No. 93799-1

No. 47397-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Basilio Cornelio Carrera, an individual,

Appellant,

v.

Sunheaven Farms, a Washington General Partnership; Sunheaven Farms, LLC, a Washington Limited Liability Company; Brent Schulthies, as general partner of Sunheaven Farms,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Sunheaven seeks to avoid full responsibility for its role in causing Basilio Carrera's injuries by invoking a statute that does not apply to this type of case. In doing so, Sunheaven promotes an analysis that would result in certain shortfall to the injured workers fund, contrary to the Legislature's plain intent. As a result, employer and employee taxpayers would bear the cost of Sunheaven's negligence. To advance the important interests of replenishing the injured workers fund for benefits already paid, providing for offset against payment of future benefits, deterring unsafe workplace practices, and promoting worker cooperation with investigations and litigation, the Legislature has authorized the Department of Labor and Industries to seek all damages from Sunheaven. Sunheaven's arguments that there is a limitation on the Department's ability to seek damages from it hinge on a statute that does not apply. It is RCW 51.24.050, not RCW 51.24.060, that applies here and authorizes the Department to prosecute the "cause of action," including seeking all damages against Sunheaven. The Department has clear authority to prosecute this cause of action, including seeking all damages. Sunheaven seeks to limit the Department to seeking damages for only "benefits paid,"

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but the Legislature has already rejected Sunheaven's "subrogation" approach. This Court should also reject it and reverse the trial court.

II. ARGUMENT

It is fundamental that statutes of limitation apply only if the government waives its sovereign immunity and affirmatively elects to subject itself to the statute of limitation. *BP American Production Company v. Burton*, 549 U.S. 84, 95-96, 127 S. Ct. 638, 166 L. Ed. 2d 494 (2006). Here, the Legislature has not waived the statute of limitations for third party actions because it has made the policy choice to replenish the injured workers fund and to deter dangerous conduct in the workplace.

A. The Industrial Insurance Act Authorizes the Department to Seek All Damages From a Negligent Non-Employer Who Injured a Worker

The plain language of RCW 51.24.050(1), related statutory provisions, and judicial authority provide that the Department may seek all damages from Sunheaven Farms. Sunheaven relies on an analysis of RCW 51.24.060. This is a different statute. RCW 51.24.060 addresses what to do after *a worker* collects money in a settlement or judgment—this statute does not address what damages *the Department* may seek under RCW 51.24.050. RCW 51.24.060 addresses a different cause of action by a different party. It does not speak to what the Department may seek from a negligent non-employer. Examining the statute before the Court, RCW

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51.24.050, it is clear the Department may seek all damages proximately caused by Sunheaven's negligence because the Legislature did not limit the Department's ability to prosecute a cause of action against a negligent non-employer.

1. The Legislature Authorizes a "Cause of Action" for All Damages

The plain language of RCW 51.24.050 authorizes the Department to seek all damages in a third party action. The Legislature describes the Department's lawsuit as a cause of action: "An election not to proceed against the third person operates as an assignment of the *cause of action* to the department or self-insurer." RCW 51.24.050(1) (emphasis added). The statute does not limit the type of damages the Department may seek in the cause of action. Analysis of legislative intent begins with the plain language of the statute, and courts presume the Legislature understands the meaning of ordinary terms. *Associated Grocers, Inc. v. State*, 114 Wn.2d 182, 189, 787 P.2d 22 (1990).

"Cause of action" is commonly used by courts and means a claim creating a right to remedies, which would include damages. *Black's Law Dictionary* (10th ed. 2014) (defining cause of action as a right to a remedy). Cause of action encompasses damages without limitation. The statutory language authorizes the Department to seek all damages

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proximately caused by Sunheaven's negligence. Sunheaven must point to specific limiting language. It has not. None exists. Under the plain language of RCW 51.24.050(1) the Department may seek all damages. It is notable that Sunheaven did not dispute the definition of "cause of action" and that it includes seeking all damages. App. Br. 1-31. Instead, it attempts to divert attention from the plain language of the statute by erroneously claiming that the nature of the assignment was that the Department could not seek general damages. Resp't's Br. at 1, 8, 18-19. But nature of the assignment is statutory and the Department is not subject to the limitations imposed on Carrera, as discussed in Part II.B.

