No. 81946-7

FAIRHURST, J. (dissenting) — Today the majority shrinks the word "all" beyond recognition. The third party recovery statute, chapter 51.24 RCW, a part of the Industrial Insurance Act (IIA), Title 51 RCW, defines "'recovery'" as "*all* damages except loss of consortium." RCW 51.24.030(5) (emphasis added). The majority concludes, however, that this definition is not broad enough to include noneconomic damages. Unlike the majority, I cannot be so dismissive of the IIA's text, structure, underlying purposes, and legislative history.

I. THIRD PARTY RECOVERY UNDER THE IIA

The word "recovery" plays an essential role in the IIA's third party recovery statute, and this role must be fully understood before the word is interpreted. Once a settlement is reached or a jury awards damages, the IIA requires the Department of Labor and Industries (L&I) to order distribution of the third party recovery. The distribution plan for third party recoveries won by L&I is provided in RCW

51.24.050(4)[1] and, for those by the injured worker, in RCW 51.24.060(1).[2] These

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[1]The relevant parts of RCW 51.24.050 are as follows:

> (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.

(Emphasis added.)

[2]The full relevant parts of RCW 51.24.060 are as follows:

> (1) If the injured worker or beneficiary elects to seek damages from the third person, any *recovery* made shall be distributed as follows:
>
> (a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer: PROVIDED, That the department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;
>
> (b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: 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 balance of the *recovery* made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;
>
> (i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid under this title: PROVIDED, That the department's and/or self-insurer's proportionate share shall not exceed one hundred percent of the costs and reasonable attorneys' fees;
>
> (ii) The department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees shall be determined by dividing the gross *recovery* amount into the benefits paid amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary;
>
> (iii) The department's and/or self-insurer's reimbursement share shall be determined by subtracting their proportionate share of the costs and reasonable

plans are nearly identical, and the term "recovery" is crucial to defining them. Under both, "[*a*]*ny* recovery" is subject to a four-tiered distribution. RCW 51.24.050(4), .060(1) (emphasis added). First, an amount is set aside to pay for the legal expenses of pursuing the action, RCW 51.24.050(4)(a), .060(1)(a). Second, "twenty-five percent of the balance" is then distributed to the injured worker. RCW 51.24.050(4)(b), .060(1)(b). This amount is calculated by multiplying 0.25 times the balance, which is the difference between the recovery and the distribution for costs and attorney fees. Third, L&I receives an amount to reimburse it for the benefits already paid to the injured worker while awaiting the recovery. RCW 51.24.050(4)(c), .060(1)(c). L&I is not fully reimbursed, however, because its claim is reduced by its proportionate share of the costs and attorney fees. *Id.* Fourth, the injured worker receives the remaining balance. RCW 51.24.050(4)(d), .060(1)(d).

> attorneys' fees from the benefits paid amount;
>
> (d) Any remaining balance shall be paid to the injured worker or beneficiary; and
>
> (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 minus the department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance. This proportionate share shall be determined by dividing the gross *recovery* amount into the remaining balance amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary. 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.
>
> (Emphasis added.)

Through this remaining balance award, the term "recovery" has a significant indirect effect. If the size of the recovery is large enough to yield a remaining balance award, the distribution plans require L&I to suspend future benefit payments, at least temporarily. RCW 51.24.050(5), .060(1)(e). L&I must restart benefit payments when the total amount of benefits that L&I would have paid exceeds the amount of a statutorily defined offset. RCW 51.24.050(5), .060(1)(e). Under RCW 51.24.050(5), the offset is equal to the amount of the remaining balance award distributed to the injured worker. Under RCW 51.24.060(1)(e), the offset is the amount of the remaining balance award distributed to the worker, subtracted by the "proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance," which means L&I shoulders a fair share of the costs and attorney fees. Thus, the remaining balance award under RCW 51.24.050(4)(d) and .060(1)(d) is the basis for an offset against L&I's liability for future benefit payments. If the size of the recovery is reduced because we are deducting noneconomic damages, the effect is less money for the remaining balance award and the corresponding offsets, and so L&I's liability for future benefit payments will be greater.

In sum, the term "recovery" defines the entire scope of the distribution plans described in RCW 51.24.050(4) and .060(1). The term "recovery" indirectly

determines the size of the remaining balance award issued under RCW 51.24.050(4)(d) and .060(1)(d) and therefore the amount of future benefit entitlements that will be offset under RCW 51.24.050(5) and .060(1)(e).

