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NO. 65673-2

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Department of Transportation,

Appellate,

v.

JARED K. BARTON, a single man; KORRINE C. LINVOG,
individually; and THOMAS and MADONNA LINVOG,

Respondents.

BRIEF OF RESPONDENTS LINVOG

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ORIGINAL

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I. SUMMARY OF RESPONDENTS LINVOGS' ARGUMENT

The State's entire claim in this appeal rests on its position that Thomas and Madonna Linvog had no risk of an adverse judgment, especially one in excess of \$100,000.00, and that this allegedly riskless environment incentivized their daughter, Korrine Linvog to perjure herself. In a thorough memorandum opinion, the trial court entered findings of fact that squarely rejected the State's position, repeatedly noting that not only was there absolutely no evidence to support the State's raw speculation, but that the State's arguments were contradicted by what actually transpired at trial and the hard facts of the case. These discretionary findings, made by the trial judge who presided over the trial of this matter, are entitled to substantial deference from this Court. Additionally and importantly, the State neglects to inform the Court that below, it moved for, and was granted, exactly what it now argues was *legally impossible*: a fully enforceable contribution judgment. This Court should affirm the trial court's decision because it was based on discretionary findings accorded substantial deference on appeal, and because the State's contention that Thomas and Madonna Linvog were insulated from an adverse judgment was actively disproved by the State itself when it sought and obtained an adverse judgment against them.

II. RESPONDENTS LINVOGS' STATEMENT OF THE CASE

A. The Accident and Lawsuit Against the State and Linvogs.

This case was the result of personal injury. Jared Barton sustained in a traffic collision. Korrine Linvog¹ was driving the car that hit him. Driving at night, Ms. Linvog pulled up to a stop sign, and stopped at the stop bar painted on the road by the State. She looked both ways, and seeing no approaching traffic, pulled out, turning left onto the highway. While Ms. Linvog was crossing the nearest lane, Mr. Barton's motorcycle collided into the side of her car. *Barton v. State, Dept. of Transp.*, Case No. 61015-5-I, 2008 WL 4838687 (Wn.App. Div. 1, 2008).

Mr. Barton sued Korrine Linvog for negligent driving, and named her parents, Madonna and Thomas Linvog, as vicariously liable defendants under the Family Car doctrine². Neither Madonna nor Thomas Linvog (collectively, the "Linvog parents") were in the car nor witnessed the accident. Mr. Barton also sued the State for negligent highway design. This claim was based on Korrine Linvog's contention that when she stopped at the stop bar painted by the State, a row of trees blocked her view of cross-traffic. Because the accident occurred at night, she was not be able to see the trees, and did not know that her view was restricted.

¹ Korrine Linvog will occasionally be referred to by her first name in this Brief, in order to differentiate her from her parents, Thomas and Madonna Linvog.

² See WPI 72.05, discussed *infra*.

After a sixteen-day trial, the jury found that Mr. Barton was entitled to \$3.6 million, finding Ms. Linvog 5 percent at fault, and the State 95 percent. *Id.*

The Linvogs' attorney William Spencer identified early on that the Linvogs' insurance policy had limits of \$100,000.00, and was highly aware that Mr. Barton's injuries were well in excess of that amount. CP 555. In an attempt to obtain a release for his clients, Mr. Spencer offered policy limits in settlement. *Id.* Mr. Barton's attorney, Ralph Brindley, declined. *Id.* Although Mr. Brindley indicated that it was not his practice to execute against family assets in excess of policy limits where there was a jointly liability institutional defendant, settling with the Linvogs would destroy the possibility for such joint liability with the State. *Id.* Mr. Brindley expressed confidence that Mr. Barton would be found fault-free. CP 560. Mr. Spencer was at all times aware that despite Mr. Brindley's "practice," Mr. Barton would have little choice but to execute fully on any *several* judgment against the Linvogs, and this practice could not prevent Mr. Brindley from executing on a joint judgment if Mr. Barton so directed him. CP 555.

During the course of the litigation, the State served discovery requests on both Mr. Barton (September 2005) and the Linvogs (July 2006). Interrogatories No. 49 and 17, respectively, asked whether those

parties had entered into any covenants or agreements with each other. CP 1490, 1249. Mr. Barton and the Linvogs both answered in the negative, in responses provided in October 2005 and August 2006. *Id.* These responses, confirmed with the signatures of counsel, were one hundred percent true without equivocation. CP 8 (No agreement until March 2007). The State's innuendo that counsel signed discovery responses that misrepresented facts is baseless.

Korrine Linvog gave her deposition in October 2006, where she gave a full account of where she stopped, and what she could see. CP 928-941. She testified that she could not see Mr. Barton approaching. *Id.* When she subsequently returned to the site in the daylight, she realized that her view had been blocked by trees she had not known were there. *Id.*

B. The Advance Stipulation.

In April 2007, about six months after Korrine's deposition, and eight months after the Linvogs' discovery responses were signed, Mr. Brindley approached Mr. Spencer to discuss the possibility of an advance payment from the Linvogs to Mr. Barton. CP 555. Mr. Barton had urgent medical needs, and his damages were beyond question. CP 561. The Linvogs agreed to advance Mr. Barton \$20,000.00, which would be credited against any eventual settlement or judgment. CP 924-5. Mr. Spencer and Mr. Brindley understood the value of the advance, and Mr.

Spencer asked for something in return. Recognizing that the biggest threat to the Linvogs would be a large several judgment (up to 100 percent) that Mr. Barton would have no choice but to attempt to collect from them, Mr. Spencer specified that in exchange for the advance, Mr. Barton would agree not to execute against the Linvog parents for any amount in excess of the Linvogs' policy limits. *Id.* In the event of a joint and several judgment against the Linvogs and the State, the Advance Stipulation reflected a hope that after Mr. Barton successfully collected a judgment from the State, the State might make a business decision not to bring a contribution action against the Linvogs.

In an unchallenged finding of fact³, the trial court determined that neither Mr. Brindley nor Mr. Spencer believed that this Stipulation (the "Advance") would have any implications on the State's *right* to this type of contribution judgment in the event the jury apportioned more than \$100,000.00 to Korrine, for which the Linvog parents would be vicariously liable. CP 9. Similarly, the trial court found that neither one of them believed that this agreement released the Linvog parents (*Id.*); indeed, Mr. Brindley had been consistent that Mr. Barton would *not* release any defendant because doing so could threaten joint liability, and

³ This finding of fact was part of the trial court's memorandum opinion in support of its denial of the State's Motion to Vacate and for Sanctions. CP 7. "Unchallenged findings are verities on appeal." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

his client's ability to collect a judgment from the State. CP 555. The agreement explicitly states that it is not a settlement, and it does not purport to release anyone. CP 924-5⁴. Korrine Linvog received nothing at all in the Advance. *Id.* The Advance had signature lines for Mr. Spencer, Mr. Brindley and Mr. Barton. The only party that actually signed it was Mr. Brindley (CP 925), but Mr. Spencer did not realize that it had not been fully executed until after the first appeal. RP Jan. 15, 2010 p. 55.

C. Because of an Oversight, Barton and the Linvogs Failed to Supplement their Responses to the State's Discovery.

Neither Mr. Spencer nor Mr. Brindley supplemented their previous, correct denials regarding an agreement between Mr. Barton and the Linvogs after the Advance. The Linvogs concede that these discovery requests ought to have been supplemented. However, where the State sees fraud, misrepresentation, and a covert attempt to "set up" the State, the reality, correctly described by the trial court (CP 7-15), is much more mundane. The agreement was not "kept secret" because of an explosive potential to collusively deprive the State of a fair defense; it was so *unimportant* to Mr. Brindley that he literally forgot about it (CP 563), and Mr. Spencer, whose associate had answered the discovery eight months earlier, was regrettably unaware that there was a response that required

⁴ A copy of the Advance is attached as Appendix A hereto for ease of reference.

supplementation. RP Jan 15, 2010, p. 58-59. In any event, the trial court correctly ascertained that Mr. Spencer never believed that it let the Linvog parents “off the hook” or would have any effect on the State’s right to a contribution claim. CP 9. The trial court determined the failure to supplement was an oversight. *Id.*

D. The Trial.

At trial, the Linvogs followed the same defense strategy they espoused before the lawsuit even began; highlighting the fact that Korrine Linvog’s view of Mr. Barton was obstructed as a result of negligent highway design, and siding with Mr. Barton to establish that he was free of fault. The ethos of this approach was to prove that both Ms. Linvog and Mr. Barton were victims of the same negligent highway design. As the trial court found (CP 11), this strategy was *not* influenced by the Advance. Judge Farris noted that this was, in fact, the only coherent defense the Linvogs could have put on. *Id.* This is because if Korrine had alleged that Mr. Barton could have avoided the accident by properly maintaining his headlights, etc., *she would have been conceding* that they could see each other despite the trees. *Id.* If this approach had been successful, Mr. Barton might have been found negligent to some degree, but the obvious implication would have been that Korrine could see him, *too*. In addition to being factually untrue, the trial court found that

proving such a fact would have completely gutted the Linvogs' most compelling defense; namely, that unknown to Korrine, the trees completely blocked her view. *Id.*

The trial court also found that a corollary benefit of this defense was that, if the Linvogs were found liable at all, Mr. Barton's freedom from fault would have entitled him to a joint and several judgment against the Linvogs and the State. CP 12. The Linvogs would thus have a chance that after Mr. Barton collected the entire judgment from the State, the State might make a business decision not to pursue them for contribution. The trial court found that the Linvogs' decision to not to oppose Mr. Barton's efforts to obtain a determination that he was fault-free was based on these considerations, and had nothing to do with the Advance. CP 11-12.

