

No. 41988-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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DENNIS JONES, *Appellant*,

v.

CITY OF OLYMPIA AND DEPARTMENT OF LABOR & INDUSTRIES  
*Respondents.*

STATE OF WASHINGTON  
BY [Signature]  
CITY OF OLYMPIA  
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COURT OF APPEALS  
DIVISION II

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APPEAL FROM THE SUPERIOR COURT FOR THURSTON COUNTY  
HONORABLE CAROL MURPHY

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**BRIEF OF RESPONDENT CITY OF OLYMPIA**

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## **I. INTRODUCTION**

This case concerns the interpretation of RCW 51.24.060 in light of the recent decision of *Tobin v Dep't of Labor & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010). Consistent with RCW 51.24.060 and this Court's decisions, the Department ordered, as affirmed by the Board and by the Superior Court, that the lien of the City of Olympia for industrial insurance benefits paid Mr. Jones apply to the entire amount of Mr. Jones' third party recovery. The reason: That third party recovery was unallocated between special and general damages, and so the recent decision of *Tobin v Dep't of Labor & Indus.* was distinguishable from this Court's controlling decision in *Gersema v. Allstate Insurance Company*.

## **II. ISSUE**

In light of the recent decision in *Tobin v Dep't of Labor & Indus.*, when a third party recovery is unallocated as between special and general damages, does the lien for industrial insurance benefits paid to the worker apply to the entire third party recovery?

## **III. STANDARD OF REVIEW**

When the Court of Appeals reviews decisions of the Superior Court about issues of law, including interpretations of statutes, the Court does so *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807,

16 P.3d 583 (2001); *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

The Court should accord substantial weight to the interpretations of the Industrial Insurance Act by agencies administering that Act. *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994); *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997).

When this Court reviews constitutional issues, it does so *de novo*. *Gersema v. Allstate Insurance Company*, 127 Wn. App. 687, 696-697, 112 P.3d 552, 553 (2005). The Court will presume that a statute is constitutional where the statute's purpose is to promote safety and welfare and bears a reasonable and substantial relationship to that purpose. *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002). A party who challenges the constitutionality of the statute must prove the statute is unconstitutional beyond a reasonable doubt. *Retired Pub. Employee's Council of Wash. v. Charles*, 148 Wn.2d 602, 623, 62 P.3d 470 (2003).

#### **IV. ARGUMENT**

##### ***A. Tobin v. Dep't of Labor & Industries***

This part of the City's response addresses parts C and D of Mr. Jones' brief. In this case, *Tobin* does not apply. Unlike the settlement agreement in *Tobin*, the settlement agreement in this case does not allocate

any portion of the settlement amount to general damages for pain and suffering. As a result, Mr. Jones cannot reduce the settlement amount subject to the lien by such category of damages. *Gersema v. Allstate Insurance Company*, 127 Wn. App. 687, 696, 112 P.3d 552, 553 (2005); see *Mills v. Dep't of Labor & Indus.*, 72 Wn. App. 575, 865 P.2d 41 (1994).

In *Gersema*, this Court held that where the settlement agreement does not allocate any portion of the settlement amount to general damages for pain and suffering, the employer's lien is applied to the full settlement amount. *Gersema*, 127 Wn. App. at 696. As the Court held:

We hold, therefore, that under RCW 51.24.060(1)(e), Allstate is entitled to a lien on the entire remainder of Gersema's excess recovery from the third party-tortfeasor settlement because the parties failed to differentiate general damages from special damages.

*Gersema*, 127 Wn. App. at 696.

In *Mills*, as this Court said, "the parties' failure to allocate a portion of the injured worker's lump-sum recovery to a loss of consortium claim subjected the *entire* award to the Department's lien for industrial insurance benefits paid or potentially payable to Mills." *Mills*, 72 Wn. App. at 577. This Court further said that "the court reasoned that neither public policy nor the statute compelled the Department to generate such an allocation where the parties themselves have failed to do so." *Mills*, 72 Wn. App.

at 579. In *Gersema*, this Court said that “[w]e find this *Mills* rationale persuasive and adopt it here.” *Gersema*, 127 Wn. App. at 696.

