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**SUPREME COURT OF THE STATE OF WASHINGTON**

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JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

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**DEPARTMENT'S REPLY TO  
ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

On July 31, 2008, the Department of Labor and Industries filed its Petition for Discretionary Review. In his answer, Tobin does not explicitly request review of the Court of Appeals decision. He argues, however, that RCW 51.24.060(1) unconstitutionally takes his property because it permits the distribution of the pain and suffering portion of his third party recovery, and that such distribution of third party recoveries violates substantive due process principles. *See* Respondent's Answer to Petition for Review (Answer) at 11-16. Pursuant to RAP 13.4(d), the Department files this Reply to address this new issue.

The Court of Appeals explicitly declined to address the new issue that Tobin raises in his answer. *See* slip op. at 11. If this Court grants discretionary review, it should do so solely on the issues raised in the Department's Petition and decline to consider Tobin's issue because, as described below, his argument does not raise a significant question of constitutional law or otherwise merit review under RAP 13.4(b).

## II. ARGUMENT

- A. Tobin's Takings Argument Does Not Satisfy RAP 13.4(b)(1) and (2)'s Criteria For The Granting Of Discretionary Review Because The Court Of Appeals Decision Is Not Conflict With Any Other Decision On This Issue**

Discretionary review of a Court of Appeals decision is warranted only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Tobin's argument that distributing the pain and suffering portion of a third party recovery under RCW 51.24.060(1) unconstitutionally takes his property satisfies none of these criteria.

The Court of Appeals decision is not in conflict with a decision of this Court or another Court of Appeals decision on the takings issue. *See* RAP 13.4(b)(1), (2). This is because the Court of Appeals did not address it. Instead, after briefly describing Tobin's takings argument, slip op. at 10, the Court stated:

Tobin frames his argument as whether L&I's right to reimbursement from his pain and suffering damages constitutes an unconstitutional taking in violation of his right to due process. But the real issue is whether the statute gives injured workers adequate notice that third party settlement funds earmarked as compensation for their personal pain and suffering are subject to distribution . . . .

Slip op. at 11. The Court of Appeals thus explicitly declined to address Tobin's takings claim, ruling instead that the Third Party Recovery Statute failed to provide "adequate notice" to injured workers that damages for pain and suffering were subject to distribution. *See* slip op. at 11-12.<sup>1</sup> With no holding on Tobin's takings argument, or even any discussion of that issue, there is no conflict with any other decision.

**B. Because Applying The Third Party Recovery Statute's Distribution Formula To Damages For Pain And Suffering Does Not Create An Unconstitutional Taking, Tobin's Constitutional Argument Also Does Not Satisfy RAP 13.4(b)(3) or (4).**

Discretionary review of Tobin's claim that the Third Party Recovery Statute unconstitutionally takes property not warranted under RAP 13.4(b)(3) or (4). The former rule allows review where "a significant

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<sup>1</sup> In its Petition for Review, the Department explained why the Court of Appeals' procedural due process constitutional analysis is incorrect and warrants discretionary review. Petition for Review at 17-19. Tobin makes no effort to defend this portion of the decision below, instead simply dismissing it as dicta. *See* Answer at 16. This assertion ignores the opinion itself, which describes the "real issue" as "whether the statute gives injured workers adequate notice," and states, "[w]e hold that it does not." Slip op. at 11.

Furthermore, while the Court of Appeals' constitutional discussion may not have been necessary to its holding, a published appellate decision stating that the Third Party Recovery Statute's distribution formula is unconstitutional merits discretionary review. *Cf. Cobra Roofing Svcs., Inc. v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 98-101, 135 P.3d 913 (2006) (reviewing and rejecting Court of Appeals' conclusion that employer would have been entitled to attorney fees under Equal Access to Justice Act had it prevailed on any issue); *see also* Petition for Review, Appendix E (class action lawsuit against Department seeking relief under 42 U.S.C. § 1983 based on allegation that *Tobin* "held" Third Party Recovery Statute to "violate due process under the United States Constitution").

question of law under the Constitution of the State of Washington or of the United States is involved.” The latter rule provides for discretionary review “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” While the Petition raises issues of substantial public interest, *see* Petition for Review 9-20, Tobin’s takings argument is not such an issue.