The trial court found that the jury's apportionment of only five percent to Ms. Linvog reflected the fact that the jurors believed that her view of oncoming traffic was blocked. CP 15. As discussed below, the trial court expressly rejected as a factual matter the State's contention that this apportionment was based sympathy for the Linvog parents. CP 14.

E. The First Appeal.

The Linvogs did not appeal from the verdict. Because the judgment against them was thus immediately enforceable, they paid

Barton the remaining \$80,000.00 of their policy limits. CP 557. The State did appeal, and made no payment until it had lost. After that remand, the parties were working out the details regarding paying the judgment and the appropriate setoff for the amount the Linvogs paid. CP 1473. In explaining why Mr. Barton was not going to pursue the Linvog parents in any amount in excess of \$100,000.00, Mr. Brindley and Mr. Spencer each independently told the State about the Advance, and voluntarily provided the State with a copy. *Id.*

F. The State's Motion to Vacate and for Sanctions.

After considering the Advance, the State moved the trial court to vacate the judgment under CR 60, accusing Mr. Spencer and Mr. Brindley of fraud for not having turned over the Advance. The State alleged that the agreement represented a fraudulent, covert re-alignment of the parties' interests, and incentivized Korrine Linvog to perjure herself, while the State's unawareness of the agreement prevented cross-examination on this bias. CP 1304 *et seq.* The State also alleged that the Linvog parents should have been dismissed because of the Advance, and their presence engendered a "false sympathy" that caused the jury to find Ms. Linvog only five percent at fault. CP 1318. The trial court squarely rejected these contentions, finding that being unaware of the Advance had not prejudiced the State, and denied the Motion to Vacate. CP 7. The trial court found

that nothing about the Advance would have given Korrine a motive to lie other than the “garden variety” motive of blaming one’s co-defendant (CP 14) – a motive the trial court noted the State had every incentive and opportunity to explore on cross examination. *Id.* The trial court also found that the apportionment of the award was firmly based on proven facts, not sympathy, and that presence of the Linvog parents as defendants did not prejudice the State. *Id.*

The State strains to explain why the allegedly alignment-changing event – the Advance – caused no change in Korrine’s testimony between her deposition and the trial. Because it cannot cite any facts to explain this *consistency*, the State relies on thinly veiled innuendo. For example, the State posits that Mr. Barton “rewarded” the Linvogs for Korrine’s deposition testimony (CP 16, 5), implying that Mr. Brindley suborned perjury to establish joint liability. Indirect though it may be, this is a scandalous charge with no evidence to support it. The State’s aspersions do nothing more than underscore the extreme, speculative nature of its positions on appeal.

F. The State Moved for, and was Granted, a Contribution Judgment Against the Linvog Parents for Amounts in Excess of the Supposed Liability “Cap.”

After the trial court denied its Motion to Vacate, and the State had paid Mr. Barton all but the Linvogs’ \$100,000.00, the State moved the

trial court for a contribution judgment against the Linvogs. CP 1547⁵. The jury's five percent allocation translated to \$180,000.00 of the total verdict, so the State argued that it had overpaid vis-à-vis the Linvogs in the amount of \$80,000.00 (plus interest). *Id.* The State argued that it was entitled to contribution under RCW 4.22.050. *Id.* at 1548. The Linvogs did not assert a "release" under RCW 4.22 in opposition that Motion. CP 1556-1570* (Sub. No. 315). The trial court entered judgment as requested by the State.

The trial court determined, as a factual matter, that although Mr. Brindley and Mr. Spencer should have disclosed the Advance, the State was not prejudiced; the verdict was the result of incontrovertibly large damages, and Korrine Linvog's well-proven defense that her view of cross traffic was blocked. As will be shown below, this was a discretionary finding which this Court should not disturb on appeal.

III. AUTHORITY & ARGUMENT

Appearances to the contrary, the State's Brief raises only one real legal issue: Did the trial court manifestly abuse its discretion in determining that the non-disclosure of the Advance did not prejudice the

⁵ This is the expected CP citation; no index has yet issued pursuant to Barton's Supplemental Designation. This Document is Sub. No. 311. Other citations of this nature will be followed by an asterisk and the Sub. No.

State's ability to prepare for and try this case? There was no abuse of discretion, and this Court should affirm.

A. The Standard of Review is Abuse of Discretion.

It is well-established that the proper standard on review of a trial court's determination of whether to vacate a judgment under CR 60, or grant a new trial as a discovery sanction under CR 26, is manifest abuse of discretion. *Roberson v. Perez*, 123 Wn.App. 320, 333, 96 P.3d 420 (2004). Nevertheless, the State claims that the trial court's decision to deny its Motion to Vacate should be reviewed *de novo* because that court misapprehended a legal issue, namely that the Advance allegedly cut off all contribution rights of the State. The State is incorrect. It is true that if the trial court's discretionary determination is *based* on an error of law, that alleged error is reviewed *de novo*⁶. Here, however, the trial court took pains to point out that the State received a fair trial *regardless* of ultimate legal effect of the Advance. CP 10. If the State were complaining that the trial court's decision unfairly deprived it of a right to contribution after the trial, the standard of review would be *de novo* on that issue⁷. But the only issue on this appeal is whether the State's lack of knowledge of the

⁶ *Marvik v. Winkelman*, 126 Wn.App. 655, 661, 109 P.3d 47 (2005).

⁷ Of course, the State can make no such claim because the trial court *granted* it a contribution judgment against the Linvogs.

Advance deprived it of a fair trial⁸. The trial court found that it did not, and the proper standard of review on that issue is whether the trial court manifestly abused its discretion. *Freeman v. Intalco Aluminum Corp.*, 15 Wn.App. 677, 680, 552 P.2d 214 (1976). (Trial court's decision on motion for new trial accorded "greatest deference" where it involves assessment of occurrences which cannot be made part of record, other than through the voice of that court.)

B. The Appropriate Consideration for the Imposition of CR 26 Discovery Sanctions and CR 60(b)(4) Motions to Vacate is Whether the Complaining Party was Prejudiced Preparing for and Defending Itself at Trial.

In exercising its discretion in determining whether a discovery violation merits the severe sanction of a new trial, the trial court should consider whether a claimed violation was "*willful or deliberate and [one that] substantially prejudiced the opponent's ability to prepare for trial.*" *Roberson v. Perez*, 123 Wn.App. 320, 333, 96 P.3d 420 (2004), quoting *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) (*emphasis in Roberson*). Similarly, under CR 60(b)(4), the trial court should consider whether an alleged fraud *cause[d]* the entry of the

⁸ The State understands that the only issue is whether its defense was prejudiced, even if it will not formally acknowledge it. In the Brief of Appellant at p. 21, the State recites, "The reason why disclosure is required is because the existence of undisclosed agreements can prejudice the proceeding by misleading the trier of fact." This has nothing to do with the legal validity of its follow-on contribution claim, which is its claimed error "of law."

judgment such that the losing party was prevented from fully and fairly presenting its case or defense.” *Lindgren v. Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990) (emphasis in original).

