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No: 637843

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON, SEATTLE

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DALLAS SWANK and JEANNE A. PASCAL SWANK,

Plaintiffs/Appellants

vs.

JIM DUFFY

Defendant/Respondent

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APPELLANTS' BRIEF

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A. INTRODUCTION.

Dallas Swank is a LEOFF II employee who was seriously injured as a result of the negligence of his employer, Snohomish County. Dallas Swank was subjected to a workman's compensation lien by self-insured Snohomish County despite a statute which specifically limits the lien where employers are at fault. After ordering an allocation of fault hearing, the trial court was persuaded by Snohomish County that it could not allocate fault to Snohomish County for reasons stated in the conclusions of law which are being appealed.<sup>1</sup>

B. ASSIGNMENTS OF ERROR

1. Dallas Swank was employed as a Snohomish County Sheriff Deputy under LEOFF II. The Washington State Supreme Court in Fray v. Spokane County, 134 Wn.2d 937, 952 P.2d 601 (1998) held that LEOFF II employees have the right to sue their employers. Did the trial court err in of Conclusion of Law 4, which stated that, as Dallas Swank's self-insured employer, Snohomish County is immune from liability to Dallas Swank under Title 51 RCW and that RCW 4.22 et seq. accordingly prohibits an allocation of fault to Snohomish County?

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<sup>1</sup> The Findings of Fact and Conclusions of Law are attached as Appendix A.

2. The 1993 amendments to RCW 51.24.060 state they only apply to cases settled on or after July 1, 1993. Dallas Swank settled his claim with Chouinard Equipment prior to July 1, 1993. Did the trial court err in Conclusion of Law 3 wherein it stated the 1993 statutory amendments to RCW 51.24.060 control this case?

3. Did the court err in Conclusion of Law 6, which stated Dallas Swank is estopped from raising the issue of percentage of allocation of fault because he did not ask the jury to allocate fault among nonparty entities in addition to deciding the issues of the case being tried?

4. Does an L&I order have res judicata effect with respect to issues not decided in the order and over which the Department of Labor & Industries has no jurisdiction as seems to be suggested by Conclusion of Law 2?

#### C. STATEMENT OF CASE

Dallas Swank is a Snohomish County Sheriff Deputy. He was severely injured in a 90-foot fall from a helicopter during a Snohomish County Sheriff Office Dive Team training session. Dallas Swank was hospitalized and has incurred substantial medical bills which were paid in part by his self-insured employer – Snohomish County. CP 140.

The fall happened because a Chouinard Equipment climbing harness was put on Dallas Swank incorrectly by James Duffy. James

Duffy was a member of the Snohomish County Sheriff Office Dive Team.  
Id.

Within three weeks of the accident Snohomish County convened an Accident Review Board to investigate Dallas Swank's fall. It held hearings, reviewed evidence and took extensive testimony under oath. CP 142, 148-150.

The Snohomish County Accident Review Board found that the harness put on Dallas Swank was manufactured by Chouinard Equipment, Ltd. The Board found that the harness had been put in the helicopter without its written instructions. Id.

The Snohomish County Accident Review Board found that the harness was improperly buckled when it was put on Dallas Swank and that Dallas Swank had fallen out of the harness because it had been improperly buckled. The Accident Review Board, further, found that, when the harness was buckled as directed by the written instructions provided with each harness sold by Chouinard, it would not release prematurely. Id.

The Snohomish County Accident Review Board found that the Snohomish County Sheriff Office instructors on the scene were not familiar with the Chouinard harness, even though it was on board the helicopter for use by Snohomish County Sheriff Office personnel. The Board found no one on the scene of the Snohomish County Sheriff Office

training exercise knew how to buckle the harness properly to prevent early release and that the Snohomish County Sheriff Office instructors, who attached the harness to Dallas Swank, had done so improperly. Id.

The Snohomish County Accident Review Board was critical of the fact that Snohomish County Sheriff Office instructors came and went during training. Four different instructors were used for various time periods. The Board criticized Snohomish County Sheriff Office personnel for doing a training tower practice rappel only one time before attempting an 80-foot rappel out of a helicopter. Id.

The Snohomish County Accident Review Board criticized the fact that trainees were allowed to use different harnesses. The Board criticized the lack of a buddy system to check equipment. It was also critical of the Snohomish County Sheriff Office because no one was in overall charge of checking equipment and because there was no crew chief. Id.

The Snohomish County Accident Review Board criticized the Snohomish County Sheriff Office because there were no overall standard operating procedures for the training mission. The Board was also critical that it was not clear what the training mission was expected to accomplish. Id.

Subsequent to the Snohomish County Accident Review Board hearings, Dallas Swank brought an action in Snohomish County Superior

Court against Chouinard Equipment Ltd., The Swallow's Nest (the store which sold the climbing harness), Snohomish County Search and Rescue (owner of the helicopter and harnesses within) and James Duffy (the individual who had buckled the climbing harness on Dallas Swank incorrectly). James Duffy was represented by the Snohomish County Prosecuting Attorney's Office. CP 142-3; CP 152-160. Suit was not filed against Snohomish County at that time.<sup>2</sup>

Chouinard Equipment Ltd. filed for bankruptcy, which stayed all proceedings for several years. Once the claim against Chouinard was removed from the bankruptcy court, Dallas Swank moved to join Snohomish County as a party. James Duffy, through his Snohomish County deputy prosecuting attorneys, opposed joinder even though Duffy himself had no stake in the matter and actually would have benefited. The Snohomish County Superior Court judge hearing the matter denied Swank's motion to join Snohomish County as a party. CP 162-173; CP 1178.