Washington’s Industrial Insurance Act, RCW Title 51, provides the exclusive remedy for workers injured in the course of their employment. In exchange for guaranteed benefits, workers and their families gave up their right to claim damages against their employers:

[A]ll phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy . . . , except as otherwise provided in this title; and to that end all civil actions . . . for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

RCW 51.04.010.<sup>2</sup>

The Third Party Recovery Statute is a narrow, legislatively-created exception to the Act’s exclusive remedy provision. It allows injured

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<sup>2</sup> Tobin does not argue, nor could he, that the Legislature’s abolition of personal injury claims for workplace injuries is unconstitutional. *E.g.*, *Raymond v. Chicago, M. & St. P.Ry. Co.*, 233 F. 239 (9<sup>th</sup> Cir. 1916), *aff’d on other grounds*, 243 U.S. 43, 37 S. Ct. 268 (1917); *State v. Clausen*, 65 Wash. 156, 117 P. 1101 (1911); *Stertz v. Indus. Ins. Comm’n*, 91 Wash. 588, 158 P. 256 (1916); *State v. Carroll*, 94 Wash. 531, 162 P. 593 (1917).

workers to seek damages from responsible third parties. *See* RCW 51.24.030(1). The Legislature originally created this exception for a specific purpose – to replenish the workers’ compensation funds. Since 1911 the Legislature has periodically amended and expanded the Act’s third party provisions, but tort claims for injured workers have remained limited in scope and always subject to the Legislature’s police power. *See generally* Petition for Review 3-5.

Tobin, of course, does not argue that the entire Third Party Recovery Statute is unconstitutional; indeed, it is this statute that allowed him to bring his tort claim in the first place. Rather, he singles out the portion of the statute that requires him to reimburse the funds from damages for pain and suffering and asserts that it unconstitutionally takes his property. *See* Answer at 12-16.

Unfortunately, the underpinnings of Tobin’s argument are difficult to ascertain. He cites several constitutional provisions in passing, including the state and federal due process clauses as well as the federal takings clause. His brief analysis focuses on a single case interpreting the federal constitution and Washington’s just compensation clause and cites only to theories about when a land use regulation violates “substantive due process.” *See* Answer at 13 (citing 5<sup>th</sup> and 14<sup>th</sup> Amendments to U.S. Const. and Wash. Const. art. 1, § 3), 13-15 (discussing *Presbytery of*

*Seattle v. King Cy.*, 114 Wn.2d 320, 330, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990)).

Tobin's argument does not merit review first because it does not meet the heavy burden that rests on a party attacking the constitutionality of a statute. *See, e.g., Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 696-697, 112 P.3d 552 (2005) (“[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)). Tobin’s constitutional arguments fall far short of the “heavy burden” he bears.

Second, Tobin ignores the fact that *Gersema* rejected the argument that he now makes. *See Gersema*, 127 Wn. App. at 698 (“[p]lacing 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”) (footnote omitted); *see generally id.* at 696-99. While *Gersema* involved a closed claim and a self-insured employer, its logic applies here with equal force: the Department is “taking” nothing from Tobin. Rather, it is applying the Legislature’s formula that governs the distribution of third party recoveries – a formula that is an integral part

of the statutory scheme that provided Tobin with his full measure of workers' compensation benefits and a qualified right of recovery against the responsible third party. *See generally* Petition at 11-12; *cf Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 547, 789 P.2d 75 (1990) (“[t]he entire scheme of RCW 51.24 evidences the vital interest of the Department in a recovery from a responsible third party”).

