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STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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SHARON A. DAVIS,

Appellant,

v.

THE WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT**

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

I. NATURE OF THE CASE.....1

II. ISSUE.....2

III. COUNTERSTATEMENT OF THE CASE .....3

IV. STANDARD OF REVIEW.....5

V. ARGUMENT .....6

A. The Department Properly Distributed The Full Amount  
Of Ms. Davis’ Third Party Recovery Because No  
Amount Was Allocated As Pain And Suffering Damages .....6

1. No allocation was made for pain and suffering  
damages in the settlement agreement and, therefore,  
the entire settlement amount was part of the recovery .....6

2. *Mills* remains law and controls Ms. Davis’ appeal.....10

3. *Gersema* remains law and directly controls Ms.  
Davis’ appeal .....12

B. The Court Cannot Excuse Ms. Davis’ Failure To Allocate  
Based On Her Expectation That The Department Would  
Ignore Any Pain And Suffering Allocation .....13

C. Requiring Administrative Allocation Is An Unnecessary  
Burden That Will Hinder The Department’s Fiduciary  
Duty To Maximize The Workers’ Compensation Funds’  
Reimbursement From Third Party Recoveries .....16

1. Fictitious allocations are not feasible .....16

2. Ms. Davis’ suggestion to use her settlement demand  
letter as a basis for allocation has no support in law .....18

3.	Ms. Davis' suggestion to use the Department's claim payment ledger has no support in law and is not an accurate basis for allocation .....	19
4.	An administrative reasonableness hearing cannot provide the relief Ms. Davis seeks, which would require the Board to undo the settlement agreement.....	20
VI.	CONCLUSION .....	22

## TABLE OF AUTHORITIES

### Cases

<i>Ackley-Bell v. Seattle School Dist.</i> , 87 Wn. App. 158, 940 P.2d 685 (1997).....	6
<i>Cockle v. Dep't of Labor &amp; Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	6
<i>Flanigan v. Dep't of Labor &amp; Indus.</i> , 123 Wn.2d 418, 869 P.2d 14 (1994).....	11
<i>Gersema v. Allstate Ins. Co.</i> , 127 Wn. App. 687, 112 P.3d 552 (2005).....	2, 4, 7, 8, 9, 12, 13, 19, 20
<i>Hi-Way Fuel Co. v. Estate of Allyn</i> , 128 Wn. App. 351, 115 P.3d 1031 (2005).....	17, 18
<i>Littlejohn Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 74 Wn. App. 420, 873 P.2d 583 (1994).....	6
<i>Mills v. Dep't of Labor &amp; Indus.</i> , 72 Wn. App. 575, 865 P.2d 41 (1994).....	1, 4, 7, 8, 9, 10, 11, 13, 14, 16
<i>Stuckey v. Dep't of Labor &amp; Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996).....	5
<i>Tobin v. Dep't of Labor &amp; Indus.</i> , 145 Wn. App. 607, 187 P.3d 780 (2008), <i>aff'd</i> , 169 Wn.2d 396, 239 P.3d 544 (2010).....	3
<i>Tobin v. Dep't of Labor and Indus.</i> , 169 Wn.2d 396, 239 P.3d 544 (2010).....	1, 7, 15
<i>Weyerhaeuser Co. v. Aetna Cas. &amp; Sur. Co.</i> , 123 Wn.2d 891, 874 P.2d 142 (1994).....	5

### Statutes

RCW 51.24.030(5).....	7
-----------------------	---

RCW 51.24.060 ..... 1, 2, 3, 6, 7, 18

RCW 51.24.060(2)..... 7

**Rules**

CR 56 ..... 5

**Other Authorities**

*In re Brian I. Shirley, Dec'd,*  
Dckt. No. 08 21182, 2009 WL 2949355 (Wash. Bd. Ind. Ins.  
App.) (Fennerty, Jr. dissenting) ..... 20

## I. NATURE OF THE CASE

Ms. Davis was injured in the course of her employment and in addition to filing a claim for workers' compensation benefits, settled her third party claim against the person causing her injury. The settlement documents made no allocation of the lump sum recovery and the Department distributed the full settlement according to the statutory distribution formula set forth in RCW 51.24.060. Ms. Davis agrees that her settlement release does not allocate any portion of her recovery as pain and suffering damages, yet asks the court to order the Department to identify a portion of her recovery as pain and suffering and exclude it from the statutory distribution formula.