II. THE STATUTORY DEFINITION OF "RECOVERY"

The most obvious flaw in the majority's interpretation is its belief that if the legislature really wanted to say *all* damages, then the legislature would not have used just the word "all." According to the majority, the legislature "could have clearly expressed its intent by defining 'recovery' to include all noneconomic damages except for loss of consortium." Majority at 7. True, the legislature theoretically could have chosen that verbose wording to express its intent. But the legislature was equally free to use the more succinct language it chose, "For the purposes of this chapter, 'recovery' includes all damages except loss of consortium." RCW 51.24.030(5). The legislature should never have to provide an exhaustive list of each thing encompassed by the word "all."

I would read the statute according to its plain meaning. By modifying the word "damages" with the adjective "all," RCW 51.24.030(5) necessarily includes noneconomic damages within its ambit. Of course, RCW 51.24.030(5) makes an exception for "loss of consortium." But it is a well settled rule that "[e]xpress exceptions in a statute suggest the Legislature's intention to exclude other

exceptions." *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 17-18, 978 P.2d 481 (1999). Loss of consortium damages is the only express exception. By excluding only loss of consortium damages, the legislature intended to include all other noneconomic damages, including pain and suffering, within the definition of "recovery."

III. THE LEGISLATIVE RESPONSE TO *FLANIGAN*

The majority's reliance on *Flanigan v. Department of Labor & Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994) is misplaced. The *Flanigan* court held that L&I's right to reimbursement "does not extend to a spouse's third party recovery for loss of consortium." *Id.* at 420. As the majority recognizes, *Flanigan*, "in dicta," also "suggested that other noneconomic damages, such as pain and suffering, may also be excluded." Majority at 5. This dictum loomed large.

The legislature responded immediately, passing an amendment in the next session that defined "recovery" as "all damages except loss of consortium." Laws of 1995, ch. 199, § 2 (codified at RCW 51.24.030(5)). This new definition affected the meaning of 18 separate provisions of chapter 51.24 RCW. *See* RCW 51.24.030(2) (using "recovery" twice), .040 (once), .050(4) (once), .050(4)(a) (once), .050(4)(b) (once), .050(5) (once), .060(1) (once), .060(1)(c) (once), .060(1)(c)(ii) (once), .060(1)(e) (twice), .060(2) (once), .060(5) (four times), and .060(6) (once). Among

these is RCW 51.24.060(1)(c), the very provision on which *Flanigan* rested and which the majority wrongly contends "the legislature did not alter." Majority at 7. Rather than give effect to this sweeping response to *Flanigan*, the majority insists that nothing has changed. The majority is incorrect.

"The Legislature 'does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.'" *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (quoting *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976)). If the legislature's objective was to keep the meaning of the third party recovery statute unchanged after *Flanigan*, as the majority holds it was, then the 1995 amendment was unnecessary and meaningless. The rules of statutory interpretation eliminate the need for the legislature to spend its time codifying this court's holdings. *See, e.g.*, *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) ("This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision."). If, however, the legislature intended the 1995 amendment to have some significant purpose, as we are compelled to presume, the only possible intention was to reject *Flanigan*'s dicta regarding noneconomic damages, not to merely codify

Flanigan's holding.

IV. RECOVERY AND THE IIA'S DISTRIBUTION PLANS

A statutory provision's context and the whole statutory scheme shed light on the provision's meaning, *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). The context in which "recovery" is used casts further doubt on the majority's analysis. The problem lies again with the majority's application of *Flanigan*. In *Flanigan*, the issue was narrowly drawn as whether RCW 51.24.060(1)(c) granted L&I the right to draw a reimbursement for benefits already paid from the loss of consortium damages that an injured worker's spouse received in an action against a third party. *Flanigan*, 123 Wn.2d at 421, 426. Holding the answer was "no," the *Flanigan* court rested its decision on the particular text of RCW 51.24.060(1)(c) ("[L&I] shall be paid the balance of the recovery made, but only to the extent necessary to reimburse [L&I] for benefits paid") and on the theory that workers' compensation benefits do not compensate a spouse for loss of consortium. *Flanigan*, 123 Wn.2d at 426. *Flanigan* is firmly anchored to the text of RCW 51.24.060(1)(c), and the *Flanigan* court never suggested that its holding related to the meaning of the word "recovery" or to the other elements of the

distribution plans set forth in RCW 51.24.050(4) and .060(1).

Still, the majority takes the *Flanigan* court's interpretation of the word "reimburse," which is found only in RCW 51.24.060(1)(c), and connects it to the word "recovery," which pervades all of chapter 51.24 RCW. Majority at 5-6. There is no justification for taking a single nearby word and using it to override the statutory definition provided in a separate section. In reality, the 1995 amendment *decouples* the words "reimburse" and "recovery." By responding to *Flanigan* with a definition for "recovery," the legislature made clear that the scope of the distribution plans does not depend on any link between the type of benefits paid and the type of tort damages recovered. Rather, "all damages except loss of consortium" are in the pool of damages to be drawn from at each step of the distribution plans. RCW 51.24.030(5).