Findings of fact on these issues were the core of the trial’s memorandum decision in support of its Order denying the State’s Motion to Vacate. Those findings reflect the trial court’s conviction that the failure to supplement did not substantially prejudice the State nor cause the State any adverse effect regarding the jury’s apportionment. As described below, the trial court’s findings that the State was not prejudiced or prevented from fairly presenting its defense were well within the proper exercise of its broad discretion.

C. The Trial Court Correctly Determined that the Omission of Supplementation did not Cause the Jury’s Allocation nor Substantially Affect the State’s Ability to Prepare for or Try this Case.

The State cites exactly three reasons why not knowing about the Advance allegedly prejudiced its ability to prepare for and try this case. *Brief of Appellant at 12-13*. First, the State claims that the nature of the Advance re-aligned the interests of the parties, and gave Korrine Linvog motive to perjure herself to “set up” the State. The State claims that because it did not know about the Advance, it did not have an opportunity to establish that motive through cross-examination.

Second, the State contends if it had known about the Advance, it might have moved to dismiss the Linvog parents because they allegedly had been released, and had no further interest in the outcome of the case. The State argues that their presence as defendants was prejudicial to it.

Third and finally, the State argues that the Advance extinguished any potential liability of the Linvog parents, and that passing reference to them being “on the hook,” along with the Family Car instruction, elicited a “false sympathy” which irretrievably infected the verdict. The Linvogs address these three arguments below, and in the course of this brief, will demonstrate that the State’s contentions are meritless.

1. Lack of knowledge of the Advance did not deprive the State of an opportunity to show “bias” on cross-examination.

After presiding over trial, Judge Farris thoroughly considered and rejected the State’s argument that it was prejudiced in preparing for and trying this case. The court was well within the bounds of its broad discretion when it concluded that regardless of whether the State knew about the Advance, it did not bias the testimony of Korrine Linvog, and did not change the Linvogs’ incentive to blame the State for the accident.

i. There was no bias to show.

a. The Advance did not realign the parties’ interests.

The State inflammatorily characterizes the Advance as a “Mary Carter” agreement, and cites commentary and cases that discuss the deleterious effect of “Mary Carters.” Mary Carter agreements can be a threat to justice, and courts treat them with skepticism and actively participate in mitigating their effect on juries. There are very specific characteristics that mark an agreement as a “Mary Carter”; the trial court correctly found as a factual matter that Advance in this case was neither a Mary Carter, nor did it create any kind of analogous moral hazard.

The term “Mary Carter agreement” originated with the case of *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla.App. 1967). The archetypical Mary Carter scenario is where a plaintiff sues two defendants for tortious conduct. The plaintiff then approaches one of the defendants, likely the one against whom the liability case is the strongest, and makes a deal. The defendant agrees to pay some amount, and the plaintiff agrees not to enforce any judgment against that defendant. These provisions, on their own, are commonplace, inoffensive settlements. The remaining terms are the mischievous ones. Instead of being dismissed, the settling defendant is required to remain a party to the litigation. Additionally, the settling party is given a financial incentive to ensure that the judgment against the non-settling defendant is as high as possible. For example, the

settling defendant is often entitled to one out of every two dollars recovered by the plaintiff, over a certain amount.

The moral hazard inherent in such schemes is obvious, and especially where secret, insidious. At the beginning of a trial, in this example, each of the defendants had incentive to defend itself, exploiting the plaintiff's weaknesses as effectively as possible. Then, one of the defendants secretly switches course mid-stream and begins, covertly, actively aiding the plaintiff to obtain as large a judgment as possible against the non-settling defendant. Meanwhile, the court and the jury continue to believe that the plaintiff and the settling defendant are adverse, falsely imparting upon the settling defendant's testimony (even if it remains honest), the air of credibility typically reserved for a witness testifying against her own interest.

Not surprisingly, courts have reacted negatively to Mary Carter agreements. There are essentially two schools of thought about the proper response. First, some courts simply ban them entirely. *See, eg., Elbaor v. Smith*, 845 S.W.2d 240 (Tex.,1992), *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347 (1971). Other jurisdictions allow them, but require them to be disclosed, and take affirmative steps to mitigate the re-alignment of the parties in front of the jury. In Oklahoma, for example, Mary Carters are tolerated, but courts are required to either dismiss the settling defendant -

informing the jury about the agreement *if* the dismissed party testifies - or, alternatively, *void the reimbursement provision* so that the parties remain adversarial and make the agreement irrelevant. *Cox v. Kelsey-Hayes Co.*, 594 P.2d 354, 356 (Okl., 1978). *See also*, J. Michael Phillips, *Comment, Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255, 257 (1994)⁹.

As the trial court noted in its memorandum opinion denying the State's Motion to Vacate Judgment, there are no Mary Carter cases where the terms of the agreement were similar to those at issue here¹⁰. CP 7. The absolutely most important feature of a Mary Carter agreement, that the settling defendant receives some financial incentive to increase the judgment against a co-defendant, is entirely absent in this case. The Barton's agreement not to execute against the parents in excess of \$100,000.00 was contingent on the advance of \$20,000.00, and *absolutely nothing else*. There was no kick-back provision. The agreement did not provide the Linvogs with any incentive to help Barton establish high

⁹ Note that all of the factual scenarios presented in this article, described as "prescient" by the State, involve a settling defendant that has been completely released, and has a *cash incentive* to assist the plaintiff in obtaining a large judgment against the other defendant. That is not this case. Sometimes, as here, the State really is a fault.

¹⁰ The case which the State cites as the *most* factually similar of any case it could find in the nation was *Poston by Poston v. Barnes*, 294 S.C. 261, 265, 363 S.E.2d 888, 890 (1987). The holding of that case is as simple as it is distinguishable: "We are of the opinion that any settlement device which does not fully release a defendant, *while purporting to do so*, is subject to disclosure to the jury." (*emphasis added*). The "device" in this case did not purport to release the Linvog parents.

damages. Its \$100,000.00 cap on execution would protect the Linvogs *only* in the event of a *several* judgment, because it did not cut off the State's contribution rights¹¹. But in no event would it protect Korrine from a judgment enforceable for the next twenty years, *at all*.

In fact, the Advance changed the Linvogs' defense strategy and incentives not at all. Given the facts of how this tragedy occurred and Mr. Barton's apparent damages, the trial court agreed that Korrine Linvog's defense options were tightly limited from the outset. CP 11. Before the agreement, the Linvogs (as a family) had maximum incentive to blame the State. But more than that, the Linvogs had maximum incentive to highlight the truth that Mr. Barton could not have avoided the accident, and was thus fault-free, because the trees blocked the line of sight between Ms. Linvog and Mr. Barton.

In this case, this particular defense position also was congruent with the Linvogs' best hope of discharging any judgment against them. As the trial court found, this strategy allowed them to preserve joint and several liability, which would be helpful if the jury assigned any substantial blame to Korrine. CP 12. A several judgment would force

¹¹ More on the actual effect of the Advance on the State's contribution rights shortly, but the Linvogs repeat that their attorney consistently understood that the State's contribution rights were preserved. CP 10. The trial court's unchallenged, and unsurprising, finding on this issue establishes this fact as a verity on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d at 42

Barton to execute to the fullest extent possible against the Linvogs¹². Conversely, a joint and several judgment would allow Barton to collect the entire thing from the State, and leave the Linvogs open to a later contribution action which the State may chose to forgo as a business decision. Neither of these were good options, but putting the State in a position where it was required to pay Barton any share of liability that the jury assigned to Korrine was, from the very beginning, a complementary element of the Linvogs' defense.

Thus, prior to the Advance, the Linvogs had natural incentive to legally establish three things. First, that Barton's damages were less severe than claimed; second, that Barton was free of fault; and third, that the accident was entirely the fault of the State. As the trial court noted, this was a legitimate, extroverted strategy, which was on display throughout all phases of this lawsuit. CP 11.

An analogous situation was presented in the case of *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St.3d 10, 615 N.E.2d 1022 (1993), *overruled on other grounds by Fidelholtz v. Peller*, 81 Ohio St.3d 197, 690

¹² Mr. Spencer explained his thinking to the trial court, "[I]f there is a finding of contributory negligence on the Plaintiff and no joint and several liability, then for sure, in my evaluation, there's going to be an excess verdict and we don't get any help on it. If there is joint and several liability, then at least I have the possibility that the State will pick up more than their proportionate share, whatever that might be, and accept that my clients only have the \$100,000 and we get that judgment discharged at some point." RP Jan. 15, 2010 p. 22-23.