Following denial of joinder, Dallas Swank filed a separate cause of action against Snohomish County based on the same accident. Snohomish County defended this separate cause with the same lawyers from the

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<sup>2</sup> Snohomish County Search & Rescue is not owned or operated by Snohomish County.

Snohomish County Prosecuting Attorney's Office as those who were defending James Duffy in the other cause. CP 175-177.

In the action involving James Duffy, Snohomish County Search & Rescue and The Swallow's Nest successfully moved for summary judgment. In June of 1993 Chouinard Equipment settled all claims against it, leaving only James Duffy, represented by the Snohomish County Prosecuting Attorney's Office, in the case. Snohomish County made no attempt at that time to collect on its Labor & Industries lien from Dallas Swank's settlement with Chouinard. CP 143-144.

In 1997 (more than 4 years after the Chouinard settlement) Snohomish County, using the lawyers from the Snohomish County Prosecuting Attorney's office who were representing James Duffy, for the first time elected to pursue collection of Snohomish County's workman's compensation lien against Dallas Swank. At Snohomish County's request, the Department of Labor & Industries filed an order July 18, 1997. The order stated Dallas Swank had recovered \$550,000 from Chouinard Equipment, Ltd., and that RCW 51.24.060 required payment of \$57,921.35 by Dallas Swank to Snohomish County. The order further provided no benefits or compensation be paid to or on behalf of Dallas Swank by Snohomish County for anything related to his injuries until after

Dallas Swank expended \$143,749.48 in costs for care of those injuries.  
CP 190-202.

Dallas Swank timely objected to the July 17, 1997 Labor & Industries order on four grounds: (1) he pointed out the calculation included sums recovered in settlement by his wife; (2) he pointed out that the Duffy case was still ongoing and that total costs, accordingly, were not and could not be known, making calculation of any lien premature; (3) he pointed out that the action was still proceeding against James Duffy for whom Snohomish County was claiming co-employee status, and that a self-insurer was not entitled to recover in full where the fault of a co-employee is the cause; (4) Dallas Swank pointed out the third party action against Snohomish County was not completed. CP 190-1.

October 3, 1997, Labor & Industries responded to Dallas Swank's objection and request for reconsideration with another order. The order stated there was no error or injustice in the prior order and that it would stand. Dallas Swank did not appeal the order, since he did not, and does not, contend the lien statute requires delay of collection from settlements entered prior to completion of litigation against remaining parties. CP 190-202.

Dallas Swank was ordered to pay Snohomish County \$71,224.65, which included interest calculated back to the date of the Chouinard

settlement, June 18, 1993. Dallas Swank paid this amount in full August 24, 1999. Id.

These same Snohomish County attorneys then proceeded to heap blame on Snohomish County in their representation of James Duffy at trial, knowing that Snohomish County was an empty chair that would only have to pay a judgment if James Duffy were found negligent. The trial brief filed by Snohomish County Deputy Prosecuting Attorney Phil Genster on behalf of James Duffy May 22, 2000 argued that negligence by Snohomish County (which was not a party) caused Dallas Swank's fall from the helicopter. The same argument was made by Mr. Genster in closing to the jury. CP 144, 207-211.

This strategy by the Snohomish County lawyers representing Duffy succeeded, and the jury returned a verdict finding Snohomish County to be a negligent empty chair and finding James Duffy to be not negligent. It did not find negligence by anyone else. CP 144, 215-218. Thus, Snohomish County avoided having to pay a judgment entered against James Duffy and avoided a judgment against itself, because it was an empty chair.

In June of 1993, the time of the Chouinard settlement, RCW 51.24.060 provided that, if an employer were determined to be at fault in a action against a third party, the self-insurer (Snohomish County in this

case) was not entitled to reimbursement for compensation and benefits paid; further, the self-insurer was not entitled to limit future benefits. RCW 51.24.060(1)(f). The statute was modified by the Washington Supreme Court to allow reimbursement on a limited basis based on allocation of fault. Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991).

Following the verdict Snohomish County made no request for a hearing to allocate fault, something it had an absolute right to do even though it was technically not a party to the Duffy case. Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991). An allocation of fault hearing was not requested following the return of the verdict on behalf of Snohomish County, even though Snohomish County had specifically been found negligent and even though Snohomish County Prosecuting Attorney Phil Genster was clearly aware Snohomish County had collected on its lien from Dallas Swank, since he had done the collecting for Snohomish County. CP 144-5; CP 195.

Since the jury had found only Snohomish County negligent, Dallas Swank asked Snohomish County to return the money which it had taken from him. Snohomish County refused, arguing return of the money premature, since there had been no allocation of relative fault. CP 144-5.

