

No: 47672-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON, TACOMA

TIMOTHY NELSON

Plaintiff/Appellant

vs.

DEPARTMENT OF LABOR & INDUSTRIES, STATE OF
WASHINGTON

Defendant/Respondent

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION.

The Department seems to suggest this case involves an isolated application of an unambiguous statute to an individual case. In fact this case involves interpretation of statutory language to the detriment of injured workers which the Department applies in every case with third party claims involving more than one defendant. The Department's interpretation of cost allocation has never before been scrutinized by the courts.

Litigation often involves multiple claims against multiple parties. It does violence to the plainly stated purpose of Title 51 for the Department to limit its own cost participation in the event of recovery to those litigation costs directly related to the settling defendant, leaving the injured worker to bear all other litigation costs alone.

II. ISSUES

A. The legislature and courts have stated any doubt regarding interpretation of Title 51 is to be resolved in favor of the worker. Contrary to this directive, the Department has interpreted the language of RCW 51.24.060 as strictly limiting the Department's cost participation where there is a recovery in actions against multiple third parties to those costs directly related to the settling third party where the statute contains no such limitation. Should the Department be permitted to create a limitation

in RCW 51.24.060 not present in the statute which operates as a financial detriment to the injured worker?

B. The courts take judicial notice of the record in a case engrafted, ancillary or supplementary to it. The Department's lien is engrafted, ancillary and supplementary to the third party action filed by Nelson. Should this court take judicial notice of the fact that there were third party defendants in addition to the third party defendant who settled?

C. The Department informed Nelson he could only submit costs related to the Wade settlement. Nelson accordingly only submitted his costs related to the Wade settlement and immediately appealed the limitation. Should Nelson be prevented from recovering his additional costs because he complied with Department instruction and then appealed?

D. The Department limits its participation in litigation costs. Litigation costs not shared by the Department are borne alone by the injured worker. Does an injured worker bearing litigation costs by himself increase that injured worker's recovery as contended by the Department?

III. ARGUMENT

A. The Department is not permitted to interpret RCW 51.24.060 in a way that adds language to the statute detrimental to the injured worker.

Chapter 51.24 should not be interpreted in a different way than the rest of Title 51. The legislature in Title 51 established how it wanted Title 51 construed:

This title shall be liberally construed for the purpose of reducing to a minimum the . . . economic losses arising from injuries and/or death occurring in the course of employment.

RCW 51.12.010. The Washington State Supreme Court has clearly stated the meaning of this provision:

In other words, where reasonable minds can differ over what Title 51 provisions mean. . . the benefit of the doubt belongs to the injured worker.

Cockle v. Department of Labor and Industries, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

The Department takes the position that only costs related to the settling third party can be applied to reduce its lien. RCW 51.24.060 does limit costs in this way. This is an interpretation of the language of the statute that benefits the Department and that is detrimental to the injured worker. It should not be allowed.

B. There is a consistent record of third party claims against other nonsettling defendants in this case and, even if there were not, judicial notice should apply to recognize the existence of those other claims.

The Department's lien in this case is related to Nelson's third party claims against Amanda Wade and Pierce County, among others. RCW 51.24.060 creates a lien right ancillary to that lawsuit. It is not independent of that lawsuit. The Washington State Supreme Court has stated: "A court of this state will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary or supplementary to it." Swak v. Department of Labor and Industries, 40 Wn.2d 51, 53, 240 P.2d 560 (1952) [emphasis added].

Nelson attaches as an Appendix a copy of the original complaint filed in the case in which the Department claims its lien. The Appendix also contains the order dismissing claims against Pierce County which took place prior to settlement. Amanda Wade and Pierce County were both named defendants. Appendix A.

ER 201(f) provides judicial notice may be taken at any state of the proceeding. The Washington State Supreme Court makes it clear that judicial notice may be taken on appeal, stating:

Judicial notice may be taken on appeal if the following standard is met: We may take judicial notice in the case presently before us or in proceedings engrafted, ancillary, or supplementary to it. However, we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.

Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) [quotation marks omitted, emphasis added].

Clearly the third party action is not independent and separate from the Department's lien calculation. The lien is in fact ancillary and supplementary to the third party action. It is certainly not independent. The lien could not exist without the third party action.

Another subparagraph of ER 201 also provides grounds for judicial notice of the complaint and dismissal order. ER 201(b) permits judicial notice of facts "not subject to reasonable dispute" which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The Department has not and cannot question the fact that Pierce County was a defendant in the subject action. A filed complaint and order in a Pierce County cause cannot be disputed and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The Department has known all along that Pierce County was an original party dismissed out. The fact of additional third parties in the litigation has been raised at every level by Nelson. (e.g., CP 142, lines 12-15; CP 154; CP 176; CP 25; CP 107; CP 145-6; CP 147, lines 11-18.)

C. Following the Department's instructions on allowable costs should not deprive Nelson of his right to lien recalculation where he complied and then immediately followed appropriate appeal procedures.

The Department's stated only those costs directly related to the claim against Amanda Wade were to be considered as part of the lien calculation. Nelson complied and submitted costs related to the Wade settlement and then asked for reconsideration of the lien order on the basis of all costs not being included. CP 100; RP 3, ln. 4-15. Reconsideration was denied. CP 53.

Nelson then appealed. A hearing before an administrative judge took place. Again the fact that all costs had not been included in the lien calculation was raised. CP 107-8. Petition for Review to the Board of Industrial Insurance Appeals was made by Nelson. CP 14. Again Nelson raised the issue that not all costs were included in the lien calculation. CP 15.

In the superior court the following exchange took place:

Mr. Lopez: Thank you, Your Honor. I won't spend a lot of time, because, you know, we really don't have any facts that we dispute in this case. We are simply saying that in our opinion the Department has misinterpreted the statute as related to liens, and that, in fact, all costs related to a litigation should be used to adjust the lien, not simply the costs limited to the settling defendant.

We don't believe the statute provides anything that limits costs to just the settling defendant, and we think that limiting costs in that way actually goes against the purpose of the statute and ends up with the Department getting a larger percentage of the settlement than they ought to.

That's basically what our argument is.

The Court: Is there anything in the record that would indicate how much the other costs were? Was that ever submitted to the Department, or were you submitted just the costs that were involved in this one lawsuit?

Mr. Lopez: No. What we did is we submitted the costs related to this because those were the costs that they wanted. They said their costs weren't to be considered. And we said, well, you ought to consider them, and they weren't.

The Court: But were never submitted because they said we don't want them.

Mr. Lopez: Correct. Right.

RP 2-3; ln. 14-15.¹

At every stage Nelson has requested this matter be sent back to the Department for recalculation of the lien because not all costs of litigation

¹ "RP" in this brief references the Verbatim Report of Proceedings from the Superior Court hearing of April 24, 2015.

had been included. Nelson should not be penalized for following Department instruction on allowable costs and then appropriately appealing the failure to include other costs.

D. Nelson is economically impacted by the amount of Department cost sharing.

The Department seems to argue that, although it does not want to participate in additional cost sharing, such additional cost sharing would not increase Nelson's net recovery anyway. The obvious question is, if that is the case, why does the Department oppose inclusion of all litigation costs in Nelson's lien calculation.

The Department takes the position that Nelson paying all costs himself without the Defendant's participation in those costs would actually diminish his recovery. The position is absurd on its face. Nelson has to bear the costs of litigation alone if the Department does not participate. The costs of litigation do not go away if the Department does not pay its share.

In fact the Department's position on lien calculation is significant and has impact on lien calculations with respect to all workers involved in multi-defendant litigation. The Department submitted a declaration that makes this clear. Doris A. Holland performed Nelson's lien calculation for the Department. She stated: "My current duties include adjudicating

third party recoveries as part of the Department's Third Party Program, such as issuing third party distribution orders pursuant to Ch:51.24 RCW." CP 77. She, further, stated: "I determined the Department's distribution share of Mr. Nelson's recovery against Amanda Wade in the same manner as I would for any recovery made by an injured worker against a third party tortfeasor -- pursuant to RCW 51.24.060." CP 78.

