

NO. 35052-1-II

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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

DARRIN R. THARALDSON,

Respondent.

14 15 1994  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]

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**REPLY BRIEF**

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## I. ARGUMENT IN REPLY

### A. **Tharaldson's Settlement for His Automobile Accident Was a Third Party Recovery within the Scope of RCW 51.24.030**

As the Department demonstrated in its Appellant's Brief (AB), the plain language of RCW 51.24.030 compels the conclusion that Tharaldson's settlement with Sasco for his automobile accident was a third party recovery. *See* AB 23-27. In his Respondent's Brief (RB), Tharaldson argues that RCW 51.24.030 can never apply to non-industrial injuries, and that the Department of Labor and Industries (Department) is categorically prohibited from recovering any portion of the industrial insurance benefits the Department paid on his claim. RB 13-19. For the reasons the Department noted in its brief, RCW 51.24.030 does apply to non-industrial injuries when, as here, the Department paid industrial insurance benefits for the combined effects of an industrial injury and a subsequent non-industrial injury. AB 23-27.

Tharaldson also argues that the statements of Charles Bush to the Legislature cannot be considered to be part of the legislative history, even though those statements are filed with the materials archived by the Legislature with E.H.B. 1386. RB 16-18. Tharaldson cites no case law stating that the statements of an Assistant Attorney General to the Legislature can never be considered to be part of a statute's legislative

history. *Id.* While the Department is not aware of a Washington decision involving identical facts, the Department notes that the Washington Supreme Court has treated the statements of both the sponsoring legislator *and* the statements of the “initiator” of the bill as constituting legislative history. *Lewis v. Dep’t of Licensing*, 157 Wn.2d 446, 462-463, 139 P.3d 1078 (2006). In this case, the Department of Labor and Industries was the entity that requested the amendment to RCW 51.24.030 the Legislature ultimately adopted. Thus, the statements of its attorney, Mr. Bush, are part of the legislative history. *Id.*<sup>1</sup>

Tharaldson also argues that if the Legislature had agreed with Mr. Bush’s view that the proposed amendment to the Third Party Statute would ensure its application to subsequent non-industrial injuries, then the Legislature would have adopted an even more expansive amendment to RCW 51.24.030 than it actually adopted. RB 17-18. Tharaldson’s argument is without merit. The Legislature amended RCW 51.24.030 with the language the Department requested. AB 25-26. Mr. Bush did not publish the Section by Section Commentary in a fruitless attempt to

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<sup>1</sup> Certainly the statements of the Department’s attorney regarding the amendment to RCW 51.24.030 establish the Department’s interpretation of that statute. As the agency which administers Title 51 RCW, this interpretation is entitled to deference. *E.g., Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996) (“A court must give great weight to the statute’s interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with legislative intent.”).

convince the Legislature to adopt a more expansive amendment than the one ultimately adopted. Rather, the Section by Section Commentary was the Department's interpretation of the very amendment and resultant statute the Legislature in fact adopted.

Tharaldson argues that the Department is attempting to recover a portion of his third party recovery based on equitable principles, and that the Department cannot invoke equity as a basis for recovery. RB 18-19. This argument is misplaced, because the Department is not relying on equitable principles to support its Third Party distribution order. Rather, the Department relies on the plain language of RCW 51.24.030.

Tharaldson also attempts to rely on the doctrine of "liberal construction" to support his narrow interpretation of the Third Party Statute. RB 7-8, 13 n.3. However, the doctrine of liberal construction does not authorize an unrealistic interpretation that produces strained or absurd results and defeats the plain meaning and intent of the Legislature. *See generally Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). Since RCW 51.24.030 unambiguously supports the Department's decision in this case, the doctrine of liberal construction does not apply. *Id.*

Furthermore, as this Court noted in *Frost v. Dep't of Labor & Indus.*, 90 Wn. App. 627, 637, 954 P.2d 1340 (1998), the doctrine of