When it became apparent Snohomish County was not going to request an allocation of fault hearing and had no motivation to do so, because it had possession of Dallas Swank's money and any allocation of fault hearing would likely result in Snohomish County having to return the money. Dallas Swank made a motion for a hearing to allocate fault, which Snohomish County opposed. Counsel for Duffy, hired by Snohomish County, stated he had been instructed by Snohomish County to oppose any hearing to allocate fault because it might result in Snohomish County having to repay money it took from Dallas Swank. CP 145.

The Court entered an order stating it would allocate fault based on memoranda and affidavits submitted by the parties. The Court ordered the parties to submit proposed findings of fact and conclusions of law along with memoranda and affidavits. Id.

Swank timely submitted his briefing and proposed findings. Rather than submit briefing and proposed findings, lawyers from the Snohomish County Prosecuting Attorney's Office, using James Duffy as a proxy, appealed Judge Meyer's order to hold an allocation of fault hearing; Duffy had absolutely no interest in the matter of an allocation of fault hearing, only Snohomish County had an interest in preventing the hearing. The Court of Appeals dismissed James Duffy's appeal. CP 145-6. Following dismissal of the appeal, Snohomish County still did not

submit the ordered briefing and proposed findings and conclusions with respect to allocation of fault. CP 146.

Following Snohomish County's failure to submit briefing and proposed findings as ordered by Judge Meyer, Dallas Swank pursued yet another avenue of recovery. To make sure Snohomish County could not claim Dallas Swank had failed to exhaust all possible available administrative remedies, Dallas Swank filed a petition for declaratory order pursuant to RCW 34.05.240 with the Department of Labor & Industries, Division of Industrial Insurance, Self-Insurance Section. CP 259-275. RCW 34.05.240 provides a potential remedy where there is uncertainty with respect to a rule, order or statute enforceable by the agency.

Dallas Swank's petition to Labor & Industries pointed out that, although the law was clear and specific with respect to the collection of a Labor & Industries lien from a third party settlement and although it was equally clear that Labor & Industries (or the self-insurer in this case) could collect its share from a partial settlement prior to resolution of the entire case, the law was silent with respect to any procedure for obtaining refund where subsequent proceedings in the same case extinguished the self-insurer's right to a lien it had already collected from the partial settlement. The petition requested a declaratory order addressing the issue. Id.

Labor & Industries declined Dallas Swank's request for a declaratory order addressing this issue. Dallas Swank appealed to the Board of Industrial Insurance Appeals. The Board of Industrial Insurance Appeals dismissed Dallas Swank's appeal stating denial of a petition for a declaratory order was not a final order from which an appeal could be taken. CP 276-7.

With potential administrative remedies exhausted and Snohomish County failing to exercise its right to allocate fault and failing to submit findings, conclusions and memorandum of its own, as ordered by the court, Dallas Swank filed a Petition for Writ of Mandate ordering Snohomish County to repay Dallas Swank. Snohomish County opposed the writ, arguing among other reasons that an adequate remedy at law still existed because the Court had never held its allocation of fault hearing. Dallas Swank's Petition for Writ of Mandate was dismissed without prejudice, presumably based on this argument by Snohomish County. CP 91, 109-118.

Dallas Swank accordingly, noted for presentation his memorandum and proposed findings of fact and conclusions of law previously submitted to the court in response to the court's order five years earlier. CP 575-611. Snohomish County once again opposed any allocation. CP 456-569. The trial court entered another order requiring Snohomish County to submit

findings and conclusions by a date certain if it wanted to participate in fault allocation. CP 452-454. Snohomish County failed to meet the court's schedule, choosing to once again appeal the court's order. CP 440; CP 443.

The Court of Appeals rejected the Snohomish County appeal of Judge Meyer's order. CP 362. Snohomish County then submitted proposed findings of fact and conclusions of law with a memorandum. CP 372-399.

Judge Meyer then determined fault could not be allocated for reasons described in his conclusions of law which are the subject of this appeal. CP 308-314.

Dallas Swank moved the court for reconsideration. CP 278. Reconsideration was denied. CP 28-29. This appeal timely followed. CP 10.

#### D. ARGUMENT

1. Snohomish County is not immune from liability to LEOFF II Sheriff deputies and fault can be allocated to it.

Conclusion of Law 4 states: The Court finds that as Swank's self-insured employer, Snohomish County is immune from liability to Swank under Title 51 RCW. As such, RCW 4.22, et seq. prohibits an allocation of fault to Snohomish County. The conclusion of law is incorrect.

This is a legal issue. It is subject to de novo review.

Dallas Swank is and was employed by the Snohomish County Sheriff Department under LEOFF II. County governments in the past tried to argue LEOFF II employers were immune from suit, arguing the legislature had repealed the right in 1992. The Washington State Supreme Court ruled otherwise.

In 1998 the Supreme Court found the Legislature's attempt to prohibit suits by LEOFF II officers against their employers was unconstitutional. The case was Fray v. Spokane County, 134 Wn.2d 937, 952 P.2d 601 (1998).