N.E.2d 502 (1998). In *Ziegler*, Mr. Ziegler was killed in a car accident. A school bus had left the highway to drop some children off. The bus driver turned around in a cul-de-sac, and was waiting at a stop sign to turn left back onto the highway. Unfortunately, there was a very heavy fog, and the bus driver could not see traffic on the highway. She waited until she thought there was a safe opening, and pulled out. The Wendel Poultry semi-truck was traveling the same direction on the highway, and had just entered the fog. Suddenly the truck driver saw the school bus turning onto the highway in front of him and slammed on his brakes. The truck hit the bus, and then skidded leftward into oncoming traffic, namely Ziegler's pickup. Ziegler was killed instantly, and his estate sued the drivers, the school and the poultry company. *Id.*

On the eve of trial, the poultry company and Ziegler's estate announced to the court that they had reached a high-low settlement agreement. Under the terms of the agreement, the poultry company's insurer agreed to pay a minimum of \$325,000.00 regardless of the jury verdict, and a maximum of \$425,000.00 if the jury allocated an amount greater than that to the poultry driver. *Id.* Ziegler's estate agreed not to execute on any judgment against the poultry company. *Id.*

Over the school district's Mary Carter objections, the trial court approved of the high-low agreement, allowed the poultry driver to

participate at trial, *and* ruled that it could not be disclosed to the jury. *Id.*

The Ohio Court Supreme Court affirmed the trial court on all these counts, concluding that the agreement was not a Mary Carter:

Wendel's [poultry driver's] exposure to liability was not reduced in proportion to any increase in liability of Wynford [bus driver] over an agreed amount. . . There was no built-in incentive on Wendel's part to increase Ziegler's damages.

One of the major dangers of Mary Carter agreements lies in the distortion of the relationship between the settling defendant and the plaintiff, which allows the settling defendant to remain nominally a defendant to the action while secretly conspiring to aid the plaintiff's case. That concern is not present here. Wendel still had an incentive to keep the amount of damages down, since a higher verdict could result in Wendel paying up to \$125,000 more should the jury's verdict have been over \$325,000. As stated by the court of appeals, "[t]he fact that Wendel Poultry remained at risk of liability in a significant amount is indicative of a lack of collusive purpose in executing the agreement."

Id. at 1029, citations omitted.

This fact pattern is a remarkably close fit to the case at bar, and exposes the hazards of clumsily painting all partial-settlements as dangerous Mary Carters. The Advance in the case at bar is almost identical in relevant respects to the high-low agreement in *Ziegler*, and carries with it the same non-existent risk of "secret conspiracy." Just as in *Ziegler*, it was appropriate to allow the Linvog parents to remain defendants, and the jury should have heard nothing about the Advance.

One obvious difference between this case and *Ziegler* is that here, the Advance was not disclosed before trial. The unimportance of that distinction is patent; the *Ziegler* agreement was announced on the first day of trial (precluding any discovery on this issue), and not disclosed to the jury. Thus the non-settling defendant was prohibited from using it in any of the ways the State complains it was deprived of in this case¹³.

A subsequent Ohio case relied on *Ziegler* in finding a similar (but more complicated) high-low agreement *not* a Mary Carter, and *not* appropriate to disclose to the jury. *Hodesh v. Korelitz*, 123 Ohio St.3d 72, 914 N.E.2d 186 (2009). There, the court affirmed the trial court's determination that the high-low agreement did not cause collusion, noting that the trial judge's observation of the parties in action put him in the best position to make that determination. The court also cautioned:

A fact that must be considered whenever one defendant makes an allegation of collusion between his codefendant and the plaintiff is that ***codefendants often attempt to blame each other***. . . . The legal positions of codefendants are often antithetical and adversarial. ***Plaintiffs benefit when codefendants attempt to blame each other; that, standing alone, is not evidence of collusion***.

Id. at 77 (emphasis added).

¹³ This would obviously include being denied the "right" to show the jury the written agreement, "that constitutes substantial subornation" of perjury, as the "quintessential core of effective cross examination." *Brief of Appellant at 17*. The State's colorful hyperbole notwithstanding, no one would have had any business waiving the Advance around at trial.

Here, the Linvogs' obvious defense strategy would be to resist Barton's damages claim, and divert as much blame as possible to the State's highway design. The only aspect of the defense the State claims was influenced by the Advance was the Linvogs' decision to oppose the State's attempts blame Barton. However, as the trial court found, this alignment with Barton was the only plausible defense strategy. Not only was it always in the Linvogs' interest to have joint liability with the State for execution purposes, but joining the State's argument would have dramatically undermined Korrine's best substantive defense. As the trial court noted, if the Linvogs had joined in this argument, the effect would have been to intentionally handicap Korrine's *very strongest* defense, namely that the trees entirely blocked her view while she was stopped exactly where the State specified she should be, and there was nothing either she or Barton could have done to avoid the accident. CP 11. The fact that Barton may have benefited collaterally from this natural alignment does not indicate any kind of collusion or fraud. *Id.*

b. The Linvogs consistently and correctly believed they were exposed to a contribution judgment in favor of the State.

As discussed above, the Advance did not realign the parties' interests, nor did it create any bias that was not naturally present from the moment suit was filed. The trial court found that neither Barton nor the

Linvog parents intended the Advance to cut off the State's right to contribution, neither believed the agreement did so, and both acted on that belief at trial. CP 9. On appeal, the State does not assign error to this finding, and does not otherwise challenge it. Instead, the State simply reiterates its position:

[W]hat Mr. Brindley and Mr. Spencer thought about the agreement was irrelevant because the prejudice from the nondisclosure of the agreement should be judged based upon the operative legal effect that the agreement had - that it operated as a release.

Brief of Appellant at 23-24.

However, because the Linvogs' defense was based on the genuine belief that they were financially "on the hook" "all the way," they were rationally protecting their self-interest exactly as they would have if the Advance had never happened. There was no "ringer" in the plaintiff's corner, as there is in the case of a real Mary Carter. The trial court was exactly right to analyze the potential prejudice to the State based on Barton's and the Linvogs' intention and belief as to how the Advance affected the Linvog parents' liability, and not whether it is conceivable that their belief could have been incorrect, in the hyper-technical, legal sense. The State does not suggest that the Linvogs' motivating fear of an adverse judgment was not genuine.

Additionally, the Linvogs' belief *was* well-grounded. In this case, there are three reasons for which this Court can be sure that the threat was real: First, the State actually moved for and *obtained* a contribution judgment for *every penny* allocated to the Linvogs by the jury above what the Linvogs paid, in an amount well in excess of the supposed liability "cap." The State is therefore judicially estopped from arguing that no contribution right existed. The Linvogs respectfully point out that the State's argument that something *actual* is not *possible* approaches the boundaries of responsible argument¹⁴. The second reason for which the Linvogs' fear of an adverse judgment was legitimate is that RCW 4.22 allowed for a contribution judgment against them, regardless of judicial estoppel. Finally, the Advance did not bias the Linvogs because it provided no protection at all for Korrine. Each of these points is addressed below.

c. *The State is Judicially Estopped from claiming it was not entitled to a contribution judgment.*

The State does not lend gravity to its position by insisting that the Linvogs were under no threat of a contribution claim from the State; the State demanded and was granted *exactly such a judgment*. Having

¹⁴ This is especially true in light of the fact that the State elected not to share with this Court the fact that it had obtained a contribution judgment against the Linvogs.

obtained a judgment based on the legal claim of contribution, the State is judicially estopped from claiming, on appeal, that the Linvog parents were insulated from that liability. The plain inconsistency of the State's positions is an affront to the judicial process itself, and the Court should not allow it. Judicial estoppel is the doctrine is designed to safeguard that integrity; it is part of the "court's arsenal of self-protective weaponry." *Saecker v. Thorie*, 234 F.3d 1010, 1014 (7th Cir. Wis., 2000). In Washington, it has been described as follows:

A party cannot invoke the jurisdiction and power of a court for the purpose of securing important rights from his adversary through its judgment and, after having obtained the relief desired, repudiate the action of the court on the ground that it was without jurisdiction. . . . Parties are barred from such conduct, not because the judgment obtained is conclusive as an adjudication, but for the reason that such a practice cannot be tolerated.

Bauer v. Bauer, 5 Wn.App. 781, 793,
490 P.2d 1350 (1971)¹⁵.

