No. 66527-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DONALD COLLINGS and BETH COLLINGS, husband and wife,

Plaintiffs/Defendants in Intervention/Respondents,

v.

CITY FIRST MORTGAGE SERVICES, LLC,

Defendant/Appellant

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE GREENPOINT MORTGAGE FUNDING TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-ARI,

Plaintiff in Intervention/Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE RICHARD EADIE

RESPONDENTS COLLINGS' ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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I. INTRODUCTION

Amicus WDTL misstates discrete holdings from numerous jurisdictions to propose a sweeping rule requiring automatic reversal of a jury verdict when any agreement between a plaintiff and less than all defendants is not immediately disclosed, regardless whether the agreement is collusive or caused the non-agreeing defendant prejudice, and regardless whether the non-agreeing defendant made any effort to discover the agreement. No jurisdiction has adopted such a far-reaching rule. This court should decline amicus WDTL's invitation to do so now in a case where the concerns it raises are not at issue.

II. ARGUMENT IN RESPONSE TO AMICUS

A. WDTL's Argument Is Superfluous Because The Agreement Between The Collings And Mullen Was Not A "Mary Carter" Agreement.

The Collings agreed not to execute any judgment obtained against the penniless Mullen in exchange for repayment of $500 of the costs of deposing him. The Collings did not give Mullen any financial interest in the Collings' recovery from City First. The Collings did not require Mullen to remain in the litigation, or to testify in any particular manner. The agreement did not "realign" the parties' interests. Because the agreement in this case did not have these fundamental features, it is not a Mary Carter agreement, and this court need not address the superfluous

policy issues raised by WDTL regarding the enforceability and consequence of Mary Carter agreements.

1. A "Mary Carter" Agreement Gives The Settling Defendant A Financial Interest In The Plaintiffs' Recovery From A Non-Settling Defendant. Mullen's Interests Were In No Way Contingent On The Collings' Recovery From City First.

WDTL maintains that settlement agreements can take many forms, and argues that collusive agreements that realign nominally adverse parties threaten the integrity of the adversary system, conceding that an essential element of a "Mary Carter" agreement is that "the settling defendant['s] . . . exposure is reduced in proportion to any increase in the liability of his codefendants over an agreed amount." (WDTL Br. 2 (*citing* John E. Benedict, *It's A Mistake To Tolerate The Mary Carter Agreement*, 87 Colum. L. Rev. 368, 369-70 (1987)). WDTL does not explain how there was any possibility of collusion between the Collings and Mullen under an agreement that gave Mullen no financial interest in the Collings' recovery from City First.

Courts have repeatedly affirmed that an essential element of a Mary Carter agreement is a provision giving the settling defendant a financial interest in the plaintiff's recovery from a non-settling defendant. *See, e.g.*, ***Miller v. Bock Laundry Mach. Co.***, 568 S.W.2d 648, 652 (Tex. 1977) ("The settlement agreement entered into here was not a 'Mary

Carter' agreement because [the settling defendant] did not acquire a financial interest in [the plaintiff]'s recovery against [the non-settling defendant]."); ***Doty v. Bishara***, 123 Idaho 329, 848 P.2d 387, 392 (1992) (acknowledging that although specific provisions vary, an essential element of a Mary Carter is that "the agreeing defendant's liability for payment is decreased in direct proportion to the increase in the non-settling defendant's liability for payment") (*citing* ***Soria v. Sierra Pac. Airlines, Inc.***, 111 Idaho 594, 726 P.2d 706, 709 (1986).[1] Because of the settling defendant's financial incentive to increase the non-settling defendant's liability, such a provision "creates the most unfair prejudice to