In 2006 Fray was revisited by the Court of Appeals. Locke v. City of Seattle, 137 P.3d 52 (2006) stated:

The Fray court also explained that LEOFF members have been entitled to sue their government employers for negligent and intentional injuries since 1971, and that a 1992 amendment purporting to repeal that right with regard to LEOFF Plan 2 members was invalid.

Id. at 55.

Conclusion of Law 4 is incorrect. Snohomish County is not immune from liability to Swank. It is an entity to whom fault can be assigned.

2. The 1993 amendments to RCW 51.24.060 do not apply to the Chouinard settlement, since they apply only to settlements taking place after July 1, 1993.

Conclusion of Law 3 states Clark v. Pacificorp was statutorily overruled and that the 1993 statutory amendments to RCW 51.24.060 control this case. Conclusion of Law 3 is incorrect.

This is a legal issue. It is subject to de novo review.

RCW 51.24.060(1)(f) provided a self-insured employer could not recover from a third party settlement if the employer was also at fault. This statute was modified by the Washington State legislature effective July 1, 1993. The modification was a response to inequities relating to fault being attributed to an at-fault entity (an employer) from whom there could be no recovery. The modification eliminated section (1)(f) as part of the overall scheme. It was signed into law May 18, 1993 as Chapter 496 of the Laws of 1993.

The settlement between Swanks and Chouinard Equipment took place in June of 1993. The related stipulation and order of dismissal with prejudice was entered June 24, 1993. Section 4 of the Act makes it clear that Section (1)(f) of RCW 51.24.060 applies even though the statute was later modified to eliminate it. Section 4 states: "This act applies to all causes of action that the parties have not settled.. . prior to July 1, 1993."

Laws 1993, Chapter 496, §4. Stated conversely, the amendments do not apply to cases settled before July 1, 1993.

Swanks settled their cause of action against Chouinard Equipment prior to July 1, 1993. Accordingly, the prior statute, which included RCW 51.24.060(1)(f), applies to that settlement by the plain terms of the amending act. Simply put RCW 51.24.060(1)(f) applies to the settlement between Swanks and Chouinard Equipment because the legislature said it does.

The court's application of the 1993 amendments to RCW 51.24.060(1)(f) to the Chouinard settlement was erroneous.

3. Dallas Swank had no duty or obligation to ask the Duffy jury to additionally allocate fault among nonparty entities in addition to deciding the issues of the case at trial.

Conclusion of Law 6 states Swank is estopped from raising the issue of allocation of fault because he did not present a jury verdict form requesting the jury allocate fault to entities other than Snohomish County. This conclusion of law improperly shifts the burden of allocating fault. It places the burden of allocating fault on the party who has no interest in allocating fault to others, not on the party seeking to have fault allocated to others.

This is largely a legal issue. It is subject to de novo review.

The question of whether Swank ought to be estopped because he did not ask the jury to allocate fault needs to be considered in the context of three things: (1) he already had a negligence cause proceeding against Snohomish County under Snohomish County Cause Number 92-2-00453-2, which presumably would allocate fault; (2) Snohomish County was not a party to the Duffy trial and thus would have likely attacked any attempted allocation of fault by virtue of not being a party, despite the presence of its lawyers; (3) Swank did not and does not believe anyone other than Duffy and Snohomish County was at fault.

Snohomish County has already been found at fault by two triers of fact – the Snohomish County Accident Review Board and the jury in the Duffy trial. The Accident Review Board was convened by Snohomish County and made numerous criticisms of how Snohomish County handled the training exercise in which Dallas Swank was injured. Snohomish County was the only entity found negligent by the Duffy jury, thanks to the diligently pursued strategy of its own attorneys, who were representing Duffy. If Snohomish County wanted to allocate some of its fault to others, it had the obligation and power to do so under Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991). It did not. It was not the duty or obligation of Plaintiffs to do so on Snohomish County's behalf.

The jury verdict form should not be used to estop Swanks. The jury was properly charged with deciding the Duffy case. It would not have been proper to additionally charge it with the duty of holding an allocation of fault hearing for Snohomish County's benefit.

At the time of Dallas Swank's settlement with Chouinard, RCW 51.24.060 provided any recovery from a third party tortfeasor be subject to a lien by the Department of Labor & Industries and/or the self-insurer for benefits paid. The statute laid out a formula to be followed.

However, the statute also provided, if Snohomish County were found to be at fault, Snohomish County would not have any right to a lien against Dallas Swank's settlement. The specific relevant language read as follows:

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.

RCW 51.24.060(f)[as the statute read at the time of the Chouinard settlement].

This language was subsequently interpreted by case law to mean, if Snohomish County's fault were to exceed the third party's share of fault, it could recover nothing on its lien on the third party recovery and could not

limit future benefits. However, if Snohomish County's fault were less than the third party's share of fault, it could recover in proportion to its share of fault. Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991). The statute empowered Snohomish County as self-insurer to request an allocation of fault hearing to preserve its right to reimbursement:

RCW 51.24.060(1)(f) provides that if an employer is at fault, the Department loses its right to reimbursement. In order to protect this right, the Department should be permitted to request a determination of fault of each entity.

Id. at 180-1.