### **Looking Behind the Settlement Agreement**

Mr. Jones further contends that although the settlement agreement here, unlike that in *Tobin*, failed to apportion amounts between special and general damages, this Court can deduce what was apportioned between those two categories of damages. Mr. Jones’ reasoning is that because the employer paid Mr. Jones \$82,188.86 in industrial insurance benefits and because the total settlement amount was \$250,000, the difference between those two amounts *must* general damages. As demonstrated below, this reasoning is fallacious.

### **Special Damages vs. General Damages**

Special damages would include amounts for medical expenses, past and future; and for wage loss, past and future (impairment of future earnings). General damages are characterized as amounts for pain and suffering.

Special damages would include more than what the City paid for *past* medical and wage loss expenses. For instance, the City pays Mr. Jones wage loss in an amount less than his actual lost wages, but Mr. Jones would recover his actual lost wages from the tortfeasor in the personal injury action. Those recovered wages would be special damages but

would not be included in the City's lien amount. Special damages would also include amounts for future medical expenses. *See Leak v. United States Rubber Co.*, 9 Wn. App. 98, 102-103, 511 P.2d 88 (1973)(Division II). It would include amounts for loss of future earnings or impairment of future earnings—an item of damage that could be very substantial. *Murray v. Mossman*, 52 Wn.2d 885, 889, 329 P.2d 1089 (1958) (the permanent diminution to earn money); *Lyster v. Metzger*, 68 Wn.2d 216, 222, 412 P.2d 340 (1966); *Leak*, 9 Wn. App. at 102. Those are amounts that the City would be called upon by Mr. Jones to pay in the future under the Industrial Insurance Act and which the City would be entitled to be reimbursed from the settlement amount.

**“Amount Subject to Offset”**

Under the Department order dated October 14, 2009, the City is entitled to offset the amount of \$32,868.38 against future industrial insurance benefits paid to Mr. Jones, including time loss payments, medical expenses, permanent partial disability and permanent total disability awards. Those amounts *may* be included in Mr. Jones' settlement amount. Because Mr. Jones did not allocate any particular amounts between general and special damages in the settlement agreement, it cannot be determined whether that settlement amount represents any amount for general damages rather than special damages in

the form of wage loss, future wage loss and medical expenses and future medical expenses.

So, contrary to what Mr. Jones contends, \$250,000 less \$82,188.86 does not necessarily equal “general damages.”

***B. Arkansas Department of Health and Human Services v. Ahlborn***

This part of the City’s response addresses part E of Mr. Jones’ brief. Mr. Jones cites to *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006). In *Ahlborn*, Medicaid paid Ahlborn’s medical expenses in the amount of \$35,581.47. Arkansas, by statute, had interpreted the federal third party lien statute as permitting it to assert a lien on the third party recovery for *all* amounts it paid on behalf of the Medicaid recipient, even amounts beyond the amount of medical expenses paid by Medicaid. The United States Supreme Court held that the federal third party recovery statute did not grant Arkansas a lien of that broad scope. Moreover, the Court held that the Medicaid law prohibited a lien on amounts beyond Medicaid payments as to Medicaid recipients.

As the Supreme Court held,

“Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn’s settlement in an amount exceeding \$35,581.47, and the federal anti-lien provision

affirmatively prohibits it from doing so. Arkansas' third party *liability* provisions are unenforceable insofar as they compel a different conclusion.”

*Ahlborn*, 547 U.S. at 292.

The *Ahlborn* holding clearly involves an interpretation of federal Medicaid law. *Ahlborn* does not apply here because *Ahlborn* involves a conflict between statutory provisions of federal third party lien law and Arkansas state law. It is not a case that constitutionally limits state action.

Mr. Jones also contends that *Ahlborn* valorizes a process by which this Court may apportion the settlement amount between special and general damages based on the amount of the City's past payments to Mr. Jones. Clearly, in that respect, the *Ahlborn* holding does not apply here. In this case, it has no precedential value. That is, it does not trump this Court's holding in *Gersema*.