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[1] *See also* ***Abbott Ford, Inc. v. Superior Court***, 43 Cal. 3d 858, 870, 741 P.2d 124 (1987) ("in all such agreements the settling defendant's ultimate liability to the plaintiff is dependent, at least in part, on the amount of money which the plaintiff recovers from the nonsettling defendants"); ***Charles McArthur Dairies, Inc. v. Morgan***, 449 So.2d 998, 999 (Fla. App. 1984) (agreement was not a Mary Carter because "the settlement was for a straight $150,000 with no contingencies"); ***Elbaor v. Smith***, 845 S.W.2d 240, 247 (Tex. 1992) ("A Mary Carter agreement exists when the settling defendant retains a financial stake in the plaintiff's recovery *and* remains a party at the trial of the case.") (emphasis in original); ***Holly Springs Realty Group, LLC v. BancorpSouth Bank***, 69 So.3d 19, 26 (Miss. App. 2010) ("The essential feature of the so-called Mary Carter agreement is the repayment of the loan from money recovered from the non-settling co-defendants."), *cert. denied*, 69 So.3d 767 (Miss. 2011); ***Ryals v. Hall-Lane Moving & Storage Co., Inc.***, 468 S.E.2d 69, 72 (N.C. App. 1996) (agreement was not a Mary Carter because "there is no contention in the case sub judice that the settlement between plaintiff and Jensen and Hall-Lane was not in the fixed, pre-determined amount of $10,000").

WDTL distinguishes ***Soria v. Sierra Pac. Airlines, Inc.***, 111 Idaho 594, 726 P.2d 706 (1986) because the agreement there did not include "some sort of financial guarantee clause." (WDTL Br. 14) But, as discussed below, that is also the case here. Accordingly, "case law requiring disclosure [is] inapplicable." ***Soria***, 726 P.2d at 717.

the non-agreeing defendant and his right to a fair trial." ***Cox v. Kelsey-Hayes Co.***, 594 P.2d 354, 357 (Okla. 1978) (WDTL Br. 4 n.2). Without this liability-shifting element, however, a settling defendant has no interest in the outcome at trial, and no "built-in incentive . . . to increase [the plaintiff]'s damages." ***Ziegler v. Wendel Poultry Serv., Inc.***, 67 Ohio St.3d 10, 615 N.E.2d 1022, 1029-30 (1993) (agreement that did not give the settling defendant a financial interest in the plaintiff's recovery was not Mary Carter agreement), *overruled on other grounds by* ***Fidelholtz v. Peller***, 81 Ohio St.3d 197, 690 N.E.2d 502 (1998).

The Tenth Circuit emphasized that the essential element of a Mary Carter agreement is the settling defendant's interest in the plaintiff's recovery from the non-settling defendant in ***Hoops v. Watermelon City Trucking, Inc.***, 846 F.2d 637 (10th Cir. 1988) (WDTL Br. 4 n.2). In ***Hoops***, the plaintiff entered into a "high-low" agreement in which the settling defendant guaranteed plaintiff a minimum payment of $150,000, regardless of the jury verdict, while limiting its liability to a maximum of $350,000, even if the jury returned a higher verdict. After trial the non-settling defendant moved for a new trial on the grounds this was a "Mary Carter" agreement proscribed under Oklahoma law by ***Cox***, 594 P.2d at 357. The Tenth Circuit affirmed the district court's denial of a new trial "because the essential element of the typical Mary Carter agreement

condemned by the Oklahoma court is missing from the contingency agreement; Leeway had no interest in Hoops' verdict against WCT. Leeway's liability to Hoops was not contingent on the size of the verdict against WCT and Leeway did not stand to benefit from a larger verdict against WCT." ***Hoops***, 846 F.2d at 640.

Here, it is undisputed that Mullen had no financial interest in the Collings' recovery from City First. (CP 1165-67) No matter what verdict the jury returned, Mullen would be liable to the Collings for the same amount. Thus, on its face this was not a Mary Carter agreement because Mullen had no financial interest in the Collings' recovery from City First.