Here, the core of the State's argument is that it did not receive a fair trial because the *actual* legal effect of the Advance was to release Linvog parents from any potential liability. This argument is diametrically opposed to, and legally incompatible with, the State's actions of seeking and obtaining a contribution judgment against the

¹⁵ In *Johnson v. Si-Cor Inc.*, 107 Wn.App. 902, 908, 28 P.3d 832 (2001), the court noted that certain cases, in dicta, had suggested that detrimental reliance was required for the application of judicial estoppel. The court rejected that premise.

Linvog parents. As the court observed in *Mueller v. Garske*, 1 Wn.App. 406, 409, 461 P.2d 886 (1969):

Our courts have recognized the wisdom of the rule by holding that a party may not assert a theory on appeal different from that presented on the trial level.

Id.

When it moved the trial court for a contribution judgment against the Linvog parents, the State attempted to inoculate itself against this very argument, reciting that the motion “is in no way intended as an abandonment of the State’s arguments based on the [Advance] including the State’s rights on appeal.” CP 1548. But a party cannot use such surplusage, as if magic words, to undo the legal effect of its actions. Otherwise, such statements would simply become boilerplate provisos that would allow parties to embarrass the legal system by obtaining contradictory pronouncements with a one-liner like, “we are not legally entitled to judgment in our favor *but* please enter one anyway.” The principles underlying judicial estoppel are made of sterner stuff. The State told the trial court it was entitled to a contribution judgment under RCW 4.22.050. *Id.* The State now tells this Court that Linvog parents were never exposed to the threat of just such a judgment. The Court should not permit the State to have it both ways.

d. Irrespective of Judicial Estoppel, RCW 4.22 permitted the State’s contribution claim.

Aside from whether the State is judicially estopped claiming it was not entitled to contribution, RCW 4.22 entitled the State to contribution because the Advance did not legally release the Linvog parents. There are a myriad of forms pre-trial partial settlement agreements can take. The effect of a particular agreement, rather than how the parties may characterize it, is controlling. *Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, *rev. denied*, 152 Wn.2d 1026, 101 P.3d 421 (2004). The trial court in this case was correct to analyze the real terms of the Advance between the Linvog parents and Barton, the parties' intentions, and their course of their conduct when it correctly determined that the Advance did not limit the State's right to contribution.

The State argues that the Advance actually served as a "full release¹⁶" of the Linvog parents, contrary to its provision that it "does not represent a settlement of any claims plaintiff Jared Barton has brought in this matter against Defendants." CP 90. For this proposition, the State cites the case of *Maguire v. Teuber*, 120 Wn. App. 393. In *Maguire*, Mr. Maguire was rear-ended and severely injured in a car accident. He sued the driver and the owner of the car who rear-ended him (two separate individuals), and then settled with both of those defendants; the plaintiff

¹⁶ *Brief of Appellant at 29, inter alia.*

granted those defendants a covenant not to execute in exchange for a payment of \$100,000.00. Maguire did not dismiss them from the lawsuit after the settlement; instead, Maguire amended his Complaint to add the State as a defendant on a negligent road design claim. *Id.*

The State moved to dismiss the driver and the car owner on the grounds that they were not defendants against whom judgment could be rendered, and their presence in the case was designed only to create joint and several liability among the three defendants. The State argued that the settlement agreement in that case was effectively a complete release, which prevented joint and several liability and under the terms of RCW 4.22.060 and 4.22.070. This Court agreed.

In analyzing whether the covenant not to execute in *Maguire* was effectively a “release” that would destroy joint and several liability under RCW 4.22.060 and 4.22.070, the Court parsed out methodically the meaning of that agreement and decided that it was the kind of agreement these tort reform statutes were intended to circumscribe:

Moreover, the covenant states that it “is intended to constitute a *complete resolution* of all claims by the plaintiffs against defendants Teuber and Hadsall under RCW 4.22.060 such that any and all contribution claims against those defendants will be extinguished by this settlement.” This is release language. It cannot be construed any other way. The fact that Maguire did not specifically “release” the defendants is irrelevant; what matters is the

covenant's operative effect. To require that the parties use the word “release” to invoke RCW 4.22.070 exalts form over substance and conflicts with the legislative purpose¹⁷.

Maguire v. Teuber, 120 Wn. App. at 397. (*Italics in original*)

This discussion lays bare the reasons why the *Maguire* holding compels the opposite result in the case at bar. The *Maguire* agreement expressly settled *all* claims between the plaintiff and the settling defendants. It recited that it was *intended* to destroy the State’s right of contribution. The fully funded settlement left the settling defendants completely immunized from any further liability – the size and apportionment of any potential “judgment” against them mattered not at all; they had *no* incentive to mount a defense and the adversarial proceeding against them had concluded. *Id.* Even though the settlement agreement did not use the word “release,” the conclusion was inescapable that such was its effect. Rendering a “judgment” against them would have been a futile expression of jurisdiction over a moot case¹⁸.

¹⁷ The settlement agreement in *Maguire* was attached to the Court’s Opinion as an appendix, presumably because the law enunciated in that case was so factually dependent on its exact content. Similarly, because it is so crucial to the distinction between *Maguire* and this case, both the *Maguire* and the Barton-Linvog agreements are attached as appendices to this Brief.

¹⁸ This was also the case in *every* case cited by the State for this proposition. *Brief of Appellant at 28-29.*

1. *Shelby v. Keck*, 85 Wn.2d 911, 918, 541 P.2d 365 (1975), cited by the State for the proposition that a “covenant not to execute that set the upper limits of a parties liability in

The State's comparison of this case to *Maguire* is specious, and is in direct contradiction of the actual mandate of that case: give effect to the *actual* terms of the agreement when determining whether it is a release. Unlike the *Maguire* agreement, the Advance did not purport to finally and completely resolve all claims between Barton and the Linvog parents; its express terms are exactly the opposite. It did not eliminate any threat to the Linvog parents of a real, adverse judgment. Whereas the only reasonable conclusion from the effective terms of the *Maguire* agreement was that it *was* a release, the only reasonable conclusion from the effective terms of the Advance is that it was *not*.

To equate the two, the State uncritically focuses on the words "not execute" which are, indeed, present in both the *Maguire* agreement and the Advance. Just as this Court determined that requiring the parties to use the word "release" in order to invoke RCW 4.22.070 "exalts form over substance and conflicts with the legislative purpose," conclusively

exchange for \$25,000 must be viewed as a binding settlement and dismissal of that party by the court was proper." This covenant was just like the one in *Maguire*, where the entire \$25,000 was paid at the time of the settlement, and the covenant not to execute prevented *any* additional liability on the part of the settling defendant, regardless of the outcome of the trial.

2. *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004). In *Romero*, the agreement was a true Mary Carter, where the settling defendant had a cash incentive to help the plaintiff, and had a full release, with no threat of any future exposure because the plaintiff covenanted not to execute *at all*.

3. *Kottler v. State*, 136 Wn.2d 437, 439, 963 P.2d 834 (1998) "Prior to trial Kottler settled with Steiner and obtained a *full* release." (Emphasis added).

presuming that any agreement containing the words “not execute” was a functional release would be committing the same offense in reverse. There are pre-trial settlement agreements that employ the words “not execute” that do not prevent a judgment, and thus do not destroy joint and several liability; this is one of them. The trial court correctly concluded that the Advance was not a release, and did not eliminate the State’s right to contribution, and certainly not the threat of it.

e. There was nothing “false” or “deceptive” about the Linvogs’ defense because Korinne Linvog was fully exposed to Barton’s claims.

The third reason why the trial court’s factual determination that the Advance did not bias the Linvog’s defense was well-founded is that the agreement provided no protection for Korinne Linvog whatsoever. Even if the Advance were a release of her parents (although it was not), a release of a principal (parents, under the Family Car Doctrine), does not release the agent (Korinne, here). *Vanderpool v. Grange Ins. Ass’n*, 110 Wn.2d 483, 489, 756 P.2d 111 (1988) (“[S]ince release of a principal does not by operation of law release an agent and the release here does not show any intent to release the agent, it only operated to release the principal.”) Thus, to adopt the State’s position that the Advance biased the Linvogs’ defense, the trial court would have had to accept the proposition that Korinne’s parents were motivated to potentially destroy

their daughter financially for the next twenty years in exchange for the possibility of a modicum of financial protection for themselves. The trial court would also have been required to accept the notion that the Linvogs' attorney, whose duty to protect Korrine's interests was every bit as consequential as his obligation to protect her parents, agreed to betray one of his clients by "setting up" the State in order to benefit the others (all members of the same nuclear family). Finally, the trial court would have had to accept that Korrine, herself, was so complicit in this sacrifice that she provided untruthful testimony against her interest.