The Supreme Court's decision in *Tobin v. Dep't of Labor and Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010), precludes the Department from including a worker's pain and suffering damages in the statutory distribution. Mr. Tobin settled his third party claim with settlement documents that allocated his damages between special and general damages. *Tobin*, 169 Wn.2d at 398. Ms. Davis did not allocate her third party recovery between general and special damages. Accordingly, *Tobin* does not apply and the trial court correctly applied this Court's holding in *Mills v. Dep't of Labor & Indus.*, 72 Wn. App. 575, 865 P.2d 41 (1994)

and the holding in *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 112 P.3d 552 (2005).

In those cases, the courts were unable to determine from the record what amount, if any, was intended by the settling parties as compensation for damages that might not have been subject to the Department's lien. That inability was caused by the settling parties' failure to allocate the recovery between categories of damages. Ms. Davis' appeal presents the same lack of information in the record.

Both the Board of Industrial Insurance Appeals (Board) and the trial court found that Ms. Davis' appeal is governed by *Mills* and *Gersema* and that the Department correctly distributed her entire unallocated recovery because no portion was identified as pain and suffering damages. So should this Court.

## II. ISSUE

An injured worker's third party recovery is distributed pursuant to the formula set forth in RCW 51.24.060. *Gersema* and *Mills* establish that any category of damage exempt from statutory distribution must be allocated in the settlement agreement. Did the Department properly distribute the entire amount of Ms. Davis' third party settlement recovery

because the parties did not allocate for pain and suffering in the settlement release?

### III. COUNTERSTATEMENT OF THE CASE

Ms. Davis was injured in an automobile accident during the course of her employment. CABR 3, 137.<sup>1</sup> She elected to pursue a third party claim for damages against her employer's uninsured motorist carrier. CABR 3, 137. Ms. Davis settled her third party claim for a lump sum payment of \$75,000. CABR 3. Ms. Davis and the settling third party did not allocate the \$75,000 payment between categories of damages. CABR 3, 140.

The Department distributed the full amount of Ms. Davis' third party recovery according to the statutory distribution formula set forth in RCW 51.24.060. CABR 2, 3. The Department issued its distribution order on June 9, 2008, before the Court of Appeals decision in *Tobin v. Dep't of Labor & Indus.*, 145 Wn. App. 607, 187 P.3d 780 (2008), *aff'd*, 169 Wn.2d 396, 239 P.3d 544 (2010). CABR 3, 4.

Ms. Davis appealed the Department's distribution order to the Board. Based on the Court of Appeals' *Tobin* decision, Ms. Davis argued the Department improperly distributed the full amount of her settlement

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<sup>1</sup> The Certified Appeal Board Record is cited as CABR.

recovery without allocating and excluding a portion as pain and suffering damages. CABR 25.

The Department moved for summary judgment at the Board, arguing that because Ms. Davis did not allocate her settlement recovery, *Tobin* does not apply and her appeal is subject to the *Mills* and *Gersema* decisions. CABR 91. Those decisions require the settling parties to allocate damages before the reviewing court will determine if the claimed category of damage should be excluded from the Department's lien and omitted from statutory distribution. *Mills*, 72 Wn. App. at 579; *Gersema* 127 Wn. App. at 695-96. Ms. Davis responded that other methods can be used to determine the amount of pain and suffering damages. CABR 117. Her methods suggested to the Board are the three same methods she presents in her opening brief to this Court. Briefly, they are using the damages figures set forth in her demand letter to establish a percentage allocation; using the Department's benefits payment ledger to establish the special damages paid through a process of elimination; and remanding to the Board for a fact-finding inquiry to establish an allocation.

The Industrial Appeals Judge granted the Department summary judgment, concluding that *Tobin* does not control Ms. Davis' appeal and that *Mills* and *Gersema* directly apply. CABR 14.

Ms. Davis petitioned the full Board for review. CABR 7. The Board issued its Decision and Order on March 2, 2009, agreeing with the Industrial Appeals Judge's Proposed Decision and Order and affirming the Department's distribution order. CABR 2.

Ms. Davis appealed to superior court. After a bench trial, the trial court affirmed the Board's decision, which affirmed the Department's distribution order. CP 323. The trial court's decision is based on its conclusion that Ms. Davis' appeal is controlled by *Mills* and *Gersema*. CP 167. Ms. Davis appealed to this Court.