2. The Distribution Formula Is Irrational and Superfluous Unless the Legislature Intended the Department to Seek All Damages

In addition to the plain language of RCW 51.24.050(1), other statutory provisions support seeking all damages from negligent non-employers who injure workers. The Legislature provides the Department specific instructions for how it must distribute money it collects from a negligent non-employer under RCW 51.24.050(1). First, the cost of bringing the lawsuit and retaining counsel must be compensated. Second, the injured worker must be provided 25 percent of the remaining award after the fees and costs are deducted. Third, the Department must reimburse itself for benefit payments. Fourth, the injured worker receives

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the remaining funds. RCW 51.24.050(4). This distribution, mandated by the Legislature, reveals its intent. If the Department is not allowed to seek more than what it has paid or expects to pay, then the injured workers fund cannot be replenished and also the fourth distribution step is meaningless.

Sunheaven offers two responses to this analysis of RCW 51.24.050. First, Sunheaven concedes a shortfall failing to fully replenish the fund is inevitable under its interpretation of the statute, but dismisses that shortfall stating "that is what the Act requires." Resp't's Br. at 26. The Act "requires" a shortfall only if the Legislature intended it. The question is whether the Legislature intended this consequence.

RCW 51.24.050 exists, in part, to allow the Department to safeguard the injured workers fund. Without this statute, injured workers alone would be responsible for safeguarding the fund. Their decision not to pursue a negligent non-employer would mean the fund will not be replenished. Employer and employee taxpayers would have to shoulder the burden to pay the costs incurred through the negligence of parties like Sunheaven.

The Legislature did not intend to safeguard the fund by leaving it to the discretion of injured workers. Instead, it enacted RCW 51.24.050 to empower the Department to recoup public money if the injured worker elects not to. It is unimaginable that the Legislature would authorize the

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Department to recoup public money, but prevent it from doing so in full. The incomplete recovery all parties concede would happen cannot be what was intended by the Legislature. No party disputes the Legislature *could* empower the Department to seek all damages. Sunheaven argues the Legislature elected not to. But, legislation hindering the Department would be an irrational act. It is apparent the Legislature intended the Department to seek all damages because it allowed the Department to prosecute the entire "cause of action" without limitation. It then provided for a scheme where the Department is reimbursed and left over money goes to the worker.

The fourth distribution step is fatal to Sunheaven's analysis because "[the Legislature] does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment. *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976). Moreover, Sunheaven responds that the fourth distribution step is only superfluous if the claim for general damages is time-barred. "When a claim is not time-barred, there would be a need to distribute any remaining funds." Resp't's Br. at 27. But this admits that the State *can* pursue all damages. Sunheaven concedes that the Legislature authorized the Department to seek general damages.

Second, Sunheaven argues that because the Department may only

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retain the amount it has paid in benefits, it may not seek money beyond this amount from the negligent non-employer. Resp't's Br. at 12-16.[1] But there is a difference between what the Department may seek from the negligent non-employer, and what the Department may retain after the money is obtained. RCW 51.24.050 places no limits on the type of damages that may be *sought* in a third party action; indeed the Department may prosecute the "cause of action," which includes seeking all damages.[2] Once the Department obtains the award or settlement, then the Department must distribute that money among itself, the worker, and the attorney. RCW 51.24.050(4). It is limited in what may be *retained* by the Department to the benefits paid. (For future benefits, it orders an offset against future benefit payments. RCW 51.24.050(5).) Sunheaven's analysis focuses on the wrong thing, it examines the distribution of an

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[1] Sunheaven calls this a "lien" or a "right to reimbursement." Resp't's Br. at 13, 16. But, these terms only apply under RCW 51.24.060(1)(c) and (2). Sunheaven also uses the term "entitlement," which also does not apply here. Resp't's Br. at 13. The trial court's order cites the "entitlement" statute, RCW 51.24.090(1). CP 405. But, this does not apply to claims brought by the Department under RCW 51.24.050. Instead, it applies to claims brought by the injured worker. It defines entitlements as amounts the Department has paid or will pay on a claim. This is significant to a claim brought by an injured worker because the Department's lien—as that term is used in RCW 51.24.060(2)—against that recovery is limited to that entitlement and the Department, under RCW 51.24.090, may object to settlement by an injured worker that fails to recover an amount sufficient to satisfy that lien. But, RCW 51.24.090 does not address damages sought by the Department under RCW 51.24.050.