The alternative to this baroque fantasy is that the Linvogs defended their interests as vigorously as possible, in exactly the same way they would have but for the Advance. As is described in more detail above, this defense was originally and consistently motivated by the goals of establishing the true fact that the trees blocked Korrine's view of Barton, that there was nothing either one of them could have done to avoid the accident, and by generally focusing as much blame as conceivably possible *away* from Korrine and *toward* the State. As the trial court noted, under the circumstances, this was the best possible defense. CP 11. Both at her deposition and at trial, Korinne Linvog testified to these facts. The trial court correctly determined that the State had every opportunity to cross-examine Korrine Linvog in an attempt to impeach her on the basis

that blaming the State was in her own financial interest. CP 14. The trial court's finding that the Advance did not re-align or bias the parties in this case was well within the boundaries of its broad discretion.

2. *The State had no right to have the Linvog parents dismissed, and even if it had such a right, the State was in no way prejudiced by the fact that they were parties.*

The State next argues that it missed a chance to move for a dismissal of the Linvog parents because it was unaware of the Advance. The State points out that it had success in causing the dismissal of settling defendants in the *Maguire* case. The State would have had no such right here. Furthermore, the State was unable to establish prejudice from Thomas and Madonna Linvog's "presence" at the trial. Once again, the issue is whether the trial court manifestly abused its discretion in its determination that the presence of the Linvog parents did not cause "substantial prejudice" to the State.

- i. *The State had no right to have the Linvog parents dismissed.*

The State claims that because Thomas and Madonna Linvog had an alleged "full release" from liability to Barton, the State would have been entitled to an order dismissing them from the litigation. The State is incorrect. The premise of the State's argument is that the supposed "full release" made any judgment against the Linvog parents impossible, for

which proposition the State cites the *Maguire* case. *Maguire* does, indeed, address the issue of dismissing an otherwise joint and severally liable defendant who enters into a pre-trial settlement. However, as described above, that case only applies where the settling defendant received a complete release, or its functional equivalent. And the rationale for that decision was that if no true, adverse judgment could be entered against the settling defendant, then it has no business participating in the trial. On this point, the Court adopted the reasoning of Professor Sisk, “In sum, only those defendants truly subject to an involuntary adverse judgment remain in the boat together when the lawsuit comes to shore for entry of judgment. [A] court should refuse to enter judgment against a party who entered into a covenant not to execute.” *Maguire v. Teuber*, 120 Wn.App. at 399 (citing Gregory C. Sisk, Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 U. Puget Sound L. Rev. 1 (1992))

In this case, the State cannot seriously dispute that the Linvog parents were subject to “an involuntary adverse judgment.” Not only were they exposed to an unlimited contribution judgment in favor of the State, they were subject to an additional \$80,000.00 executable directly by Barton. As much as they would have preferred otherwise, the Linvog parents were most certainly “in the boat” when this case came to shore for

judgment. Once again, the State is in the worst position possible to argue that the Linvog parents were not subject to an adverse judgment, having convinced the trial court to enter just such a judgment in its favor.

ii. *The status of the Linvog parents as parties in no way prejudiced the State.*

In *Maguire*, the State explained why it sought the dismissal of the settling defendants: “[T]heir continued presence in the litigation puts the State at a disadvantage because they are disinterested defendants who will not adequately defend Maguire’s claims.” *Id. at 394*. The concern in that case was more understandable; the settling defendants had quite literally nothing to lose, and would have done a disservice to a forum designed to resolve the clash of adversaries. In stark contrast, Thomas, Madonna and Korrine Linvog all had momentous financial risk, and a skillful advocate who mounted a difficult but *successful* defense in convincing the jury that the State was 95% responsible for causing Barton’s injuries, even though Korrine was driving the instrument of harm. The Linvogs were not parties. They were nothing at all like the settling defendants in *Maguire*. And the trial court’s excellent position to have observed the vigorous defense conducted by the Linvogs explains why this Court accords its discretion wide latitude, only reversing where that discretion has been manifestly abused.

Another important distinguishing factor in this case is that unlike the settling defendants in *Maguire*, the Linvog parents were potentially liable only as principals under the Family Car agency doctrine. They were not parties against whom the jury could allocate a unique share of liability that could have been theoretically carved out of the State's responsibility. Thus not only were the Linvog parents' defense interests aligned with those of their daughter, the State could not possibly have been prejudiced by having to pay a portion of liability assigned to them by the jury because no such portion could even theoretically exist, independent of Korrine's. In *Maguire*, the State's Motion to Dismiss was based on the concern that it would have to pay whatever portion of the judgment the jury allocated to the settling defendants. That concern was simply not present in this case.

3. *The State is unable to establish prejudice from the Linvog parents' "role" in the trial.*

Aside from claiming that it was prejudiced by the Linvog parents' status as parties, the State also claims that it was prejudiced because the jury was "falsely" led to believe that her parents would be liable for damages apportioned to Korrine. The State claims this "false" belief overwhelmed the jury with sympathy for Thomas and Madonna Linvog, and so infected its verdict that the trial court manifestly abused its discretion in not vacating the judgment. The State contends that this

prejudice occurred in two ways: passing reference to Thomas and Madonna Linvog in opening statements, and Jury Instruction No. 18, which correctly stated the Family Car doctrine. The trial court correctly found that the jury was not misled because the vanishingly brief reference to the Linvog parents in opening statements was true, and that even *if* those statements reflected the attorney's misapprehension of the legal effect of the Advance, the State suffered no prejudice because the verdict was squarely grounded on *facts*, not sympathy. Such a finding was well within the trial court's proper exercise of discretion, and should not be disturbed.

i. Comments in opening statements.

After a studying the transcript of the 16-day trial, the only grounds the State has found for complaint are two brief comments, one made by Mr. Brindley and the other by Mr. Spencer, in their opening statements; these comments did nothing more than explain why Thomas and Madonna Linvog were defendants in the lawsuit. The State contends that Mr. Brindley and Mr. Spencer *lied* to the jury in their statements that the Linvog parents were “on the hook” and “responsible” for Korrine's actions. The trial court carefully considered this argument, and unequivocally rejected it in its memorandum opinion, finding that the statements were *true*, and that the verdict was based on the evidence rather

than sympathy, in any event. Evaluating this type of alleged defect is precisely the area in which the trial court's discretion is accorded maximum deference. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983) (The trial judge is best suited to judge the prejudice of a statement.)

a. The statements were true; the Linvog parents were "on the hook."

That an attorney "lied to the jury" is an inherently provocative allegation, and represents a choice of words no doubt intended by the State to offend the Court. The State ought reserve such inflammatory charges for situations that merit it. No one in this case "lied to the jury." Although the State consistently glosses over it, there is *no dispute* that the Linvog parents *were* fully and directly liable to Barton for up to \$80,000.00 over and above the \$20,000.00 advance, *only if* the jury determined that Korrine's liability exceeded the advance amount. Moreover, the trial court's unchallenged finding that both Mr. Spencer and Mr. Brindley intended and believed that the Linvog parents were fully exposed to a contribution judgment (CP 9) absolutely negates the impetuous charge that they intentionally misrepresented a fact. Furthermore, it is now clearer than ever that what Mr. Brindley and Mr. Spencer told the jury about Thomas and Madonna Linvog was entirely

correct; the State's contribution *judgment* against the Linvog parents is proof positive that they were, indeed, "on the hook."

b. The verdict was based on proven facts, not sympathy.

The trial court was well within its broad discretion in rejecting the State's speculation that sympathy for the Linvog parents caused the jury to apportion 95% of the fault for Barton's injury to the State. Having observed the entire presentation of the case, Judge Farris's opinion was explicit about the reasons for which the court rejected this argument. She observed that the jury was instructed that it was not to rely on sympathy, and there was no evidence that it disregarded that instruction. CP 14.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, **not on sympathy, bias, or personal preference**. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 1458 (emphasis added).

The court further highlighted what the evidence established:

The claim the State was at fault was strong and supported with facts, while the claim the Plaintiff was at fault was weak and speculative. . . .

These facts showed if a car stopped at the line painted by the State it would put the driver in a position where a row of trees' trunks would line up just right forming an invisible black wall blocking the view to the left. Because the obstruction was not due to leaves and bushes and did not

exist except from a specific spot, it would not necessarily be known to someone who had driven the road before or noticeable at night. If a driver had stopped elsewhere before the intersection, the trees would not line up and the driver could see between the trunks. In addition, there was evidence the State had previously placed the stop line where it was supposed to be and no one from the State could explain how or why it got moved other than through oversight.

