

64809-8

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No. 64809-8 I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SHARON A. DAVIS,

Appellant,

vs.

THE WASHINGTON STATE DEPARTMENT OF  
LABOR AND INDUSTRIES,

Respondent.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUL 28 PM 3:27

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REPLY BRIEF OF APPELLANT

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## I. SUMMARY OF REPLY

The fact that Ms. Davis' third-party settlement was not allocated between special and general damages is not fatal to her claim. The allocation rule should not apply here because it was not until *Tobin* was decided that it was confirmed the Department was not entitled to reimbursement from general damages in a third party settlement.

Prior to *Tobin* the Department did not recognize allocations and therefore it should not be allowed to escape responsibility for reimbursing injured workers whose third-party settlements were not allocated.

Requiring the Department to engage in administrative allocation is neither impractical nor inconsistent with the Department's mission and is supported by compelling policy considerations.

The practical effect of adopting the Department's position is this: Ms. Davis (and thousands of others of injured workers) will be precluded from recovering funds to which the Department was indisputably not entitled. That result is not equitable or consistent with the law.

The trial court's judgment in favor of the Department should be reversed and the case remanded for a correct determination of the Department's lien.

## II. ARGUMENT

### A. The Department's Reliance Upon *Mills* and *Gersema* is Misplaced in Light of *Tobin*

*Mills* explained the principal reason for its allocation rule in the loss of consortium context: "...the parties to the settlement have the ability to control the outcome simply by allocating a certain amount or percentage of the settlement to the spousal loss of consortium claim." *Mills*, 72 Wn. App. at 577-78.<sup>1</sup>

But prior to *Tobin* parties did not have the ability to control the outcome because Department did not recognize agreements allocating third-party settlements between special and general damages.

In *Tobin* the Supreme Court resolved the issue in the context of general damages as a matter of statutory construction by interpreting RCW Ch. 51.24 and rejecting the Department's longstanding and vigorous position that it was entitled to include all damages—allocated or not—when calculating its lien.

Certainly *Mills*' reasoning<sup>2</sup> informed *Gersema*.<sup>3</sup> *Gersema*'s discussion of the allocation rule was made in the context of deciding

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<sup>1</sup> *Mills* noted "the Board determined that the Department could not assert its lien against any portion of a third party recovery awarded specifically to a worker's spouse for loss of consortium until the spouse began receiving benefits under the Industrial Insurance Act (the Act)." *Mills*, 72 Wn. App. at 576.

<sup>2</sup> *Mills* itself didn't have anything to do with the issue decided by *Tobin* because *Mills* governs allocation for loss of consortium claims.

whether there was an excess recovery subject to offset under RCW 51.24.060(1)(e) and RCW 51.24.060(2). At that time it had not been decided that general damages were excluded from such a determination and nothing in *Gersema* established that allocation agreements were actually enforceable against the Department. That was not decided until *Tobin*. *Gersema* did not contain a thorough discussion of the allocation rule and the reasons for applying it to the case before it (unlike this Court in *Mills*).

If the Court agrees with the Department's construction and application of *Mills* and *Gersema* it nevertheless has the ability to abridge or modify the allocation rule as applied to Ms. Davis (and, by extension, those whose post-*Gersema* and pre-*Tobin* settlements were not allocated). The allocation rule is judicially-created and *Mills* and *Gersema* are intermediate appellate decisions which the Court is entitled to revisit in order to reach a fair and reasoned result.

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<sup>3</sup> The Department argues Ms. Davis is bound because *Gersema* "foreshadowed" *Tobin*. Parties are not bound by foreshadowing.

B. The Department is Not Excused by Ms. Davis' Lack of Allocation When It Wouldn't Have Accepted or Been Bound by Any Allocation

The Department vigorously argued that Mr. Tobin's allocated \$1.4 million settlement was subject to the Department's lien in its entirety. The Department required workers to use its Third Party Recovery Worksheet<sup>4</sup> which calculated the amount of its lien based upon the gross amount of the recovery. The Department certainly didn't make a point of advertising that allocation was possible.

In short, at the time Ms. Davis' claim was settled there was no indication that the Department was obliged to recognize any allocation even if there had been such an agreement.

The Department insists Ms. Davis (and the insurance carrier with which she settled) should have gone through the charade of allocating the settlement. This argument leads to an absurd conclusion—that Ms. Davis should have engaged in an act of futility in order to preserve uncertain legal rights, based upon a case (*Tobin*) that hadn't been decided yet, which the Department wouldn't recognize anyway.

*Tobin* did not need to reach the issue of allocation. Yet the Court of Appeals took care to observe that given the state of the law at the time and the text of the statute that injured workers “would not know to take

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<sup>4</sup> See Appendix I to the Brief of Appellant.

care” to allocate their recoveries.<sup>5</sup> The Department concedes there was a statutory ambiguity.<sup>6</sup> The Supreme Court confirmed the statute required interpretation and did not say what the Department claimed it did.