[2] This would include both special damages and general damages. For example, in claiming special damages, the Department may seek the reasonable value of all medical care received, even if the Department pays less than that under its contract with providers under RCW 51.36.010. *Hayes v. Wieber Enter., Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001); *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 597 (1997).

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award once it is obtained from the negligent non-employer and incorrectly confuses what to do with funds already obtained with what the Department may seek in its "cause of action" where it may collect all damages.

Under Sunheaven's analysis that the Department is limited to seeking what it has paid, the legislative formula would always result in a shortfall to the injured workers fund because funds would need to go to the attorney and the worker—a result not intended by the Legislature.

Sunheaven also calls the Department's interest a "subrogation" right. Resp't's Br. at 16. But, Sunheaven has fundamentally misconstrued RCW 51.24.050 to say there is only a subrogation right.[3] The Department may seek a judgment or settlement in excess of the benefits it has paid under the plain language of RCW 51.24.050. This is not a mere "subrogation" right, though an earlier version of the third party statute provided for only that. *See* Laws of 1911, ch. 74, § 3 (definition of "workmen"); *State v. Cowlitz County.*, 146 Wash. 305, 307, 311, 262 P. 977 (1928). That the Legislature abandoned this approach in favor of a broader claim shows that Sunheaven's theory is incorrect. If Sunheaven was correct that the Department is limited to seeking from the negligent

[3] Subrogation is an equitable principle and does not apply to limit a statutory right to recovery. *See Dillon v. Dep't of Labor & Indus.*, 28 Wn. App. 853, 855-56 626 P.2d 1004 (1981).

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non-employer the amount of benefits it has paid, this supposition renders the language authorizing the Department to prosecute the entire "cause of action" and the distribution steps in RCW 51.24.050(4) meaningless. RCW 51.24.050(1) puts no limitations on damages sought. RCW 51.24.050(4)(d)'s fourth step provides that left over amounts go to the worker, but there would never be a remaining balance for the worker under Sunheaven's theory.

The Department is fulfilling its duty as trustee of the injured workers fund to replenish the fund and reduce industrial insurance taxes on employers and employees, and contrary to Sunheaven's accusation is not trying to "make a profit." Resp't's Br. at 27. Sunheaven's statutory interpretation would result, as a mathematical certainty, in incomplete reimbursement of the injured workers fund. In this case, the shortfall is $394,209. The Legislature would not have intended that, nor would it provide a superfluous and meaningless distribution step that the Department could never reach. Sound interpretation of legislative intent is that RCW 51.24.050 authorizes the Department to pursue a cause of action and seek all damages proximately caused by Sunheaven's negligence.

3. Washington Case Law Holds that the Department May Seek All Damages in a Third Party Action under RCW 51.24.050

The Department, in its brief, cited decisions recognizing that the

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Department is the real party in interest for purposes of controlling the litigation and may seek general damages in assigned cases under RCW 51.24.050. *See Duskin v. Carlson*, 136 Wn.2d 550, 956 P.2d 611 (1998) (court approved settlement of an assigned Department action against third party that included $10,000 in general damages); *Burnett v. Department of Corrections*, 187 Wn. App. 159, 167, 349 P.3d 42 (2015) ("DLI has the right to use [injured worker's] name under RCW 51.24.050(1). DLI is a real party in interest. Sunheaven offers no response. Instead, it ignores these cases and relies on cases that do not address the question of the Department prosecuting negligent non-employers for all damages they cause.

