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NO. 637843

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DALLAS SWANK AND JEANNE A. PASCAL SWANK,
husband and wife and their marital community,

Appellants,

vs.

JIM DUFFY,

Respondent.

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DIVISION I
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RESPONDENT NON-PARTY SNOHOMISH COUNTY'S
RESPONSIVE BRIEF

MARK K. ROE
Snohomish County Prosecuting Attorney
THOMAS L. SCHWANZ, WSBA #13842
CHARLOTTE F. COMER, WSBA #36805
Deputy Prosecuting Attorneys
Attorneys for Respondent
non-party Snohomish County
3000 Rockefeller Avenue
7th Floor Robert Drewel Bldg., M/S 504
Everett, WA 98201
(425) 388-6330

ORIGINAL

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INTRODUCTION

Dallas Swank suffered an on-the-job injury over twenty-two years ago. Close to ten years ago, this case proceeded to trial, with the jury returning a verdict in favor of Defendant Jim Duffy. Snohomish County [“the County”], Swank’s self-insured employer, was not a party to that lawsuit. Eight years after the jury trial, the Swanks moved the Superior Court to allocate “fault” to the County. The Swanks provided little or no legal authority, or evidentiary support, for their proposed findings of fault. Rather, they provided the Superior Court with one piece of inadmissible evidence, and proposed that fault to the County be allocated at 90 percent. The Honorable Judge John Meyer properly allocated zero percent fault to the County.

Now, for the first time, the Swanks argue that because Dallas Swank was LEOFF II¹, Judge Meyer erred in allocating zero percent fault to the County. Not only should this Court not consider this, or any of the Swanks new arguments on appeal, it continues to be without any merit. As the law, and the evidence, does not permit any allocation of fault to the County, this Court should affirm the Superior Court and allocate zero percent fault to the County.

¹ “LEOFF II” refers to an individual’s status within the Washington State Law Enforcement Officers and Firefighters Retirement Plan.

STATEMENT OF ISSUES

1. Whether this Court should disregard the Swanks' argument that Fray v. Spokane County, 134 Wn.2d 637, 952 P.2d 601 (1998) permits an allocation of fault to Swank's self-insured employer, and affirm the Superior Court's zero percent fault allocation to the County, because this argument is raised for the first time on appeal.

2. Whether this Court should affirm the Superior Court's zero percent fault allocation to the County, regardless of whether Swank's LEOFF II status may have permitted him to sue his self-insured employer, because this issue was unsettled at the time of the Chouinard settlement.

3. Whether this Court should affirm the Superior Court's zero percent fault allocation to the County, regardless of whether Swank's LEOFF II status may have permitted him to sue his self-insured employer, because the Swanks failed to comply with the procedural requirements outlined in Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991).

4. Whether this Court should affirm the Superior Court's zero percent fault allocation to the County because this case was not completely settled and judgment was not entered prior to July 1, 1993; and as such the statutory amendments to RCW 51.24.060 control this matter.

5. Whether this Court should affirm the Superior Court's zero percent fault allocation to the County because the Swanks waived an allocation of fault hearing by failing to provide notice of a third party settlement, to schedule a reasonableness hearing prior to entering into a third party settlement, and to submit jury instructions which could have cured these errors by inviting the jury to allocate fault to the County, as an empty chair, at trial.

6. Whether this Court should disregard the Swanks' argument that a Labor and Industries Order has a res judicata effect, and affirm the Superior Court's zero percent fault allocation to the County, because this argument is raised for the first time on appeal.

7. Whether the Superior Court erred in admitting into evidence the findings of the Snohomish County Accident Review Board, which was not testimony under oath, evidence of a subsequent remedial measure, and hearsay. As such, the Swanks submitted no admissible evidence of fault to the County, providing this Court with an additional reason to affirm the Superior Court's zero percent fault allocation to the County.

8. Whether this Court should affirm the Superior Court's zero percent fault allocation to the County because the Superior Court already determined, in a companion case, that Clark v. Pacificorp, 118 Wn.2d 167,

822 P.2d 162 (1991) does not permit an allocation of fault to the County. As such, the allocation of fault hearing was barred by the doctrine of collateral estoppel.

9. Whether this Court should affirm the Superior Court's allocation of zero percent fault to the County because the proceeding was barred by the doctrine of laches.

10. Whether the Superior Court erred in finding it had jurisdiction to Order a non-party to propose findings of fact and conclusions of law in this case, providing this Court with an additional reason to affirm the Superior Court's zero percent fault allocation to the County.

STATEMENT OF THE CASE

A full recitation of the facts and procedural history of this case would require a review of over twenty years of litigation, under three different cause numbers. For purposes of this appeal, the County will outline a few key facts and dates for the Court. The Court may also find it informative to review its own prior decisions regarding this matter. See Swank v. Duffy, 81 Wn. App. 1013 (1996); Swank v. Snohomish County, 124 Wn. App. 1056 (2005). This current dispute arises out of the Swanks' continuing efforts to recover money the Department of

Labor and Industries Ordered the Swanks pay the County from a third party settlement on July 18, 1997. (CP 403.)

On August 6, 1987, Dallas Swank (“Swank”) was injured when he fell while trying to rappel from a helicopter during a training operation for the Snohomish County Search and Rescue Team in Snohomish County.² (CP 1456-1458.) On March 4, 1988, Swank and his wife filed this action against: (i) Chouinard Equipment, Ltd. (the manufacturer of the faulty harness); (ii) Jim Duffy (the County volunteer who put the harness on Swank) and Jane Doe Duffy; (iii) Swallow, Inc.; and (iv) Snohomish County Search and Rescue, Inc. (Id.) The County was not named a party to that action. (Id.)