The burden of proving fault lies with the person asserting it. Thus, the plaintiff is burdened with proving negligence; however, the defendant is burdened with proving comparative negligence. Chapter 4.22 RCW does not specify the burden of proof with respect to the allocation of fault to non-party entities. However, the presumption is that the party or entity asserting the negligence of another entity has the burden of proof on that issue. This position is embraced by case law and the Washington Pattern instructions which state:

Before a percentage of fault may be attributed to any entity that is not party to this action, the defendant has the burden of proving each of the following positions: First, that the entity was negligent; and second, that the entity's negligence was a proximate cause of the injury to the plaintiff.

WPI 21.10.

Turning to the case at bar, attorneys from the Snohomish County Prosecuting Attorney's office, who represented James Duffy in one cause and Snohomish County in the other, never requested an allocation of fault hearing. Further, in the Duffy action they pursued a strategy of heaping fault on Snohomish County in order to avoid having to pay any judgment obtained against James Duffy. As a result the Duffy jury found Snohomish County, and no one else, negligent. Following the jury verdict, Snohomish County did not request an allocation of fault hearing, even though it had become clear Snohomish County was an at fault entity.

As the case now stands the only entity to have ever been found at fault was Snohomish County. Under the law as it existed at the time of the Chouinard settlement, if Snohomish County failed to establish it had less than 50% of the fault, it could not recover from the Chouinard settlement and could not limit future payments.

If Snohomish County had requested or participated in an allocation of fault hearing and established Chouinard should have been allocated more of the fault than Snohomish County, then Snohomish County would have only been required to return a percentage of the money it took from Swanks. Instead, Snohomish County chose to try to avoid paying

anything back to Dallas Swank by trying to avoid any allocation of fault hearing and simply keeping all of Dallas Swank's money. This strategy has caused Snohomish County to be the only at fault party.

Snohomish County chose not to exercise its right to request a hearing to allocate fault to other entities; a right clearly conferred to it by Clark v. Pacificorp, 118 Wn.2d 167, 180-, 822 P.2d 162 (1991). Further, Snohomish County aggressively opposed attempts by Plaintiff to conduct an allocation of fault hearing because it did not want to have to repay Dallas Swank any of the money it took from him. "A party fails to claim its right to allocate fault by not producing evidence of fault by the other party." Joyce v. State, Department of Corrections, 116 Wash.App. 569, 75 P.3d 548, 64 P.3d 1266 (2003).

The Washington State Supreme Court, when considering lien enforcement rights of Labor & Industries on third party actions, made it plain that those rights are to be construed so all doubts are resolved in favor of the workers. Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) states:

The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the workers.

Id at 179. This admonition provides additional reason why Dallas Swank should not be estopped by virtue of the jury verdict form.

Dallas Swank had no duty or obligation to ask the Duffy jury to allocate fault among nonparties whom he did not believe to be at fault. Estoppel is not appropriate and shifts the legal burden.

4. An L&I order does not have res judicata effect with respect to issues not decided and over which the Department has no jurisdiction.

Conclusions of Law 2 is a correct statement of the law. However, its inclusion in the conclusions of law submitted by Snohomish County and signed by the Honorable John Meyer suggests it may intend to conclude that the unappealed 1997 DLI distribution order was res judicata with respect to allocation of fault, since that was an argument made to the trial court by Snohomish County. The 1997 DLI distribution order was not res judicata with respect to allocation of fault.

This is an issue of law. It is reviewed de novo.

L&I orders only become binding with respect to matters decided in those L&I orders and over which the Department has jurisdiction. L&I orders do not become binding with respect to matters not decided or over which the Department lacks jurisdiction.

There is no question unappealed DLI orders can have collateral estoppel or res judicata effect; however, to have such effect the orders must actually address the issues for which preclusion is sought. Additionally, the Department must actually have jurisdiction over the issue for which preclusion is sought.

The Washington Supreme Court has stated the following with respect to claim and issue preclusion in the context of administrative orders:

Res judicata applies in the administrative setting only where the administrative agency resolves disputed issues of fact properly before it which the parties each have had an adequate opportunity to litigate. In Washington, other considerations are also relevant when the prior adjudication took place in an administrative setting including (1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations.

Stevedoring Services of America, Inc. v. Eggert, 129 Wash.2d 17, 914 P.2d 737 (1996) at ¶108.

Allocation of fault was not decided by the 1997 DLI orders. The issues involved here were specifically not decided despite the fact that in 1997 Dallas Swank raised the absence of determination of those issues as reasons to delay imposition of the L&I order at the time.

Further, the Department could not allocate fault even if it had wanted to. The Department does not have jurisdiction to allocate fault. That determination is for the courts. The Swank DLI orders do not determine fault. They merely apply the mathematical formula from the statute to the settlement amount.

At the request of Snohomish County the Department of Labor and Industries entered a determination order July 17, 1997. The order stated Dallas Swank had recovered \$550,000 from a third party and that RCW 51.24.060 required distribution of the proceeds pursuant to its formula. The order gave Snohomish County a lien, and it limited future benefits. It did not address the issue of allocation of fault. It simply made the calculation without regard to fault; it had no power to make a fault determination. CP 192-4.