4. *Tobin* and *Flanigan* Do Not Limit What the Department May Collect *From a Negligent Non-Employer*

Nothing in RCW 51.24.050 and the statutory scheme supports that it is the Legislature's intent to limit the Department's ability to prosecute the cause of action, including seeking all damages. As a result, Sunheaven relies on a different statute. In the guise of saying that it is interpreting the Industrial Insurance Act as a whole, it relies on RCW 51.24.060, the statute authorizing injured workers to pursue their own claims against negligent non-employers. Resp't's Br. at 13. It also points to other statutes that establish a worker's duties when the worker elects to sue the negligent

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non-employer. Resp't's Br. 10-11, 12-13. But, these statutes do not apply to limit the Department's ability to prosecute a "cause of action" under RCW 51.24.050 for all damages. In particular, RCW 51.24.060 addresses what money the Department may obtain from an injured worker who, unlike Carrera, hired a lawyer, sued a third party, and recovered damages. This limitation is not in dispute. But, Sunheaven takes another step. It argues that this statute should somehow substitute for the plain language of RCW 51.24.050 and prescribe what *the Department* may seek from a negligent non-employer. The approach is novel, and in error. The statutes are different. The Legislature addressed different situations and it constructed different laws to address those situations.

RCW 51.24.060 explains what must happen when injured workers pursue their claims against third parties. It explains what must happen when injured workers succeed and recover money from a third party. This money is earned by the injured worker through litigation and belongs to the injured worker. The injured worker obtained the judgment as the real party in interest. But, because the injured worker received benefits taken from the injured workers fund, the Department is entitled to reimbursement from the proceeds obtained by the injured worker.

RCW 51.24.050 is different. This statute explains what must happen when injured workers do not pursue their claims. In both statutes,

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there are two questions: what can the plaintiff seek from the negligent non-employer and, second, how must those monies be distributed? The second question is not at issue in this case because no money has been obtained. The statutes provide that an injured worker or the Department may pursue a cause of action and seek all damages proximately caused by a negligent non-employer. The sole question before this Court is what the Department may seek from the negligent non-employer and the answer unambiguous: a negligent non-employer gets no discount when sued by the Department.

The plain language of RCW 51.24.060, relied on by Sunheaven, limits what the Department may claim from an injured worker *after* a settlement or judgment. This limitation does not address what that settlement or judgment may be in the first place. RCW 51.24.060 defines worker entitlement to its own settlement or judgment and limits the Department's share. The third party defendant is not implicated, as the settlement or judgment is already entered and paid. In contrast, RCW 51.24.050 defines what the Department may seek from a third party defendant, a question decided pre-judgment.

The Department does not dispute the interpretation of RCW 51.24.060 articulated by the Supreme Court in *Tobin v. Departmentt of Labor & Industries*, 169 Wn.2d 396, 239 P.3d 544 (2010) and *Flanigan v.*

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Departmentt of Labor & Industries, 123 Wn.2d 418, 869 P.2d 14 (1994) – but it is not an issue relevant to this appeal. Both decisions limit what the Department may recover from an award obtained by an injured worker *after* a settlement or a judgment is entered and paid. In those instances, the Department is limited to a share of the award necessary to reimburse its expenditures—it is the "right to reimbursement" from the worker. Resp't's Br. at 14. This is not in dispute and it is irrelevant.

Not only do *Tobin* and *Flanigan* analyze different statutes, these cases rely on language in RCW 51.24.060 that the Legislature did not use in RCW 51.24.050. RCW 51.24.060(1)(c) permits the Department's recovery but "'only to the extent necessary to reimburse the department . . . for benefits paid.'" Tobin, 169 Wn.2d at 402 (quoting RCW 51.24.060(1)(c)).[4] The Court found it instructive in *Tobin* that the Legislature did not delete this language, which the *Flanigan* Court had explicitly relied on, when the statute was amended. 169 Wn.2d at 402. RCW 51.24.050 does not contain such language. Instead it reads: "[t]he department and/or self-insurer shall be paid the compensation and benefits paid to or on behalf of the injured worker or beneficiary by the department and/or self-insurer." RCW 51.24.050(1)(c). The phrase "only to the extent

[4] The full section reads: "[t]he department and/or self-insurer shall be paid the balance of the recovery made, *but only to the extent necessary to reimburse the department* and/or self-insurer for benefits paid." RCW 51.24.060(1)(c).