CP 11-12.

The trial court also noted that no one attempted to elicit sympathy for the Linvog parents. CP 14. If the State's trial counsel had perceived any of the allegedly offending comments in opening statements to have been an appeal to sympathy, the State should have objected. This issue was not unknown to the State prior to the trial. In fact, in seeking an Order *in Limine* on the issue, the State argued:

There is no legitimate issue in this case upon which the financial capability or lack thereof of the plaintiff, the Linvogs or the State is material or relevant. Evidence of such would merely create an improper sympathy factor.

Furthermore, the attempt to compare the plaintiff's or Linvogs' financial position with that of the State would inject an element of prejudice into the case which is not permissible.

CP 1438 (The Motion was granted: CP 1443)

The State was correct. The fact that the State was expressly aware of this concern, and made no objection when Mr. Brindley and Mr. Spencer mentioned the reason for the Linvog parents' presence reflects the

same reality described by the trial court's memorandum opinion; no one even attempted to invoke juror sympathy for the threat of "financial ruin" to Madonna and Thomas Linvog. The Linvogs' "strategy" that "worked brilliantly" was not the Advance; it was methodically and effectively establishing that Korrine Linvog's view of Jared Barton's approaching motorcycle was blocked by trees because of the State's negligent re-positioning of the stop bar. This Court should not disturb the trial court's well-supported discretionary findings of these facts.

ii. Jury Instruction No. 18 is an accurate statement of the law and did not prejudice the State.

Instruction No. 18 is a Washington Patten Jury Instruction:

A person who maintains or provides a motor vehicle for the use of a member of his or her family is responsible for the acts of that individual in the operation of that motor vehicle.

6 Wash. Prac., Wash. Pattern Jury Instr. Civ.
WPI 72.05 (5th ed.)

There is no contention that this instruction is not a correct and complete statement of the law. And the Linvog parents never disputed that they were responsible as "principals" under this doctrine. The cases cited by the State where courts have found instructions were an improper "comment on the evidence" all involve instructions that effectively resolved factual issues which were the province of the jury to decide. Where the instruction is nothing more than a correct statement of law, it is

not a comment on the evidence. As the Supreme Court held in *Hamilton v. Department of Labor and Industries of State of Wash.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988):

We have consistently held an instruction which does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge under Const. art. 4, § 16. An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question.

Id. (citations omitted).

Instruction No. 18 did not convey to the jury anything at all about Judge Ferris's personal attitude toward the merits of the case, nor did it reflect the trial court's opinions on witness credibility. It was not an improper comment on the evidence. Additionally, as the court in *Hamilton* went on to note, "Jury instructions are to be considered in their entirety." *Id.* at 573 (citation omitted). Here, the Family Car instruction must be considered in conjunction with the trial court's specific instruction that the jury was make its determination based on the law and the facts proven, not sympathy, bias or personal preference.

D. A Failure to Give Notice and Move for a Determination of Reasonableness under RCW 4.22.060 Can, at Most, Leave the Settling Defendant Jointly Liable and Subject to a Contribution Claim.

For purposes of this appeal, the Linvogs do not dispute that the State's discovery requests should have been supplemented to disclose the Advance. The State's argument that RCW 4.22.060 *also* required disclosure does not add anything to the argument. The point of RCW 4.22.060 is to provide the settling defendant *protection* from contribution claims; the Linvogs have never asserted a defense that RCW 4.22 protected them from the State's contribution rights, not even when the State sought judgment against them. Accordingly, the Linvogs point out that even if the statute required disclosure, the only effect of not having done so would have been to deny the Linvog parents the statutory promise of immunity from contribution liability. The reason for the pre-settlement notice requirement in RCW 4.22.060 is to provide the other parties at least five days to prepare to challenge the reasonableness of the proposed agreement. If a court determines, after hearing all challenges, that the settlement was reasonable, the settling party is not subject to contribution claims. RCW 4.22.050. However, if the court finds the settlement *unreasonable*, the settling defendant remains exposed to contribution claims, simply getting credit for money paid. RCW 4.22.060. That is to say, the finding of unreasonableness does not affect the enforceability of the settlement agreement between the settling parties. *Id.*

The statute does not address the consequences of not moving for a reasonableness determination at all. However, they cannot logically be worse than having moved for one, and lost. And here, the effect of that would have been to leave the Linvog parents subject to contribution claims from the State, without affecting the agreement's enforceability as between the Linvogs and Barton. In short, the Linvogs and the State would have been in exactly the same position as they actually were. Especially where the State has actually obtained a contribution judgment, the Linvogs' failure to give notice and move for a reasonableness hearing cannot independently support the State's request for affirmative relief.

E. This is Not a Spoliation Case.

The State compares the oversight in failing to supplement in this case to spoliation in cases like *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977), and *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 972 P.2d 475 (1999). The purpose of this comparison is an attempt to establish an entitlement to a presumption that the evidence would have affected the verdict, and thus automatically establish prejudice to the State. This, however, is not a spoliation case. No evidence was lost or destroyed. The trial court had the Advance when it was considering the State's Motion to Vacate, and was able to evaluate its exact contents in the context of having presided over the trial. This is no different from any

case where a trial court is accorded broad discretion in evaluating whether a claimed discovery violation prejudiced a party's rights at trial. The State is not entitled to any kind of spoliation-like presumptions.

F. Sanctions

1. The imposition of sanctions is discretionary with the trial court, which discretion was not abused.

Cases are legion vesting the trial court with wide discretion regarding the implementation of sanctions for discovery violations. *See, eg. Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993), *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn.App. 422, 431, 10 P.3d 417 (2000). This is a reflection of the fact that the trial court presiding over the lawsuit is uniquely well-positioned to judge the presentation of evidence, the conduct of counsel, the impact of particular statements, and the potential prejudice to a party based on evidentiary and discovery-related complaints.

Here, the State alleges that monetary sanctions are mandatory under the Court Rules and the trial court abused that discretion by issuing none at all. The State applies the incorrect Court Rule, and fails to appreciate the breadth of the trial court's discretion.

The State repeatedly and incorrectly states that Mr. Spencer and Mr. Brindley misrepresented the existence of the Advance when they signed responses to the State's discovery requests, in violation of CR 26(g). However, Mr. Brindley's and Mr. Spencer's certifications were entirely true when they were made; at that time, there was no stipulation. The State's complaint is not properly under CR 26(g), but CR 26(e), which addresses supplementation of discovery responses. While CR 26(g) makes some level of sanction mandatory, CR 26(e)(4) provides, "Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate¹⁹." Because no sanction is mandatory for an oversight in supplementation, the trial court did not abuse its discretion for not sanctioning Mr. Spencer. This rule was applied in the case of *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn.App. at 431. There, this Court affirmed the trial court's decision not to impose sanctions for a failure to supplement under CR 26(e)(4):

In declining to impose sanctions, the trial court noted that any potential prejudice from the late discovery of the document, after Hill's perpetuation deposition, could be cured because Hill was available to testify at trial. We conclude the trial court did not err in finding that sanctions were not warranted.

¹⁹ This may be a recognition that a failure to supplement does not involve attesting to something which is false, as would be the case in signing misleading discovery responses. In any event, the Court Rules intentionally provide a different remedy.

Id.

Here, the trial court correctly determined that the State was not prejudiced at trial by being unaware of the Advance. This lack of prejudice was manifested by the trial court's willingness to enter a contribution judgment in favor of the State, which effectively cured any vestigial impact that the Advance could have had, even if that agreement were otherwise interpreted as the State suggests as a bar to contribution. The trial court was under no obligation to impose a sanction at all, and this Court should not disturb that discretionary determination.

2. *The "disgorgement" sanction, requested for the first time on appeal, is inappropriate.*

The State cites no authority for its "alternative" remedy of disgorgement of attorney fees, which it proposes for the first time on appeal. Additionally, the State's argument is premised on the proposition that such disgorgement is necessary to ensure that the attorneys do not profit from the alleged wrong. Because the trial court correctly found that the alleged wrong did not influence the result of the trial, there was no profit from this oversight, and hence no unfair profit to disgorge.