It does not make sense to hold that workers were required to allocate their third party settlements when the substantive issue of their right to do so remained undecided<sup>7</sup> and the Department’s stated position was that allocation agreements would not be respected.

C. Administrative Allocation is Neither Impractical Nor Unduly Burdensome

The argument that allocation is beyond the Department’s institutional capabilities should be rejected. It’s not unfair to require the Department to engage in that process for cases that where the Department’s lien was administratively determined before *Tobin* established that agreements to allocate would be given effect.<sup>8</sup>

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<sup>5</sup> While Ms. Davis agrees that the Supreme Court did not decide the case on constitutional due process grounds (and her present arguments do not rely on such grounds in light of the Supreme Court’s holding), the Court of Appeals’ remarks nevertheless ring true.

<sup>6</sup> Brief of Respondent at 15.

<sup>7</sup> The Department seems to slightly misapprehend Ms. Davis’ (perhaps inartfully articulated) argument distinguishing *Mills* (Brief of Appellant, p. 14, fn. 6). While the substantive issue regarding loss of consortium had not been resolved, apparently allocations for loss of consortium were being recognized. We know from *Tobin* that allocations to general damages were not.

<sup>8</sup> At best it might be reasonable to apply the allocation rule to post-*Tobin* settlements (now that the Supreme Court has clarified the Department must recognize agreements allocating to general damages).

*Mills* explained the policy reasons against administrative allocation.<sup>9</sup> And that's the only basis for its ruling on that issue—there is no positive law which says the Department is not authorized to engage in allocation. (Further, it can be argued that *Gersema* was limited on the record before it.<sup>10</sup>)

*Mills* noted minimizing the cost to the fund was an interest in requiring allocation in settlements. *Mills*, 72 Wn. App. at 578. But in this case the Department's complaints about the time and expense of administrative allocation are ironic. Any cost to the fund is entirely the result of the Department's erroneous interpretation of the third-party recovery statute and refusal to accept allocations to general damages even where made. In light of the windfall it's received (and should disgorge) the Department does not merit the Court's solicitude or undue deference.

There are equally compelling policy reasons for requiring allocation in this case and other cases which were decided before *Tobin*. Those reasons are (i) full compensation for tort victims and (ii) ensuring the Department follows the law and does not receive more than it's entitled to under the law.

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<sup>9</sup> One of those reasons was not to require the Department to allocate settlements for the benefit of nonbeneficiaries (spouses), because this "would not serve the legislative purpose of recouping benefits paid out of the state fund." *Mills*, 72 Wn. App. at 578-79. But in this case Ms. Davis was a beneficiary.

<sup>10</sup> Brief of Appellant, p. 19, fn. 14.

The Department objects to the allocation methods proposed by Ms. Davis.<sup>11</sup> While Ms. Davis contends any one of those methods are acceptable, the significant point is that there's more than one way to skin a cat. The Department has a number of tools at its disposal to consider evidence and rationally arrive at an appropriate allocation in these cases.<sup>12</sup> It should be required to employ them in order to repay the funds it was not entitled to.

It's difficult to understand the Department's arguments that Ms. Davis' suggested allocation methods (i) do not account for the defendant's agreement to or input regarding a particular allocation method and (ii) would "undo" settlement agreements. The first concern is irrelevant in this context. The goal is not to ascertain the intent of the parties (as might be the case when enforcing a settlement agreement), but what amounts are appropriately excluded from the Department's lien. The Department offers no argument in support of its second concern and it is difficult to understand how a settlement agreement would be "undone" if allocation is performed at the administrative level.

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<sup>11</sup> Ms. Davis cited to *Allyn* (128 Wn. App. at 361) not because of its holding or factual similarity but because the Department was eager to use an approach that it claimed in *Mills* and *Gersema* it was incapable of engaging in.

<sup>12</sup> Ms. Davis agrees with the Department's characterization of Board Member Finnerty, Jr.'s dissent in *Shirley* (2009 WL 2949355). But the conclusion to be drawn from that dissent is that (i) a Board member explained a factfinding process was appropriate at the hearings level and (ii) if it is not unduly burdensome to determine whether someone could allocate it is not unduly burdensome to consider evidence supporting allocation.

### III. CONCLUSION

The Court should reverse the trial court's judgment and remand this case for the recalculation of the Department's lien to exclude general damages pursuant to *Tobin*. If such relief is ordered by the Court Ms. Davis should recover attorney fees and expenses pursuant to RAP 18.1 and RCW 51.52.130(1).

DATED this 28<sup>th</sup> day of July, 2011.

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CERTIFICATE OF SERVICE

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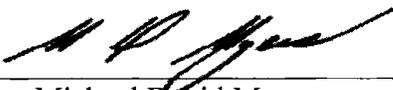
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Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury of the laws of the State of Washington that a true and correct copy of the foregoing *Reply Brief of Appellant* was hand-delivered on the 28<sup>th</sup> day of July, 2011, to:

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