

No. 93799-1

SUPREME COURT
OF THE STATE OF WASHINGTON

BASILIO CORNELIO CARRERA, an unmarried individual;
DEPARTMENT OF LABOR & INDUSTRIES, as statutory assignee of
Basilio Cornelio Carrera,

Respondents,

v.

SUNHEAVEN FARMS, a Washington general partnership;
SUNHEAVEN FARMS, LLC, a Washington limited liability company;
BRENT SCHULTHIES FARMS, LLC, a Washington limited liability
company; BRENT SCHULTHIES and ELAINE SCHULTHIES, husband
and wife, and the marital community comprised thereof, individually and
as general partner of Sunheaven Farms; and JOHN DOES and JANE
DOES 1 through 10 inclusive,

Petitioners,

and

THOMAS S. OLMSTEAD and BARBRA E. OLMSTEAD, husband and
wife, and the marital community comprised thereof; LAW OFFICE OF
THOMAS S. OLMSTEAD, a Washington sole proprietorship; JOHN
DOES and JANE DOES 1 through 10 inclusive,

Defendants.

PETITIONERS' SUPPLEMENTAL BRIEF

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A. INTRODUCTION

This case presents an odd set of circumstances in which the Department of Labor and Industries (“DOLI”) seeks to pursue personal injury claims on behalf of an injured worker, Basilio Cornelio Carrera, pursuant to RCW 51.24, against Sunheaven Farms, Brent Schulthies Farms, and Brent and Elaine Schulthies (“Sunheaven Farms”) although Carrera’s own RCW 51.24 action was previously dismissed.

DOLI’s claims against Sunheaven Farms are barred on principles of *res judicata* or are time-barred under RCW 4.16.080, because DOLI is bringing the present action in its proprietary, as opposed to its governmental, capacity.

If this Court concludes that DOLI’s claim against Sunheaven Farms remains viable, DOLI’s recovery must be limited to the amount of its interest under RCW 51.24.050(4)(c).

B. ISSUES PRESENTED FOR REVIEW

1. Is DOLI barred from seeking damages against petitioners on assignment from an injured worker when the injured worker dismissed his own RCW 51.24 third-party action?
2. Is DOLI’s action against petitioners barred by the statute of limitations, RCW 4.16.080, notwithstanding the provisions of RCW 4.16.160, when DOLI is acting in a proprietary, not governmental, capacity in seeking recovery of benefits paid to an injured worker?
3. Where DOLI is barred from retaining noneconomic

damages of an injured worker under RCW 51.24.050, is it precluded from recovering such damages against petitioners on behalf of that injured worker?

C. STATEMENT OF THE CASE

The Court of Appeals discussion of the facts in its opinion is essentially correct. Op. at 2-3. However, certain key procedural points bear emphasis.

Carrera initially elected to pursue a third party action under RCW 51.24 for his personal injuries sustained from a serious agricultural accident that occurred on August 14, 2009 in *Carrera v. Brent Hartley and Jane Doe Hartley and Hartley Produce, LLC* (Benton County Cause No. 10-2-02367-1). CP 14-15. On the defendants' motion for summary judgment, CP 15-16, the trial court entered an order on March 18, 2011, dismissing claims against the defendants. CP 24-25.

Critically, *nothing* prevented Carrera from pursuing whatever RCW 51.24 third-party claims he might have had against all defendants, including the present petitioners, arising out of the August 2009 industrial accident in that Benton County proceeding. Indeed, DOLI/Carrera's amended complaint below identified all of the possible claims against these petitioners that should have been brought by Carrera in that litigation. CP 12-14. The failure to join the present petitioners was identified in the amended complaint as a basis for a professional

negligence claim against Carrera's then-counsel. CP 16 ("Failed to join 'third-party defendants' liable to Basilio, particularly including Sunheaven Farms General Partnership and Sunheaven Farms, LLC, it's [sic] successor, and Brent Schulthies, a putative owner of the unreasonably dangerous conveyor belt.").¹

More than two years after dismissal of Carrera's action, on December 24, 2013, DOLI advised Carrera that he needed to elect whether to pursue a third-party action. CP 100. Carrera apparently did not respond.

On March 4, 2014, nearly three years after the dismissal of the first action, DOLI advised Carrera that his third party action was deemed assigned to it. CP 102. DOLI then filed the present action on March 14, 2014 alleging legal malpractice by Carrera's attorney in Carrera's first RCW 51.24 personal injury action. CP 79-95.² It then amended its complaint to assert liability on the part of Sunheaven Farms. CP 1-23.