Third, Tobin's argument rests on his assertion that he has an absolute property interest in the pain and suffering portion of his third party recovery because “an individual's chose in action for damages against another is property.” Answer at 12. From this premise, Tobin reasons that “the protections of our Washington State Constitution Article I, Section 3” apply to any recovery from a third party that an injured worker makes under RCW 51.24. *See id.* at 13.<sup>3</sup>

*Fria v. Dep't of Labor & Indus.*, 125 Wn. App. 531, 105 P.3d 33 (2004), provides a sound basis for rejecting Tobin's view. There, the Court of Appeals considered and rejected a worker's argument that the Third Party Recovery Statute was unconstitutional, specifically ruling that

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<sup>3</sup> Further confusing Tobin's argument is the fact that Article I, Section 3 of the Washington Constitution concerns substantive due process. The state takings clause appears at Article I, Section 16 of Washington's Constitution, a provision not cited in Tobin's answer. *Compare* Wash. Const. art. I, § 3 (“[n]o person shall be deprived of life, liberty, or property, without due process of law”) *with id.* at art. I, § 16 (“[n]o private property shall be taken or damages for public or private use without just compensation ...”).

a worker's third party recovery was not a property right. The *Fria* Court recognized that third party lawsuits brought by injured workers are purely statutory in nature, and that this statutory privilege must be viewed within the context of the Industrial Insurance Act as a whole:

Washington's Industrial Insurance Act is the result of the 'great compromise' that allows government to restrict an employee's rights to tort recovery for injuries sustained while in the scope of employment in exchange for a system that guarantees compensation for work place injuries regardless of fault. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995).

The act withdraws all cases involving industrial injuries from private controversy and from the jurisdiction of the courts, except as otherwise provided in RCW Title 51 . . . .

One statutory exception arises when a third party, not in the worker's same employ, caused the injury. RCW 51.24.030. But this third party recovery is subject to the Department's right to reimbursement for payments the Department has already made on the worker's behalf.

...

The constitutionality of the act, generally speaking, has been upheld since its inception. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917); *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 P. 256 (1916); and *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 P. 1101 (1911). *Fria* has not shown how the constitutional principles he asserts relate to the workers' compensation statute. *He has provided no authority to support his claim of a fundamental right to a tort remedy . . . .*

*Fria*, 125 Wn. App. at 534-35 (emphasis added; some citations omitted).

*Fria* reaffirms that the Industrial Insurance Act is a valid limitation on an injured worker's right to recovery in tort. It also stands for the proposition that, to the extent that the Legislature has permitted injured workers to file personal injury claims, the statutory limitations on tort recoveries – including the Department's right of reimbursement from such recoveries – do not infringe on any kind of "fundamental right." *Cf. Orion Corp. v. State*, 109 Wn.2d 621, 641-642, 747 P.2d 1062 (1987) (because "a 'property right must exist before it can be taken'" and purchaser of property subject to public trust doctrine "never had the right to dredge and fill its tidelands," statutory and regulatory prohibitions on such activities did not create unconstitutional taking (citation omitted)).

Finally, this Court should recognize while Tobin loosely refers to "takings," the only analysis he offers is based on *Presbytery*. See Answer at 13-16. The three-prong *Presbytery* test that Tobin quotes concerns an alleged taking of private property without substantive due process. See Answer at 13; compare *Presbytery*, 114 Wn.2d at 330-333 (substantive due process) with *id.* 333-337 (takings of private property for public use). To the extent that *Presbytery*'s substantive due process test applies to the Legislature's determinations regarding the existence of and limitations on

tort claims for injured workers, the Third Party Recovery Statute's distribution formula readily satisfies it.<sup>4</sup>

Under *Presbytery*, a regulation of private property is constitutional if (a) it "is aimed at achieving a legitimate public purpose," (b) "uses means that are reasonably necessary to achieve that purpose," and (c) is not "unduly oppressive." *Presbytery*, 114 Wn.2d 330.<sup>5</sup> Tobin concedes the first prong, acknowledging that the Third Party Recovery Statute's distribution formula addresses a legitimate public purpose. Answer at 14. Tobin, however, mentions only "[p]revention of double recovery in tort

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<sup>4</sup> To be clear, the inquiries for substantive due process challenges to real property regulation are focused on the topic of real property and do not directly translate to the analysis of workers compensation statutes. Instead, substantive due process is met when the statutory rights and limits granted to workers rationally relate to a legitimate purpose. This is a standard that is easily met in the workers' compensation context. See generally *Smith v. Gould*, 918 F.2d 1361 (8<sup>th</sup> Cir. 1990).