### **C. Due Process**

This part of the City's response addresses part F of Mr. Jones' brief. Mr. Jones contends that the City's lien is an unconstitutional taking, violating due process under the Washington and United States Constitution. He cites to RCW 4.08.080; Const. Art. I §16; U.S. Const. Amend. 14 §I; *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 513 P.2d 849 (1973); *In re Marriage of Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984).

*Woody's Olympia Lumber, Inc. v. Roney* is not on point. There the court held that an unliquidated claim for damages based upon a theory of negligence and capable of being reduced to a certain judgment constitutes property within the terms of RCW 6.04.060 [since repealed or renumbered].

*In re Marriage of Brown* is not on point. There the court held that recovery for an injury inflicted upon a married person by a third party tortfeasor is the separate property of the injured spouse, except to the extent the recovery compensates the marital community for expenditures from community property (lost wages and medical expenses).

A court will presume that a statute is constitutional where the statute's purpose is to promote safety and welfare, and bears a reasonable and substantial relationship to that purpose. *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002). Mr. Jones, in challenging the statute, must prove the statute is unconstitutional beyond a reasonable doubt. *Retired Pub. Employee's Council of Wash. v. Charles*, 148 Wn.2d 602, 623, 62 P.3d 470 (2003). That said, when the settlement agreement fails to differentiate between general and special damages, as does the settlement agreement in this case, RCW 51.24.060 is constitutional. *Gersema*, 127 Wn. App. at 699.

#### **D. RCW 51.24.060 in Derogation of Common Law**

This part of the City's response addresses part G of Mr. Jones' brief. Mr. Jones raises this legal argument for the first time. When an issue is not raised at the Board, that issue is waived. RCW 51.52.104. When an issue is not raised in Superior Court, this Court may refuse to consider such purported error of law. RAP 2.5(a).

Essentially, Mr. Jones argues that when the third party tortfeasor and the worker fail to allocate the settlement amount between special and general damages, the lien holder has the burden of proving the allocation and, in failing to prove the allocation, the lien holder is not entitled to recover its lien.

That argument has the following structure:

##### **Premises:**

1. RCW 51.24.060, in creating a lien on a recovery in a personal injury claim [based on a theory of negligence], is in derogation of common law.
2. RCW 51.24.060, being in derogation of common law, should be strictly construed [, if ambiguous, against the lien holder].
3. RCW 51.24.060 clearly states that the City should be paid the balance of any recovery, but only to the extent necessary to reimburse the City for "benefits paid."
4. [Unstated premise: RCW 51.24.060 is ambiguous.]

5. RCW 51.24.060, being ambiguous, should be interpreted in favor of the worker, Mr. Jones.

**Conclusion:**

1. RCW 51.24.060, when interpreted in favor of Mr. Jones, would require, when the third party recovery is unallocated between damages for benefits paid and damages for pain and suffering, the City and/or Department to bear the burden of proving which portions of the unallocated recovery represent special and general damages.

2. [If the City and/or Department fail to carry that burden, neither should be able to apply the lien against damages for pain and suffering.]

3. [Since the City and/or Department cannot allocate any amount of an unallocated recovery to general damages for pain and suffering, neither should be able to apply the lien against the third party recovery.]

This argument has a number of internal flaws, including that this Court has held that unstated premise number 4 is untrue—that is, RCW 51.24.060 is not ambiguous. *See Hi-Way Fuel Company v. Estate of Joseph S. Allyn*, 128 Wn. App. 351, 359, 115 P.3d 1031 (2005).

Those flaws aside, the major problem with this argument is external to the argument—namely, that this Court has previously held that when the third party tortfeasor and the worker fail to allocate the settlement amount between special and general damages, the Department and/or self insured employer may apply the lien to the entire third party recovery; that is, that neither the Department nor the self insured employer

loses its lien if the third party tortfeasor and the worker fail to allocate the settlement amount between special and general damages. *Gersema*, 127 Wn. App. at 696.

## V. CONCLUSION

For the preceding reasons, the City respectfully requests that this Court affirm the Superior Court's judgment affirming the decision of the Board of Industrial Insurance affirming the order of the Department of Labor and Industries distributing the entire third party recovery of Mr. Jones.

Respectfully submitted this 12<sup>th</sup> day of September 2011.