¹ Carrera also understood, at least in part, the legal implication of the dismissal of the first lawsuit when he pleaded in this action. CP 16 ("The final legal effect of the *Carrera* trial court Order granting the motion for summary judgment was to preclude any further claims by the plaintiff against all named defendants subject to the motion, including third parties Brent and Berniel Hartley and Hartley Produce, LLC.").

² It is noteworthy that any putative assignment to DOLI of Carrera's legal malpractice claim arising out of the handling of the first lawsuit may have been against public policy. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003) (legal malpractice claim not assignable to adversary in same litigation). *See also, Kim v. O'Sullivan*, 133 Wn. App. 557, 137 P.3d 61 (2006), *review denied*, 159 Wn.2d 1018 (2007); *Kenco Enters. Nw., LLC v. Wiese*, 172 Wn. App. 607, 291 P.3d 261, *review denied*, 177 Wn.2d 1011 (2013).

DOLI sought to recover all damages available to Carrera against Sunheaven Farms, including noneconomic damages that DOLI cannot retain, notwithstanding the fact that the statute of limitations for Carrera's claim lapsed long before the current lawsuit was filed.

Sunheaven Farms filed a motion for partial summary judgment, asserting that DOLI was only entitled to recover the economic damages it had paid since the statute of limitations had run with respect to Carrera's claim (and for which Carrera had previously filed a third-party action). CP 51-60. The trial court granted summary judgment in part, ruling that DOLI was limited to recovery of benefits it had paid. CP 402-06.³

The Court of Appeals reversed the trial court's dismissal of DOLI's action on Carrera's behalf, concluding it could recover, but not retain, noneconomic damages, and that its action was not time-barred as it was acting in a governmental capacity.

D. SUMMARY OF ARGUMENT

DOLI's present action is barred under principles of *res judicata* where it seeks to split the cause of action it obtained on assignment by operation of law from Carrera. Carrera's RCW 51.24 third-party action was previously dismissed and DOLI cannot now revive it.

³ The claims against Brent Schulthies Farms, LLC, and Brent and Elaine Schulthies personally were dismissed with prejudice by a previous September 15, 2014 order. Only the claims against Brent Schulthies as a partner of Sunheaven Farms general partnership were not dismissed.

DOLI's derivative action on Carrera's behalf was also time-barred under RCW 4.16.080(2), the three-year statute of limitations pertaining to tort claims. Carrera's injury occurred in 2009 and DOLI's present action was filed in 2014. There is no question that Carrera's own claim is time-barred. DOLI's present action is not preserved by RCW 4.16.160 because this action was maintained in DOLI's proprietary, and not its sovereign, capacity, or DOLI was merely a conduit for an action calculated to benefit Carrera, so that RCW 4.16.160 is inapplicable.

If DOLI's present action may go forward (and it should not), DOLI's recovery is confined to its interest as defined in RCW 51.24.050(4)(c), the only amount of any claim pertinent to DOLI's interest (as opposed to Carrera's which has been dismissed).

E. ARGUMENT

(1) Third-Party Actions Under Title 51 RCW

Washington's Industrial Insurance Act, Title 51 RCW, ("IIA") generally withdraws the handling of industrial claims from Washington's courts. RCW 51.04.010. Under the "Grand Compromise" of 1911, injured workers receive certain benefits under the IIA without regard to fault, and employers are immunized from suit by those workers. *Birklid v.*

Boeing Co., 127 Wn.2d 853, 859, 904 P.2d 278 (1995).⁴ However, third parties to that relationship may be sued by injured workers for their fault in causing the industrial injury.

RCW 51.24.030 authorizes such third-party actions by injured workers. *See* Appendix. RCW 51.24.030(1) provides:

If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

RCW 51.24.070 provides, in relevant part:

(1) The department ... may require the injured worker or beneficiary to exercise the right of election under this chapter by serving a written demand by registered mail, certified mail, or personal service on the worker or beneficiary.

(2) Unless an election is made within sixty days of the receipt of the demand ..., the injured worker or beneficiary is deemed to have assigned the action to the department....

If the injured worker chooses not to proceed, his/her claim is assigned to DOLI by operation of law, RCW 51.24.050(1), and the statute establishes how any recovery then generated must be distributed. RCW 51.24.050(4).⁵ In particular, apart from its legal expenses, DOLI is only

⁴ In rare circumstances, an injured worker may sue her/his employer. RCW 51.24.020.