It is clear that the Department's position is not case specific to Mr. Nelson. It is an interpretation of the lien statute which it applies to everyone.

The issues in Nelson's case have broad application and have been appropriately raised by Nelson. The Department itself has raised the very issue it now seeks to avoid having the court decide. In the initial hearing before the administrative law judge, Nelson raised the following point:

Mr. Lopez: . . . let's say you had multiple causes of action which we did in this case against multiple defendants and one of them gets dismissed out before the settlement with Ms. Wade. Is it the Department's position that you don't get to use those costs as a reduction, you know?

Because basically what they're saying is that if you happen to get a defendant dismissed out before you settle then you get to count those costs out but if a defendant is dismissed out after you settle, you're unsuccessful against a defendant after you settle, you don't get to count those costs.

CP 145-6, ln. 25-10.

The Department's response was:

Mr. Henry: Just very briefly, Your Honor.

So with regard to the point on which you asked the Department to respond in terms of a situation in which a defendant is dismissed out of the litigation presumably because the – I am guessing they were dismissed for – based on the merits of the claim against that defendant.

Mr. Lopez: Yes.

Mr. Henry: If the defendant dismissed out then any costs that were associated with the pursuit of litigation against the defendant, the Department's position is that those costs would also not be associated with the ultimate recovery in the case.

And so the Department's position is that they would – those costs would be improperly utilized in calculating the distribution order.

So we believe the Department's position is consistent in that regard.

CP 147-8, ln. 11-2.

The issue is not newly raised and is central. The Department's position is that only those costs directly related to the Wade settlement may be considered in the lien calculation. The Department states unrelated litigation costs before and after the Wade settlement cannot be included. Nelson contends the statute does not limit the costs to the settling defendant and that this is a restriction on cost participation added

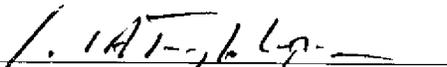
to the statute by the Department which benefits the Department to the injured worker's detriment.

III. CONCLUSION

The Superior Court decision should be reversed. This case should be remanded to the Department for recalculation of the lien to include all reasonable costs of litigation. Nelson should be awarded his costs and attorney fees.

Dated this 29th day of February, 2016.

LOPEZ & FANTEL, INC., P.S.



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

APPENDIX A

November 02 2010 1:30 PM

KEVIN STOCK
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NO: 10-2-07104-6

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7 SUPERIOR COURT OF WASHINGTON
IN AND FOR PIERCE COUNTY

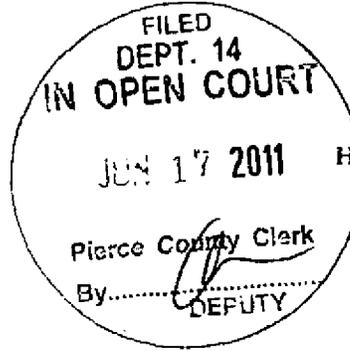
8 TIMOTHY NELSON, an individual,)
9 Plaintiff,) NO.10-2-07104-6
10 v.) FIRST AMENDED COMPLAINT FOR
11 AMANDA WADE, an individual; PIERCE)
COUNTY,) PERSONAL INJURY
12 Defendants.)
13
14

15 Plaintiff states:

- 16 1. The above-entitled court properly has jurisdiction over this cause.
17
18 2. Plaintiff Timothy Nelson resides in Pierce County, Washington.
19
20 3. Defendant Amanda Wade is a resident of Pierce County, Washington. She is
subject to the jurisdiction of the above-entitled court.
21
22 4. A proper claim has been timely filed against Defendant Pierce County. Pierce
County is subject to the jurisdiction of the above-entitled court.
23
24 5. On or about May 23, 2008, a vehicle operated by Defendant Amanda Wade struck
25 the vehicle Plaintiff was operating. The subject collision occurred at Key Peninsula Highway
26 and 134th Avenue KPN, Pierce County.