“liberal construction” is inapplicable when a worker’s right to industrial insurance benefits is not in dispute, and when the only dispute is whether the worker “will receive a double recovery.” In this case, as in *Frost*, the doctrine of liberal construction is inapplicable, because Tharaldson’s right to industrial insurance benefits is not in dispute, and the only issue is whether Tharaldson may retain a double recovery. *Id.*

**B. The Burden of Proof Was on Tharaldson to Present Evidence Showing the Department’s Distribution Order Was Incorrect. Because Tharaldson Failed to Present any Evidence Demonstrating This, the Department Order Must Be Affirmed.**

**1. Under the plain language of the Industrial Insurance Act, Tharaldson bore the burden of proving that the Department’s distribution order was incorrect.**

RCW 51.24.060 states that appeals from orders asserting a right to an injured worker’s tort recovery are governed by RCW 51.52. *See also* AB 34-42. RCW 51.52.050 states that a party appealing a Department order bears the burden of proving the Department order was incorrect, unless the case involves an allegation of willful misrepresentation. The Department order on appeal in this case did not accuse Tharaldson of committing willful misrepresentation. Thus, Tharaldson bore the burden of proving the Department’s distribution order was incorrect. RCW 51.52.050. When Tharaldson appealed the Board’s decision to the Pierce County Superior Court, he continued to bear the burden of proof, because

the Board's findings of fact are presumed to be correct, and the appealing party bears the burden of proving the Board's decision was in error. See *Harrison Memorial Hosp v. Gagnon*, 110 Wn. App. 475, 477, 40 P.3d 1221 (2002).

Tharaldson's Brief of Respondent argues that the Department bore the burden of proof. RB 11-13. But Tharaldson does not respond to the Department's argument (at AB 34-42) that the plain language of RCW 51.52.050 placed the burden of proof on him, nor does he give any explanation as to why the Court should ignore the plain language of that statute. Instead, Tharaldson attempts to rely on cases involving either a party asserting a lien on another's property or a tortfeasor seeking to apportion his or her responsibility for damages among his fellow tortfeasors. RB 11-13. The cases Tharaldson attempts to rely upon are simply inapposite. The Department is neither a party asserting a lien upon another's property nor is it a tortfeasor seeking to apportion fault to a fellow tortfeasor.

Tharaldson argues that the Department's right to recovery in a third party claim is a "statutory lien" and the Department therefore bears the burden of proof. RB 13. However, the Washington Supreme Court held in *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 548-549, 789

P.2d 75 (1990), that the Department's right to a portion of an injured worker's tort recovery is an absolute property right, *not* a statutory lien.

In *Maxey*, an injured worker received both industrial insurance benefits and damages for a tort claim. *Id.* The worker went bankrupt, and a dispute ensued between the Department and the IRS as to who had priority to receive a portion of the tort recovery. *Id.* The IRS argued that the Department's interest in the worker's tort recovery was a mere statutory lien, while the Department argued that it had an absolute right to its portion of the worker's third party recovery. *Id.* The *Maxey* Court agreed with the Department. *Id.* *Maxey* acknowledged that the Third Party Statute used the term "lien", but it concluded this was merely a result of "inartful" drafting, that the Department had an absolute right to its share of the worker's third party recovery, and the Department's interest in the worker's tort recovery was *not* a lien. *Id.* Because the Department is not asserting a lien against Tharaldson's property, he fails in his statutory lien argument regarding the burden of proof. *Maxey*, 114 Wn.2d at 548-549.

**2. The Department's distribution order was consistent with the undisputed medical testimony.**

The undisputed medical testimony in this case established that Tharaldson's industrial injury resulted in disability to his low back, and his

subsequent motor vehicle accident exacerbated the effects of his industrial injury. CABR Hwang, pp 8-9, 18-19; Brack, pp. 13, 16.<sup>2</sup> The only witness who attempted to apportion causation between the industrial injury and the car accident was Dr. Hwang, who testified that 60 percent of the claimant's symptoms and need for treatment were due to the car accident and 40 percent of the claimant's symptoms and need for treatment were due to his industrial injury. CABR Hwang, pp. 8-9, 18-19.