⁵ If the injured worker elects to proceed on her/his own, any recovery is distributed in accordance with RCW 51.24.060. DOLI may recover the compensation

entitled to recover compensation and benefits paid to the injured worker. RCW 51.24.050(4)(c).

Significantly, RCW 51.24 clearly contemplates that only a single cause of action exists for the injured worker against any third-party tortfeasor. The trial court understood this, CP 404, and the Court of Appeals concurred: "...L&I has no separate cause of action in assigned third party claims." Op. at 17. The election process of RCW 51.24 provides for an assignment by operation of law to DOLI if the injured worker declines to act. The statute does not create a separate cause of action *for DOLI* against a third-party tortfeasor; DOLI's right to pursue a third-party tortfeasor is entirely derivative of any rights of injured worker against such a tortfeasor.⁶

Recently, in *Burnett v. State, Dep't of Corrections*, 187 Wn. App. 159, 172, 349 P.3d 42 (2015), Division III concluded that DOLI was real party in interest as to third-party action when injured worker assigned her rights to DOLI, but the court was also clear in stating that DOLI's rights

and benefits paid to the injured worker, "but only to the extent necessary to reimburse the department ... for benefits paid," RCW 51.24.060(1)(c), and it has a lien against any third-party recovery for such share. RCW 51.24.060(2).

⁶ As DOLI is the assignee of the injured worker's third party cause of action, traditional assignment principles apply. The Court of Appeals did not address a key principle that the assignee of a cause of action takes its interest from the assignor subject to any defenses that could be asserted against the assignor. *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 359, 662 P.2d 385 (1983). The trial court recognized this principle when it noted that DOLI stood in Carrera's shoes with respect to any claim it pursued under RCW 51.24. CP 404.

derived from the election in RCW 51.24.050 and .070 were those of an assignee. *Id.* at 175-76. Thus, DOLI could dismiss an appeal without the injured worker's approval.

Here, of course, Carrera actually made the requisite election, pursued an action on his own, and that action was dismissed.

(2) DOLI's Action Is Precluded on Principles of *Res Judicata*⁷

One of the defenses available to a third party like Sunheaven Farms against Carrera, or DOLI as his assignee, is *res judicata*. *Res judicata*, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983); *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865-66, 92 P.2d 108 (2004). Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. *Id.*

Under Washington law, *res judicata* precludes "claim splitting." *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *review*

⁷ This issue is appropriately before this Court. Sunheaven Farms pleaded that DOLI failed to state a claim upon which relief could be granted. CP 12. In any event, this issue is also properly before the Court. RAP 2.5(a)(2) (party may raise the failure to establish facts upon which relief can be granted on appeal).

denied, 168 Wn.2d 1068 (2010). Claim splitting occurs when a party files two separate lawsuits based on the same events. *Id.* *Res judicata* rests upon the ground that “a matter [that] has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.” *Id.* The general rule is that if an action is brought for part of a claim, it must be brought for the whole claim, and a judgment obtained in the first action precludes the plaintiff from bringing successful actions for the residue of the claim. *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274, *review denied*, 139 Wn.2d 1006 (1999). In Washington, *res judicata* is “the rule, not the exception.” *Hisle*, 151 Wn.2d at 865.

Critical to the resolution of the question of whether DOLI’s present action is barred by the dismissal of Carrera’s first third-party lawsuit is the precise nature of DOLI’s interest derived from RCW 51.24.⁸ In RCW

⁸ “The primary goal of statutory construction is to carry out legislative intent.” *Cockle v. Dep’t of Labor and Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington’s traditional process of statutory interpretation, this analysis begins by looking at the words of the statute. “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* The Court must look to what the Legislature said in the statute and related statutes to determine if the Legislature’s intent is plain. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the Court’s role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

51.24, the Legislature did not create a new, distinct cause of action in favor of DOLI against third-party tortfeasors. Rather, simply put, as the trial court properly noted, CP 404, any interest DOLI had against Sunheaven Farms is derivative of Carrera's interest and was therefore barred by the dismissal of Carrera's first action. *Res judicata* principles forbidding the splitting of any cause of action barred DOLI's apparent effort to re-assert Carrera's previously dismissed RCW 51.24 claims. DOLI had no separate cause of action against Sunheaven Farms left to it once Carrera's original third-party action was dismissed.