Amicus WDTL concedes that this is not a "classic Mary Carter," but argues that the court should apply the rules adopted by some courts faced with collusive Mary Carter agreements because the agreement was allegedly contingent upon Mullen's deposition testimony being "acceptable" to the Collings. (WDTL Br. 8) But the trial court did not find any quid pro quo in the content of Mullen's testimony (CP 1859-63), and, in the absence of any suggestion that Mullen's testimony was anything less than credible and true, the only "evidence" cited by WDTL is a vague statement submitted after trial by City First's attorney that Mullen's testimony had to be "acceptable." (CP 1773) To the contrary, the written agreement (CP 1165-67), the sworn statements of both

Collings' and Mullen's counsel (CP 1162, 1212-13, 1838), and the nature of Mullen's testimony, which was admitted at trial *by City First*,[2] confirm that the payment was to offset deposition expenses, and contingent only on the financially strapped Mullen appearing for his deposition. Mullen's interests were in no way contingent on the Collings' recovery from City First, and the policy issues raised by WDTL to support the sweeping rule it proposes to address Mary Carter agreements have no application to this case.

2. A "Mary Carter" Agreement Requires That The Settling Defendant Remain In The Litigation. Mullen Was Not Required To Remain In The Litigation And Did Not Even Show Up At Trial.

The Collings' agreement did not require Mullen to remain in the litigation. Mullen was free to show up, or not, at trial. A Mary Carter agreement "requires the settling defendant to remain in the litigation." ***Garrett v. Mohammed***, 686 So.2d 629, 630 (Fla. App. 1996) (*quoting* ***Dosdourian v. Carsten***, 624 So.2d 241, 246 (Fla. 1993)), *rev. denied* 697 So.2d 510 (1997), *abrogated on other grounds by* ***Allstate Ins. Co. v. Sarkis***, 809 So.2d 6 (Fla. App. 2001), *decision approved*, 863 So.2d 210 (2003). Where this element is missing, the dangers of a Mary Carter

[2] Mullen testified to how City First operated through its branches and its policies regarding supervision. Virtually all of his testimony was corroborated by City First's sole witness at trial, Sherry Russett, and none of Mullen's testimony was contested. *See* §C, *infra.*

agreement are not present. ***Garrett***, 686 So.2d at 630. For this reason as well this was not a Mary Carter agreement.

In ***Garrett***, the plaintiff entered into a "high-low" agreement that limited the settling defendant's liability to a range of $5,000 and $15,000. After learning of the agreement during trial, the non-settling defendant unsuccessfully moved for a mistrial. The court of appeals rejected the non-settling defendant's argument that the agreement was akin to a "Mary Carter" agreement because the settling defendant "was not required to remain in the litigation. She was free to either participate in the litigation or to walk away." ***Garrett***, 686 So.2d at 630.

Here, as in ***Garrett***, the agreement was not a Mary Carter agreement because it did not require that Mullen remain in the litigation. Mullen was free to "participate in the litigation or walk away." 686 So.2d at 630. Indeed, Mullen chose to walk away. Mullen's counsel withdrew after the agreement was executed. Mullen did not show up at trial, presented no evidence or witnesses, and made no arguments to the jury.

WDTL concedes that a Mary Carter agreement requires that the "settling defendant remain[] a party in the trial" (WDTL Br. 2), but does not address how this element is present in this case, when Mullen did not even participate in the trial. This court also should decline to address

WDTL's arguments regarding Mary Carter agreements because the agreement did not require Mullen to remain in the case.

B. City First Is Not Entitled To A New Trial Because The Collings Had No Duty To Disclose Their Agreement With Mullen Absent A Discovery Request.