On June 18, 1993, Defendant Chouinard paid the Swanks \$550,000 to settle any and all claims against it. (CP 112, ¶ 8.) Pursuant to RCW 51.24.060, the County, as Swank’s self-insured employer, filed a lien against that amount for payments the County had made as for medical benefits provided to Swank. On July 18, 1997, the State Department of Labor and Industries issued a Notice and Order (“L&I Order”) requiring Swank to reimburse the County \$57,921.35 pursuant to RCW 51.24.060. (CP 403.) On September 12, 1997, Swank

² At the time, Swank was an Officer with the Snohomish County Sheriff, a political subdivision of Snohomish County. Swank recently retired with the rank of Lieutenant.

requested reconsideration of that order. (CP 405-406.) He objected to the order on the following grounds:

- A. The order inappropriately included sums awarded Jeanne Pascal Swank [Swank's wife] in its lien calculation;
- B. The order ignored the fact that the case was ongoing and that total costs, etc., were not yet known and thus no calculation of any lien right could be made;
- C. The claim involved negligence of Snohomish County as part of the ongoing litigation and, since the part of the cause related to Snohomish County was ongoing and unresolved, Snohomish County was not entitled to recover;
- D. The order was entered before the third party action was completed.

(Id.) On October 7, 1997, the Department affirmed the order. (CP 407.)

The Swanks never appealed that decision, and pursuant to RCW 51.52.110, the order became final and binding.

The Swanks did not comply with the 1997 order, and on May 12, 1999, the County filed a Warrant for Unpaid Lien and Interest Pursuant to RCW 51.24.060. (CP 410-411.) On October 15, 1999, the Swanks satisfied the Judgment against them. (CP 413.)

The Chouinard Action continued to trial in May 2000 with Jim Duffy as the only remaining defendant.³ (CP 213.) A jury verdict was

³ The Swanks allege the trial was delayed for a number of years because Chouinard filed for bankruptcy, staying the proceedings. The County notes that this assertion, while possibly true, is not supported by the record. The Court generally will not consider "facts recited in the briefs but not supported by the record." See Sherry v. Financial Indem Co., 160 Wn.2d 611, 615, 160 P.3d 31 (2007)(Fn.1); RAP 10.3(a)(5), 13.4(c).

returned finding Jim Duffy not negligent. (Id.) The jury also found the County negligent as an unnamed party, or empty chair. (Id.) No percentage of fault was allocated to the County or any other entity or party. (Id.) The failure to allocate fault was due to the verdict form proposed by the Swanks and presented to the jury by the Superior Court. (CP 521-530.)

Although the Swanks state that the lawyers representing Jim Duffy “heap[ed] blame on Snohomish County at trial,” this is another allegation not supported by the record.⁴ (Brief at 8.) Rather, Duffy’s trial brief reads “In this case, the evidence will show that the entities whose fault contributed to Mr. Swank’s damages include Mr. Swank, Chouinard Equipment, Ltd, Snohomish County, the Sheriff’s Office and agents and employees of the Sheriff’s Office.” (CP 210.)

On January 8, 2001, the parties entered a “Stipulation and Order of Dismissal with Prejudice” with the Court of Appeals. (CP 533-536.) That stipulation read: “COME NOW Appellants, Dallas D. Swank and Jeanne A. Pascal Swank, and Appellee Jim Duffy, by and through their attorneys of record, CARL A. TAYLOR LOPEZ, and RAYMOND J. DEARIE JR., Deputy Prosecuting Attorney, respectively, and stipulate

⁴ Indeed, much of the facts in the Swanks’ brief are not supported by the record in this case. And, the facts with citations refer primarily the findings of the Snohomish County Accident Review Board, which, as will be discussed later, should be stricken from the record.

that the above-entitled matter shall be dismissed with prejudice and without costs to either party.” (Id.) This Court granted that motion, and ordered this case dismissed on January 19, 2001. (CP 538.) Satisfaction of Judgment was entered in Snohomish County Superior Court on January 30, 2001. (CP 540.)

At some point later, the Swanks appear to have filed a Motion to Join Snohomish County in this case.⁵ On June 8, 2001, the Superior Court found “this motion cannot be brought under this cause number because this cause number is no longer viable.” (CP 542.)

This Order did not deter the Swanks. Three years later, on June 14, 2004, the Swanks filed their first “Motion to Set a Date for Hearing Re: Allocation of Fault.” The County objected to that motion, and filed a motion for discretionary review. This Court denied the County’s request for review, finding that there was no order entered on the Swanks’ motion. (CP 478.) In denying the County’s request for discretionary review, the Commissioner expressed concern about “the unusual nature of a hearing to allocate fault to an empty chair five years after the final judgment.” (CP 479.)

This Court remanded the motion for consideration by the Superior Court. (CP 478.) The Swanks did not re-note the matter on the

⁵ Counsel was unable to locate Plaintiffs’ Motion, just the Court’s Order denying it.

civil motions calendar, nor did the Swanks communicate to the County any intent to do so, until nearly four years later. Although the Swanks appear to believe that the County bore the burden of noting a hearing regarding allocation of fault, this contention is without legal authority, and ignores the fact that, at all times, it is the Swanks that sought affirmative relief in this matter.