10-2-07104-6 36529118 ORGSJ 06-20-11



Hon. Susan K. Serko
Dept. 14

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

TIMOTHY NELSON, an individual,

NO. 10-2-07104-6

Plaintiff,

vs.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

AMANDA WADE, an individual, PIERCE
COUNTY,

Defendants.

The motion of defendant Pierce County for dismissal of plaintiff's action against it pursuant to Civil Rule 56 came on regularly before the Court on Friday, June 17, 2011.

In ruling upon defendant's Pierce County motion for summary judgment, the Court has considered the following:

1. Defendant Pierce County's Motion for Summary Judgment with attachments thereto;
2. Declaration of Ronald L. Williams in Support of Defendant Pierce County's Motion for Summary Judgment with attachments thereto;
3. Declaration of Rory Grindley;

1 4. Plaintiff's Opposition to Pierce County's Summary Judgment Motion with
2 attachments thereto;

3 5. Defendant Pierce County's Reply on Motion for Summary Judgment.
4

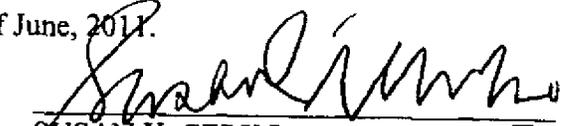
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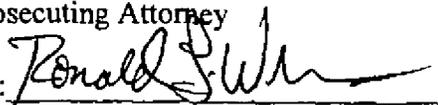
7 The Court has considered all materials submitted in support of and in opposition to the
8 motion for summary judgment, and finds that there are no genuine issues of material fact and
9 that defendant Pierce County is entitled to summary judgment dismissal as a matter of law
10 regarding plaintiff's claims.

11 Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that defendant
12 Pierce County's motion for summary judgment is hereby GRANTED and that all claims of
13 plaintiff are hereby DISMISSED with prejudice.

14 ~~IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff shall pay~~
15 ~~costs and sanctions of \$ _____ to defendant Pierce County.~~ RW

16 DONE IN OPEN COURT this 17th day of June, 2011.

17 
18 SUSAN K. SERKO
19 JUDGE

20 Presented by:
21 MARK LINDQUIST
22 Prosecuting Attorney
23 By: 
24 RONALD L. WILLIAMS / WSB# 13927
25 Deputy Prosecuting Attorney
Attorneys for Defendant Pierce County

Approved as to form:
LOPEZ & FANTEL
By: 
CARL A. TAYLOR LOPEZ / WSB# 6215
Attorneys for Plaintiff PLAINTIFF NAME

FILED
DEPT. 14
IN OPEN COURT
JUN 17 2011
Pierce County Clerk
By: 
DEPUTY

LOPEZ FANTEL

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COURT OF APPEALS, DIVISION II
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TIMOTHY NELSON

Plaintiff/Appellant

vs.

DEPARTMENT OF LABOR & INDUSTRIES, STATE OF

WASHINGTON

Defendant/Respondent

CERTIFICATE OF SERVICE OF

REPLY BRIEF OF APPELLANT

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I, Cynthia Ringo Palmer, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Snohomish County, Washington, and am over the age of 18 years.

2. On the 29th day of February, 2016, I caused to be served on counsel as follows:

- Appellant's Reply Brief; and
- Certificate of Service.

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Tacoma, WA 98402-4454

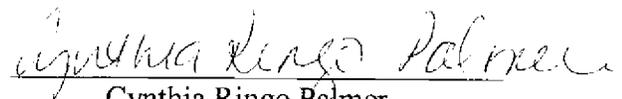
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William F. Henry
Scott T. Middleton
Attorney General of Washington
Labor & Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

via email
 via Fax: 206-587-4290
 via ABC legal messenger, special run
 via U.S. regular mail

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated at Seattle, Washington, this 29th day of February, 2016.


Cynthia Ringo Palmer

LOPEZ FANTEL

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Court of Appeals Case Number: 47672-0

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