WDTL cites no authority to support a mandatory duty to any and all agreements between litigants, even in the absence of a discovery request. (WDTL Br. 8-9) A party cannot *conceal* an agreement if there has been no effort to *discover* the agreement. In this case, City First conducted no discovery. In the absence of a discovery request from City First, the Collings were under no obligation to disclose their agreement with Mullen. *See* § D, *infra.*

Assuming only for purposes of argument that the agreement in question here could be likened to a Mary Carter agreement, courts will not grant a new trial on the basis of a Mary Carter agreement discovered post-trial where the complaining party did not exercise due diligence in seeking to discover the agreement before trial. *See, e.g.,* ***Grillo v. Burke's Paint Co., Inc.***, 275 Or. 421, 551 P.2d 449 (1976) (WDTL Br. 7 n.5); ***Med. Staffing Network, Inc. v. Connors***, 313 Ga. App. 645, 722 S.E.2d 370, 374 (2012) ("we find no abuse of discretion in the trial court's denial of Medical Staffing's motion for a new trial based on the failure of the Rowlands and the hospital to *spontaneously disclose* their litigation

agreement to Medical Staffing and the court.") (emphasis in original); *see also* ***Vermont Union Sch. Dist. No. 21 v. H.P. Cummings Const. Co.***, 143 Vt. 416, 469 A.2d 742, 750 (1983) ("a majority of those jurisdictions considering the issue have fashioned a rule requiring that such agreements *be subject to pretrial discovery* and, with some qualifications, admitted into evidence") (emphasis added) (listing cases).

In ***Grillo***, the plaintiff borrowed $16,000 from one of two defendants. The plaintiff agreed to repay the loan from any judgment recovered against the non-settling defendant, and not to execute any judgment recovered against the settling defendant. The settling defendant remained a party at trial, and the agreement was not disclosed to the non-settling defendant or the trial court. The non-settling defendant discovered the agreement after the jury returned a $36,500 verdict against both defendants and moved for a new trial. ***Grillo***, 551 P.2d at 451.

The Oregon Supreme Court affirmed the trial court's denial of a new trial because "the settlement was a matter that could have been discovered before trial in the exercise of due diligence." ***Grillo***, 551 P.2d at 454. In discussing Mary Carter agreements generally, the Oregon court observed that "the majority of jurisdictions which have considered this question do not condemn the agreements as invalid per se but instead require that the agreements be subject to *pretrial discovery procedure* and

be admissible into evidence on request of any non-settling defendant." 551 P.2d at 452 (emphasis added).

Where courts have granted post-trial relief on the basis of a Mary Carter agreement, the aggrieved party actively sought to discover the agreement. *See, e.g.,* ***Firestone Tire & Rubber Co. v. Little***, , 276 Ark. 511, 639 S.W.2d 726, 728 (1982) ("The judgment has to be reversed because Firestone asked the day before trial whether the plaintiff and the two other defendants, Shelton and Smith, had entered into a 'Mary Carter Agreement.'") (WDTL Br. 7 n.5); ***Cox***, 594 P.2d at 356 ("Appellants became aware of this agreement through answers to interrogatories."). Here, City First did not inquire of either the Collings or Mullen whether they had entered into any agreements or whether they had discussed settlement.

Neither City First nor WDTL cites to any rule of court or professional conduct that obligates a plaintiff to disclose communications or agreements with a defendant in the absence of a discovery request. Amicus' condemnation of "secret deals" (WDTL Br. 8-9) has no application to this case because neither the Collings nor Mullen took any steps to keep the agreement secret. The agreement did not contain a confidentiality clause (CP 1165-67), and would have been freely disclosed

upon a proper discovery request.[3] City First is not entitled to a new trial where it failed to make discovery requests that sought information regarding payments or agreements between the parties.

C. The Trial Court Did Not Abuse Its Discretion In Finding That The Agreement Caused City First No Prejudice Because Mullen's Testimony Was Consistent With His Pre-Covenant Discovery Responses And Corroborated By City First's Own Witness.