In the interim, Swank focused his efforts on seeking contribution in other ways—including requesting review by the Department of Labor and Industries, and filing a Writ of Mandamus against the County. (CP 505; 604.) Both efforts failed. (CP 568; 604)

Regarding the Writ of Mandamus, while the Swanks assert that “Snohomish County opposed the writ, arguing among other reasons that an adequate remedy of law still existed because the Court had never held its allocation of fault hearing,” this is simply untrue. (Brief at p. 12.)(emphasis added.) The County, in opposing Swank’s Motion for a Writ of Mandamus, argued “the loss of a remedy at law by lapse of time does not compel mandamus.” (CP 493.) The crux of the County’s argument in opposition to the 2006 Writ of Mandamus was that Swank could not use mandamus to correct his own error in failing to seek timely review of an order from Labor and Industries. At no time did the County suggest that Swank continued to have a remedy at law today.

Following dismissal of Swank's Writ of Mandamus, in August 2008, the Swanks proceeded to bring the motion that is subject to this appeal, requesting the County brief fault of an accident that occurred over twenty years prior and a trial that occurred over eight years prior. Notably, the Swanks provided no legal authority for their motion. Nor did they provide any admissible evidence supporting any allocation of fault to the County. Nor did they present the Court with any arguments related to Swank's LEOFF II status. (CP 577-593.)

The County objected to the Swanks' motion on jurisdictional grounds. (CP 456.) After oral argument, the Superior Court found it had jurisdiction to consider the Swanks' motion, and ordered the County to submit its own proposed findings of fault and conclusions of law. (CP 445.) The County sought and was denied discretionary review of that decision. (CP 417-425; 443.)

On February 10, 2009, the County, as a non-party, submitted its own proposed findings of fact and conclusions of law, with supporting memorandum, in this case. (CP 372-392; 394-399.) The Swanks failed to submit a reply brief addressing any of the County's arguments. On April 30, 2009, the Honorable John M. Meyer, issued an "Order on Findings of Fact and Conclusions of Law," and allocated zero percent fault to non-party Snohomish County. (CP 13-18.) The Court

specifically found “the Plaintiff is estopped from raising the issue of % of allocation of fault in light of F of F # 16.” (CP 18.) Finding of Fact number 16 reads:

The jury instructions, and verdict form, provided by the Court to the Jury were those proposed by Plaintiffs. Plaintiffs’ proposed verdict form did not invite the jury to allocate to any other potentially negligent party—including Snohomish County, Chouinard or Swank himself—if it found Defendant Duffy not negligent.

(CP 16.)

On May 11, 2009, the Swanks filed a Motion for Reconsideration, and, for the first time, asserted that fault was properly allocated (presumably at the proposed 90%) because Swank was LEOFF II. (CP 278-288.) The County opposed the Swanks’ motion, arguing that the Swanks’ attempt to introduce new (but not newly discovered) legal argument and evidence was improper under CR 59 and/ or CR 60. (CP 72-88.) On June 12, 2009, the Honorable John M. Meyer denied the Swanks’ Motion for Reconsideration. On July 10, 2009, the Swanks filed a notice of appeal, seeking review of (i) Judge Meyer’s Order on Findings of Fact and Conclusions of Law dated April 30, 2009; and (ii) Ordering Denying Swanks’ Motion for Reconsideration dated June 12, 2009. (CP 10.)

For the legal arguments presented below, any of which could independently support a zero percent fault allocation to the County, this Court should affirm the decision of the Honorable John M. Meyer assessing fault to the County at zero percent.

ARGUMENT

I. Standard of Review.

This Court reviews a trial court's conclusions of law de novo. Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). This Court reviews findings of fact "under a substantial evidence standard." Pardee v. Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). "Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted." Cingular Wireless, L.L.C. v. Thurston County, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

Finally, motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. Perry v. Hamilton, 51 Wn. App. 936, 938, 756 P.2d 150 (1988). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).

II. The Swanks argument that Fray v. Spokane County, 134 Wn.2d 637, 952 P.2d 601 (1998) permits an allocation of fault to Swank's self-insured employer should be disregarded because it is raised for the first time on appeal.

Generally, this Court will not review an issue raised for the first time on appeal. RAP 2.5(a); Better Fin. Solutions, Inc. v. Caicos Corp., 117 Wn. App. 899, 912-913, 73 P.3d 424 (2003). In August 2008, the Swanks filed their proposed findings of fact and conclusions of law in this case. (CP 331.) That pleading makes no argument related to Swank's LEOFF status, or the Fray case. On February 10, 2009, the County filed its own proposed findings of fact and conclusions of law, with supporting memorandum. (CP 372-392; 394-399.) The County argued that it was immune from liability under Title 51. (CP 378.) The Swanks failed to file a reply brief addressing this, or any of the County's arguments, prior the Superior Court's April 17, 2009 hearing on the matter. Any argument that the Swanks did not understand they had the opportunity to reply is contradicted by the Swanks' own Memorandum Regarding Allocation of Fault, which reads: "Presumably, Swanks will have an opportunity to reply to the response by Snohomish County." (CP 331.)

After the Superior Court adopted the County's proposed findings of fact and conclusions of law, and allocated zero percent fault to the County, the Swanks filed a Motion for Reconsideration. (CP 278.) It was

only then that the Swanks argued, for the first time, that as a LEOFF II Officer, Fray v. Spokane County permitted Swank to sue his self-insured employer. (CP 285.)

