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NO. 36031-4-II

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

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

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**DEPARTMENT'S REPLY BRIEF**

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## I. INTRODUCTION

The Department of Labor and Industries distributed the proceeds of Jim Tobin's tort recovery pursuant to RCW 51.24.060(1), which mandates that "any recovery" made in a third party suit "shall be distributed" pursuant to a statutory formula. RCW 51.24.030(5) defines "recovery" as "all damages except loss of consortium." Relying on dicta contained in *Flanigan v. Department of Labor & Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994), Tobin challenges the Department's distribution order. He maintains that the portion of his third party recovery representing pain and suffering damages was exempt from distribution notwithstanding RCW 51.24.030(5)'s definition of "recovery."

In its Brief of Appellant (AB), the Department demonstrated that the plain language of RCW 51.24.060(1) and RCW 51.24.030(5) requires the Department to include Tobin's entire "recovery," including his damages for pain and suffering, in the distribution order. The policies underlying the third party provisions of Title 51 RCW support this result, and the legislative history of RCW 51.24.030(5) compels it.

Tobin makes little effort to refute the Department's arguments in his Respondent's Brief (RB). Instead, he returns to *Flanigan's* dicta and additional dicta from this Court's decision in *Gersema v. Allstate Insurance Company*, 127 Wn. App. 687, 112 P.3d 552 (2005). See RB

5-9. He also raises a takings argument, RB 14-18, that two Divisions of the Court of Appeals have previously considered and rejected.

Tobin seeks to expand *Flanigan*'s holding far beyond damages for loss of consortium, but at the same time asks the Court to limit the Legislature's response to *Flanigan* to loss of consortium alone. He cannot have it both ways. When it enacted RCW 51.24.030(5) the Legislature directed the Department to include the pain and suffering component of a third party recovery in its distribution orders. The trial court erred when it failed to follow the Legislature's mandate.

## II. ARGUMENT

### A. *Flanigan*'s Dicta Regarding Pain and Suffering Damages Was Never the Law, and the Legislature Immediately Rejected It.

#### 1. RCW 51.24.030(5) Establishes that Damages for Pain and Suffering Are Subject to Distribution Under RCW 51.24.060, Abrogating *Flanigan*'s Dicta that Suggested Otherwise.

Tobin insists that *Flanigan* supports the trial court's decision regarding the distribution of the pain and suffering portion of his recovery. RB 5-11. *Flanigan*, however, held only that damages for loss of consortium were not subject to distribution under RCW 51.24.060. Its discussion of pain and suffering damages was limited to dicta. See AB 16-18.

While *Flanigan* may have left questions regarding the distribution of pain and suffering damages, the Legislature's response did not.¶¶ Immediately after *Flanigan*, the Legislature enacted RCW 51.24.030(5), which defined "recovery" for purposes of ch. 51.24 RCW – including RCW 51.24.060, governing the distribution of "any recovery" – as "all damages except loss of consortium." See generally AB 18-19. Tobin made no recovery for loss of consortium. The plain language of this statute thus directs the Department to distribute Tobin's recovery as it did.

Tobin presents no convincing authority to suggest that the Legislature failed to limit *Flanigan* to its specific holding when it enacted RCW 51.24.030(5). Indeed, in response to the extensive legislative history appended to the Department's Brief of Appellant, legislative history that establishes that the Legislature intended precisely this result, see AB 22-31, Tobin presents no authority at all.<sup>1</sup> Instead, he simply asks the Court to ignore that legislative history through a motion to strike.<sup>2</sup>

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<sup>1</sup> Tobin does suggest that the Court should not rely on "some discussion of general damages by witnesses before the committees." RB 10. While numerous witnesses representing all stakeholders concerned with the distribution of third party recoveries testified explicitly that RCW 51.24.030(5) would limit *Flanigan* to damages for loss of consortium, see AB 24-30, a host of other sources confirm that the Legislature intended this result when it passed the law. See generally AB 22, 31; Appendices B-D.