Carrera was obligated in his first Benton County lawsuit to present any and all claims he had against any defendant under RCW 51.24. Nothing (except his counsel's malpractice) prevented him from suing the petitioners at that time. He *acknowledged* this fact in the amended complaint. CP 12-14. *Res judicata* forecloses re-litigation of claims that were litigated in the first action, or *that could have been pursued in that action*. *E.g., Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 726 P.2d 1 (1986) (wife's wrongful death action foreclosed by her failure to pursue wrongful death claim in life insurer's interpleader action in federal court).

All of the elements of *res judicata* are met in this case. The parties and claims are effectively identical in both Carrera's dismissed first action

and DOLI's present action. The trial court should have dismissed DOLI's action as it had nothing left to pursue against Sunheaven Farms.

(3) DOLI's Action Here Is Time-Barred

A second reason for dismissing DOLI's claim against Sunheaven Farms is that it is time-barred. The Court of Appeals was correct in concluding that RCW 4.16.080(2)⁹ mandated a three-year statute of limitations here, op. at 12, but erred in concluding that DOLI's action was not time-barred. Op. at 15-18. It misapplied RCW 4.16.160 relating to claims by the government because DOLI acted in a proprietary capacity only, or as a conduit for Carrera's private right of action.

The Court of Appeals overlooked this Court's expression of public policy as to statutes of limitations. Such statutes serve a valuable public policy purpose, as this Court noted in *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969) ("No civilized society could lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims brought in good faith, much less whatever stale, illusory, false, fraudulent or malicious

⁹ The following actions shall be commenced within three years:

...

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated; ...

accusations of civil wrong might be leveled against him.”). The Court of Appeals decision would totally frustrate that key public policy by effectively eliminating any statute of limitations on third-party actions under RCW 51.24.¹⁰

In certain circumstances, statutes of limitations do not apply to actions by the State or its political subdivisions. RCW 4.16.160. *See* Appendix. But Washington law also provides that this principle of *nullum tempus* is inapplicable if the State or its subdivisions is acting in a proprietary capacity or if they are acting not for a broader public purpose but as a conduit to pursue legal remedies on behalf of individuals.

(a) Government Acting in Proprietary Capacity

The principle that RCW 4.16.190 does not apply when the government is acting in a proprietary capacity was discussed in *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 202 P.3d 924 (2009) (“*Pub. Facilities Dist.*”) and *State v. LG Electronics*, 186 Wn.2d 1, 375

¹⁰ Under Division II’s reasoning, even where an injured worker’s claim would otherwise be time-barred, as here, DOLI could bring a claim *at any time* if the worker’s claim was assigned to it by operation of law. However, the injured worker, too, may be able to pursue otherwise time-barred claims. RCW 51.24.070 contemplates that even in a situation where DOLI has taken assignment under an election process, the injured worker may, at the DOLI’s discretion, “exercise a right of reelection and assume the cause of action subject to reimbursement of litigation expenses incurred by the department or self-insurer.” RCW 51.24.070(4). This sequence of events would allow an injured worker to completely circumvent the statute of limitations that applied to her/his claim since DOLI can take assignment after the statute of limitations has lapsed, as occurred here.

P.3d 636 (2016).

In the stadium case, a case in which the stadium public facilities district sued a contractor over construction defects allegedly in breach of the parties' contract, this Court held that construction of a stadium was a sovereign act because it provided a public, as opposed to private, good in allowing for public recreational opportunities. *Pub. Facilities Dist.*, 165 Wn.2d at 694. In *LG Electronics*, this Court concluded that the State's action under the Consumer Protection Act, RCW 19.86, to enjoin foreign electronics manufacturers from antitrust violations and to obtain restitution from them on the public's behalf was not subject to the CPA's statute of limitations in light of RCW 4.16.160. The Court looked to the language of the CPA and its legislative history to reach this conclusion. 181 Wn.2d at 12.

The test for sovereign, as opposed to proprietary, activities is straightforward: "[T]he principal test for determining whether a municipal act involves a sovereign or proprietary function is whether the act is for the common good or whether it is for the specific benefit or profit of the . . . entity." *Pub. Facilities Dist.*, 165 Wn.2d at 687. Put another way, this Court has indicated that courts must analyze whether the function at issue

implicates sovereignty.¹¹

Washington courts have addressed proprietary governmental activity in numerous decisions, and those decisions confirm that DOLI's present action is brought to fulfill a proprietary, not a sovereign, function.¹²

In analyzing whether DOLI's action here implicates a sovereign activity or a proprietary function, this Court must look broadly to the statutory provisions of RCW 51.24 and the context for third-party actions. Division II did not do this in its statute of limitations analysis. Op. at 15-18. It essentially relies only on the old Supreme Court decision in *State v. Vinther*, 176 Wash. 391, 29 P.2d 693 (1934). That analysis is too superficial.