#### IV. STANDARD OF REVIEW

Because this case was disposed of at both the Board and superior court levels on motion for summary judgment, this Court reviews the trial court's decision to grant the Department's motion for summary judgment *de novo*. When deciding whether the Department was entitled to summary judgment, the Court must view all facts in the light most favorable to Ms. Davis. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). However, there are no disputed facts in this case. The questions of law raised by this appeal are reviewed *de novo*. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

The issues in this case turn on the proper construction of RCW 51.24.060. Statutory construction is a question of law, reviewed *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). However, the Department and Board interpretations of the Industrial Insurance Act are entitled to great deference, and the courts “must accord substantial weight to the agenc[ies’] interpretation of the law.” *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994) (deference given to the Department’s interpretation); *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997) (recognizing that deference is due the interpretations of both the Department and Board).

## V. ARGUMENT

### A. **The Department Properly Distributed The Full Amount Of Ms. Davis’ Third Party Recovery Because No Amount Was Allocated As Pain And Suffering Damages**

1. **No allocation was made for pain and suffering damages in the settlement agreement and, therefore, the entire settlement amount was part of the recovery**

An injured worker’s third party recovery is subject to distribution according to RCW 51.24.060. The worker receives a portion of the recovery and the Department receives a portion of the recovery. RCW 51.24.060. The Department has a lien on its share of the recovery.

RCW 51.24.060(2). Recovery is defined to include “all damages except loss of consortium.” RCW 51.24.030(5). The Supreme Court recently held that pain and suffering damages are also excluded from this definition of recovery and thereby excluded from distribution under RCW 51.24.060. *Tobin*, 169 Wn.2d at 404. Mr. Tobin was injured in the course of his employment and successfully recovered damages from the negligent third party. *Tobin*, 169 Wn.2d at 398. Mr. Tobin’s settlement allocated a portion of his recovery as pain and suffering. *Tobin*, 169 Wn.2d at 398. The Supreme Court concluded that an injured worker’s pain and suffering damages may not be included in the RCW 51.24.060 distribution formula. *Tobin*, 169 Wn.2d at 404.

Ms. Davis concedes that she did not allocate her third party recovery by specifying a portion as compensating for pain and suffering damages. Appellant’s Brief (AB) at 4. Our Court of Appeals has twice reviewed an injured worker’s argument that a portion of his or her unallocated third party recovery should be excluded from distribution. *Gersema*, 127 Wn. App. 687, *Mills*, 72 Wn. App. 575. In both instances, the court affirmed the Department’s distribution of the entire recovery because the record did not reveal what amount, if any, the parties intended as compensation for categories of damages that might be excluded from

the Department's lien. *Gersema*, 127 Wn. App. at 695-96; *Mills*, 72 Wn. App. at 577.

In *Mills*, the court was presented with a single settlement that resolved an injured worker's claims against the third party and his wife's separate action for loss of consortium. *Mills*, 72 Wn. App. at 576. The settlement documents made no allocation for the wife's loss of consortium, but resolved her claim. *Mills*, 72 Wn. App. at 576. The court affirmed the Department's distribution of the entire recovery, holding "the parties' failure to allocate a portion of the lump sum recovery to Mrs. Mills' loss of consortium claim in the settlement documents subjects the entire award to the Department's lien." *Mills*, 72 Wn. App. at 577.

Years after *Mills*, the Court of Appeals was presented with an appeal nearly identical to Ms. Davis' in *Gersema*. Like Ms. Davis, Mr. Gersema recovered damages from the third party, but did not allocate in his settlement documents. *Gersema*, 127 Wn. App. at 690. Mr. Gersema argued that subjecting the full amount of his unallocated recovery to the self-insured employer's lien amounted to an unconstitutional taking of his general damages.<sup>2</sup> *Gersema*, 127 Wn. App.

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<sup>2</sup> The third party statutes apply equally to third party recoveries made by workers with state fund and self-insured employers. The only material difference is that the lien is owned by the Department in state fund cases, and by the self-insured employer in self-insured claims.

at 692. The court declined to hold that Mr. Gersema's pain and suffering damages were improperly distributed because it could not discern from the record what amount, if any, the settling parties intended as pain and suffering damages. *Gersema*, 127 Wn. App. at 696. The court also declined Mr. Gersema's suggestion that his pain and suffering damages should be determined through a court-imposed process of elimination. *Gersema*, 127 Wn. App. at 698. The *Gersema* court adopted and applied the rationale expressed in *Mills*. *Gersema*, 127 Wn. App. at 696. In an instance of foreshadowing its *Tobin* decision, the *Gersema* Court stated that had Mr. Gersema clearly allocated a portion of his recovery to pain and suffering, it might be inclined to agree with his argument that pain and suffering damages are excluded from the Department's lien. *Gersema*, 127 Wn. App. at 696.