<sup>2</sup> The Court denied Tobin's motion to strike, and on January 11, 2008, it denied Tobin's motion to modify that ruling. In his pleadings Tobin has asked to file a "supplemental brief" that responds to the legislative history of RCW 51.24.030(5) in the event that his motion to strike remains denied. See RB 19; Motion to Strike Documents

The heart of Tobin's *Flanigan*-based argument is that his pain and suffering damages are exempt from RCW 51.24.060's mandatory distribution formula "because the Department has not and will not pay such damages under the claim." RB 5. This distinction, however, proves too much: as explained in the Department's Brief of Appellant, the Industrial Insurance Act provides workers' compensation benefits that tort claims do not – including awards for permanent partial disability and post-retirement wage replacement benefits. *See* AB 17-18, n.11. If Tobin were correct, then the Department could not seek reimbursement for such benefits – a result entirely inconsistent with both statute and case law. *E.g.*, RCW 51.24.060(1)(c) (Department entitled to reimbursement for "benefits paid"); *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 690, 112 P.3d 552 (2005) (affirming reimbursement for permanent partial disability and medical benefits; no wage replacement benefits paid in claim).

Tobin attempts to resolve this contradiction inherent in his argument by citing *Davis v. Bendix*, 82 Wn. App. 267, 917 P.2d 586 (1996). According to Tobin, *Davis* establishes that permanent partial disability awards are a form of wage replacement. RB 17 ("permanent

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from the Appendix to Appellant's Brief 1-3; Motion to Modify Ruling 2, 6. The Department will respond to such a supplemental brief when and if it is filed.

partial disability benefits are granted solely because such an award anticipates a certain lost earning capacity associated with a percentage loss in any given bodily function”). This portion of *Davis*, however, has been explicitly disapproved by our Supreme Court. *McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 263, 26 P.3d 903 (2001) (“[t]o the extent that the statements in *Davis* could be read as meaning that permanent partial disability payments in addition to permanent total disability payments would constitute double recovery because both compensate for lost earning capacity, it is disapproved”); *see also Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 734-36, 57 P.3d 611 (2002).

Permanent partial disability awards do not reflect lost wages, but are subject to reimbursement from the proceeds of third party lawsuits. It is impossible to reconcile Tobin’s position with this fact.

Tobin’s attempt to “match up” his tort damages with his workers’ compensation benefits is inconsistent with the policies that underlie the statute that allowed Tobin to bring his tort claim in the first place. *See* AB 16-19, nn.10-12. More importantly, it is directly contrary to the plain language of RCW 51.24.060 and RCW 51.24.030(5), and flies in the face of the latter statute’s extensive legislative history.<sup>3</sup> Indeed, Tobin himself

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<sup>3</sup> The Department explained in its Brief of Appellant that Tobin’s construction of RCW 51.24.030(5) would also render RCW 51.24.030(5) meaningless. *See* AB 34-36. While Tobin insists that the Legislature did not mean what it said when it passed

acknowledges that RCW 51.24.030(5) was “a legislative fix in response to the *Flanigan* decision.” RB 9. The Court should not rely on *dicta* in a case where, as here, to do so would frustrate the Legislature’s explicit intention to abrogate that *dicta*.<sup>4</sup> *Cf. In re Mulholland*, 161 Wn.2d 322, 331, 166 P.3d 677 (2007) (while language of prior case “provided encouragement for the State’s position, the language is *dicta* and does not stand up to a plain reading of the statutes at issue here”); *State v. Kane*, 101 Wn. App. 607, 618, 5 P.3d 741 (2000) (“[a]ny remaining strength to an argument based on . . . the *dicta* in *Heath* has been dispelled by a brief statute recently adopted by our Legislature”).

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RCW 51.24.030(5) in the wake of *Flanigan*, he offers no other interpretation that would confer meaning on the Legislature’s action. See RB 11 (“[n]othing about the enactment of RCW 51.24.030(5) would change [the Court’s] interpretation” of RCW 51.24.060(1).

<sup>4</sup> *Arkansas Dep’t of Heath & Human Svcs. v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d (2006), cited at RB 14, is irrelevant. That case involved reimbursement from a third party recovery under the federal Medicaid program, which directs states providing Medicaid benefits to seek reimbursement “to pay for care and services available under the plan.” *Ahlborn*, 547 U.S. at 275, quoting 42 U.S.C. § 1396(a)(25)(A) (2000 ed.); see also *id.* at 277 (states providing Medicaid benefits must require recipients to assist state in pursuing “any third party who may be liable to pay for care and services available under the plan,” quoting 42 U.S.C. § 1396k(a)(1)(C)). This Medicaid case, based on statutes that explicitly limit reimbursement to those portions of third party recoveries representing “care and services available under the plan,” provides no assistance in interpreting Washington’s statutory formula for distributing tort recoveries made by plaintiffs who have received workers’ compensation benefits under Title 51 RCW.