The County objected to this new argument, arguing that CR 59 and CR 60 do not permit Swank to propose new theories of the case that could have been raised or presented to the Court before entry of an adverse decision. See JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 7, 970 P.2d 343 (1999)(CP 72.) Specifically, Civil Rule 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case. Id. (citing Vaughn v. Vaughn, 23 Wn. App. 527, 531, 597 P.2d 932 (1979)).

The Swanks had the opportunity to bring the Fray case to the Superior Court's attention, prior to the entry of the Court's Findings of Fact and Conclusions of Law; they failed to do so. The Court then properly refused to consider these new legal arguments as part of a motion for reconsideration. It defies logic to find that an appellant could bypass RAP 2.5, by simply advancing new arguments as part of a motion for reconsideration. This is particularly so when the Superior Court's decision to deny that motion is reviewed by this Court for an abuse of discretion. See Perry, 51 Wn. App. at 938.

Finally, the County further notes that the fact that Swank is LEOFF II is not even properly found in the record before this Court. As this Court generally will not consider “facts recited in the briefs but not supported by the record,” this provides this Court with an additional reason to disregard any argument regarding Swank’s LEOFF status on appeal. See Sherry, 160 Wn.2d at 615; RAP 10.3(a)(5), 13.4(c).

III. While a LEOFF II Officer could sue his employer today, that right is not unlimited, and that right was not clearly established at the time of the Chouinard Settlement.

As an initial matter, the County agrees that a LEOFF II member does have a right to sue his employer today. Fray v. Spokane County, 134 Wn.2d 637, 952 P.2d 601 (1998). However, while that may be well established now, the matter was certainly not resolved at the time of the Chouinard settlement. See Fray, 134 Wn.2d at 637 (finding the 1992 amendments to RCW 41.26.280 which removed a LEOFF II Officers right to sue his employer unconstitutional). This is important because the Swanks, in seeking to proceed under Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991)(superseded by the 1993 amendments to RCW 51.24.060) and RCW 51.24.060 (1992), are arguing that the relevant law in this matter is the law as it existed at the time of the Chouinard settlement: 1993.

RCW 41.26.280 (1993) granted the right to sue one's employer to LEOFF I members only. See Fray, 134 Wn.2d at 649-650. Accordingly, had Swank proceeded with a reasonableness hearing prior to entering into the Chouinard settlement, as he was required to do under Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991), there is a strong argument that he would have been prohibited from allocating fault to the County at that time. Clark, 118 Wn.2d at 167.

By simultaneously asking the Court to apply Fray and Clark, the Swanks are essentially picking and choosing law over the twenty plus years since Swank's accident, and applying only the parts favorable to their position. Such a position is illogical, and simply put, unfair to the County.

Second, while Swank's right to sue his employer was conferred by RCW 41.26.281, that right to sue is not unlimited. Specifically, that statute reads, in part, that "[i]f injury . . . results to a member from the . . . negligent act or omission of a member's governmental employer, the member, . . . shall have the privilege to benefit under this chapter and also have a cause of action against the governmental employer as otherwise provided by law, for **any excess of damages over the amount received or receivable under this chapter.**" (emphasis added).

Under LEOFF, the statute expressly provides that the employer is subrogated to all rights of the member against third parties to recover payments made by the employer for medical services. RCW 41.26.150(3); Hansen v. City of Everett, 93 Wn. App. 921, 927, 971 P.2d 111 (1991). Further, the claim against the employer for negligence is limited to amounts in excess of damages over the amount received or receivable under the statute from the employer. Gillis v. City of Walla Walla, 94 Wn.2d 193, 196, 616 P.2d 625 (1980)(overruled on other grounds by Flanigan v. Dep't of Labor & Indus., 123 Wn.2d 418, 423, 869 P.2d 14 (1994)). These two provisions allow for the employer to recover from the employee the amounts the employer has paid on behalf of the employee for medical expenses without limitation or reduction due to possible negligence on the part of the employer. See RCW 41.26.150(3); Hansen, 93 Wn. App. at 927. To the extent Swank's claim is to be evaluated under the statutory structure of LEOFF II, the County has an absolute right to the money it collected from Swank without considerations of its fault. To the extent Swank's claim is to be evaluated under the statutory structure of the Industrial Insurance Act, the County is immune from liability under RCW 4.22.070. Either way, the Court was correct in determining Swank is estopped from pursuing an allocation of

fault against the County, and properly allocated zero percent fault to the County.

IV. While the Swanks ask the Court to apply Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991), they failed to follow the specific procedure outlined in the case at the time of the Chouinard settlement, and should be estopped from doing so now.

Regardless of whether the County is immune from liability to Swank under chapter 51 RCW, the Court's ultimate Conclusion of Law, that Swank is estopped from raising the issue of allocation of fault, is correct because the Swanks failed to follow the specific procedure outlined in the very case it cites for authority in this matter.

Specifically, the Swanks argue that Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991)(superseded by the 1993 amendments to RCW 51.24.060) and RCW 51.24.060, as it existed in 1993, provided legal authority for the Superior Court to allocate fault to the County today. While the Swanks wish to rely on this dated law, they have failed to comply with any of the specific procedures outlined in the case law or statute.

In 1991, the Supreme Court outlined the very specific procedure for evoking the protections provided to injured workers by RCW 51.24.060(1)(f). Clark, 118 Wn.2d at 167. Specifically, the parties were to proceed as follows:

The parties shall comply with the notice requirements for third-party actions as required by RCW 51.24.030(2) and .080(1) and (2) and as further defined in this opinion.