Although WDTL asserts – without citation to authority – that "most courts" analyze Mary Carter agreements "*regardless of fraud or collusion*" (WDTL Br. 8-9) (emphasis in original), "most courts" in fact consider whether non-disclosure of an agreement resulted in prejudice to the non-settling defendant before taking the extraordinary step of reversing a jury verdict and requiring a new trial. "Most courts" also recognize that deciding whether a new trial is warranted is a matter left to the discretion of the trial court, which is best able to assess the consequences of an undisclosed agreement between plaintiff and a defendant. This court should do the same.

A trial court abuses its discretion by granting a new trial where alleged improprieties in the trial did not prejudice the complaining party. ***Trosper v. Heffner***, 51 Wn.2d 268, 317 P.2d 530 (1957). Consistent with

[3] Notably, neither City First's trial nor in-house counsel submitted a declaration affirmatively stating they had no independent knowledge of any agreement between the Collings and Mullen.

this rule, courts refuse to vacate a jury verdict based on non-disclosure of an alleged Mary Carter agreement absent a showing of prejudice. *See, e.g.,* ***Monti v. Wenkert***, 287 Conn. 101, 947 A.2d 261, 277 (Conn. 2008) ("we conclude that the defendant was not prejudiced by the nondisclosure of the agreement so as to warrant a reversal"); ***Med. Staffing Network, Inc. v. Connors***, 722 S.E.2d at 374 ("we agree with the trial court's conclusion that there is nothing in the record to show that Medical Staffing's ignorance of the litigation agreement rendered the trial fundamentally unfair"); ***Ryals v. Hall-Lane Moving & Storage Co., Inc.***, 122 N.C. App. 134, 468 S.E.2d 69, 72 (1996) ("We conclude the latter were not prejudiced by ignorance until mid-trial of a settlement agreement").

Courts have vacated a jury verdict only upon a clear showing of prejudice resulting from an agreement between a plaintiff and one of several defendants.[4] *See, e.g.*, ***Gen. Motors Corp. v. Lahocki***, 286 Md. 714, 410 A.2d 1039, 1045 (Md. 1980) ("GM's assertion that the

[4] The Texas Supreme Court documented in detail the prejudice suffered by the non-settling defendant in ***Elbaor v. Smith***, 845 S.W.2d 240 (Tex. 1992), where the plaintiff's attorney claimed in voir dire and opening statements that the settling defendant was "heroic," and argued in closing that the settling defendant was not negligent, while the settling defendant's lawyers elicited testimony on cross-examination favorable to the plaintiff, and argued in closing that the plaintiff should be awarded all her damages. 845 S.W.2d at 246; *see also* ***Ratterree v. Bartlett***, 238 Kan. 11, 707 P.2d 1063, 1075-76 (1985) (appellant identified seven specific instances of prejudice) (WDTL Br. 4, 7, 11).

agreement effected a change in its relationship as a co-defendant with Contee is adequately borne out by the record.") (WDTL Br. 6-7).

When analyzing whether prejudice exists, courts consider if the non-settling defendant has admitted the facts testified to by the settling defendant. *See, e.g.,* ***Hackman v. Dandamudi***, 733 S.W.2d 452 (Mo. App. 1986) ("Examination of [plaintiff]'s testimony reveals that appellant could not have been prejudiced by his inability to cross-examine her because he essentially admitted all the facts to which [plaintiff] testified.").

Courts also compare a party's pre- and post-agreement conduct; if that conduct is consistent, then the agreement caused no prejudice. *See, e.g.,* ***Montgomery v. Clubb***, 907 S.W.2d 174, 176 (Mo. App. 1995) (affirming trial court's refusal to allow cross-examination on alleged Mary Carter because there was "no significant change in [plaintiff]'s testimony at trial from her deposition testimony two years earlier"); ***Slusher v. Ospital by Ospital***, 777 P.2d 437, 444 (Utah 1989) (finding no prejudice from refusal to disclose agreement to jury because non-settling defendant "draws to our attention no significant instance of discrepancy between [plaintiff]'s presettlement deposition testimony and his post-settlement trial testimony"); *see also* WDTL Br. 14 (noting lack of prejudice where pre-settlement testimony is consistent with post-settlement testimony).