In *Smith*, the Eighth Circuit faced an argument by a worker claiming that substantive due process was violated by the exclusive remedies. The court reviewed a century of failed substantive due process challenges to various details of workers compensation statutes and concluded:

The constitutionality of workers' compensation acts was settled early this century in a series of Supreme Court decisions on the subject. [Citing numerous cases, including *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260 (1917)]. . . . The [Supreme] Court never found a workers' compensation statute that transgressed constitutional limits, nor did it identify a hypothetical statute that would do so. Today courts continue to uphold workers' compensation statutes against (now infrequent) constitutional attack.

*Smith v. Gould*, 918 F.2d at 1364. *Fria* and *Gersema* are recent Washington examples of decisions upholding the constitutionality of aspects of Washington's Industrial Insurance Act.

<sup>5</sup> The third prong of *Presbytery*'s test actually directs a court to determine "whether [the challenged regulation] is unduly oppressive *on the land owner*," again highlighting the poor fit between *Presbytery* and the Third Party Recovery Statute. See *Presbytery*, 114 Wn.2d at 330 (emphasis added). Tobin makes no argument that RCW 51.24.060 fails to satisfy the third prong of the *Presbytery* test and therefore we do not address it further.

claims” as the purpose of the Third Party Recovery Statute’s reimbursement formula. As noted above and in the Department’s Petition for Review, the Third Party Recovery Statute serves at least four purposes: reimbursing the funds, ensuring that third parties bear the full cost of their negligence, allowing injured workers to recover full damages, and preventing double recoveries. *See* Petition for Review at 5.

Based on his incomplete recitation of the purposes behind the Third Party Recovery Statute, Tobin asserts that distributing the portion of a recovery allocated to pain and suffering damages “is not reasonably necessary to achieve the purposes of RCW 51.24.060.” Answer at 15. In fact, *not* distributing the pain and suffering portion of a third party recovery thwarts at least three of the four purposes of the Third Party Recovery Statute: it undermines the funds’ right of reimbursement, it shifts the cost of third party negligence onto the employers and workers whose premiums fund Washington’s workers’ compensation program, it allows injured workers to recover substantially more than their “full damages.” *See generally* Petition for Review at 11-17.

There is no reason for this Court to review Tobin’s constitutional argument. Ultimately, *Presbytery* is a case involving regulation of real property and does not shed light on how the Legislature has provided for and distributed third party recoveries in RCW 51.24.060(1) and

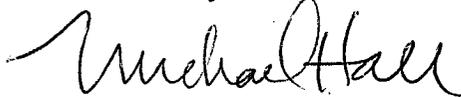
RCW 51.24.030(5).<sup>6</sup> The Third Party Recovery Statute's distribution formula does not take private property nor does it violate substantive due process. The Legislature has used reasonably necessary means to allow for third party claims and achieve the purposes of RCW 51.24.

### III. CONCLUSION

For the foregoing reasons and the reasons set out in the Department's Petition for Review, the Court should grant the Department's Petition and decline to consider the constitutional argument raised in Tobin's answer.

DATED at Olympia, Washington this 10<sup>th</sup> day of September, 2008.

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<sup>6</sup> Tobin cites *Rafn Co. v. Department of Labor & Industries*, 104 Wash. App. 947, 17 P.3d 711, *review denied*, 144 Wn.2d 1006 (2001), for the proposition that "[t]he *Presbytery* substantive due process test has been applied in the workers' compensation context." Answer at 14. *Rafn* is not a third party case and has nothing to do with the Third Party Recovery Statute; rather, it simply holds that requiring temporary help companies to pay Industrial Insurance premiums for their workers was not unconstitutional.

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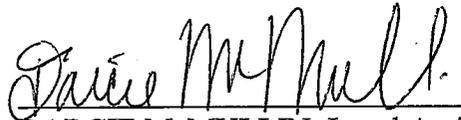
DECLARATION OF  
MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department's Reply to Answer to Petition for Review by facsimile to (253) 472-3500 and by depositing a copy in the United States Mail, postage prepaid addressed as follows:

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DATED this 10<sup>th</sup> day of September, 2008.

  
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