on functions as an action more than a "mere conduit"—it is the deterrence contemplated by *Herrmann* and *LG Electronics*. This is consistent with the deep roots in this State that recognize the importance of legislative regulation of work place safety: "Our constitution requires the legislature to 'pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health.'" *Afoa*, 176 Wn.2d at 470 (quoting Wash. Const. art. II, § 35). By allowing tort actions against negligent third parties for all damages after the statute of limitations applicable for private parties passes, the Legislature has acted to further our State's strong policy of promoting work place safety.

Sunheaven questions the benefit of deterrence, arguing that many companies the Department might sue might be out of business. Pet. at 19. But deterrence entails a *risk* of lawsuit and incurring significant damages. This risk compels companies to protect worker safety. That companies sued by the Department may be "out of business" does not reduce the deterrent effect at the outset in the form of potentially significant financial exposure. Tort law has a deterrent effect on negligence, and exemptions from tort liability can weaken that deterrent effect. *See Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007).

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Herrmann recognized that policies of deterrence benefit the State, and the Court of Appeals properly applied this decision.

Sunheaven argues that, unlike the multiple opinions in which this Court has held that the State may act in its own interest even if it simultaneously benefits private citizens, this case is different because only one private citizen is affected. Pet. at 18. This premise is false: deterrence promotes safety affecting all citizens as does a replenished injured worker fund. But more problematic, this analysis misunderstands the Court of Appeals opinion and this Court's precedent.

Consistent with this Court's precedent, the Court of Appeals recognized that a state lawsuit is an exercise of sovereign power if it serves a state interest. Incidental benefits to private citizens are not relevant. A case may benefit one citizen or thousands of citizens. It is not the extent of incidental benefits that matter; it is the character of the benefits to the State. Towards that end, the Court of Appeals identified the state interests the Legislature sought to advance in authorizing the Department to bring third party lawsuits: deterrence and replenishing the injured worker fund. *Carrera*, 196 Wn. App. at 258-59.

For policy reasons, the State has not waived sovereign immunity for third party actions, so the statute of limitations applicable to a worker does not apply in this case. Sunheaven points out the social value in

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following statutes of limitation (Pet. at 12-13) and argues there is a windfall to the worker who did not timely pursue his claim. Pet. at 10. But the Legislature has decided not to waive sovereign immunity in this context, due to the social value in pursuing third party actions that benefit both the State and the worker. A worker does not receive a windfall when the Legislature authorizes the action. The Legislature has weighed the equities and determined that a negligent third party should not receive a windfall by escaping the consequences of its unsafe behavior. This routine application of sovereign immunity principles does not merit review under RAP 13.4(b)(4).

V. CONCLUSION

The Court of Appeals applied Supreme Court precedent in addressing the noneconomic damages and statute of limitations issues here. Sunheaven shows no conflict with this precedent and raises no issue of substantial public interest.

January 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing to the parties mentioned below as indicated:

COPY TO:

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DATED this 4th day of January, 2017.

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