*Wallace Klor & Mann, P.C.*



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## **APPENDIX A**

### **RCW 51.24.060 [Pre-2011 Amendments]**

(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 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.

(2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

(3) The department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

(a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person;

(b) Factual and legal issues of liability as between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

(4) In an action under this section, the self-insurer may act on behalf and for the benefit of the department to the extent of any compensation and benefits paid or payable from state funds.

(5) It shall be the duty of the person to whom any recovery is paid before distribution under this section to advise the department or self-insurer of the fact and amount of such recovery, the costs and reasonable attorneys' fees associated with the recovery, and to distribute the recovery in compliance with this section.

(6) The distribution of any recovery made by award or settlement of the third party action shall be confirmed by department order, served by

registered or certified mail, and shall be subject to chapter 51.52 RCW. In the event the order of distribution becomes final under chapter 51.52 RCW, the director or the director's designee may file with the clerk of any county within the state a warrant in the amount of the sum representing the unpaid lien plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of such worker or beneficiary mentioned in the warrant, the amount of the unpaid lien plus interest accrued and the date when the warrant was filed. The amount of such warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the injured worker or beneficiary against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee UNDER RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the injured worker or beneficiary within three days of filing with the clerk.(7) The director, or the director's designee, may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice and order to withhold and deliver property of any kind if he or she has reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property which is due, owing, or belonging to any worker or beneficiary upon whom a warrant has been served by the department for payments due to the state fund. The notice and order to withhold and deliver shall be served by the sheriff of the county or by the sheriff's deputy; by certified mail, return receipt requested; or by any authorized representatives of the director. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice and order to withhold and deliver. In the event there is in the possession of the party named and

served with such notice and order, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the director or the director's authorized representative upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount claimed by the director in the notice together with costs. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer to all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

#### **RCW 51.52.104**

After all evidence has been presented at hearings conducted by an industrial appeals judge, who shall be an active or judicial member of the Washington state bar association, the industrial appeals judge shall enter a proposed or recommended decision and order which shall be in writing and shall contain findings and conclusions as to each contested issue of fact and law, as well as the order based thereon. The industrial appeals judge shall file the signed original of the proposed decision and order with the board, and copies thereof shall be mailed by the board to each party to the appeal and to each party's attorney or representative of record. Within twenty days, or such further time as the board may allow on written application of a party, filed within said twenty days from the date of communication of the proposed decision and order to the parties or their attorneys or representatives of record, any party may file with the board a written petition for review of the same. Filing of a petition for review is perfected by mailing or personally delivering the petition to the board's offices in Olympia. Such petition for review shall set forth in detail the grounds therefore and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.

In the event no petition for review is filed as provided herein by any party, the proposed decision and order of the industrial appeals judge shall be adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts. If an order adopting the proposed decision and order is not formally signed by the board on the day following the date the petition for review of the proposed decision and

order is due, said proposed decision and order shall be deemed adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts.

**RCW 4.08.080**

Any assignee or assignees of any judgment, bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, named in such judgment, bond, specialty, book account, or other chose in action, notwithstanding the assignor may have an interest in the thing assigned: PROVIDED, That any debtor may plead in defense as many defenses, counterclaims and offsets, whether they be such as have heretofore been denominated legal or equitable, or both, if held by him against the original owner, against the debt assigned, save that no counterclaim or offset shall be pleaded against negotiable paper assigned before due, and where the holder thereof has purchased the same in good faith and for value, and is the owner of all interest therein.

**CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing **Brief of Respondent City of Olympia** by U.S. Mail by depositing the original thereof in Lake Oswego, Oregon, on today's date, in a sealed envelope, postage thereon prepaid, addressed as follows:

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I further certify that I served the foregoing **Brief of Respondent City of Olympia** on attorneys of record and other parties by mailing copies on September 12, 2011, addressed to said persons at their last known address as follows:

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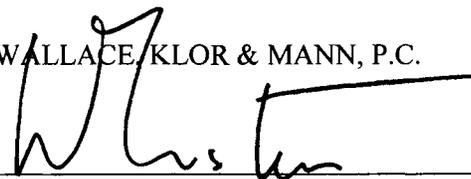
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