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necessary" does not appear.

More importantly, the "right to reimbursement" that Sunheaven cites to is what happens *after* the money is obtained. Resp't's Br. at 16. *Tobin* and *Flanigan* did not purport to say what the Department may seek from a negligent non-employer in the first instance. The section of the statute these cases interpret, and Sunheaven relies on, address distribution of a judgment or settlement. Neither *Tobin* nor *Flanigan* address what the Department may seek *from a negligent non-employer* under RCW 51.24.050.

Whether *Tobin* or *Flanigan* applies to limit the amount the Department may retain in terms of the general damages under RCW 51.24.050 is a separate question that would be raised by the worker when the Department distributes the money. But, this question is not on appeal, nor does Sunheaven have standing to challenge it. *Burnett,* 187 Wn. App. at 171-172 (party may not raise other party's claim). Nothing in RCW 51.24.050, *Tobin*, or *Flanigan* purport to shield a negligent party from paying all the damages it caused.[5]

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[5] In *Jones v. City of Olympia*, 171 Wn. App. 614, 622, 287 P.3d 687 (2012), the court used language that could be read to imply that the *Tobin* Court intended to cover all actions under both RCW 51.24.050 and RCW 51.24.060 in its analysis. The *Jones* Court defined "recovery"—a term that is present in both .060 and .050—as follows: "Also excluded from this statutory definition of 'recovery' and, therefore, not subject to distribution under RCW 51.24.060, are pain and suffering damages." *Id.* But, the *Tobin* Court specifically held that its analysis relied upon reading RCW 51.24.030 and RCW

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B. The Department's Standing to Bring a Cause of Action Against a Negligent Non-Employer Derives From Statute, Not the Injured Worker, and Thus Its Cause of Action Is Not Limited to Claims Carrera Could Have Brought

The Department is not limited from pursuing general damages because Carrera could not pursue them. Sunheaven asserts that the Department's rights as assignee are contingent on Carrera's interests, such that because Carrera could not prosecute the claim, the Department cannot seek general damages. Resp't's Br. at 1, 8, 18-19. This is premised on its argument that the Department may only pursue "its" claim, and not "Carrera's," because the latter was time-barred when the State obtained its standing to sue. This reasoning is fundamentally flawed in a number of ways. First, the Department's cause of action includes all damages – which necessarily includes general damages. It is well-established that a third party assignment is a statutory assignment and that the Department has independent rights under the statute that are not limited to what the worker can convey. *See State v. Vinther*, 176 Wash. 391, 393-398, 29 P.2d 693 (1934); *Cowlitz County*, 146 Wash. at 311. Second, even if the general damages were somehow not part of the Department's cause of action and were solely Carrera's (even though RCW 51.24.050 makes no such distinction), the Department would be able to seek them as such an action

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51.24.060(1)(c) together, and indeed the *Tobin* analysis turns on RCW 51.24.060(1)(c). 169 Wn.2d at 402. Neither *Tobin* nor *Jones* purported to analyze whether the limitation in RCW 51.24.060(1)(c) applies to a completely separate statute in RCW 51.24.050.

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is for the benefit of the State under RCW 4.16.160.

1. Analysis of Common Law Assignment of Claims Does Not Apply to a Cause of Action Created By Statute, Rather *Herrmann* Provides the Analysis To Show When the Legislature Waives the Statute of Limitation

Sunheaven provides no authority that informs on the parameters of the statutory assignment in the third party statute. Sunheaven cites *Havsy v. Flynn,* 88 Wn. App. 514, 945 P.2d 221 (1997), and *Gorman v. City of Woodinville*, 175 Wn.2d 68, 283 P.3d 1082 (2012), but neither address a cause of action authorized by statute. *Havsy* explains common law assignment claims when a party attempts to assign an invalid claim. 88 Wn. App. at 519. *Gorman* analyzes a City's claim to property dedicated to it by a party who lost title before dedicating the property. 175 Wn.2d at 72.