**2. This Court's Dicta in *Gersema* Does Not Require the Court Now to Disregard the Plain Language and Legislative History of RCW 51.24.030(5).**

Tobin cites to dicta in *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 112 P.3d 552 (2005), to support his position regarding damages for pain and suffering. As is the case with *Flanigan*, however, Tobin's reliance on the *Gersema* dicta comes at the expense of the plain language and legislative history of RCW 51.24.030(5).<sup>5</sup>

According to Tobin, *Gersema*'s holding that damages for pain and suffering were subject to distribution under RCW 51.24.060 was based entirely on the fact that *Gersema*'s third party recovery "failed to allocate damages to delineate which portion of the recovery was for pain and suffering." Turning to *Gersema*'s dicta, Tobin maintains that because his own recovery contained a specific allocation to pain and suffering, that portion of the recovery is exempt from distribution. *See* RB 8-9.

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<sup>5</sup> Tobin also relies on presumptions that the Industrial Insurance Act should be "liberally construed" and that "all doubts as to the meaning of the Act are to be resolved in favor of the injured worker." RB 4-5. These presumptions, however, apply only in *worker benefit* cases – *i.e.*, doubts regarding a claimant's entitlement to benefits under the Act and the amount of such benefits are to be resolved in favor of the injured worker. The presumptions have no bearing on the unambiguous Third Party Statute, which concerns not workers' compensation benefits, but instead provides claimants with a very limited ability to seek recovery in *tort*. *Cf. Frost v. Dep't of Labor & Indus.*, 90 Wn. App. 627, 637, 954 P.2d 1340 (1998), *review denied*, 137 Wn.2d 1001 (1999) (third party case rejecting doctrine of liberal construction as "inapplicable where the injured worker's right to benefits is not at issue"); *see also Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 472 n.7, 843 P.2d 1056 (1993) ("only if the statute is ambiguous would we be able to employ a liberal construction to it for the benefit of the injured worker").

Tobin's interpretation of *Gersema* stems from a single sentence in that decision: "If Gersema's settlement with Titus Will had clearly allocated some of the damages to his pain and suffering, *we might agree* with his contention that this general damages . . . should receive the same treatment as loss of consortium damages in *Flanigan*." *Gersema*, 127 Wn. App. at 556 (emphasis added). Now that the issue of distribution of allocated pain and suffering damages is squarely before the Court, the Department respectfully suggests that the phrase "we might agree" does not require this Court to reach a result that conflicts with a controlling statute and its legislative history. *See generally* AB 31-34.

**B. Including Tobin's Pain and Suffering Damages in RCW 51.24.060's Distribution Formula Does Not Amount to an Unconstitutional Taking**

Finally, Tobin argues that distributing his pain and suffering damages pursuant to RCW 51.24.060's mandatory formula would violate the takings clauses of the state and federal constitutions. RB 14-18 (*citing* Const. art. I, § 3; U.S. Const. amend. V; amend. 14, § 1.<sup>6</sup> For several reasons, Tobin's takings argument fails.

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<sup>6</sup> While Tobin refers to both the state and federal constitutions, he provides no *Gunwall* analysis to suggest that Washington's Constitution provides him with greater protection than the United States Constitution. *See, e.g., Centimark Corp. v. Dep't of Labor & Indus.*, 129 Wn. App. 368, 374-75, 119 P.3d 865 (2005) (*citing State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). In any event, Tobin's argument fails under any of the constitutional provisions that he cites.

First, although not couched in such terms, Tobin's actual argument is that RCW 51.24.030(5) is unconstitutional. That statute's plain language directs the Department to include Tobin's pain and suffering damages in distributing his recovery; hence, it is that statute which Tobin attacks.