Because *Tobin* addresses an allocated settlement agreement, it does not overrule or affect the holdings of *Mills* and *Gersema*. In fact, these three decisions act in harmony to reinforce the clear rule first set forth by the court in *Mills*: unless the settling parties clearly allocate what portion of a third party recovery the injured worker seeks to exclude from the Department's lien, the full amount of the recovery is subject to statutory distribution. *Mills*, 72 Wn. App. at 577.

**2. *Mills* remains law and controls Ms. Davis' appeal**

Ms. Davis argues that *Mills* does not control her appeal because it: 1) involved a loss of consortium claim (contrasted with her pain and suffering claim); and 2) involved different claims belonging to different claimants. AB at 12.

The fact that *Mills* involved a loss of consortium claim rather than a pain and suffering claim is not material. The basis for the Mills' claim that a portion of the recovery should be excluded as loss of consortium is that the Department does not pay loss of consortium benefits and therefore should not be allowed to seek recovery from that category of benefit. This is the same basis for Ms. Davis' contention regarding her pain and suffering: it is a benefit that is not subject to the Department's lien.

Ms. Davis' second argument against *Mills*' application to her appeal is likewise immaterial. Mrs. Mills did have a claim separate from her husband. *Mills*, 72 Wn. App. at 576. However, both the Mills entered into a single settlement agreement that resolved all of their collective and individual claims, including the loss of consortium claim. *Mills*, 72 Wn. App. at 576. The critical fact of the Mills' settlement is the failure to allocate a portion of the recovery for a category of damage that may not be subject to the Department's lien.

Ms. Davis' contention that the *Mills* court did not have the benefit of a clear rule of law regarding loss of consortium ignores an important element of the *Mills* decision. The *Mills* court issued its decision with full knowledge that the Supreme Court had accepted review of *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994), which would resolve the question whether loss of consortium is subject to the Department's lien. *Mills*, 72 Wn. App. at 577 n.1. The court explained that it did not need to delay its decision regarding the Mills' appeal because it decided the appeal on grounds independent of the issue presented by *Flanigan*. *Mills*, 72 Wn. App. at 577 n.1. The *Mills* holding is expressly based on the parties' failure to allocate, which made it impossible to identify what amount, if any, the settling parties intended as loss of consortium damages. This creates a simple rule: an injured worker must specify what amount of his third party recovery is allocated toward the category of damage that he claims is excluded from the Department's lien. The Mills argued that the Department should have been able to allocate the award, but the court declared that the Department should not be forced to do something that the parties had complete control over: allocate the recovery. *Mills*, 72 Wn. App. at 578.

**3. *Gersema* remains law and directly controls Ms. Davis' appeal**

The Court in *Gersema* adopted and applied the *Mills* allocation rule specifically to pain and suffering. *Gersema*, 127 Wn. App. at 696. The *Gersema* holding is harmonious with the *Tobin* decision. In *Gersema*, the court stated that had the settling parties allocated an amount to pain and suffering, it could have entertained Mr. Gersema's argument that pain and suffering damages are excluded from the Department's lien. *Gersema*, 127 Wn. App. at 696. *Tobin* presented what the *Gersema* court required: a settlement agreement that allocated for general damages. Division II adopted *Mills* in *Gersema* and extended it to pain and suffering. Citing *Flanigan*, Mr. Gersema argued that his damages for pain and suffering, which were not specifically allocated in his settlement agreement, should not be considered in the third party distribution formula. The Court of Appeals disagreed.

If Gersema's settlement with Titus Will had clearly allocated some or all of the damages to his pain and suffering, we might agree with his contention that these general damages are not "excess" and, therefore, should receive the same treatment as loss of consortium damages in *Flanigan*. But such is not the case here. Unlike *Flanigan's* differentiated award, Gersema received an undifferentiated settlement award for which it is impossible to determine from the record what portion was attributable to general damages, such as pain and suffering, and what portion was attributable to special damages, for which Allstate had

already paid Gersema industrial insurance benefits or may pay as future benefits arising from the same neck injury. *Thus, Flanigan, with its differentiated award, does not apply.*

Instead, we apply and adopt the rationale of *Mills* . . . . We find this *Mills* rationale persuasive and adopt it here.