Dallas Swank in 1997 simply asked the Department to wait until the whole case was resolved before issuing a determinative order with respect to the lien. The Department declined to wait. There is no requirement in RCW 51.24.060 that the Department or a self-insured be compelled to wait for all issues to be resolved with respect to all parties before collecting on its lien. The statute is silent on the issue, and the Department was within the law when it elected to not wait to issue a determinative order. An appeal of the order would only have resulted in a

determination of whether or not the Department had to wait, and Dallas Swank does not dispute that. There was no requirement for the Department to wait. No substantive issue related to allocation of fault would have been resolved by an appeal of the 1997 DLI orders, because the Department had no jurisdiction to allocate fault. Its jurisdiction was to simply apply the facts it received to the statutory formula and do the math.

However, although the statute does not require the Department or a self-insured to wait for all issues involving all parties to be resolved before collecting on its lien against third party settlements, it also does not prohibit adjustment of the amount when subsequent events change the entitlement. In fact it would do violence to the intent of the statute to, on the one hand allow the Department to collect from partial settlements before all relevant issues against all parties were decided, while on the other hand prohibiting adjustment when later events in the same case take away the entitlement to the lien. The Department could then simply rush its orders through before anyone had opportunity to allocate fault, secure in the knowledge that no worker could get his money back regardless of subsequent events.

Snohomish County in effect advocated insertion of a prohibition in RCW 51.24.060 which did not exist in 1993 and which does not exist now. The statute has never prohibited directly or by implication revisiting

a lien taken from a partial settlement prior to allocation of fault where a trier of fact subsequently finds the employer to be at fault. Such a prohibition is not only not found in the statute, but would do violence to a consistent line of cases, including Clark, which states:

The guiding principle in construing provisions of the Industrial Insurance Act 15 is that the act is remedial in nature and is to be liberally construed to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

Clark v. Pacificorp, 118 Wn.2d 167, 179, 822 P.2d.

The DLI orders are only binding with respect to matters decided. They have no binding impact on issues not decided or over which the Department lacks jurisdiction. In particular they have no res judicata effect with respect to allocation of fault.

E. CONCLUSION

The conclusions of law should be vacated. This cause should be returned to the trial court for allocation of fault.

Dated this 15<sup>th</sup> day of December, 2009.

LOPEZ & FANTEL, INC., P.S.

  
CARL A. TAYLOR LOPEZ,  
WSBA No. 6215  
Of Attorneys for Appellants

RECEIVED <sup>SCANNED</sup>

MAY 01 2009

LOPEZ & FANTEL

The Honorable John Meyer

COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

DALLAS D. SWANK and JEANNE A.  
PASCAL SWANK,

Plaintiffs,

vs.

JIM DUFFY,

Defendant.

88-2-01155-7

NON-PARTY SNOHOMISH COUNTY'S PROPOSED ORDER ON FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter came before the Court on Plaintiffs' Memorandum Supporting Presentation of Findings of Fact and Conclusions of Law. Plaintiffs and Non-Party Snohomish County submitted, and the Court has reviewed the following:

- a. Plaintiffs Memorandum Supporting Presentation of Findings of Fact and Conclusions of Law;
- b. Affidavit of Carl A. Taylor Lopez, with attachments;
- c. Non-Party Snohomish County's Memorandum in Support of its Proposed Findings of Fact and Conclusions of Law;
- d. Declaration of Charlotte F. Comer in Support of Snohomish County's Opposition to Plaintiffs' Memorandum Supporting Presentation of Fact and Conclusions of Law, with attachments;
- e. Second Declaration of Charlotte F. Comer in Support of Snohomish County's Proposed Findings of Fact and Conclusions of Law;

NON-PARTY SNOHOMISH COUNTY'S PROPOSED FINDINGS OF FAULT AND CONCLUSIONS OF LAW (SCSC 88-2-01155-7) - 1

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APPENDIX A - 000001

1 and

2 \_\_\_\_\_  
3 \_\_\_\_\_  
4 \_\_\_\_\_  
5  
6 The Court being fully advised in the premises, IT IS HEREBY ORDERED,  
7 ADJUDGED AND DECREED, the Court makes the following findings of fact and  
8 conclusions of law:

9 **FINDINGS OF FACT**

- 10  
11 1. On August 6, 1987, Dallas Swank was injured during a training  
12 operation for the Snohomish County Search and Rescue Team.  
13 Swank was employed by the Snohomish County Sheriff's Office, and  
14 Snohomish County was his self-insured employer. (*Docket # 2.*)  
15  
16 2. Plaintiffs Dallas D. Swank and Jeanne A. Pascal Swank filed this  
17 cause of action on March 4, 1988. The complaint named Chouinard  
18 Equipment, Ltd., Jim Duffy, Jane Doe Duffy, Swallow Inc. and  
19 Snohomish County Search and Rescue as Defendants. Plaintiffs did  
20 not name Snohomish County as a Defendant. (*Docket # 2.*)  
21  
22 3. On January 1, 1989, Defendant Snohomish County Search and  
23 Rescue was dismissed with prejudice. (*Docket # 54.*)  
24  
25 4. On January 16, 1992, Plaintiffs moved to amend their complaint to  
26 add Snohomish County as a Defendant. (*Docket # 113.*)  
27  
28 5. On January 23, 1992, the Court denied Plaintiffs motion to amend  
29 their complaint to add Snohomish County. (*Docket # 119.*)  
30  
31 6. Also on January 23, 1992, the Court dismissed Defendant Swallow  
32 Inc. with prejudice. (*Docket # 120.*)  
33  
34 7. On June 18, 1993, Defendant Chouinard paid the Swanks \$550,000  
35 to settle any and all claims against it. (Ex. D to Comer Decl., *Docket*  
36 *# 331; Petition at ¶ 8.*)