Finally, courts consider whether the defendants had an incentive to blame each other for plaintiff's damages prior to the agreement. ***Jensen v. Beaird***, 40 Wn. App 1, 12, 696 P2d 612 ("there is no requirement under the law that codefendants be friendly"), *rev. denied*, 103 Wn.2d 1038 (1985); ***Monti***, 947 A.2d at 277 ("there is no evidence that the agreement created a more adversarial relationship between the defendant and Wenkert than that which predated the agreement"); ***Riggle v Allied Chemical Corp.***, 180 W.Va. 561, 378 S.E.2d 282, 287 (1989) (no prejudice from refusal to disclose agreement to jury where "even before the settlement agreement, Allied and appellant were in an adversarial posture"); ***Hackman***, 733 S.W.2d at 457 (no prejudice where "both parties were in a sense pointing their fingers at each other long before trial").

Here, WDTL does not address prejudice at all. But review of the evidence demonstrates that City First was not prejudiced in any way. Mullen's limited deposition testimony was entirely consistent with the testimony of City First's own witness (*compare*, *e.g.*, 9/15 RP 57 *with* Ex. 70 at 15-17 (City First branch offices had City First signage); *compare* 9/15 RP 84 *with* Ex. 70 at 10 (Mullen was City First employee); *compare* 9/15 RP 52, 58-59 *with* Ex. 70 at 6, 10-17 (City First had a Home Front Branch Office); *compare* 9/15 RP 95, 189 *with* Ex. 70 at 29 (loan officers were compensated by City First), and with Mullen's pre-agreement

answers to discovery requests. (*Compare, e.g.*, CP 1188 *with* Ex. 70 at 29 (Mullen left City First in June 2006); *compare* CP 1188 *with* Ex. 70 at 8-9 (Loveless was in charge of operations); *compare* CP 1188, 1198 *with* Ex. 70 at 28 (Spencer was a loan officer at City First))

Further, City First and Mullen had no incentive to cooperate before – or after – Mullen's deposition testimony. From the inception of this case, City First sought to paint Loveless and Mullen as "rogue" agents acting outside of their authority. (*See, e.g.*, CP 266 (City First Answer denying that Loveless and Mullen were authorized agents)) A review of the actual evidence, as opposed to WDTL's conclusory assertions regarding the prejudicial nature of Mary Carter agreements, demonstrates that Mullen's deposition testimony, admitted *by City First* at trial, caused no unfair prejudice to City First.

That Mullen's deposition testimony did not cause any of the prejudice associated with Mary Carter agreements also is obvious from a comparison to other cases. Here, Mullen did not even attend trial. Unlike ***Elbaor*** and similar cases, none of the attendant concerns about collusive jury selection, motions in limine, witness examination, or argument are present in this case.

This analysis presumes, however, that this court is in a position to assess prejudice independently. WDTL concedes that the trial court is "in

the best position to determine what if any remedies to impose" (WDTL Br. 9), but inconsistently argues that this court should reverse the trial court's *finding* that no prejudice occurred and no remedy was warranted here. Contrary to WDTL's argument, virtually all appellate courts that have addressed the consequence of Mary Carter agreements have acknowledged that the trial court is in the best position to determine whether and what remedy is warranted.

Appellate courts routinely defer to the trial court's determination of whether non-disclosure of an agreement warrants a new trial. *See, e.g.*, ***McCluskey v. Handorff-Sherman***, 68 Wn. App. 96, 105, 841 P.2d 1300 (1992) (trial court did not "abuse[] its discretion in denying the State's motion for an evidentiary hearing and for a new trial" based on alleged Mary Carter agreement), *aff'd,* 125 Wn.2d 1, 882 P.2d 157 (1994) (WDTL Br. 6); ***Med. Staffing Network, Inc.***, 722 S.E.2d at 374 ("we find no abuse of discretion in the trial court's denial of Medical Staffing's motion for a new trial based on the failure of the Rowlands and the hospital to spontaneously disclose their litigation agreement to Medical Staffing and the court."); ***Hodesh v. Korelitz***, 123 Ohio St.3d 72, 914 N.E.2d 186, 191 (2009) ("the trial court was in a better position than the court of appeals to determine the motives of counsel and whether collusion was behind their

decisions, because he observed counsel and witnesses while the court of appeals reviewed a cold record").