Before the worker and third party enter a settlement agreement, a hearing shall be held to determine the fault of all at-fault entities. The procedures set forth in RCW 4.22.060(1) shall be followed.

The judge has discretion as to the evidence and testimony (whether by affidavit, deposition or live witnesses) presented during the hearing.

The judge's decision must be reasonable and supported by substantial evidence.

The purpose of the hearing is to allocate fault among all at-fault entities.

The determination is to be made by a judge, and not by jury.

Id. at 182 (emphasis added).

RCW 51.24.030(2) requires that: “[i]n every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed.” RCW 51.24.080 further provides:

(1) If the injured worker or beneficiary elects to seek damages from the third person, notice of the election must be given to the department or self-insurer. The notice shall be by registered mail, certified mail, or personal service. If an action is filed by the injured worker or beneficiary, a copy of the complaint must be sent by registered mail to the department or self-insurer.

(2) A return showing service of the notice on the department or self-insurer shall be filed with the court but shall not be part of the record except as necessary to give notice to the defendant of the lien imposed by RCW 51.24.060(2).

Finally, RCW 4.22.060 provides further notice requirements:

(1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

...

(emphasis added.)

There is no evidence the Swanks (i) provided notice of an election to seek damages from a third party related to his on-the-job injury; (ii) filed notice of that election with the Court; or (iii) gave written notice to all other potentially at fault entities prior to entering into settlement with Chouinard and/or final judgment was entered—all of which Swank was required to do by law. See RCW 51.24.030(2); RCW 51.24.080; RCW 4.22.060. And, it is undisputed that the Swanks made no effort to schedule a reasonableness hearing prior to entering into a settlement with Chouinard. See RCW 4.22.060.

Further, in contrast to the procedure the Swanks advocated to the Superior Court, Clark contemplated a reasonableness hearing with all potentially at fault entities. The Clark Court noted:

The language of RCW 4.22.070(1) is clear and unambiguous: ‘the trier of fact *shall* determine the percentage of the total fault which is attributable to *every* entity which caused the claimant's damages’. ‘Shall’ is presumed mandatory. Reserving the question to a trier of fact prevents manipulation by any one of the parties. We hold that RCW 51.24.060(1)(f) and RCW 4.22.070 require a trier of fact to determine the percentage of total fault attributable to every entity which caused plaintiff's damages.

Clark, 118 Wn.2d 167 at 181 (internal citations removed)(emphasis in original). There is no evidence the Swanks put any other potentially at fault entity on notice of *this* allocation of fault. Rather, the Swanks wish to assign fault to the County only. The Swanks cannot have it both ways—if this Court finds that Clark v. Pacificorp provided the legal authority for an allocation of fault hearing today, then the Swanks should have been required to follow the clear procedures outlined in the case. The question of whether Swank could or could not sue his self-insured employer does not change the fact that he failed to follow the procedures outlined in Clark.

The Swanks that argue the County somehow bore the burden of scheduling a hearing to allocate fault. To support this proposition, the Swanks cite to WPI 21.10 and Joyce v. State, Department of Corrections,

116 Wn. App. 569, 75 P.3d 548 (2003)(reversed in part by Joyce v. State, Dept. of Corrections, 155 Wn.2d 306, 119 P.3d 825 (2005)). What the Swanks conveniently ignore is that this pattern jury instruction, and the Joyce case, are both directed to *defendants* asserting an empty chair defense at trial. The County was not a party to this lawsuit, and, therefore, had no obligation to establish any party's fault at trial. Further, this argument was not raised to the Superior Court (outside of Swank's motion for reconsideration), and should not be considered here. See RAP 2.5(a); Better Fin. Solutions, 117 Wn. App. at 912-913.

Nonetheless, the proposition that the County bore the burden of establishing fault is contrary to the clear language of RCW 4.22.060, which requires that the "party entering into a release" give notice to the Court that a reasonableness hearing is required. RCW 4.22.060(1). Further, "[t]he burden of proof regarding the reasonableness of the settlement offer shall be in the party requesting the settlement." Id. What the Swanks advocate for here, is that a potentially at fault party, who is not privy to a settlement agreement, appear before the Court and present evidence that it is *not at fault* and/or present evidence of the fault of others.

The question of whether Swank could or could not sue his self-insured employer does not change the fact that he failed to follow any of

the procedures outlined in Clark, the very case he relies upon today. As such, this Court should affirm the Superior Court and allocate zero percent fault to the County.

V. **This case was not completely adjudicated prior to July 1, 1993; and as such the statutory amendments to RCW 51.24.060 control.**

RCW 51.24.060(1993), provided in part:

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

...

(c) The 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 compensation and benefits paid;

...

(e) 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;

(f) If the employer or a co-employee are determined under RCW 4.22.070 to be at fault, (c) and (e) of this subsection do not apply and 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.

In 1993, the Legislature amended the statute and completely removed RCW 51.24.060(1)(f) to permit the self-insured employer to recover costs and benefits paid to injured workers from a third party

settlement, regardless of fault. RCW 51.24.060 (2008). The “Historical and Statutory Notes” section following the statute as written today states: “Effective date - - Application - - 1993 c 496: see notes following RCW 4.22.070.” Id. The “Historical and Statutory Notes” section of RCW 4.22.070 reads “Application - - 1993 c 496: This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993.” RCW 4.22.070 (2008).

This Court determines legislative intent by “starting with the language of the statute.” McGinnis v. State, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). Legislative intent is derived from “the plain language of the statute if the statute is clear.” Id. This is because the Legislature is “presumed to ‘mean exactly what it says.’” Id. (citing State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). “A statute is clear on its face if there is only one reasonable interpretation.” Id.

The question of whether the statutory amendments apply to this case turns on whether this case was “settled” or “judgment” was entered prior to July 1, 1993. “Settle” means “to agree, to approve, to arrange.” *Black's Law Dictionary* 1372 (6th ed. 1990). A judgment is a “[d]etermination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal

duty or liability does or does not exist.” *Black's Law Dictionary* 842 (6th ed.1990).

While Chouinard settled with the Swanks in June 1993, this case was not completely settled until after the 2000 jury trial. Indeed, judgment was not entered until January 30, 2001. (CP 540.) While now the Swanks argue that “this case” is limited to Chouinard and the Swanks, that argument ignores the reality that “this case” involved multiple defendants. And, interestingly, the Swanks took this very position—that “this case” was unresolved as of 1997—when they objected to the 1997 L&I Order. (CP 509.) Accordingly, the 1993 amendments control, and RCW 51.24.060(1)(f) has no relevance to this proceeding. As such, the County has an absolute right to collect money it paid for Swank’s medical expenses from a third party settlement, regardless of fault, and the Superior Court properly allocated zero percent fault to the County.

VI. The Swanks waived an allocation of fault to the County by delaying 15 years from the Chouinard settlement to allocate fault to the County.

“A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive.” *Jones v. Best*, 134 Wn.2d 232, 241-242, 950 P.2d 1, 6 (1998). To demonstrate implied

waiver, there must “exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors.” Id. Further, a party cannot invite its own error, even unintentionally, and complain later. See State v. Recuenco, 154 Wn.2d 156, 163, 110 P.3d 188 (2005)(rev’d on other grounds, 126 S. Ct. 2546 (2006)). Specifically, “[t]he doctrine of invited error precludes a party from benefiting from an error that he induced at the trial court level.” State v. Frank, 112 Wn. App. 515, 520, 49 P.3d 954 (2002).

Over the twenty plus years since Swank’s on the job injury, the Swanks have been presented with several opportunities to either formally allocate fault to the County, or seek formal review of the Labor and Industries Order which ordered the Swanks to reimburse the County from the Chouinard settlement. In each instance, the Swanks failed to act.

First, as noted above, the Swanks should have provided formal notice to the County and the Court, as well as scheduled a reasonableness hearing, prior to entering into a settlement with Chouinard in June 1993. See Clark, 118 Wn.2d at 182; RCW 51.24.080; RCW 4.22.060. There is no evidence that the Swanks attempted to comply with the law at that time, and, as such, a reasonableness hearing

was never scheduled and the Court made no allocation of fault. As such, the Swanks have waived an allocation of fault today.

Second, the Swanks never appealed the Department of Labor and Industries October 3, 1997 decision affirming its Order that the Swanks reimburse the County costs it paid for Swank's medical care from the third party settlement with Chouinard. (CP 604.) Pursuant to RCW 51.52.110, the order became final and binding. Ultimately, the Swanks seek an allocation of fault to the County in order to request reimbursement of these funds. Because timely appeal of the Department's decision could have cured this issue over ten years ago, the Swanks have waived any allocation of fault today.

Finally, as noted above, the jury in the 2000 trial was instructed by the Court, using jury instructions proposed by the Swanks. Those instructions did not request the jury to assign a percentage of fault to the County, or any other potentially at fault entity, if the jury found Duffy not negligent. (CP 521-532.) Eight years later, the Swanks attempted to rectify that error by seeking an Order from the Superior Court allocating fault to the County at 90%.

The Swanks argue they did not have to propose proper jury instructions allocating fault because they (1) had a cause of action

pending against Snohomish County⁶ for negligence (Snohomish County Cause No. 92-2-00453-2); (2) Snohomish County was not a party to the Duffy action and (3) Swank did not believe anyone other than Duffy and Snohomish County was at fault. (Brief at p. 17.) Not only do each of these arguments miss the point, they were not properly raised to the Superior Court and, thus, should not be considered by this Court. See RAP 2.5(a); Better Fin. Solutions, 117 Wn. App. at 912-913.

The Swanks were required to proceed under the specific guidelines outlined in Clark prior to entering into a third party settlement. When it failed to do so, the Swanks could have invited the jury to cure this error at trial. They failed to do so. It defies logic to find that the County bore the burden of instructing the jury to allocate fault to it when (i) it was not a party to this lawsuit, and had no standing to submit jury instructions; (ii) it was already in possession of the money L&I Order the Swanks pay to them; and (iii) the L&I Order had become final and binding three years prior. Further, the Swank's argument that they did not believe anyone other than the County and Duffy were negligent is disingenuous when it settled with Chouinard for \$550,000 sixteen years prior (and it seems unlikely they took that position when negotiating with Chouinard.)

⁶ Clearly filed outside of the statute of limitations. RCW 4.16.080.

Finally, the argument that the County bore the burden of allocating fault to its self at the 2000 jury trial, or at any point after the Department issued the L&I Order, is inconsistent with the Clark case. Clark specifically found that the allocation of fault hearing is intended to protect a “plaintiffs’ interests in recovering damages, and the Department’s interest in protecting its lien.” Clark, 118 Wn.2d at 181. Once the Department ordered the Swanks to reimburse the County, regardless of the County’s fault, an allocation of fault hearing served no purpose to the County—who, as Swank’s self-insured employer, held the lien typically owed to the Department.