Nothing about DOLI's action implicates its sovereign authority. Rather, it is acting in its proprietary capacity to collect funds from third-

¹¹ In determining whether the government's activity was sovereign or proprietary, courts "may look to constitutional or statutory provisions indicating the sovereign nature of the power, and [they] may consider our traditional notions of powers which are inherent in the sovereign. Relevant to this analysis are the general powers and duties under which the municipality acted, the purpose of those powers, and whether the activity or its purpose is normally associated with private or sovereign concerns." *Wash. Public Power Supply System v. General Elec. Co.*, 113 Wn.2d 288, 296, 778 P.2d 1047, 1049 (1989).

¹² For example, contracting for generation of electricity is a proprietary function. *Wash. Pub. Power Supply Sys.*, 113 Wn.2d at 288. See also, *Okeson v. City of Seattle*, 159 Wn.2d 436, 150 P.3d 556 (2007). A municipality's actions as to its drinking water supply are similarly proprietary. *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164 (E.D. Wash. 2006).

party tortfeasors in part to compensate an injured worker and in part to reimburse its Accident and Medical Aid Funds.¹³ In the case of DOLI's operation of those funds, created in RCW 51.44.010-.020, no case has specifically addressed whether it is fulfilling a governmental or proprietary function in operating those Funds. It is noteworthy, however, that the State treats the Accident or Medical Aid Fund as trust funds "administered by the state for the benefit of injured workmen." *Mason-Walsh-Atkinson-Kier Co. v. Dep't of Labor & Indus.*, 5 Wn.2d 508, 516, 105 P.2d 832 (1940); *State ex rel. Trenholm v. Yelle*, 174 Wash. 547, 549-50, 25 P.2d 569 (1933). This would suggest that the Funds' purpose is more focused on the workers' personal benefit than a broader public benefit.

Moreover, this Court's decisions indicate that DOLI's activities are proprietary in nature. For example, in *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 810 P.2d 500 (1991), this Court concluded that DOLI's

¹³ In the cases where sovereign conduct is involved, it is not a single individual who has benefitted, but rather the public generally. See, e.g., *LG Electronics, supra*, 186 Wn.2d at 15-16 (State filed suit on behalf of itself and as *parens patriae* seeking damages and restitution for citizens of Washington); *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 691 P.2d 178 (1984) (school districts act on behalf of the State when they build and maintain school buildings, affecting numerous students and their families); *Herrmann v. Cissna*, 82 Wn.2d 1, 507 P.2d 144 (1973) (insurance commissioner was acting to regulate negligent and fraudulent conduct by officers and directors of insurance companies); *Pub. Facilities Dist., supra* (constructing public baseball stadium, a public recreational space). This factual scenario is qualitatively different because it involves the claims of a single individual (even though he already had pursued a third-party action).

statutory lien did not constitute “state funds” to which the Constitution’s bar on gifts of public funds applied. Thus, DOLI could compromise its lien when the injured worker settled with a third party. Again, this indicates a broader public interest is not at play with regard to the Funds’ operation.

Division II also discerned a sovereign benefit in DOLI’s action from the deterrent effect of such third party actions, but that is too general. As Justice Gordon-McCloud noted in *LG Electronics*, “when the State seeks to collect on private claims against private entities for the benefit of private parties, the result is less clear as to whether such cases are ‘for the benefit of the state’ under RCW 4.16.160. This is because there is always some conceivable public benefit (such as general deterrence) when the State enforces its laws, regardless of whether the lawsuit is brought on its own behalf or on behalf of others.” 186 Wn.2d at 26 (Gordon-McCloud, J., dissenting in part).

The amorphous impact of a general policy of “deterrence” is insufficient to overcome the plain fact that the thrust of RCW 51.24 third-party actions is to more fully compensate injured workers. That is the clear impact of the distribution schemes set forth in RCW 51.24.050/.060. The injured worker’s recovery is preeminent; DOLI’s right to recover, a right it may compromise to aid settlement, takes a back seat.

In sum, DOLI acts under RCW 51.24 in a proprietary, not sovereign, capacity.