Here, the trial court, which were in a unique position to observe the demeanor and conduct of counsel, is entitled to substantial deference in its decision that a new trial was not warranted. After observing the entire trial and the presentation of evidence, the trial court determined that City First was not entitled to a new trial. This court should defer to that determination.

D. The Tort Reform Act Does Not Apply To The Collings' Claims. Even If It Did, It Required Mullen, Not The Collings, To Disclose The Agreement.

WDTL argues that the agreement conflicts with the "spirit" of the Tort Reform Act (WDTL Br. 11-16), but fails to explain why the Act even applies to the Collings' claims, which were not based in tort, raising issues of comparative fault, but rather asserted statutory rights. The Act does not apply to this case. But even if it did, it would have mandated that Mullen, not the Collings, disclose the agreement.

The Tort Reform Act requires court approval of settlement agreements because under a regime of several liability and comparative fault, the non-settling defendant's liability is reduced by the amount of the reasonable settlement regardless of the percentage of fault assigned to the settling defendant. Because the jury was never required to allocate fault

among the defendants, ***Romero v. W. Valley Sch. Dist.***, 123 Wn. App. 385, 98 P.3d 96 (2004), *rev. denied*, 154 Wn.2d 10 (2005) and ***Bunting v. State***, 87 Wn. App. 647, 943 P.2d 347 (1997) (WDTL Br. 12-16), are inapposite. Here, the jury was never asked to assign each parties' comparative fault, and in fact assigned liability to City First independent of any acts of Mullen. (CP 899)

Even if the Act did apply, it would have required that defendant Mullen, not plaintiffs Collings, disclose the agreement, in order to avoid a contribution claim from City First. *See* RCW 4.22.060(1) ("A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement *with a claimant* shall give five days' written notice of such intent to all other parties and the court.") (emphasis added); *compare the contrary rule in* ORS § 31.815 ("When a covenant described in subsection (1) of this section is given, *the claimant shall give notice* of all of the terms of the covenant to all persons against whom the claimant makes claims.") (emphasis added); ***McCarthy v. Hensel Phelps Const. Co.***, 64 Or. App. 256, 667 P.2d 558, 560 (1983) (under ORS § 31.815 duty of disclosure is with plaintiff). Here, the Collings were the claimants, and if the Act was applicable, Mullen was the party obliged to disclose the agreement in order to protect himself.

III. CONCLUSION

WDTL proposes a draconian rule to address an evil that does not exist in this case, where reversal of the jury's verdict would intolerably exalt form over substance. This court should not address the issues raised by amicus and should affirm the jury's verdict.

Dated this 16th day of May, 2012.

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Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 16, 2012, I arranged for service of the foregoing Respondents Collings' Answer to Brief of Amicus Curiae Washington Defense Trial Lawyers, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of May, 2012.

Victoria K. Isaksen

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May 16, 2012

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Re: *Collings v. City First Mortgage Services, LLC* and *U.S. National Bank*
Cause No. 66527-8-I

Dear Clerk:

Enclosed for filing is the original plus one copy of the Respondents Collings' Answer to Brief of Amicus Curiae Washington Defense Trial Lawyers in the above-referenced matter. Please copy receive the corresponding face page and return it to this office in the enclosed self-addressed stamped envelope.

Thank you for your courtesy.

Very truly yours,

Victoria K. Isaksen
Paralegal

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Enclosures