NON-PARTY SNOHOMISH COUNTY'S PROPOSED FINDINGS OF  
FAULT AND CONCLUSIONS OF LAW (SCSC 88-2-01155-7) - 2

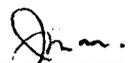
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**APPENDIX A - 000002**

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8. On June 24, 1993, the Court dismissed Defendant Chouinard with prejudice. (*Docket # 180.*)
9. Pursuant to RCW 51.24.060, the County, as Dallas D. Swank's self-insured employer, filed a lien against the Chouinard settlement. On July 18, 1997, the State Department of Labor and Industries issued a Notice and Order ("L&I Order") requiring Dallas D. Swank to reimburse the County \$57,921.35 pursuant to RCW 51.24.060. (Ex. A to 2<sup>nd</sup> Comer Declaration, 1997 Order.)
10. On September 12, 1997, the Swanks requested reconsideration of that order. (Ex. B to 2<sup>nd</sup> Comer Declaration, 1997 Objection to DLI Order.) Swank objected to the order on the following grounds: (i) the order inappropriately included sums awarded Jeanne Pascal Swank [Swank's wife] in its lien calculation; (ii) the order ignored the fact that the case was ongoing and that total costs, etc., were not yet known and thus no calculation of any lien right could be made; (iii) the claim involved negligence of Snohomish County as part of the ongoing litigation and, since the part of the cause related to Snohomish County was ongoing and unresolved, Snohomish County was not entitled to recover; and (iv) the order was entered before the third party action was completed. (Ex. D to the Comer Declaration, *Docket # 331*, Petition at ¶ 15.)
11. On October 3, 1997, the Department affirmed the order. (Ex. C to 2<sup>nd</sup> Comer Declaration, 1997 Appeal Order and Notice.) The Swanks never appealed that decision.
12. The Swanks did not comply with the 1997 order, and on May 12, 1999, Snohomish County filed a Warrant for Unpaid Lien and Interest Pursuant to RCW 51.24.060. (Ex. D to the 2<sup>nd</sup> Comer Declaration, Warrant.)
13. On October 15, 1999, the Swanks satisfied the Judgment against them. (Ex. E to 2<sup>nd</sup> Comer Declaration, Satisfaction of Judgment.)
14. On May 22, 2000, this case proceeded to trial with Jim Duffy as the only remaining defendant. (*Docket # 225.*)
15. In July 2000, a jury verdict was returned finding Jim Duffy not negligent. The jury also found Snohomish County negligent as an unnamed party, or empty chair. (Ex. C to Lopez Declaration.)

  
**NON-PARTY SNOHOMISH COUNTY'S PROPOSED FINDINGS OF FAULT AND CONCLUSIONS OF LAW (SCSC 88-2-01155-7) - 3**  
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- 1 16. The jury instructions, and verdict form, provided by the Court to the  
2 Jury were those proposed by Plaintiffs. Plaintiffs' proposed verdict  
3 form did not invite the jury to allocate a percentage of fault to any  
4 other potentially negligent party—including Snohomish County,  
5 Chouinard or Swank himself—if it found Defendant Duffy not  
6 negligent. (Ex. E to the Comer Declaration, *Docket # 331*, Swank's  
7 proposed jury instructions and verdict form.)
- 8 17. On February 1, 2001, Satisfaction of Judgment was entered in  
9 Snohomish County Superior Court (*Docket # 292*.)
- 10 18. On May 4, 2004, Swank filed a motion to allocate fault in this case.  
11 (*Docket # 306*.)
- 12 19. The County objected to that motion, and filed a motion for  
13 discretionary review. The Court of Appeals denied the County's  
14 request for review, finding that there was no order entered on  
15 Swank's motion. (Ex. A to the Comer Declaration, *Docket # 331*,  
16 January 20, 2005 Appeal Letter.) The Court of Appeals remanded  
17 the motion for consideration by the trial court.
- 18 20. In June 2006, Plaintiff Dallas Swank filed a Writ of Mandamus in  
19 Skagit County Superior Court, arguing that the County was compelled  
20 to reimburse funds to him that the Department of Labor and  
21 Industries ordered he pay to the County related to his 1987 on the job  
22 injury. (Ex. D to the Comer Declaration, *Docket # 331*, 2006 Writ.)
- 23 21. On March 13, 2008, the County filed a cross-motion for summary  
24 judgment, seeking dismissal of Swank's Writ of Mandamus. (Ex. B to  
25 Comer Declaration, *Docket # 332*, County's Cross Motion.)
- 26 22. On April 23, 2008, this Court granted the County's Motion, and  
dismissed Swank's Writ of Mandamus without prejudice. (Ex. Q to  
Comer Declaration, *Docket # 332*, Order Granting Summary  
Judgment.)
- 23 23. On August 4, 2008, the Swanks again moved this Court to allocate  
24 fault to non-party Snohomish County. (*Docket # 327*.) The County  
25 opposed this effort, arguing that this Court did not have jurisdiction to  
26 order a non-party to submit findings of fault and conclusions of law.  
This Court found it had jurisdiction, and, on August 12, 2008, ordered  
the County to submit its own findings of fault and conclusions of law  
no later than October 17, 2008. (*Docket # 335*.)