(b) Government Collecting Funds as a Conduit for an Individual's Interest

Even if DOLI acts in a governmental capacity generally when it administers the Funds, that does not necessarily mean that its actions under RCW 51.24 are also in a governmental capacity. As noted *supra*, RCW 4.16.160 is inapplicable when the government is essentially undertaking to collect monies due to an individual, as the Court of Appeals acknowledged in its opinion at 15-16. There is a clear line between actions taken “for the benefit of the state” versus those situations where the state is “a mere formal plaintiff in a suit . . . to form a conduit through which one private person can conduct litigation against another private person.” (emphasis added). See, e.g., *Vinther, supra*; *Herrmann, supra*. Again, this goes to the essential reason for the *nullus tempus* principle – the government is not acting for the public good, but for an individually-driven interest.

On this point, this Court’s *Herrmann* decision is key. This Court made clear there that if the state’s action is brought for the benefit of a private party, no sovereign action is implicated. 82 Wn.2d at 5. More specifically, “if the state is a mere formal plaintiff in a lawsuit, acting only

as a conduit through which one private person can conduct litigation against another, the state is not exempt from the defense that the statute of limitations has run on the action.” *Id.* Moreover, if the action is purely derivative, depending upon the actual right of a private individual to proceed, RCW 4.16.160 does not apply. *Id.* at 7.

Undoubtedly, DOLI will contend that *Vinther* controls here. There, this Court concluded that under the then-applicable statutes, the predecessor statute to RCW 4.16.160 did not bar a subrogation claim brought by DOLI in the name of an injured worker against a third-party tortfeasor. However, as the Court of Appeals here noted, *op.* at 16, the statute that applied at the time specifically provided that the *only* interest at play in such actions was DOLI’s reimbursement interest as “the State was not allowed to seek damages beyond this subrogation amount.” *The law has changed.* Indeed, the entire thrust of RCW 51.24 is *full compensation* of the injured worker. That the preeminent thrust of actions under RCW 51.24 is full compensation *to the worker*, not DOLI, is crystallized in a 1977 statute:

The injured worker or beneficiary shall be entitled to the full compensation and benefits provided by this title regardless of any election or recovery made under this chapter.

RCW 51.24.040.

This point is further confirmed in the distribution scheme of RCW 51.24.050/.060, enacted long after *Vinther*, that indicates its foremost purpose is to benefit the injured worker, not DOLI. Under RCW 51.24.050's distribution scheme, the injured worker receives 25% of any recovery after DOLI's expenses are paid; moreover, after DOLI's "lien" is satisfied, any remainder goes to the injured worker. RCW 51.24.050(4). A similar thrust can be seen in the distribution scheme of RCW 51.24.060 when the injured worker directly sues the third-party tortfeasor.

That the entire thrust of the modern version of RCW 51.24 is to compensate the injured worker is further supported by this Court's decisions in *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994) and *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010). The Court held in those cases that the worker's recovery of her/his noneconomic damages from the third-party tortfeasor was particularly the injured worker's alone and could not be a part of DOLI's recovery under the distribution schemes of RCW 51.24.050/.060 at all.

DOLI went to great lengths here to emphasize that it was the only real party in interest in this litigation and that Carrera was not a party. CP 114, 118-23, 127, 131. However, at most, its only interest was expressed in RCW 51.24.050(4). In *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 789 P.2d 75 (1990), this Court held that an injured worker had a

property interest in that portion of the third-party recovery provided for in RCW 51.24.060, but DOLI had an exclusive property interest in its share of the distribution. DOLI's interest, when compared to the worker's under the statutory provisions above, is indeed narrow, confined to its interest specified in RCW 51.24.050(4), or its RCW 51.24.060 lien interest.

In sum, given the drastic changes in RCW 51.24 since *Vinther*, it is no longer good law.¹⁴ DOLI was not acting in a sovereign capacity replenishing the Accident and Medical Aid Funds, but, more pointedly, DOLI acted as a mere conduit for a private citizen in this action.

The statutory scheme of RCW 51.24 is to benefit the injured worker by fully compensating her/him. DOLI acts as a mere conduit to facilitate that result in RCW 51.24 third-party actions. RCW 4.16.160 is inapplicable here.

