

No. 41988-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DENNIS JONES,

Appellant,

v.

CITY OF OLYMPIA AND
DEPARTMENT OF LABOR & INDUSTRIES,

Respondents.

FILED
COURT OF APPEALS
DIVISION II
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APPELLANT'S REPLY BRIEF

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I. APPELLANT DENNIS JONES' REPLY

A. The City can only recover for benefits paid.

The Court is well-briefed on this issue and Mr. Jones will keep his reply to a minimum. The City has argued that its lien can be based on more than benefits paid (e.g., more than medical bills and wage loss paid to Mr. Jones). To emphasize this argument, the City relies upon two cases that predate the recent *Tobin* decision. *Gersema v. Allstate*, 127 Wn. App. 687, 112 P.3d 552 (2005); *Mills v. Department of Labor & Indus.*, 72 Wn. App. 575, 865 P.2d 41, *review denied*, 124 Wn.2d 1008 (1994).

The City's argument is without merit because it can be readily ascertained that the City only paid \$82,188.86 in medical bills and wage loss and, therefore, basing the City's lien on any excess amount would invade general damages in violation of the standards set forth in *Tobin*.

In *Tobin v. DLI*, 169 Wn.2d 396 (2010), the court began its analysis by focusing on the underlying statute, RCW 51.24.060(1), which states that the Department can only recover "to the extent necessary to reimburse [the Department] for benefits paid." *Id.* at 401. Any remaining balance is to go to the injured worker. Next, the court observed that this statute was not particularly clear, thereby leaving the court to interpret the legislature's intent. *Id.* The court then repeated and relied upon language from the *Flanigan* decision, which is clearly on point against the City's argument, as

follows:

Referencing the language of RCW 51.24.060(1)(c), we concluded [in Flanigan] that where the Department has not paid out benefits for a type of damages, it cannot seek reimbursement from that type of damages.

Id.

The court then concluded that “The Department did not pay of benefits for pain and suffering; therefore it cannot be “reimbursed” for pain and suffering.” *Id.* at 406-07. By doing so, the court interpreted the statute as saying the Department cannot base its lien on any portion of a recovery that does not represent benefits paid by the Department.

The City is essentially arguing that because the settlement was not allocated, it can claim that the entire \$250,000.00 represents benefits paid by the City, and base its lien on this amount (rather than the amount the City actually paid). This is nonsensical and clearly against the rule set forth by the Washington Supreme Court in *Tobin*.

When the City calculated its lien based on Mr. Jones’ entire settlement, rather than what it paid in medical bills and time loss, the City justified its actions by piecing together case law and dicta from two Court of Appeals decisions that predated *Tobin* and were not mentioned or relied upon by the Supreme Court in its recent decision. *Gersema and Mills, supra*.

The problem with the City’s reliance upon these two Court of Appeals decisions is that the Supreme Court has since twice ruled differently with

regard to general damages of loss of consortium and pain and suffering. It is not unusual for the highest court in Washington to interpret a statute. After such interpretation, this becomes the law of Washington and former decisions from appellate courts that would result in conflicting outcomes no longer apply.

The City is not entitled to base its lien on Mr. Jones' entire settlement of \$250,000.00 by arguing that the whole amount must somehow be benefits paid by the City because Mr. Jones did not allocate his settlement between special and general damages. Such an argument defies common sense when Mr. Jones clearly and unequivocally received \$82,188.86 in benefits this case.

B. The settlement in *Ahlborn* was not apportioned – The U.S. Supreme Court did not allow the government to invade general damages.

The Supreme Court in *Ahlborn* was applying a statute similar to the one in the instant case. *Arkansas Dep't of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L.Ed.2d 459 (2006). In *Ahlborn*, the statute allowed recovery for services paid by Medicaid, but—like this case—did not allow for recovery beyond services paid. Here, if we are to follow the standards set forth by the U.S. Supreme Court, the City can only base its lien on the amount of benefits paid, otherwise it will clearly invade Mr. Jones' general damages. Moreover, as made clear by the U.S. Supreme

Court, the City's argument that failure to apportion damages allows it to base its lien on the entire settlement is again without merit. The settlement agreement in *Ahlborn* was not apportioned. Therefore, the City's argument fails, and this Court should determine that the City must calculate its lien based on the amount it actually paid in medical bills and time loss.

C. **The City's lien calculation violates takings and due process under the Washington Constitution and the United States Constitution.**

The City argues that Mr. Jones has offered little or no support for his position that invading general damages violates takings and due process under our Constitutions. The City again suggests that because Mr. Jones did not apportion his settlement, it can simply assume the entire settlement constitutes benefits paid. However, in the instant case, we do know the amount in benefits paid, which is far less than the total settlement. Moreover, it is well established black letter law that general damages are a property interest. *See* 4.08.080; *see also Woody's Olympia Lumber, Inc. v. Roney*, 9 Wash. App. 626, 513 P.2d 849 (1973); *In re Marriage of Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984).

Accordingly, calculating a lien that invades general damages is not only in violation of *Tobin*, but is a regulatory taking without due process in violation of Washington's Constitution and the U.S. Constitution. *See* Const. Art. I § 16; U.S. Const. Amend. 14 § I. The court in *Tobin* did not need to

reach this argument, however, because it held that when correctly applied, RCW 51.24.060 does not allow a lien to extend to general damages of pain and suffering.

II. CONCLUSION

The Court should grant firefighter Dennis Jones appeal for the reasons set forth above. Because the City of Olympia paid \$82,188.86 for medical bills and time loss incurred as a result of Mr. Jones' injury, and because this amount is readily ascertainable, the Court should apply the holdings in *Tobin* and *Ahlborn*, as well as the plain meaning of the underlying statute, and find that the City is only entitled to calculate its lien based on the amount it paid in benefits (special damages).

DATED: December 21, 2011

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS: 1. APPELLANT’S REPLY BRIEF; and
 2. DECLARATION OF SERVICE.

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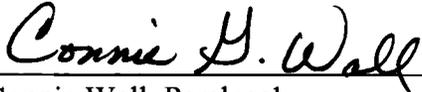
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DATED this 21st day of December, 2011, at Lacey, Washington.



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