In both cases standing to sue derives, not from statute, but from another party's affirmative act transferring his or her claim to another party. *Gorman*, 175 Wn.2d at 72; *Havsy*, 88 Wn. App. at 519. Here standing to sue derives directly from the statute and the legislative decision to allow the Department to pursue claims against negligent non-employers when the worker does not. The Department's claim is independent, derives from statute, and Washington law is clear that such claims are immune from the statute of limitations. *Vinther*, 176 Wash. at

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393-98; *Cowlitz County.*, 146 Wash. at 311.

The Department identified, in its opening brief, the method provided by the Supreme Court for resolving the question presented in this appeal where both private and public interests are involved. Appellant's Br. at 26. In *Herrmann v. Cissna*, 82 Wn.2d 1, 7, 507 P.2d 144 (1973), the Court held that the question whether a statute of limitations applies to a state lawsuit enabled by statute when it benefits the state is answered by identifying whether an "express provision" abrogating state immunity from the statute of limitations is found in the enabling statute.[6] *State v. LG Electronics, Inc.*, 185 Wn. App. 123, 137, 340 P.3d 915 (2014) *review granted*, 183 Wn2d 1001 (2015), holds the same. If an express provision cannot be found, RCW 4.16.160 governs and the state lawsuit is immune from a statute of limitations if it benefits the state. Sunheaven offers no answer, correctly conceding this is the proper metric to resolve this appeal. In fact, Sunheaven provides authority endorsing this metric which, applied to this case, compels holding the Department lawsuit is not barred by the statute of limitations.

Sunheaven cites *Pacific Northwest Bell Telephone Co. v. Department of Revenue*, 78 Wn.2d 961, 481 P.2d 556 (1971) a case in which the Supreme Court invalidated an administrative rule promulgated

[6] Part II.B.2 discusses how this action "benefits the state" under RCW 4.16.160.

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by the Department of Revenue because it provided immunity from the statute of limitations even though the Legislature had expressly declined to do so.

The ruling in *Pacific Northwest Bell* applies the metric articulated in *Herrmann* and *LG Electronics* to different facts, namely it looks to the express legislative intent. *Id.* at 964-965. Like *Herrmann* and *LG Electronics*, in this case the plain language and legislative history of RCW 51.24.050 indicate no time bar on actions brought against third parties by the Department because such actions benefit the State under RCW 4.16.160. No common law jurisprudence trumps the absence of an "express provision" in the statute when an action benefits the state, a criteria employed in every case examining a State cause of action born of statute.

In *Pacific Nw. Bell*, the Court found that the Legislature intended to abrogate state immunity from the statute of limitations. *Id.* In *Herrmann* and *LG Electronics*, the Court found it had not. 82 Wn.2d at 7; 185 Wn. App. at 137. This case presents the same facts as the latter cases. In all three, there are valid state interests coupled with no evidence of any legislative intent to modify RCW 4.16.160 and impose a time limit upon the State. Because no provision of RCW Title 51 even hints at abrogation of RCW 4.16.160, the Department is immune from the statute of

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limitations.

2. The State Is Immune from the Statute of Limitations Under RCW 4.16.160 Because the Legislature Authorizes this Lawsuit to Advance Important Public Policy Interests

RCW 4.16.160 provides "there shall be no limitation to actions brought in the name or for the benefit of the state." The "cause of action" under RCW 51.24.050 is one such action brought for the benefit of the State. The Department identifies a number of important public interests third party lawsuits serve – interests distinct from Carrera's interest as a private citizen. *E.g.*, Appellant's Br. at 21, 26. Sunheaven does not have an answer to these arguments, but instead argues that benefitting the State is not enough and that an action that benefits the state must be an "exercise of sovereign power." Resp't's Br. at 22. Third party lawsuits could not be a clearer example of the State exercising its sovereign power. An exercise of sovereign power is manifest if the "constitution and statutes . . . indicat[e] that the matter sued upon relates to a sovereign duty of the State. *Washington Public Power Supply System v. General Electric Company*, 113 Wn.2d 288, 300-01, 778 P.2d 1047 (1989). Third party lawsuits are specifically authorized by statute, not merely "indicated."