(4) If DOLI's Claim Is Viable, It Is Not Entitled to Recover Any More Than What Is Allowed Under RCW 51.24.050(4)

The Court of Appeals here concluded that DOLI could recover on Carrera's behalf any damages he could prove against Sunheaven Farms,

¹⁴ Although the *LG Electronics* court cited *Vinther*, it did so without the benefit of the foregoing analysis. The majority in *LG Electronics* acknowledged that a government does not in a sovereign capacity when it sues as a conduit for the private interest of a private individual. 186 Wn.2d at 13. The Court concluded that restitution would benefit consumers individually, but served a clear *public* benefit – upholding the State's *parens patriae* interest in a fair economic system free of sharp business practices. *Id.* at 13-14. Moreover, critical to the case is the fact that the Legislature in 2007 *specifically authorized* such *parens patriae* actions by statute. 186 Wn.2d at 9, 25-26.

but that result is inequitable as any such claim would have been time-barred had Carrera pursued it himself,¹⁵ and DOLI's only ostensible "sovereign" interest was recovery of any compensation or benefits paid to Carrera. RCW 51.24.050(4). This is precisely why the trial court limited any action by DOLI to that interest alone. CP 405.

This Court in *Flanigan* and *Tobin* recognized that in a case brought within the statute of limitations for personal injury actions by the injured worker himself, DOLI could not take into account noneconomic damages in determining its recovery because it otherwise would receive an "unjustified windfall." In *Flanigan*, this Court held that the recovery available to DOLI under the distribution scheme set forth in RCW 51.24.060 did not include funds received as damages for a loss of consortium claim. 123 Wn.2d at 426. Recognizing that IIA benefits do not compensate employees or their beneficiaries for noneconomic damages such as loss of consortium, the Court held that DOLI was not entitled to reimbursement for those damages and, therefore, allowing a surviving spouse to retain those damages did not result in a double recovery. *Id.* at 425.

This Court in *Tobin* went farther, excluding all noneconomic

¹⁵ This also contravenes the policy of RCW 4.16.160 referenced in *LG Electronics* that the statute cannot be used to revive time-barred claims. 186 Wn.2d at 25 (Gordon-McCloud, J., dissenting in part).

damages from the statutory definition of “recovery” in addition to those arising from loss of consortium claims, reasoning that RCW 51.24.060(1)(c) provides DOLI access to recovery “only to the extent necessary to reimburse the department ... for benefits paid.” 169 Wn.2d at 402. Because DOLI does not reimburse injured workers for noneconomic damages, such damages do not constitute “benefits paid” and are therefore not recoverable under the statute. *Id.*

Here, the Court of Appeals correctly extended the *Flanigan/Tobin* reasoning to situations where the injured worker elects not to pursue an action against the third party, as arguably occurred here, finding that the reasoning underlying RCW 51.24.060 applies “with equal force” to actions brought pursuant to RCW 51.24.050.¹⁶ Op. at 9. The Court of Appeals correctly held that “L&I may not retain noneconomic damages in assigned third party actions.” *Id.*

The Court of Appeals, however, went on to state that “[e]ven if L&I may not retain all the proceeds it requests as damages, it may seek and recover those damages in an assigned third party action and dispense them according to the statutory distribution scheme.” Op. at 11. This statement is at odds with the policy recognized in *Flanigan/Tobin* that DOLI cannot, in effect, utilize such damages for the reimbursement of

¹⁶ Again, here, Carrera had, in fact, pursued a third party action.

benefits it has paid, its only ostensibly “sovereign” interest. RCW 51.24.050(4).

If this Court is to allow DOLI to recover damages that are part of a cause of action that was otherwise time-barred, and to allow it to pursue noneconomic damages, damages that this Court concluded were not part of the distribution scheme of RCW 51.24.050/.060 and therefore not of “sovereign” concern *per se*, the Court would provide an “unjustified windfall” for the injured worker who did not pursue his claim in a timely manner.¹⁷ Indeed, the Court of Appeals ruling encourages injured workers not to pursue their claims within the statute of limitations, knowing that DOLI can step in, literally years later, and attempt to revive claims for damages those workers cannot themselves pursue.¹⁸ This is contrary to the policy of limitations periods this Court expressed in *Ruth*.

To the extent that DOLI is allowed to pursue any derivative third-party action on behalf of Carrera, its recovery should be confined to its statutory interest under RCW 51.24.050(4), in light of the dismissal of

¹⁷ Sunheaven Farms, of course, does not mean to imply that Carrera is not deserving of fair compensation for his permanent injury, assuming liability could have been established in a lawsuit that was filed within the statute of limitations.

¹⁸ In this case, the unfortunate accident occurred in 2009; the initial third-party action was dismissed in 2011; DOLI did not notify Carrera of his election rights until 2013; and DOLI did not file the amended complaint naming Sunheaven until April 2014—more than five years after the incident occurred and almost two years after the statute of limitations ran.