*Gersema*, 127 Wn. App. at 695-96. Like Mr. Gersema, Ms. Davis failed to allocate her third party recovery, which subjects her entire recovery to the statutory distribution formula.

**B. The Court Cannot Excuse Ms. Davis' Failure To Allocate Based On Her Expectation That The Department Would Ignore Any Pain And Suffering Allocation**

*Gersema* was decided in 2005. Ms. Davis settled her third party claim three years later in 2008. CABR 3. Ms. Davis should have been aware that she needed to allocate her settlement recovery in order to preserve her argument that a portion of her settlement should be excluded from statutory distribution as “pain and suffering” damages. The Court should reject Ms. Davis’ request that she be excused from the allocation requirement because of her statement that “the Department would not have recognized the allocation anyway.” AB 14.<sup>3</sup>

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<sup>3</sup> Ms. Davis’ footnote following her statement indicates her appeal is distinguished from *Mills* based on the incorrect assumption that at the time *Mills* was decided the substantive issue of whether loss of consortium damages should be included in the Department’s lien had been resolved. That question was being litigated in the Supreme Court at the time this Court issued *Mills*. *Mills*, 72 Wn. App. at 577, n.1.

The essence of *Mills* and *Gersema* is that those courts could not determine from the record before them what amount, if any, was for loss of consortium (*Mills*) or pain and suffering (*Gersema*). Ms. Davis did not heed the directive from those courts to allocate and her failure to do so is not distinguishable from that of the Mills and Mr. Gersema. It is axiomatic that a party is required to have a factual record to support the party's claim.

There are two categories of third party settlements: allocated and unallocated. Allocated settlements are analyzed under *Flanigan* and *Tobin* and result in pain and suffering and loss of consortium damages being excluded from the Department's lien. Unallocated settlements are still governed by the *Mills* and *Gersema* rule with distribution of the full amount of damages not expressly allocated to a specific category of damage that is excluded from the Department's lien.

This treatment of unallocated settlements does not violate *Tobin* nor place any undue or impossible burden on injured workers, particularly Ms. Davis. Ms. Davis has made no argument that allocation was impossible or that the third party defendant refused to allocate.

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Contrary to Ms. Davis' assertion, *Mills* is even more on point in this appeal because it's holding is based solely on the failure to allocate and does not rely on a determination of whether the contested category of damage can be included in the Department's lien. *Mills*, 72 Wn. App. at 577.

Ms. Davis quotes extensively from the Court of Appeals' discussion of substantive due process in its *Tobin* decision.<sup>4</sup> AB 15. However, the Supreme Court rendered that portion of the Court of Appeals' decision dicta by addressing the Court of Appeals' substantive due process discussion and concluding: "Even if the Court of Appeals were correct, ambiguity in a statute triggers the need for court interpretation, not a finding that the statute violates substantive due process." *Tobin*, 169 Wn.2d at 405. Because the Supreme Court disposed of the Court of Appeals' notion that the distribution statute may violate substantive due process, Ms. Davis' arguments that the statute misled or failed to inform her of an allocation requirement does not invoke a constitutional due process question. The Supreme Court resolved the statutory ambiguity concerning treatment of pain and suffering damages: pain and suffering damages cannot be included in the statutory distribution. *Tobin*, 169 Wn.2d at 404. Tobin's settlement identified a precise portion of his recovery as "pain and suffering damages." *Tobin*, 169, Wn.2d at 398. Ms. Davis' does not. AB 4. Because Ms. Davis' settlement documents do not identify a specific amount of pain and suffering damages, the allocation rule set forth in *Mills* and *Gersema*

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<sup>4</sup> Ms. Davis does not assign error based on constitutional grounds and the Department assumes that Ms. Davis does not make such an argument. AB 5.

applies and supports the Department's distribution of Ms. Davis' unallocated third party recovery.