Even if this Court were to determine that the trial court abused its discretion by not imposing a sanction on Mr. Spencer, the imposition of sanctions remains a function of the trial court, which is in a better position

to assess the conduct of the attorneys and parties which appeared before it. If this Court determines that sanctions were mandatory, it should remand that issue for the trial court's determination of the proper remedy rather than establish it at the appellate level.

IV. CONCLUSION

As described above, the trial court was well within the broad discretion accorded to it by appellate courts when it determined that counsel's oversight in failing to provide the State a copy of the Advance did not prejudice the State's preparation or participation in the trial. Additionally, the trial court was well within its broad discretion in declining to impose a monetary sanction on Mr. Spencer or the Linvogs. For all of these reasons, Respondents Linvog respectfully request that this Court affirm in all respects.

Respectfully submitted,



Brent W. Beecher, WSBA 31095
Hackett Beecher & Hart
Attorneys for Respondents Linvog

Appendix A

The Advance (CP 924-925)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

JARED K. BARTON, a single man,)
)
Plaintiff,)

NO. 05-2-10687-3

vs.)

STATE OF WASHINGTON,)
Department of Transportation; SKAGIT)
COUNTY, Department of Public Works;)
KORRINE C. LINVOG, individually;)
and THOMAS AND MADONNA)
LINVOG, husband and wife,)
)
Defendants.)

STIPULATION OF PARTIES
REGARDING ADVANCED
PAYMENT

COME NOW the parties hereto, by and through their respective counsel of record, and hereby stipulate and agree that Mutual of Enumclaw has paid funds in the amount of \$20,000 to Plaintiff Jared Barton as an advance payment against any future settlement or verdict obtained against Defendants Korinne Linvog, or her parents, Thomas and Madonna Linvog, in this matter.

The parties agree and stipulate that the advance payment shall be an offset to be applied to any judgment, verdict, arbitration award, or settlement obtained by

STIPULATION OF THE PARTIES REGARDING ADVANCED
PAYMENT BY MUTUAL OF ENUMCLAW

MURRAY, DUNHAM & MURRAY
ATTORNEYS AT LAW
200 West Thomas, Ste. 350
Seattle, WA 98109-0844
(206) 422-2665, 484-6824 (FAX)

1 Plaintiff Jared Barton against Defendants Korinne Linvog and/or Defendants Thomas
2 and Madonna Linvog.

3 Plaintiff agrees and stipulates that in return for the advance payment, he will
4 not execute on any judgment he obtains against Defendants Thomas and Madonna
5 Linvog in excess of the liability insurance coverage available to Defendants Thomas
6 and Madonna Linvog through the policy issued by Mutual of Enumclaw. Plaintiff
7 Jared Barton will be allowed to execute on any judgment against Defendants Thomas
8 and Madonna Linvog up to the amount of insurance limits available.

9 The parties further agree and stipulate that the advance payment does not
10 represent a settlement of any claims Plaintiff Jared Barton has brought in this matter
11 against Defendants.

12 Dated this ____ day of March, 2007.

13
14 By: *Ralph Brindley*
15 Ralph Brindley, WSBA #8391
16 Attorney for Plaintiff Jared
Barton

By: _____
William W. Spencer, WSBA #9592
Attorney for Defendants Korinne
Linvog, Thomas Linvog and
Madonna Linvog

17
18 By: _____
19 Jared Burton, Plaintiff

20
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23
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STIPULATION OF THE PARTIES REGARDING ADVANCED
PAYMENT BY MUTUAL OF ENUMCLAW -2-

MURRAY, DUNHAM & MURRAY
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Appendix B

Maguire Covenant Not Execute

As quoted by the Court in *Maguire v. Teuber*, 120 Wn.App. 393, 399-402, 85 P.3d 939, (2004).

COVENANT NOT TO EXECUTE

THIS AGREEMENT made on this day, by and between JOHN MAGUIRE and PATRICIA MAGUIRE, (hereinafter jointly referred to as plaintiffs), and STEVEN A. TEUBER and JANE DOE TEUBER, husband and wife, and WILLIAM W. HADSALL and JANE DOE HADSALL, husband and wife (hereinafter referred to as defendants).

RECITALS

Whereas, plaintiffs have separate claims against defendants arising out of an accident which occurred on October 1, 1999, on Interstate 5 in the vicinity of Milepost 147, Seattle, King County, Washington; and

Whereas, the accident of October 1, 1999 caused severe injuries to John Maguire, and loss of consortium for Patricia Maguire, and

Whereas, as a result of the aforementioned accident, an action has been commenced in the Superior Court of Washington for King County entitled *John Maguire and Patricia Maguire v. Steven A. Teuber and Jane Doe Teuber, husband and wife and the marital community composed thereof; and William W. Hadsall and Jane Doe Hadsall, husband and wife and the marital community composed thereof, defendants*, King County Cause No. 00-2-29728-9 SEA;

Whereas, defendants Teuber did not have insurance coverage; and

Whereas, defendants Hadsall have insurance policy coverage through Farmer's Insurance bearing policy number with policy limits of \$100,000.00, but have no other insurance agreements, and/or policies under which an insurance carrier may be liable to satisfy part or all of a judgment which may be entered in the aforementioned litigation, or to indemnify or reimburse defendants for payments made to satisfy any judgment; and

Whereas, defendants have no substantial assets of their own with which to satisfy a judgment greater than \$100,000.00, and

Whereas, the plaintiffs have offered to settle their claims against Hadsall and Teuber for Hadsalls' liability insurance policy limit of \$100,000.00; and

Whereas, the plaintiffs and defendants agree that the sums paid hereunder are not full compensation for damages sustained by the plaintiffs, and that the damages to plaintiffs resulting from their injuries, in fact, far exceed the amount to be paid hereunder; and

Whereas, this Agreement is being made for the sole benefit of the parties herein under the policy of the law favoring the settlement of litigation, which policy would be to some extent impaired if any remaining potentially liable persons or entities, including the State of Washington, received any benefit of any kind whatsoever by way of discharge of their liability, either in whole or in part; and

Whereas, there is no intent by plaintiffs or defendants to benefit any remaining potentially liable persons or entities, including the State of Washington, as a result of the covenants contained herein, but the sole intent is that this Agreement should be to their own benefit, and that any remaining potentially liable persons or entities, including the State of Washington, are not to be in any way construed as third party beneficiaries thereof; and

Whereas, defendants expressly deny any liability for the accident of October 1, 1999, the sums paid hereunder being for the purpose of avoidance of the uncertainties, inconvenience, and expenses of the pending lawsuit, and for the additional purpose of partial compensation to the plaintiffs for their damages resulting from the accident; and

Whereas, plaintiffs expressly reserve all rights of actions, claims, demands, and rights of execution against any and all other persons or entities, including the State of Washington, other than as mentioned herein;

1. In consideration of the payment of \$100,000.00 to the plaintiffs, receipt of which is hereby expressly acknowledged, plaintiffs do covenant, and agree with defendants, their successors, assigns, agents, employees, and insurance carriers that plaintiffs (or any successor or assignee) will not execute or otherwise seek to enforce or collect on any judgment entered in the pending lawsuit rendered against the defendants, their assigns, agents, employees or insurance carriers. Plaintiffs will not assign any such judgment to any other party and, if such assignment is made, plaintiffs' assignors will be bound by the terms of this Covenant. Should judgment be entered against any defendant who is a party to this agreement, plaintiff will provide that defendant with a Satisfaction of Judgment promptly upon final disposition of all claims in this matter.

2. The plaintiffs expressly reserve all rights of action, claims, demands, and rights of action against any and all persons or entities, including the State of Washington, or any of its agents or agencies, other than as mentioned herein.

3. The plaintiffs expressly acknowledge that this Covenant Not to Execute is intended to constitute a complete resolution of all claims by the plaintiffs against defendants Teuber and Hadsall under RCW 4.22.000 such that any and all contribution claims against those defendants will be extinguished by this settlement. While the parties to this Covenant Not to Execute believe that this settlement is reasonable, it is hereby recognized that should a court at any time find that this settlement was unreasonable, this settlement is still effective between the parties to this agreement and any finding that the settlement is unreasonable shall not affect the validity of this agreement nor shall any adjustment be made in the amount paid between the parties to this agreement nor shall such a finding have any effect on the discharge of defendants Hadsall and Teuber from any liability for contribution.

CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the State of Washington, that on October 15, 2010 I served a copy of Brief of Respondents Linvog on counsel of record by ABC Legal Messenger to the following addresses:

Michael P. Lynch
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DATED THIS 13th day of December, 2010.



Nancy Boyd