Tobin makes no effort to meet the heavy burden that rests on a party attacking the constitutionality of a statute. *See, e.g., Gersema* at 696-97 (“[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* itself rejected the constitutional argument that Tobin now makes. *See Gersema* 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 simply applying a statutory formula and not making payments pursuant to the mandate of the very same law that both entitles him to full workers’ compensation benefits and qualifiedly authorizes his tort lawsuit and recovery.

Third, Tobin’s claim that the takings clause applies to *any* portion of his recovery is predicated entirely on his assertion that “a chose of action for personal injuries arising out of a claim based on negligence of another constitutes property.” RB 15. It is this property interest, Tobin reasons, that triggers “the protections” of Article I, Section 3 of the Washington State Constitution (the takings clause). RB 15. Among other things, this means that Tobin’s takings analysis is applicable to *any* third party recovery, not simply the pain and suffering portion of such recovery.<sup>7</sup>

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’s distribution formula was unconstitutional on equal protection, due process, and privileges and immunities grounds. *Id.* at

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<sup>7</sup> Tobin characterizes his pain and suffering damages as “separate property . . . whereas wage loss and injury-related expenses are damage components which are community property.” RB 15. Presumably Tobin draws this distinction because damages for lost wages are indisputably subject to distribution under RCW 51.24.060. Of course, the takings clause applies to community property as well as to personal property; hence, if distribution of lost wages is not a taking (which it is not), then neither is the distribution of pain and suffering damages.

535. More specifically, the *Fria* Court ruled that a worker's third party recovery was not a property right. It reached this result by understanding that third party lawsuits brought by plaintiffs receiving workers' compensation benefits were purely statutory in nature, and recognizing the nature of this statutory privilege 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. . . .

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. *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; 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 limited extent that the Legislature permitted injured workers to file personal injury claims, the distribution of recoveries made in such actions – including the Department's right of reimbursement – do not infringe on any "fundamental right." The principal case on which Tobin hangs his constitutional argument, *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990), see RB 15-18, is a real property case and provides no reason to depart from the *Fria* and *Gersema* holdings that the Third Party Statute is constitutional.<sup>8</sup>

By pursuing a tort claim under the Third Party Statute and then arguing that the distribution formula contained in that very same statute is unconstitutional, Tobin again seeks to have it both ways. Tobin quite properly took advantage of the limited exception to the Industrial Insurance Act's exclusive remedy provisions – and must now adhere to

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<sup>8</sup> Tobin cites *Rafn Co. v. Department of Labor & Industries*, 104 Wn. App. 947, 17 P.3d 711 (2001), for the proposition that "[t]he *Presbytery* substantive due process test has been applied in the workers' compensation context." RB 16. *Rafn* is not a third party case and has nothing to do with the Third Party Statute; rather, it simply holds that requiring temporary help companies to pay Industrial Insurance premiums for their workers was not unconstitutional. Furthermore, in language equally applicable to Tobin's constitutional argument, the *Rafn* Court stated that "all of [the employer's] assertions address the wisdom of [the statute requiring it to pay premiums], not its constitutionality. We review a statute's constitutionality, not its wisdom. The statute passes constitutional muster." *Rafn* at 953.

the Act's unambiguous language establishing the distribution of his recovery. His request that the distribution formula be re-examined should be directed to the Legislature, as it was in 1995, and not to the courts.

**C. Tobin Is Not Entitled to Attorneys Fees**

Pursuant to RCW 51.52.130, the trial court awarded Tobin attorneys fees and costs, payable "if and when the accident or medical aid fund is affected." CP 54. Tobin seeks additional fees and costs on appeal. RB 19-20. The Department does not dispute that Tobin is entitled to such an award (the amount to be determined by the court) if he prevails. However, if this Court reverses the trial court's decision, then Tobin is entitled to no fees or costs whatsoever. *See* RCW 51.52.130 (fourth sentence) (fees payable for worker's appeal where "decision and order of the board is reversed or modified" and for Department appeal where "the worker[']s . . . right to relief is sustained"). Furthermore, even if this Court affirms the trial court's decision, Tobin is entitled to fees only "if the accident fund or medical aid fund is affected by the litigation." *Id.*

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### III. CONCLUSION

For the foregoing reasons, and for the reasons set out in the Department's Brief of Appellant, the trial court's decision should be reversed.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of January, 2008.

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