The majority opinion will have harmful effects on the statutory scheme as a whole. In many cases, there will be an inadequate sum of economic damages for fully reimbursing L&I pursuant to RCW 51.24.050(4)(c) and .060(1)(c). That itself is unfortunate, but the real problem lies with L&I's liability for *future* benefit payments. With the distribution plans denied the full recovery intended by the legislature, a smaller remaining balance distribution goes to the injured worker under RCW 51.24.050(4)(d) and.060(1)(d). Because both RCW 51.24.050(5) and

.060(1)(e) use the remaining balance amount to offset future compensation benefits, the offsets will expire and RCW 51.24.050(5) and .060(1)(e) will require L&I to restart benefit payments to the injured worker from the compensation fund much sooner than the legislature intended. The majority undercuts the third party recovery statute's goals of preventing a double recovery and ensuring that the workers' compensation fund "[is] not charged for damages caused by a third party." *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990).

All this is illustrated by Tobin's case. Under the majority's interpretation, the noneconomic damages of $793,083.16 are excluded and the economic damages of $606,916.84 are the only recovery. This smaller recovery is filtered through the distribution plan of RCW 51.24.060(1), and a much smaller remaining balance is available to offset L&I's future liability. *See infra* app. chart 4. After L&I's proportionate share of costs and attorney fees is subtracted from the remaining balance award, the size of the offset is only $164,552.30. *Id.* With such a small offset, L&I estimates that it will pay Tobin another $398,179.70 in workers' compensation benefits in the future. *Id.* Under the majority's holding, these future benefits are added to the $80,501.40 that L&I already has paid to Tobin, as well as the $525,532.71 in net recovery from pain and suffering, and the awards of $100,551.21 and $248,305.22 under the distribution plan of RCW 51.24.060(1). *Id.*

In total, Tobin will receive $1,353,070.24 in net compensation. *Id*. If he had received *all* of the tort damages--economic and noneconomic--and there were no workers' compensation system, he would have taken home only $927,737.56 out of the $1.4 million recovery, once he paid costs and attorney fees. *See infra* app. chart 2. The majority thus gives Tobin a windfall of over $400,000, and it comes at the expense of the workers' compensation fund, even though a third party was liable for Tobin's injuries, not the employers that pay into the system. Once similar cases play out, the majority's holding will cause a severe hit to the workers' compensation fund and, ultimately, higher premiums levied on employers that pay into the fund, with all the detrimental economic effects this would cause.[3]

The majority suggests that L&I receives a windfall under my and L&I's view of the statute. This is incorrect. L&I would receive only $53,346.31 as reimbursement for past benefits paid, after paying its proportionate share of costs and attorney fees, while Tobin (1) keeps the $80,501.40 he has already received in

[3]This result will flow partly from the need for L&I to ensure the workers' compensation fund is adequately financed into the future. But this result will also stem from the now inevitable consequences of a pending class action lawsuit. *See Davis v. Dep't of Labor & Indus.*, No. 385279-III, *petition for review stayed* (Wash. Ct. App. Mar. 31, 2009); Pet. for Review, App. E. The plaintiffs claim, based on the Court of Appeals holding that recovery does not include noneconomic damages, that L&I's past distributions of third party recoveries have overstated reimbursements to L&I and have wrongly denied the plaintiffs benefit payments to which they were entitled. The majority's interpretation of the IIA gives the plaintiffs a strong argument. Any damages awarded to the plaintiffs will, of course, come from the workers' compensation fund, and premiums will rise still further to make up the deficit.

workers' compensation benefits, (2) would receive another $136,996.37 in future benefit payments once the offset is exceeded, and (3) would get awards of $231,934.39 and $642,456.86 through the distribution plan of RCW 51.24.060(1). *Infra* app. chart 3. In total, Tobin would receive $1,091,889.02. *Id.* Under my interpretation of the legislature's intent, Tobin and others similarly situated would still be better off *with* the third party recovery statute than without it. Even though the employer was not liable for the injury, the legislature intends that the workers' compensation system provide a safety net to the injured worker in the event that a tort recovery is insufficient.