In the twenty years since Swank’s accident, and the sixteen years since the Chouinard settlement, the Swanks have been presented with several opportunities to allocate fault to the County. In each instance, they failed to act. As such, they have waived an allocation of fault to the County today, and the Superior Court properly allocated zero percent fault to the County.

VII. The Swanks’ argument that a Labor and Industries Order has a res judicata effect should be disregarded because this argument is raised for the first time on appeal.

As noted above, generally, this Court will not review an issue raised for the first time on appeal. RAP 2.5(a); Better Fin. Solutions, Inc., 117 Wn. App. at 912-913. The Swanks never raised the argument of

whether a Labor and Industries Order has a res judicata effect to the Superior Court, and so this Court should not consider it now.

Further, it's not clear why the Swanks are raising this issue at all. The Swanks take issue because the Superior Court's Conclusion of Law # 2 "suggests" that the Department of Labor and Industries Order had a res judicata effect as to the County's fault. Yet, Conclusion of Law # 2 is silent on that matter. Rather, it reads:

The Court finds that the State Department of Labor and Industries Notice and Order ("L&I Order") requiring Dallas D. Swank to reimburse the County \$57,921.35 pursuant to RCW 51.24.060 dated July 18, 1997, became final and binding pursuant to RCW 51.52.110 after Swank failed to seek timely review of the Department's decision affirming the Order on October 3, 1997.

(CP 294.) Indeed, the Swanks concede that Conclusion of Law # 2 is a correct statement of the law. (Brief at p. 22.) As such, by raising this issue, the Swanks appear to be seeking an advisory opinion, which this Court does not give. See Commonwealth Ins. Co. of America v. Gray's Harbor County, 120 Wn. App. 232, 310, 94 P.3d 304 (2004).

Further, while it may be true that the Department did not formally allocate fault to any party, it did consider, and disregard Swank's argument that the lien was premature because the Duffy case was ongoing, and the County's negligence had not been determined. (CP 405-407; 604.) In doing so, it ordered Swank to reimburse the County for medical expenses it paid on Swank's behalf, without regard to the

County's "fault." That Order became final and binding when the Swank's failed to appeal the Department's decision. See RCW 51.52.110. This is important because the Swanks purpose in allocating fault to the County now is to seek reconsideration of that Order—which, as Conclusion of Law # 2 plainly and correctly states, became final and binding over twelve years ago.

VIII. The findings of the Snohomish County Accident Review Board, which were not testimony under oath, evidence of a subsequent remedial measure, and hearsay were improperly admitted into evidence.

To support its assertion that the County was appropriately assigned 90% fault in this case, the Swanks submitted one piece of evidence—the “findings” of the Snohomish County Accident Review Board. Notably, they submitted no evidence or testimony from the 2000 trial to support their proposed findings of fault. The County renews its motion to strike the findings of the Accident Review Board from the record.

What the Swanks sought in this case was a declaratory judgment. As such, CR 56 controls. CR 56(c) reads in part: “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Likewise,

CR 56(e) reads: “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” (emphasis added.)

Not only did the Swanks ask the Court to rule on issues of material fact (i.e., assign fault, and determine contributory negligence), they relied on inadmissible evidence. CR 56(c) and 56(e) prohibited the Court from doing so. The findings of the Accident Review Board are inadmissible for several reasons.

First, what the Swanks submitted to the Court was an incomplete document. (CP 236-238.) They presented the Court with a cover page, and the “findings,” while omitting 77 pages from this document—pages which appear to be testimony. While the Swanks claim this was testimony under oath, the record does not support this contention. (Brief at p. 3.) Indeed, while the “findings” include what appears to be a transcript, there is no evidence the speaker was sworn in, or that the statements were given under penalty of perjury. (CP 236-238.) Second, this document is classic hearsay. ER 802. It is unclear who made these “findings,” or what evidence these “findings” were based upon. Third, from the small portion of the document submitted by the Swanks, it appears this Board was convened to evaluate policies and procedures in

the Sheriff's Office, not to establish comparative liability of parties. Indeed, the document reads: "The purpose of the meeting this morning is to determine the reason for the accident on the 6th of August 1987; try to determine the cause if possible, not necessarily to establish blame, but to establish procedures or SOP's, if necessary." (CP 236)(emphasis added.) As such, this document represents evidence of subsequent remedial measures taken by the County, and is inadmissible. ER 407.

Without these "findings," which clearly should have been stricken, the Swanks provided the Court no basis to allocate any percentage of fault to the County. Further, even if the Court considers the findings of the Accident Review Board, what the Swanks submitted do not support a 90% allocation of fault to the County as a matter of law. Noticeably absent from the document provided by Swank is any specific reference to Swank himself. And, many of the statements are incomplete. For example, the Board noted that the harness had been put in the helicopter without instructions—but it did not reach a conclusion as to how this happened (i.e., the report is silent as to whether this was the result of (i) Chouinard failing to include instructions with the harness, (ii) Swallows Nest—who sold the harness—failing to include instructions, or (iii) the County failing to provide instructions.) (CP 236-238.) As the Swanks presented no evidence of fault of the County, this

provides an additional reason for this Court to affirm the Superior Court and allocate zero percent fault to the County.

IX. The doctrine of collateral estoppel prevented Swank from arguing that Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) permitted an allocation of fault to the County.

To the extent that the Swanks sought to revisit the issue of whether Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) compelled action in this case, the argument is barred by the doctrine of collateral estoppel.