Further, Sunheaven endorsed criteria for finding an exercise of sovereign power: "whether the act is for the common good." Resp't's Br at

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23 (*quoting Washington State Major League Baseball. Stadium Public Facilities District v. Hubei, Hunt & Nichols- Kiewit Constr. Company*, 165 Wn.2d 679, 687, 202 P.3d 924 (2009)).

Sunheaven may disagree with the Legislature, but it has determined that third party lawsuits are for the common good. These lawsuits replenish the injured workers fund for benefits already paid, provide for offset against payment of future benefits, deter unsafe workplace practices, and promote worker cooperation with investigation and litigation. The mere fact that Carrera receives some of the award does not undermine the public good the Legislature attempts to advance with these lawsuits. The Legislature's decision to provide a share of the award to the injured worker is not haphazard. Reasons include promoting worker cooperation with the investigation and lawsuit by giving the worker incentive to assist in prosecuting the cause of action. Additionally, the injured worker's share of the award prevents further drain on the injured worker fund.

As a matter of law, benefit of a private party does not by itself transform a lawsuit that benefits the common good into one that does not. Both *Herrmann* and *LG Electronics* examined lawsuits that enriched private parties, but this fact did not undermine the fact that the Legislature crafted the lawsuit to benefit the common good. 82 Wn.2d at 7; 185 Wn.

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App. at 137. Sunheaven has no answer to this binding precedent except to say that *Hermann* and *LG Electronics* are distinguishable because "the Department must turn over all the proceeds of Carrera's private claim." *Id.* At 26. This is neither true nor dispositive. Carrera has no claim. All proceeds of the lawsuit – whether limited to the Department's entitlements as the superior court ordered or including general damages – are subject to the same distribution formula. There is no segregation of the award.[7]

Further, it is impossible to prevent Carrera's enrichment even if Sunheaven convinces this Court to limit damages because the injured worker must be provided 25 percent of the award. This certain distribution to the worker shows that the legislature decided, on balance, that it would allow some recovery even where a statute of limitations had expired, in favor of encouraging worker cooperation.[8]

The mere fact that Carrera has a stake in the outcome does not make the State his conduit. Precedent, specifically *Herrmann* and *LG*

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[7] *Tobin*'s limitation on general damages under RCW 51.24.060 does not apply to money collected under RCW 51.24.050. But, even if this Court disagrees, the Department may still claim against the general damages for two reasons. First, RCW 51.24.050 authorizes a claim for the entire "cause of action" without limitation. Second, if all the general damages had to go to Carrera, this would still benefit the State because important public policies would be served in deterring dangerous conduct in the workplace and in encouraging cooperation in the investigation and litigation. Goals essentially the same as those recognized by *Herrmann* as benefiting the State.

[8] Note the logical corollary to Sunheaven's argument that because the worker has not filed a claim within the statute of limitations, he or she has no interest in the judgment means that the worker would not be able to obtain a portion of the recovery under RCW 51.24.050. The Legislature did not intend such a result.

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Electronics, makes this clear. Indeed, in *Herrmann* and *LG Electronics*, the "private parties" received the *entire* award, but the Courts held the State acted in its own interests and was not a conduit for those private parties. 82 Wn.2d at 8-9; 185 Wn .App. at 137. A private party's receipt of an award won by the State in a lawsuit authorized by statute is not relevant to the question whether the lawsuit is an exercise of the State's sovereign power.