V. THE LEGISLATIVE HISTORY

The majority does not mention the legislative history, a review of which resolves any lingering doubt about legislative intent. House and senate journals are not the only sources of legislative history. *See Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 104-05, 829 P.2d 746 (1992). A broad range of evidence can be probative of the legislature's intent, including testimony offered to a committee, *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 304, 149 P.3d 666 (2006); committee staff's explanations of a bill's effects, *Brown v. State*, 155 Wn.2d 254, 265-66, 119 P.3d 341 (2005); discussion among committee members, *State v. Heiskell*, 129 Wn.2d 113, 119, 916 P.2d 366

(1996); and committee staff memoranda, *State v. Turner*, 98 Wn.2d 731, 737-38, 658 P.2d 658 (1983). Several such sources from the 1995 legislative session are available.

The fiscal note is particularly revealing. In describing *Flanigan*, it says the opinion "excepted damages for loss of consortium from [L&I's] right of reimbursement, and created a potential for attempts at excluding other forms of damages from [L&I's] right of reimbursement." Pet. for Review, App. C, Fiscal Note at 7. The fiscal note describes several assumptions of what would occur without passage of the amendment defining "recovery" to include "all damages except loss of consortium." *Id.* First, "piecemeal attempts to exclude various forms of damages from the Trust Funds' right of reimbursement will be made"; second, "the underlying purpose of the third party chapter which is replenishment of the Trust Funds will be significantly hampered"; and third, "recoveries from third persons will be unpredictable and unreliable in determining actuarial levels of reserve and premium necessary to ensure solvency of the State Fund, leading to potential instability and higher costs of industrial insurance." *Id.* Strikingly, these are all concerns that the majority dismisses.

In testimony before the House Commerce and Labor Committee, a representative of the Washington State Trial Lawyers Association (WSTLA) (now

known as the Washington State Association for Justice) conceded that the 1995 amendment would define the scope of the distribution plans and L&I's right to reimbursement to include noneconomic damages, including pain and suffering. The WSTLA representative explained that WSTLA's policy preference was that pain and suffering damages should not be included in the distribution plans because L&I "does not pay for pain and suffering." Pet. for Review, App. C, Verbatim Report of Proceedings (VRP) (Mar. 22, 1995) at 44. But WSTLA then *conceded* that the effect and intent of the 1995 amendment was to *reject* WSTLA's policy preference. WSTLA said, when discussing noneconomic damages for pain and suffering, "We are conceding that [L&I] should benefit in that payment even though they don't pay a nickel for it. . . . [I]n this bill, we are conceding [L&I] has a lien on it even though they never paid it in the first instance." *Id.* at 45.

WSTLA's understanding of the amendment accords with L&I's. Testifying to the Senate Committee on Labor, Commerce, and Trade, Mike Watson, the L&I deputy director indicated L&I's intent to "codify that loss of consortium is the only part of a third-party recovery for an injury that would not be subject to repayment of the benefits that L & I or the self-insured employer has paid out." Pet. for Review, App. C, VRP (Jan. 24, 1995) at 31. Watson explained that "[t]here was some language in the Supreme Court decision [*Flanigan*] that began to get into an

analysis of special damages [economic] versus general damages [noneconomic]." *Id.* at 31-32. Watson said that the *Flanigan* dicta regarding noneconomic damages "has never taken place in terms of the law or the application of the law in the past, and we would like to make that clear." *Id.* at 32. When Watson later testified before the House Committee on Commerce and Labor, he explained that the proposed amendment agreed with *Flanigan* that loss of consortium damages were not appropriate sources of reimbursement for L&I. Pet. for Review, App. C, VRP (Mar. 22, 1995) at 5. But he explained the amendment also limited *Flanigan* by "making sure that all other damages are subject to the right of lien by [L&I] or [the] self-insurer." *Id*. According to Watson, to reject the dicta of *Flanigan*, the amendment would clarify "it isn't necessary to define whether they're economic or noneconomic. If you make the recovery, anything other than loss of consortium is subject to the lien of [L&I] or the self-insured." *Id.* at 22-23.

Although this committee testimony is not conclusive, it tends to show that the legislature wanted to limit *Flanigan*. The amendment was requested by L&I. 1 Senate Journal, 54th Leg., Reg. Sess., at 130 (Wash. 1995). Hence, L&I's testimony about the amendment's meaning deserves some weight. And it is significant that WSTLA, which *opposed* the amendment's underlying policy, conceded the amendment would include damages for pain and suffering within the

definition of "recovery." This legislative history cannot be explained away, especially when doing so requires a redefinition of the word "all."

For all the reasons stated, I respectfully dissent. I would reverse the Court of Appeals and hold that noneconomic damages for pain and suffering are among the "all damages" described in RCW 51.24.030(5). It is now the legislature's turn to undo what the majority has done.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:

Justice James M. Johnson

Appendix charts 1-4 can be found at http://www.courts.wa.gov/opinions/attachment/819467.pdf.