“Collateral estoppel ‘prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case.’” Lemond v. State, Dept. of Licensing, 143 Wn. App. 797, 803-804, 180 P.3d 829 (2008)(citing Barr v. Day, 124 Wn.2d 318, 324-25, 879 P.2d 912 (1994). “Collateral estoppel, or issue preclusion, is the applicable preclusive principle when ‘the subsequent suit involves a different claim but the same issue.’” Id. Thus,

[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Id.

The proponent of a collateral estoppel defense bears the burden of demonstrating:

(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

Lemond, 143 Wn. App. at 797, 804-805.

In 2006, Swank filed a Writ of Mandamus in Skagit County Superior Court, arguing the County was compelled to reimburse funds to him that the Department of Labor and Industries ordered he pay to the County related to his 1987 on the job injury. (CP 505.) Swank argued that Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) controlled the issue, and that the jury verdict finding the County negligent as an empty chair mandated reimbursement of funds the Department of L&I ordered he pay the County. The County opposed the Writ, and filed a cross-motion for summary judgment—arguing, among other things, that Clark did not control in this case. (CP 482-499.) On April 23, 2008, the Honorable John M. Meyer granted the County’s motion. (CP 568.) Swank did not appeal.

Four months later, the Swanks again argued, in the proceeding now on appeal, that Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991) compelled the County to reimburse funds to him that the Department of L&I ordered he pay to the County related to his 1987 on

the job injury, and that the jury verdict finding the County negligent as an empty chair mandated reimbursement of funds the Department of L&I ordered he pay the County. The only difference is that, in this proceeding, the Swanks sought a specific allocation of fault to the County first.

When Swank failed to appeal this Court's 2006 Order regarding Mandamus, it became a final judgment on the merits. The County was the named party in the Writ of Mandamus; it is the party the Swanks now seek action from under this cause number. Finally, the Swanks cannot argue injustice. The only prejudice here is to the County, who in the twenty years since Swank's accident, is continually required to respond to Swank's endless parade of frivolous pleadings. All elements of collateral estoppel are met. Accordingly, Clark does not compel a finding of fault to the County, and fault was properly allocated at zero percent.

X. The proceeding was barred by the doctrine of laches.

The equitable doctrine of laches bars an action when: "(i) the plaintiff knew the facts constituting a cause of action, (ii) the plaintiff unreasonably delayed commencing an action, and (iii) the defendant was materially prejudiced by the delay in bringing the action." Harmony At

Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.,

143 Wn. App. 345, 362, 177 P.3d 755 (2008).

The Swanks have known the facts surrounding this action for over twenty years. The Swanks knew they were obligated to inform the Court and the County of the third party settlement, prior to entering into the settlement. The Swanks knew of the L&I Order in 1997. As the Swanks were always represented by counsel, they undoubtedly knew of the 1993 amendments to RCW 51.24.060 at the time of the L&I Order. The Swanks knew their jury instructions did not invite the jury to allocate a percentage of fault to the County over eight years ago. The Swanks knew their failure to timely appeal the 1997 L&I Order would render it final and binding.

The Swanks offer no legitimate explanation as to why they delayed nearly ten years from the L&I Order, and eight years from the Duffy special jury verdict prior to initiating this allocation of fault proceeding. Such a delay is unreasonable.

Finally, the Swanks delay has materially prejudiced the County. In proposing its own findings of fault, the County has had to reconstruct the procedural history of a lawsuit filed nearly twenty years ago. Memories have faded, witnesses have moved on. In contrast, the Swanks have, at all times, been represented by the same counsel. As

such, this allocation of fault is barred by the doctrine of laches and fault to the County is appropriately assessed at zero percent.

XI. The Superior Court did not have jurisdiction to Order the County to brief fault in this matter.

It is well established that following the formal commencement of an action, the Court is “deemed to have acquired jurisdiction and to have control of all subsequent proceedings.” RCW 4.28.020. “Commencement” follows “by service of summons, or by filing of a complaint, or as otherwise provided.” Id. The reverse logically follows—absent formal commencement of an action against a party, the Court does not have jurisdiction and control over an individual. See id.

It is undisputed the County is not, and never has been a party to this lawsuit. It was never served with a complaint or summons. It did not participate in the jury trial. And, yet, the Court found it had jurisdiction to order the County, as a non-party, to brief fault. (CP 445-446.) The County has not waived this jurisdictional argument, and submitted its own proposed findings of fact and conclusions of law over objection. Because it was not a party to this lawsuit, the Court did not have jurisdiction to Order the County to act, and this proceeding should not have taken place.

CONCLUSION

This Court should affirm the Superior Court's decision to allocate zero percent fault to the County. Not only is there no legal basis for an allocation of fault to the County, the Swanks have submitted no admissible evidence of fault. While the Swanks argue that the County, as an empty chair, has the burden of presenting evidence of the fault of others, or alternatively, providing evidence it was not at fault—they provide no legal authority for this proposition, and such a contention ignores the fact that it is the Swanks, not the County, who seek affirmative relief in this matter. Further, a number of the Swanks' arguments are raised for the first time on appeal, and should be disregarded by the Court. For the reasons outlined above, non-party Snohomish County respectfully requests this Court affirm the decision of the Honorable John M. Meyer allocating zero percent fault to the County.

RESPECTFULLY SUBMITTED this 29th day of January, 2010.

MARK K. ROE
Snohomish County Prosecuting Attorney

By Charlotte F. Comer
CHARLOTTE F. COMER, WSBA 36805
Deputy Prosecuting Attorney
Attorney for Respondent Non-Party Snohomish County