**C. Requiring Administrative Allocation Is An Unnecessary Burden That Will Hinder The Department's Fiduciary Duty To Maximize The Workers' Compensation Funds' Reimbursement From Third Party Recoveries**

**1. Fictitious allocations are not feasible**

Ms. Davis' assertion that allocating her recovery at the administrative level is feasible runs contrary to this Court's central holding in *Mills*. The *Mills* Court provided two reasons why the Department should not be required to establish allocations for the parties. *Mills*, 72 Wn. App. at 577-78. First, because the settling parties can control the distribution outcome simply by allocating at the time of settlement, no reason would "require the Department to do something over which the parties had complete control." *Mills*, 72 Wn. App. at 577-78. Second, requiring the Department to allocate recoveries would detract from its primary responsibility to minimize cost to the industrial insurance fund by "creating another bureaucratic responsibility which would hinder rather than foster the Department's goal of minimizing the costs to the fund." *Mills*, 72 Wn. App. at 578.

Ms. Davis' suggested allocation methods are also not supported by, and her own appeal is distinguished from, *Hi-Way Fuel Co. v. Estate*

of *Allyn*, 128 Wn. App. 351, 115 P.3d 1031 (2005). As Ms. Davis explains, *Allyn* involved a superior court judgment that allocated specific damages for loss of consortium as well as other damages. *Allyn*, 128 Wn. App. at 354. However the liable defendant could not satisfy the full judgment. *Allyn*, 128 Wn. App. at 354. At dispute was whether funds available to partially satisfy the judgment should be either pro-rated between the loss of consortium and non-loss of consortium damages, or used first to satisfy the loss of consortium damages before using the remainder to satisfy other categories of damages. *Allyn*, 128 Wn. App. at 358. The court held that because the Department's lien does not apply to loss of consortium, the available funds must first be used to satisfy the loss of consortium. *Allyn*, 128 Wn. App. at 361.

Ms. Davis' appeal is much different from *Allyn* and distinguishable. Ms. Davis focuses on the fact that in *Allyn* there were not enough funds to satisfy all of the adjudicated damages. But the salient fact of *Allyn* is there was a defined amount of damages owing, which were clearly defined by category. The *Allyn* court distinguished the facts of that case from those present in *Mills*. *Allyn*, 128 Wn. App. at 361. *Allyn*'s third party judgment clearly allocated damages, alleviating the need for

what Ms. Davis now asks this court to order: allocation by the Department. *Allyn*, 128 Wn. App. at 361.

In Ms. Davis' case, there is no dispute that she agreed to the value of her claim, received that amount of damages, but did not define those damages by category. Because Ms. Davis is not owed an identifiable amount of funds for "pain and suffering" damages, the Department is required to distribute the full amount of the award in accordance with the statutory formula in RCW 51.24.060. Accordingly, the Department did not distribute any pain and suffering damages and Ms. Davis' appeal must fail.

**2. Ms. Davis' suggestion to use her settlement demand letter as a basis for allocation has no support in law**

Ms. Davis argues her settlement demand letter clearly apportioned the damages she recovered. AB 19. It does not. There is no evidence in the record that the third party defendant agreed to this proposed allocation. All one can do at this stage is speculate as to why the defendant paid the gross sum it did to settle the claim. Such speculation will not substitute for the *Mills* and *Gersema* requirement that the record clearly set forth the damages allocation.

**3. Ms. Davis' suggestion to use the Department's claim payment ledger has no support in law and is not an accurate basis for allocation**

The Department itemizes all payments made to injured workers as part of their claims. Contrary to Ms. Davis' suggestion, allocating the difference between the Department's expenditures and the gross recovery is not an accurate way of determining general damages. This proposed allocation method, like using Ms. Davis' settlement demand letter, suffers from the fact that the defendant has no input, making it impossible to determine what categories of damages and amounts for each the defendant agreed to pay the settlement funds. Ms. Davis' settlement agreement is comprehensive and intended to cover all damages, known and unknown. The defendant may have anticipated that Ms. Davis will require future medical care and suffer future wage loss as the result of her workplace injury. Or not. Again, the problem with Ms. Davis' proposal is the lack of any evidence that shows the third party defendant agreed with her proposed allocation.