As the Department explained in its opening brief, in calculating the amount of its third party recovery, it first subtracted all benefits provided to Tharaldson before his motor vehicle accident, and then determined that the Department's right of recovery would be calculated based on 60 percent of the benefits provided after that accident. AB 11-13. Thus, the Department adjusted the benefits paid figure to reflect Dr. Hwang's opinion.

Tharaldson presented no medical evidence contradicting Dr. Hwang's opinion. Rather, Tharaldson conclusorily asserts that the correct standard is whether the subsequent motor vehicle accident caused

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<sup>2</sup> Citations to testimony in the Board Record will be indicated by "CABR" followed by the witness's name and the page and line numbers therein. Tharaldson testified on two dates; citations to his December 16, 2004 testimony will include the reference "Tharaldson I," and his January 11, 2005 testimony will be referred to as "Tharaldson II." Board exhibits will be indicated by "CABR Ex." followed by the appropriate exhibit number. Other documents in the Board Record bear machine-stamped numbers in their lower right-hand corners; citations to such documents will be to those numbers.

an increase in claim costs. RB 8-11. In making this argument Tharaldson necessarily argues that it is irrelevant that 60 percent of his low back disability was due to the motor vehicle accident and that he received both full workers' compensation benefits and a tort recovery for the same condition. Putting aside these facts, Tharaldson insists that the sole question is whether the motor vehicle caused the Department to provide benefits it would not have otherwise provided. RB 8-11.

No witness testified that it was *probable* that the motor vehicle accident did *not* result in an increase in claim costs. It is well settled that a party bearing the burden of proof has the burden of showing that a preponderance of the evidence supports that party's contentions. *See, e.g., Gagnon*, 110 Wn. App. at 477. There is a preponderance of the evidence supporting a contention when it is more probable than not that the contention is true. *See Id.* Although the two medical witnesses who testified in this case acknowledged that it was *possible* Tharaldson's need for treatment, permanent partial disability, and temporary inability to work would have been the same even if the motor vehicle accident did not occur, no witness testified it was *probable* this was true.

Despite the absence of this critical evidence, Tharaldson attempts to argue that he may prevail in this case even if he bore the burden of proof. RB 11. He states, "All health care providers testified that they

could not state, more probably than not, that any of the DLI's claim related costs were affected by Tharaldson's MVA injuries. Tharaldson has therefore made a *prima facie* case that the order under appeal is incorrect". RB 11.

Tharaldson's argument that he made a *prima facie* case fails on its face. As noted above, no witness testified that Tharaldson's claim costs would have been the same if the motor vehicle accident had not occurred. At *most*, Tharaldson established that it was *possible* his need for treatment, inability to work, and permanent partial disability would have been the same if the motor vehicle had not occurred. *See* CABR Hwang, p. 28; Brack, pp. 28-29. Tharaldson cannot be heard to argue that he made a "prima facie" case in this appeal, because he has failed to present any evidence establishing that it was *probable* his motor vehicle accident had no impact on his low back disability and resulting claim costs.

In conclusion, Tharaldson failed to present any evidence contradicting Dr. Hwang's opinion that 60 percent of his low back symptoms and need for treatment was due to the motor vehicle accident, and he failed to present any evidence establishing that the motor vehicle accident did not result in an increase in claim costs. CABR Hwang, pp. 8-9, 18-19. Thus, Tharaldson failed to meet his burden of proving the Department's order was incorrect, regardless of whether the proper

standard is (1) the percentage of the claimant's disability due to the motor vehicle accident or (2) an increase in claim costs as a result of the motor vehicle accident. Furthermore, even if it is assumed, contrary to the plain language of RCW 51.52.050, that the Department bore the burden of proof, the Department met its burden through Dr. Hwang's testimony that Tharaldson's motor vehicle accident exacerbated the effects of his industrial injury and it was responsible for 60 percent of his symptoms and need for treatment. CABR Hwang, pp. 8-9, 18-19.

**C. Tharaldson's Argument that He Has Not Received a Double Recovery Because His Tort Settlement Was Not Differentiated between General and Special Damages Is Without Merit.**

The best evidence of the fact that Tharaldson received a double recovery comes from Tharaldson himself. AB 8-10. In his tort claim against Sasco, Tharaldson's demand letter asserted that he had suffered damages based on "permanent partial disability", "lost wages", and medical treatment. *Id.* The permanent partial disability Tharaldson claimed in his demand letter was identical to the permanent partial disability the Department had paid for in his industrial injury. *Id.* The lost wages Tharaldson asserted in his demand letter were slightly higher than the time loss compensation he had received from the Department, but this can be explained by the fact that time loss is based on a percentage of a claimant's lost wages. *Id.* There is no credible evidence disputing that the

Department paid all of Tharaldson's medical bills following both his industrial injury and his motor vehicle accident.<sup>3</sup> The medical bills Tharaldson requested in his settlement demand letter were higher in dollar value than the amount of medical bills paid by the Department, but this discrepancy can be explained, as Tharaldson himself points out (*see* RB 5 n.2), by the fact that the Department's schedule for payment of medical bills is lower than the amounts ordinarily charged by providers, and in a tort claim medical bills are measured at their fair market value.

Tharaldson nonetheless argues that the record is "wholly devoid" of any evidence of a double recovery. RB 4. However, Tharaldson does *not* dispute that the Department paid all of the medical bills, permanent partial disability, and time loss for treatment needs and disability that occurred following both his industrial injury and his motor vehicle accident. Tharaldson does not argue that his motor vehicle accident resulted in any permanent partial disability, lost wages, or medical bills that had *not* been paid by the Department. Tharaldson could not be heard

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<sup>3</sup> Tharaldson initially claimed that the Department had not paid for his February 27, 2002 surgery. Indeed, Tharaldson was under the impression that his surgical bills had never been paid. *See* CABR 20-21. The Department's billing records are to the contrary, showing payment (at Department rates) to Good Samaritan Hospital for surgical services provided in February 2002. CABR Exh. 1. Exhibit 1 shows a large (\$14,000) bill from Good Samaritan upon which no payment was made. This appears to be a duplicate billing for the surgical services that the Department covered. *See also* CABR Malcom 22 (Tharaldson's attorney recognizing the Department paid for surgery).

to make such arguments in any event, because he did not preserve his right to raise either of these issues on appeal.<sup>4</sup>

Instead, Tharaldson argues there is no evidence he received a double recovery because his settlement demand letter to Sasco asserted “a variety of damage elements” that were “alleged but not proven,” and that the settlement he received was an “undifferentiated payment” of \$50,000. RB 4-5. Tharaldson thus implies that as a result of the motor vehicle accident he suffered some sort of harm or loss completely unrelated to his medical bills, permanent partial disability, and lost wages, the items that in his statement of damages he explicitly alleged *were* related to the motor vehicle accident. RB 4-5.

Not surprisingly, Tharaldson does not identify what sort of separate harm or loss resulted from the motor vehicle accident, let alone point to any evidence to substantiate such a claim. Instead, he

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<sup>4</sup> The Industrial Appeals Judge specifically found in his Proposed Decision and Order that Tharaldson had received industrial insurance benefits for the combined effects of his industrial injury and his tort claim, and he received damages for his motor vehicle accident. Tharaldson’s Petition For Review did not dispute this Finding of Fact. The Board made a similar finding in its Decision and Order, which Tharaldson did not challenge in his Superior Court appeal. He thus waived any challenge to these findings. See RCW 51.52.104 (“Such petition for review shall set forth in detail the grounds therefore and the party . . . shall be deemed to have waived all objections or irregularities not specifically set forth therein.”); RAP 2.5(a) (appellate court may refuse to review any claim of error not raised at trial); *Stelter v. Dep’t of Labor & Indus.*, 147 Wn.2d 702, 711, n.5, 57 P.3d 248 (2002) (declining to reach an issue which “was not raised or briefed to the Board or in judicial proceedings below”); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (“Allan waived this objection because it was not set out in her petition for review . . . as required by RCW 51.52.104.”); *Cosmopolitan Eng’g Group, Inc. v. Ondeo*, 128 Wn. App. 885, 893-94, 117 P.3d 1147 (2005) (trial brief did not adequately preserve the issue under RAP 2.5(a)).

conclusorily asserts that it is a “universal truth” that insurers do not pay for damages not caused by their insured’s negligence, and it follows that the settlement he received from Sasco must have been intended to compensate him for a loss completely unrelated to his permanent partial disability, lost wages, and medical bills. RB 8-9.

Tharaldson’s argument that his tort recovery could not have included any funds for losses attributable to the combined effects of his industrial injury and his subsequent motor vehicle accident is circular, unsupported by the record, and contrary to case law. Tharaldson’s argument assumes that Sasco was entitled to, and did, subtract the value of any industrial insurance benefits Tharaldson had received from the Department from its total liability figure, even if the industrial insurance benefits had been provided for the combined effects of the industrial injury and the subsequent tort. Tharaldson’s argument presumes the damages attributable to his industrial injury and his motor vehicle accident were completely distinguishable. Based on this premise, a premise that both of Tharaldson’s treating doctors testified was incorrect, Tharaldson concludes there was no double recovery because his tort settlement necessarily did not include any damage elements for which he had received industrial insurance benefits. *See* CABR Hwang, p. 20; Brack, pp. 13-14, 16. Besides conflicting with his treating doctor’s testimony,

this argument is inconsistent with Tharaldson's assertion in his settlement demand letter that the motor vehicle accident was responsible for *all* of his lost wages, medical bills, and permanent partial disability. CABR Tharaldson II, p 5.

Tharaldson's unstated premise that Sasco was entitled to offset its tort liability by the value of any industrial insurance benefits that had been provided for the combined effects of his motor vehicle accident and his industrial injury is contrary to the Washington Supreme Court's ruling in *Cox v. Spangler*, 141 Wn.2d 431, 438-441, 5 P.3d 1265 (2000). In *Cox*, as in this case, a claimant suffered an industrial injury, and later suffered a non-industrial motor vehicle accident that aggravated the effects of the industrial injury. *Id.* The defendant argued that her liability should be reduced to account for the claimant's receipt of industrial insurance benefits, and sought to introduce evidence of the industrial insurance benefits paid to the plaintiff. *Id.* The *Cox* Court held that the plaintiff's damage award could not be reduced to account for the previously provided industrial insurance benefits, and ruled that the collateral source rule prevented the defendant from presenting evidence of the plaintiff's receipt of workers' compensation benefits. *Id.* The Court explained that this ruling would not result in a double recovery because the Department

the Department would be entitled to a portion of Cox's tort recovery under the Third Party Statute. *Id.*

Tharaldson argues that his tort settlement was for an undifferentiated payment of money. He suggests, with no supporting evidence or law, the settlement may have been based either partially or entirely on general damages. RB 4-5, 23. Tharaldson appears to argue, although his brief is not clear on this point, that general damages are not subject to the Department's right of recovery. RB 23.

Under *Mills v. Dep't of Labor & Indus.*, 72 Wn. App. 575, 577, 865 P.2d 41 (1994) and *Gersema v. Dep't of Labor & Indus.*, 127 Wn. App. 687, 692-693, 112 P.2d 552 (2005), a plaintiff's failure to specify damages in a tort settlement prevents the plaintiff from later arguing that some portion of the damage award is not subject to the Department's right of recovery. Because Tharaldson's tort recovery was an undifferentiated settlement, he cannot be heard to argue that some portion of his tort recovery is not subject to the Department's right of recovery. *Gersema*, 127 Wn. App. at 692-693; *Mills*, 72 Wn. App. at 577.

In *Mills*, an injured worker received both a settlement in tort and industrial insurance benefits. *Mills*, 72 Wn. App. at 577. The claimant then argued that a portion of his damages settlement was for loss of consortium even though the settlement itself was undifferentiated, and the

Department could not pursue that part of his tort recovery. *Id.* The Court held that because the claimant's tort settlement was undifferentiated, the claimant could not be heard to argue that any portion of it was for loss of consortium, and, therefore, the entire tort settlement was subject to the Department's right of recovery. *Id.*

In *Gersema*, a claimant received industrial insurance benefits and a damages settlement for the same injury, and later argued that some portion of his damages settlement was actually for pain and suffering, even though the settlement itself was undifferentiated. *Gersema*, 127 Wn. App. at 692-693. The Court held that the claimant's failure to differentiate damages in the settlement prevented him from arguing that some aspect of his settlement was for pain and suffering, and therefore declined to consider his argument that pain and suffering is not subject to the Department's right of recovery. *Id.* at 592-593.<sup>5</sup>

Even if it were assumed that Tharaldson's settlement included "general" damages, it still would not follow that Tharaldson's settlement would be exempt from the Department's right of recovery. Contrary to Tharaldson's suggestion, *Gersema* did not hold that general damages are not subject to the Department's right of recovery. *See Id.* Rather, the

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<sup>5</sup> Tharaldson cites to several other statements of the *Gersema* decision, but his brief does not mention that this was the central holding of *Gersema*, let alone attempt to distinguish his case from *Gersema*.

*Gersema* Court expressly declined to rule on whether or not damages for pain and suffering are subject to the Department's right of recovery, because the settlement in that case, as in this case, was for an undifferentiated payment of money. *Id.* The *Gersema* Court also did not rule, one way or another, on the impact of the amendment to RCW 51.24.030(5) adopted by the Legislature following the Supreme Court's decision in *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994), providing that "recovery includes all damages except loss of consortium."

Tharaldson demanded that Sasco pay him for all of his treatment, lost wages, and permanent partial disability the Department had already paid, including payments that predated the accident for which he was demanding compensation. CABR Tharaldson II, p 5. He thus represented to Sasco that his damages from the motor vehicle accident were precisely those covered under his workers' compensation claim. *Id.* He now argues to this Court that the funds he received from Sasco were completely unrelated to his workers' compensation claim, compensating him instead for some undefined other loss. RB 8-9. Tharaldson cannot have it both ways. The record and his own actions amply demonstrate that he has received a double recovery, and his arguments to the contrary are without merit.

**D. There Has Been No Unconstitutional Taking.**

Tharaldson argues that the Department's application of the Third Party Statute to his tort recovery is unconstitutional, relying on Article 1, Section 3 of the Washington State Constitution which provides "[n]o person shall be deprived of life, liberty, or property, without due process of law." RB 19-24. Tharaldson correctly notes that the takings clause of the Washington State Constitution is the functional equivalent of the corresponding provisions of the United States Constitution. RB 20. Tharaldson's takings analysis is flawed for at least three reasons, and his argument should be rejected.

- 1. Because Tharaldson's recovery was a third party recovery, he did not have a property interest in the settlement proceeds and his takings analysis is irrelevant.**

In making his takings argument, Tharaldson begins with the assumption that the Third Party Statute did not authorize the Department to recover any portion of his tort settlement, and he relies on this assumption throughout his takings argument. However, as the Department explained in its Brief of Appellant and in the first section of this brief, the Third Party Statute does apply to Tharaldson's tort settlement. Since

Tharaldson's constitutional argument hangs on a false premise, it fails to leave the starting gate.<sup>6</sup>

Although not couched in such terms, Tharaldson's true argument is that the industrial insurer-reimbursement scheme of the Third Party Statute, in its entirety, is unconstitutional. Only by negating the entire reimbursement scheme can Tharaldson argue that there has been a taking (an argument that would still fail under *Gersema*, *see infra*). Tharaldson has not met the heavy burden that rests on a party attacking the constitutionality of a statute. *See, e.g., Gersema*, 127 Wn. App. at 696-697 (“[a] court will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute’s purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose”; “[a] challenger must prove the statute is unconstitutional beyond a reasonable doubt”) (citations omitted).

But Tharaldson's constitutional argument is weaker still. His claim that the takings clause applies to *any* portion of his recovery is based on his assertion, without citation to any constitutional case law, that “a cause of action, a judgment, and the money from the judgment are

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<sup>6</sup> Alternatively, in the event this Court concludes that Tharaldson is correct that the Department had no right to recover any portion of his tort settlement under the Third Party Statute, then Tharaldson would be entitled to prevail on that basis alone, and this Court would have no occasion to consider Tharaldson's constitutional argument.

personal property protected by substantive due process considerations.” RB 20-21. It is this putative constitutional property interest, Tharaldson reasons, that triggers “the protections” of Article I, Section 3 of the Washington State Constitution (the takings clause). *See Id.* If Tharaldson’s constitutional argument had merit, it would apply to *any* request by the Department for a portion of a Third Party recovery.

In *Fria v. Dep’t of Labor & Indus.*, 125 Wn. App. 531, 105 P.3d 33 (2004), the Court of Appeals rejected a worker’s argument that the Third Party Statute was unconstitutional. More specifically, the *Fria* Court rejected the worker’s argument that his third party recovery was a property right. *Id.* at 535. The *Fria* Court so ruled because third party lawsuits brought by plaintiffs receiving workers’ compensation benefits are authorized solely through the grace of the Legislature, are purely statutory in nature, and thus clearly are not a property right when viewed within the context of the Industrial Insurance Act as a whole. *Id.* at 534-535.

*Fria* reaffirms that the Industrial Insurance Act took away entirely a worker’s right to recovery in tort, and then granted a limited exception providing only a qualified worker right to recovery in tort. *Id.* *Fria* also stands for the proposition that, to the extent the Legislature permitted injured workers to file personal injury claims, the statutory limitations on

tort recoveries, including the Department's right of reimbursement from such recoveries, does not infringe on any kind of "fundamental right." Relying on *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990), a real property case, Tharaldson provides no reason to depart from *Fria*'s holding that the Third Party Statute is constitutional.<sup>7</sup>

**2. Even if Tharaldson's third party recovery were his property, there has been no taking.**

No case has ever held that a third party recovery related to the Industrial Insurance Act is a worker's property. Indeed, in *Maxey*, the Supreme Court held the opposite. *Maxey*, 114 Wn.2d at 548-549. Without addressing the question of "property," however, *Gersema*, a case on which Tharaldson relies (*see* RB 22-23), rejected the constitutional argument Tharaldson now makes. *See Gersema*, 127 Wn. App. at 696-699.

One passage from the *Gersema* decision is particularly noteworthy:

Placing a lien on these settlement funds until such time as Gersema's future disability or medical needs are known does not constitute a 'taking' of or constraint on Gersema's property. First, Gersema has already received and had access to the excess recovery funds. He is not being deprived of any property in his possession, nor will he have

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<sup>7</sup> *Cf. Rafn Co. v. Dep't of Labor & Indus.*, 104 Wn. App. 947, 952, 17 P.3d 711 (2001) (implying that the *Presbytery of Seattle* analysis was, at best, a poor fit when analyzing the constitutionality of the Industrial Insurance Act by stating that "Rafn tries to fit the economic regulation of RCW 51.16.060 into the three-prong-land-use-regulation-substantive-due-process test outlined in *Presbytery of Seattle* . . .").

to pay any of these funds to Allstate. Second, unlike a lien on real property, Allstate's lien on the excess third-party recovery neither prevents nor restricts Gersema's use of these funds in any way.

Rather, *if* Gersema reopens and seeks future industrial insurance benefits for his neck injury, he simply will not receive additional benefits from Allstate until the benefits to which he is entitled exceed . . . the excess recovery amount that he has already received from Titus Will for this injury. In that event, Allstate will neither receive nor take anything to which it will not be entitled; rather, it will simply receive credit for this amount under the statute, as if Allstate, instead of Titus-Will, had paid Gersema [the excess recovery amount]. Allstate's lien, therefore, is simply not a taking, unconstitutional or otherwise.