Sunheaven further attempts to distinguish *Herrmann* and *LG Electronics* with unsupported assertions. Sunheaven argues lawsuits by the Insurance Commissioner against negligent parties damaging insurance companies, in *Herrmann*, is an exercise of the State's sovereign power. But, it argues the Department lawsuits are not because "[t]he purposes of the insurance code are not comparable to the Industrial Insurance Act." Resp't's Br. at 28. Sunheaven does not explain how this is so. In fact, recouping public funds, as third party lawsuits allow, is a much more obvious example of sovereign power than enriching a private insurance company because this scheme provides a direct financial award to the State.

And, fatal to Sunheaven's assertion, the lawsuits in *Herrmann*, *LG Electronics*, and here, deter negligent actors from harming the public and the Supreme Court has held this goal immunizes a State lawsuit from the

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statute of limitations. 82 Wn.2d at 7. Sunheaven counters that Department lawsuits would not deter negligent non-employers, but does not explain why. Resp't's Br. at 29. It is certainly reasonable to conclude threat of financial loss motivates a business; indeed, such logic underpins the *Herrmann* Court's conclusion that "the Legislature reasonably could have concluded that the deterrent effect of such proceedings by the commissioner . . . is a factor tending to benefit the public in general. 82 Wn.2d at 7."

Sunheaven's effort to distinguish *LG Electronics* is also unpersuasive. Sunheaven agrees that a cause of action obtaining funds for private citizens is an exercise of sovereign power immunizing state lawsuits from the statute of limitations. Resp't's Br. at 29 (*quoting* Black's Law Dictionary (10th ed. 2014) at 1287; *LG Electronics*,185 Wn. App. at 148). This should end the inquiry, but Sunheaven changes course and argues that some state lawsuits that enrich private citizens are an exercise of sovereign power, but some are not. Sunheaven argues that a cause of action that is not a "parens patriae" cause of action is not an exercise of sovereign power. Resp't's Br. at 30. No authority, let alone *LG Electronics*, conflates sovereign power with a parens patriae cause of action. The *LG Electronics* Court did not hold that a parens patriae cause of action was immune from the statute of limitations, and other lawsuits

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were not.

In each case analyzing lawsuits created by the Legislature, the courts have looked to the Legislature for a clear intent to modify state immunity from the statute of limitations in RCW 4.16.160. The fact that a private citizen may be enriched is of no consequence. The amount of recovery the State may claim when the funds are distributed is of no consequence. In all cases, the court declined to second guess the Legislature's decision that a public interest was or was not served. Because lawsuits under RCW 51.24.050 benefit the State and because the Legislature has decided not to impose a time limit to the "cause of action" in RCW 51.24.050, this Court should allow the Department to prosecute its "cause of action" for all damages.

III. CONCLUSION

The Legislature has advanced important interests to be served by Department lawsuits against negligent non-employers. Those interests are compelling and can only be served by the ability to fully prosecute the cause of action against the negligent non-employer, including seeking all damages. No statute exists indicating the Legislature intended to impose upon itself a statute of limitations, for a class of damages only,[9] in claims

[9] The Department refers to its briefing explaining why a statute of limitations is never intended to apply to damages alone, and notes that Sunheaven has no response to this dispositive evidence of legislative intent.

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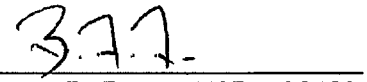
against negligent non-employers. Washington precedent was not honored by the trial court, and its order should be reversed.

November 20, 2015

Respectfully submitted,



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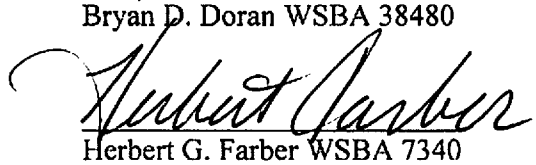

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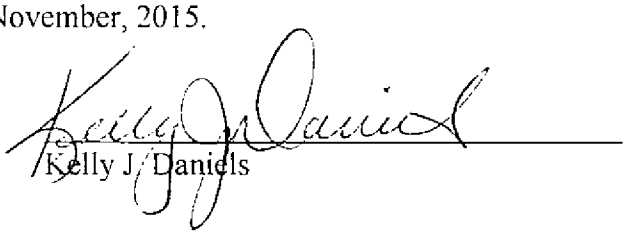

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