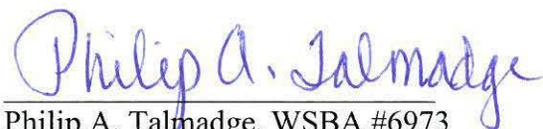
Carrera's prior RCW 51.24 action.

F. CONCLUSION

This Court should reverse the Court of Appeals and remand the case to the trial court for dismissal or reverse and remand, alternatively, with directions to the trial court that DOLI is limited to recovery of the compensation and benefits it paid to Carrera. RCW 51.24.050(4). Costs on appeal should be awarded to petitioners.

DATED this 6th day of April, 2017.

Respectfully submitted,



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APPENDIX

RCW 4.16.160:

The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310, there shall be no limitation to actions brought in the name or the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: AND FURTHER PROVIDED, That no previously existing statute of limitations shall be interposed as a defense to any action brought in the name or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to February 27, 1903, nor shall any cause of action against the state be predicated upon such a statute.

RCW 51.24.030:

(1) If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

(2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.

(3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

(4) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

(5) For the purposes of this chapter, “recovery” includes all damages except loss of consortium.

RCW 51.24.050:

(1) An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.

(2) If an injury to a worker results in the worker’s death, the department or self-insurer to which the cause of action has been assigned may petition a court for the appointment of a special personal representative for the limited purpose of maintaining an action under this chapter and chapter 4.20 RCW.

(3) If a beneficiary is a minor child, an election not to proceed against a third person on such beneficiary’s cause of action may be exercised by the beneficiary’s legal custodian or guardian.

(4) Any recovery made by the department or self-insurer shall be distributed as follows:

(a) The department or self-insurer shall be paid the expenses incurred in making the recovery including reasonable costs of legal services;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the recovery made, which shall not be subject to subsection (5) of this section: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The 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; and

(d) The injured worker or beneficiary shall be paid any remaining balance.

(5) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(6) When the cause of action has been assigned to the self-insurer and compensation and benefits have been paid and/or are payable from state funds for the same injury:

(a) The prosecution of such cause of action shall also be for the benefit of the department to the extent of compensation and benefits paid and payable from state funds;

(b) Any compromise or settlement of such cause of action which results in less than the entitlement under this title is void unless made with the written approval of the department;

(c) The department shall be reimbursed for compensation and benefits paid from state funds;

(d) The department shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the self-insurer in obtaining the award of settlement; and

(e) Any remaining balance under subsection (4)(d) of this section shall be applied, under subsection (5) of this section, to reduce the obligations of the department and self-insurer to pay further compensation and benefits in proportion to which the obligations of each bear to the remaining entitlement of the worker or beneficiary.

RCW 51.24.070:

(1) The department or self-insurer may require the injured worker or beneficiary to exercise the right of election under this chapter by serving a written demand by registered mail, certified mail, or personal service on the worker or beneficiary.

(2) Unless an election is made within sixty days of the receipt of the demand, and unless an action is instituted or settled within the time granted by the department or self-insurer, the injured worker or beneficiary is deemed to have assigned the action to the department or self-insurer. The department or self-insurer shall allow the worker or beneficiary at least ninety days from the election to institute or settle the action. When a beneficiary is a minor child the demand shall be served upon the legal custodian or guardian of such beneficiary.

(3) If an action which has been filed is not diligently prosecuted, the department or self-insurer may petition the court in which the action is pending for an order assigning the cause of action to the department or self-insurer. Upon a sufficient showing of a lack of diligent prosecution the court in its discretion may issue the order.

(4) If the department or self-insurer has taken an assignment of the third party cause of action under subsection (2) of this section, the injured worker or beneficiary may, at the discretion of the department or self-insurer, exercise a right of reelection and assume the cause of action subject to reimbursement of litigation expenses incurred by the department or self-insurer.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Petitioners' Supplemental Brief in Supreme Court Cause No. 93799-1 to the following parties:

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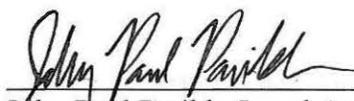
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Original e-filed with:
Washington Supreme Court
Clerk's Office

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

DATED: April 6, 2017 at Seattle, Washington.



John Paul Parikh, Legal Assistant
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TALMADGE/FITZPATRICK/TRIBE

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