*Id.* at 698-699 (emphasis in original; footnotes omitted). While *Gersema* involved a self-insured employer, its logic applies here with equal force: the Department is "taking" nothing from Tharaldson; rather, it is simply applying a statutory formula and not making payments pursuant to the mandate of the very same law that entitled him to workers' compensation benefits and authorized his tort lawsuit in the first place. *Id.*

The fact that Tharaldson challenges the Department's *reimbursement* as well as its offset of future benefits as unconstitutional also does not change the result compelled by *Gersema*. *Id.* Tharaldson "has already received and had access to" the Industrial Insurance benefits for which reimbursement is sought, and reimbursement from the "third-

party recovery neither prevents nor restricts” his use of his workers’ compensation benefits. *Id.*

**3. Assuming arguendo a property interest, the Department’s order passes constitutional muster under Presbytery.**

Finally, even under the *Presbytery of Seattle* analysis Tharaldson urges at RB 19-24, the Third Party Statute easily passes constitutional muster. 114 Wn.2d 320. Under *Presbytery of Seattle*, courts engage in a “3-prong analysis” to determine the constitutionality of a statute, asking: (1) whether the statute “is aimed at achieving a legitimate public purpose”; (2) “whether it uses means that are reasonably necessary to achieve that purpose”; and (3) “whether it is unduly oppressive” to the property owner.<sup>8</sup> *See Id.* at 330.

As explained above, allowing the Department reimbursement under the Third Party Statute ensures that “(1) the accident and medical aid funds are not charged for damages caused by a third party and (2) the worker does not make a double recovery.” *Maxey*, 114 Wn.2d at 548-549. These are obviously legitimate public purposes and have been upheld as such in every third party case to have addressed them. Tharaldson’s argument to the contrary is predicated on his circular argument that the

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<sup>8</sup> This portion of the Department’s brief assumes for the sake of argument that Tharaldson has some form of “property” interest in his third party recovery.

public purpose is only legitimized when the tort recovery is for the same accident that was the subject of the industrial injury claim. RB 22.

As explained above, Tharaldson's premise is simply wrong – the Third Party Statute goes beyond merely the event that led to a worker's industrial injury. Where, as in Tharaldson's case, extinguishing the Department's reimbursement right would lead to the accident funds bearing the costs of a third party's negligence and provide the injured worker with a double recovery, the first prong of *Presbytery of Seattle* is fully satisfied. 114 Wn.2d at 330.

The second *Presbytery of Seattle* test is whether the statute uses means reasonably necessary to achieve its purpose. *Id.* The purpose of the statute is to replenish the funds and prevent double recoveries. Asserting a right of reimbursement against a third party recovery that would otherwise thwart these policies is not only "reasonably necessary" to achieve this purpose, it is the *only* way to achieve this purpose.

Finally, the third prong of *Presbytery of Seattle* is satisfied because requiring Tharaldson to repay the Department in part for industrial insurance benefits duplicated by his third party recovery is hardly "unduly oppressive." *Id.* Tharaldson has received the money for the same damages twice, once from the Department and once from Sasco. It is not oppressive to prevent a two-fold recovery for the same damages,

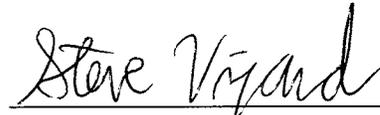
particularly where not preventing the double recovery would injure Washington's workers and employers by requiring the funds, which are financed with workers' compensation premiums, to bear the cost of Sasco's negligence. After he pays the Department's reimbursement, Tharaldson will have received full compensation under the Industrial Insurance Act for his industrial injury *and* his car accident, *plus* an additional \$8,000 free and clear from any Department claim. This result is in no way "oppressive."

## II. CONCLUSION

For the reasons discussed above and in the Department's Brief of Appellant, the Department respectfully requests that this Court reverse the Superior Court decision. The Board and Department decisions in this case are correct and should be affirmed.

RESPECTFULLY SUBMITTED this 28 day of March, 2007.

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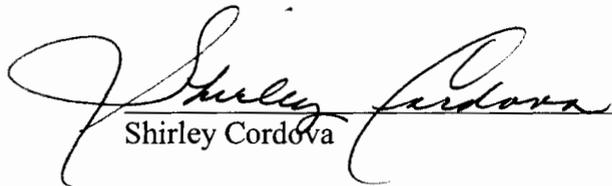
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