- 1 24. On September 9, 2008, the County filed a Notice of Discretionary  
2 Review with the Court of Appeals seeking review of the August 12,  
3 2008 Order. (Docket # 338.)
- 4 25. On October 17, 2008, the parties filed a Stipulation and Order of  
5 Enlargement of Time with the Court. The parties asked the Court to  
6 enlarge the time for the County to comply with the Court's August 12,  
7 2008 Order to a date 90 days after the Court of Appeals entered an  
8 Order denying discretionary review. (Docket # 341.) The Court  
9 entered an Order, granting the enlargement of time on October 30,  
10 2008. (Docket # 344.)
- 11 26. On November 12, 2008, the Court of Appeals denied the County's  
12 Motion for discretionary review. (Ex. F to 2<sup>nd</sup> Comer Declaration,  
13 Denial of Discretionary Review.)
- 14 27. On February 10, 2009, consistent with the parties' October 20, 2008  
15 Stipulation and Order for Enlargement of Time, the County filed its  
16 Proposed Findings of Fact and Conclusions of Law, as well as a  
17 supporting Memorandum.

### 18 CONCLUSIONS OF LAW

- 19 1. The Court finds that the findings of the Accident Review Board,  
20 submitted as Ex. A to the Lopez Declaration, should be stricken from  
21 the record as inadmissible because (i) there is no evidence this  
22 testimony is under oath; (ii) the statements are hearsay, and (iii) the  
23 statements are evidence of subsequent remedial measures taken by  
24 Snohomish County. ER 802; 407. Plaintiffs have submitted no  
25 admissible evidence supporting any allocation of fault to non-party  
26 Snohomish County.
2. The Court finds that the State Department of Labor and Industries  
Notice and Order ("L&I Order") requiring Dallas D. Swank to  
reimburse the County \$57,921.35 pursuant to RCW 51.24.060, dated  
July 18, 1997, became final and binding pursuant to RCW 51.52.110  
after Swank failed to seek timely review of the Department's decision  
affirming the Order on October 3, 1997.
3. The Court finds that Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d  
162 (1991) was statutorily overruled by the amendments to RCW  
51.24.060 in 1993. The 1993 statutory amendments to RCW  
51.24.060 control this case.

NON-PARTY SNOHOMISH COUNTY'S ~~PROPOSED FINDINGS OF~~  
FAULT AND CONCLUSIONS OF LAW (SCSC 88-2-01155-7) - 5

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4. The Court finds that as Swank's self-insured employer, Snohomish County is immune from liability to Swank under Title 51 RCW. As such, RCW 4.22 et. seq. prohibits an allocation of fault to Snohomish County.

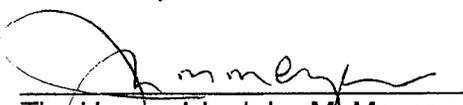
5. The Court finds that the Swanks ~~have~~ presented no admissible evidence of fault of Snohomish County, nor have they provided any legal authority for an allocation of fault to Snohomish County.

6. ~~For the above reasons, the Court allocates 0% fault to Snohomish County in the above captioned matter.~~

*The Plaintiff is estopped from raising the issue of % of*  
There being no just reasons for delay, the order is entered effective as of the

date of entry by the Court.

DONE IN OPEN COURT THIS 30 day of April, 2009.

  
The Honorable John M. Meyer

*Jm m .*  
*allocati*  
*of fault*  
*in light of*  
*F of F #16*

PRESENTED BY:

JANICE E. ELLIS  
Snohomish County Prosecuting Attorney

By: Charlotte F. Comer  
CHARLOTTE F. COMER, WSBA #36805  
Deputy Prosecuting Attorney  
Attorney for non-party Snohomish County

Approved as to Form; Notice of Presentation waived; copy received:

LAW OFFICE OF LOPEZ & FANTEL

By: \_\_\_\_\_  
CARL A. TAYLOR LOPEZ, WSBA # 6215  
Attorney for Plaintiffs Dallas Swank  
and Jeanne Pascal Swank

*CC: Comer*  
*lopez*

~~NON-PARTY SNOHOMISH COUNTY'S PROPOSED FINDINGS OF FAULT AND CONCLUSIONS OF LAW (SCSC 88-2-01155-7) - 6~~

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