But there is no need to resort to these methods of speculation and after-the-fact guesswork. The *Gersema* court expressly rejected this proposed process of elimination for creating an after-the-fact pain and suffering allocation. *Gersema*, 127 Wn. App. at 697-98. Mr. Gersema's

settlement agreement covered all known and unknown future injuries and damages. *Gersema*, 127 Wn. App. at 698. The court concluded that placing a lien on the full settlement funds until the amount of any future special damages is not a taking or constraint on Mr. Gersema's property. *Id.*

The clear allocation rule of *Mills* and *Gersema* recognizes that parties can avoid the confusion and guesswork Ms. Davis now requests by simply placing an allocation in the settlement agreement. Requiring the Department to participate in this speculation diverts resources from the workers' compensation funds. This Court has twice held that is not permissible public policy and there is no reason to change that analysis now.

**4. An administrative reasonableness hearing cannot provide the relief Ms. Davis seeks, which would require the Board to undo the settlement agreement**

Ms. Davis' claim that one of the Board members suggested a form of administrative reasonableness hearing in *In re Brian I. Shirley, Dec'd.*, Dckt. No. 08 21182, 2009 WL 2949355 (Wash. Bd. Ind. Ins. App.) (Fennerty, Jr. dissenting) is not accurate. In that case, the Board granted the Department summary judgment in a case with similar facts to Ms. Davis. The Board Member Fennerty dissented because he felt there

was a genuine issue of material fact regarding the claimant's widow's ability to allocate at the time of settlement. He did not give the opinion that an administrative allocation hearing was appropriate; only that the genuine issue of material fact should preclude summary judgment. Nevertheless, Ms. Davis has never argued that she did not have the ability to allocate her settlement and there is no evidence in the record that would support such argument.

Ms. Davis' reference to decisions in Kentucky and New Mexico that hold the administrative law judge has the ability to allocate third party recoveries under the respective workers' compensation laws of those states does not support her argument. AB 20. An injured workers' right to bring a third party action arising from an industrial injury occurring in Washington State is governed by chapter 51.24 RCW, not the law of other states. This court should not look to contradictory holdings of other states when the holdings of *Mills* and *Gersema* are directly on point and interpret the very statutes that enabled Ms. Davis to bring her third party action.

Beyond this initial reason for ignoring the foreign law cases Ms. Davis cites, those decisions are based on state law that expressly grants the industrial appeals judge authority to allocate settlements. Washington has no such law and our courts have expressed sound

practical and policy reasons for not engaging in after-the-fact allocations of third party settlements. Our courts have determined that when the settling parties fail to allocate damages in the settlement agreement, the entire recovery is subject to statutory distribution. Foreign decisions interpreting non-Washington law cannot be superior to our own courts' interpretation of Washington law.

## VI. CONCLUSION

For the reasons discussed above, the Department respectfully requests that the Court affirm the Superior Court's affirmance of the Board order finding the Department properly distributed Ms. Davis' entire third party recovery.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of June, 2011.

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COURT OF APPEALS FOR DIVISION I STATE OF WASHINGTON  
STATE OF WASHINGTON BY \_\_\_\_\_

SHARON DAVIS,  
  
Appellant,  
  
v.  
  
WASHINGTON STATE DEPT OF  
LABOR AND INDUSTRIES,  
  
Respondent.

DECLARATION OF  
MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Ryan Nute  
Michael David Myers  
Myers & Company, PLLC  
1530 Eastlake Avenue East  
Seattle, WA 98102

DATED this 27<sup>th</sup> day of June, 2010 at Tumwater, Washington.

2011 JUN 29 AM 11:23  
COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON

*Jerei Bargabus*  
JEREI BARGABUS  
Legal Assistant



**Rob McKenna**  
**ATTORNEY GENERAL OF WASHINGTON**  
Labor & Industries Division  
PO Box 40121 • Olympia WA 98504-0121 • (360) 586-7707

February 5, 2010

**RECEIVED**  
JUN 28 2011

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

Richard Johnson  
Clerk of the Court  
Court of Appeals, Division I  
One Union Square, 600 University Street  
Seattle, WA 98101-1176

RE: ***Sharon A. Davis vs. DLI***  
**Court of Appeals No. 64809-8-I**

Dear Mr. Johnson:

Enclosed for filing is the Department's Brief of Respondent and Declaration of Mailing in the above matter. Also enclosed is a copy to be conformed for return to this office. Thank you for your assistance.

Sincerely,

JEREI BARGABUS  
Legal Assistant to  
DUSTIN DAILEY  
Assistant Attorney General

/jlb

Enclosures

cc: Ryan Nute (w/encl.)  
Michael David Myers (w/encl.)

2011 JUN 29 AM 11:22  
CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON