

65673-2

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NO. 65673-2-1

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

JARED K. BARTON, a single man,
Respondent,

v.

STATE OF WASHINGTON, Department of Transportation,
Appellant,

KORRINE C. LINVOG, individually; and
THOMAS LINVOG and MADONNA LINVOG, husband and wife,
Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
HONORABLE ANITA L. FARRIS

BRIEF OF RESPONDENT JARED K. BARTON

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I. INTRODUCTION

Plaintiff sued the State of Washington for negligent highway design, along with the teenage driver who collided with plaintiff at an intersection, and the driver's parents. Before trial, the driver's counsel agreed to advance \$20,000 from the driver's insurer to the plaintiff for much needed medical care and obtained plaintiff's counsel's promise not to execute against the parents' personal assets beyond the limits of their \$100,000 liability policy. Although a stipulation was prepared, it was never signed by both parties' counsel nor filed in superior court, but was instead set aside and forgotten about by the attorneys, and therefore not disclosed to the State before trial by either of the attorneys when they supplemented discovery responses. The jury found the State 95%, and the driver 5%, responsible for the plaintiff's injuries, and entered a joint and several judgment against the parents that was affirmed on appeal.

Plaintiff's counsel provided the State with a copy of the check and the proposed stipulation after the driver's insurer paid the remaining limits in partial satisfaction of the judgment and plaintiff demanded that the State pay the balance and recover the difference in a contribution action against the driver's parents. The State responded to plaintiff's disclosure by charging the lawyers with perpetrating a

fraud on the court. It moved to vacate the judgment and sought an award of all its fees and costs for the failure of plaintiff's and the driver's counsel to supplement their discovery responses before trial.

A failure to timely supplement discovery responses does not warrant substantial sanctions, let alone a new trial, when, as here, it causes no prejudice. The stipulation did not eliminate the joint and several liability of the defendant driver, who was covered by her parents' insurance policy, did not give any of the defendants a financial stake in the plaintiff's recovery, and did not align the driver or her parents with the plaintiff. The parents remained responsible for their daughter's liability and had a continuing interest in minimizing the jury's award of damages in part because the State had the right to seek contribution – an obligation that the State is currently enforcing against the parents. After careful consideration of the State's allegations, the court before whom the case had been tried properly exercised its discretion in denying the State's motion to vacate and refusing to order a new trial as a discovery sanction. The trial court found that the failure to supplement discovery was inadvertent and not intended to deceive the State, and that in any event the State suffered no prejudice. This court should affirm.

II. RESTATEMENT OF ISSUES

Did the trial court, who presided over this 16-day trial in which the State, the defendant driver and her parents were held jointly and severally liable for plaintiff's damages, abuse its discretion in denying the State's motions to vacate the judgment, to grant a new trial, and to award the State all its attorney fees and costs from the trial and appeal as sanctions for failing to supplement discovery responses to disclose plaintiff's promise not to execute against the driver's parents beyond their insurance limits in return for a \$20,000 advance payment made by the driver's insurer prior to trial, which did not eliminate joint and several liability, did not eliminate the State's right to contribution, and which the trial court found did not realign the parties or prejudice the State in any manner?

III. RESTATEMENT OF THE CASE

The State alleges as "fact" improper collusion and prejudice that was expressly rejected by the trial court after presiding over a 16-day trial and after considering in two lengthy hearings the allegations raised in the State's motion to vacate and the testimony of counsel for

plaintiff Jared Barton and defendant Linvogs.¹ The trial court made extensive findings of fact based on this sworn testimony and on its personal experience presiding over the trial, hearing testimony, and observing the demeanor of the witnesses and the conduct of counsel firsthand. (CP 383-91) The State's allegations in its Statement of the Case that it was prejudiced by attorney misconduct are directly at odds with the trial court's findings, which established that in supplementing discovery on the eve of trial counsel inadvertently failed to disclose a \$20,000 advance payment from the Linvogs' insurer to Barton, that this nondisclosure had no effect on the State's ability to prepare its case or defend at trial, had no effect on the Linvogs' liability for their share of the judgment, and did not as a matter of law or fact prejudice the State. The following restatement of the case relies upon the trial court's findings and the substantial evidence upon which they are based:

¹The State's trial counsel, John Kirchner, died shortly after the trial. (CP 843) The allegations of misconduct in the motion to vacate were lodged by the State's appellate counsel, who had no personal knowledge of any of the events occurring during or prior to trial. As the trial court noted in its memorandum decision, the State did not ask for an evidentiary hearing. (CP 383)

A. Korrine Linvog Consistently Asserted That Her View Of The Intersection Was Obstructed The Night That She Collided With Jared Barton's Motorcycle.

This action arose from an intersection collision in Skagit County at the intersection of a county road and State Route 536 on November 24, 2004. Jared Barton was driving his motorcycle westbound on SR 536. Korrine Linvog, who was driving her parents' car south on Moore's Garden Rd., came to a stop at the T-intersection with SR 536, then pulled out into the highway to make a left-hand turn. Her vehicle was struck by Barton, who sustained serious permanent injuries. (CP 384) See *Barton v. State*, noted at 147 Wn. App. 1021, 2008 WL 4838687 (2008).

While it now alleges that the Linvogs' and Barton's lawyers colluded to manufacture a theory of State liability for the accident (App. Br. 3), on the very night of the collision Korrine told the investigating officer that she looked to the left but did not see Barton's oncoming headlight. (CP 861; Tr. Ex. 11) She became aware of the obstruction created by trees to the east of the stop line when she

returned to the accident scene less than two weeks later, before she was contacted by anyone representing Jared Barton. (CP 1007)²

The State's assertion that Korrine Linvog's deposition testimony was then influenced by improper collusion lacks any support in the record. When Korrine was deposed in October 2006, she again stated that she stopped, looked to the left, and then pulled out to make her turn without seeing Barton's motorcycle. (CP 860) Her deposition testimony was consistent with her initial statement given the night of the collision to the State Patrol officer. (CP 861; Tr. Ex. 11) Her testimony did not change at trial, where Korrine reiterated that she was unable to see Mr. Barton's approaching headlight when she turned to the left after coming to a stop at the intersection. (CP 1006-08)

The State's contention that Korrine Linvog's testimony was "the only evidence" that its negligence caused the collision (App. Br. 4) is also refuted by the record at trial, as affirmed by this court on appeal. It was undisputed that the State maintained the intersection and that

² The State suggests that Korrine only came up with the notion that the trees blocked her view when she met with plaintiff's traffic engineer at the accident site in April 2005 many months later. (App. Br. 3) This ignores both her handwritten statement that she made to the investigating officer on the night of the collision and the fact that Korrine went back to the intersection on her own only days after the collision. (CP 861, 1007-08)

to the east of the stop sign, two trees 60 feet apart and just 10 to 11 feet north of the fog line on SR 536 obscured a clear view of the westbound traffic on the state highway. See **Barton v. State**, noted at 147 Wn. App. 1021, 2008 WL 4838687 (2008). The fact that the trees on SR 536 obstructed the view of a driver stopped at the stop line on Moore's Garden Road was not a disputed fact at trial. Expert testimony from a transportation engineer, an accident reconstructionist, and the State's own traffic engineer established that the placement of the stop line created an obstruction and did not comply with the State's own sight standards for placement of stop lines at intersections. (See CP 1160-77)

Barton filed his action against the State in 2005 to recover for his substantial injuries, including a brain injury. Barton's theory of the case against the State was straightforward. As the trial court summarized, Barton, who "had been driving straight down the highway on his motorcycle," had the right of way, when he was struck by Defendant Korrine Linvog who had stopped at the stop sign, but did not see Barton as "the view was obstructed" because of the placement of the stop line in relationship to the trunks of trees that "block[ed] the view of cars traveling toward the intersection." (CP 384)

B. Barton's Counsel Accurately Answered The State's Interrogatories After Turning Down A Policy Limits Settlement From The Linvogs.

Barton also sued Korrine Linvog's parents because Korrine was driving the Linvogs' car. (CP 384) The Linvogs had \$100,000 of insurance liability coverage, which their counsel, William Spencer, offered to Barton as a full settlement of all claims against the Linvogs shortly after the lawsuit was filed. (CP 555) Barton's counsel, Ralph Brindley, believed that the Linvogs' liability limits represented only a fraction of Barton's damages, and he wanted to preserve joint and several liability, which would be destroyed were the Linvogs dismissed pursuant to a settlement and release. (CP 555) In rejecting the offer, Mr. Brindley explained to Mr. Spencer that while he would not risk defeating joint and several liability (along with the State's right of contribution against joint tortfeasors), his general practice was to refrain from attempting to collect a judgment above insurance limits from an individual defendant where a solvent institutional defendant was jointly and severally liable on the same judgment. (CP 384, 555, 560-61, 569)

In October 2005, Mr. Brindley answered "not applicable" to the State's form interrogatory regarding whether Barton "or anyone acting on [his] behalf ha[d] entered into any agreement or covenant with any

party or person regarding the incident referred to in the Complaint” and denied receiving “money from any source” as a result of the collision. (CP 833) Mr. Spencer answered similar form interrogatories in the negative. (CP 556) The trial court found that these discovery responses were true when they were made. (CP 384)³

C. Shortly Before Trial, Barton Accepted A \$20,000 Advance From The Linvogs’ Insurer To Obtain Much Needed Medical Care, Memorialized His Intention Not To Execute Against Mr. and Mrs. Linvog’s Personal Assets, But Did Not Release Any of The Linvogs From Liability, In A Stipulation That Was Never Completed.

By early 2007, over two years after the collision, Mr. Barton, who was uninsured, had still not received any compensation for his significant injuries. Mr. Brindley sought an advance from the Linvogs’ insurer on his client’s behalf because, as the trial court found, Mr. Barton was in dire need of medical care. (CP 384, 560) Mr. Brindley believed that both the State and the Linvogs would share fault for Mr. Barton’s injuries. (CP 560-61) Mr. Spencer also recognized that there was a significant likelihood that Korrine Linvog would be held

³ The State has abandoned its argument below that counsel for the Linvogs and Barton entered into “a verbal agreement” or covenant not to execute before March 2007, based on this 2005 exchange. (CP 509) The trial court expressly rejected this allegation in its written decision, finding that Mr. Brindley’s statements regarding his practice of not pursuing an excess judgment did not create an oral agreement or any type of “binding promise to not collect against the Linvogs.” (CP 384)

liable. (CP 555) The Linvogs' insurer agreed to advance \$20,000 to Mr. Barton in exchange for a binding agreement not to execute against Mr. and Mrs. Linvogs' personal assets:

The agreement was that if the Linvog parents Defendants (Thomas and Madonna Linvog) paid \$20,000 to Plaintiff, then Plaintiff agreed that he would not execute on any judgment against the Linvog parents that exceeded the \$100,000 limits of their insurance coverage.

(CP 384-85)

The State argues that Barton released the Linvogs from any further liability above their insurance limits as a matter of law, and thus, as a quid pro quo, the Linvogs rewarded the plaintiff by shifting their liability for Korrine's negligence to the State of Washington. But the State's legal theory falters in light of the undisputed fact that none of the participants believed that the Linvogs would be let "off the hook," as the State contends. (App. Br. 15, 31) To the contrary, the trial court found as a matter of fact that the agreement was premised on counsel's expressed understanding that the agreement would not in any way affect each of the Linvogs' potential joint and several liability with the State or the State's right of contribution. (CP 384-85) Whether that understanding of the law was right or wrong, it is undisputed that Mr. Spencer and Mr. Brindley discussed the fact that

Korrine Linvog would not be a party to the agreement and thus would still be jointly and severally liable for the full amount of any judgment and that the State would retain a right of contribution against all of the Linvogs. Mr. Spencer told the Linvogs that they would still face liability in contribution to the State in the event that their daughter's share of liability exceeded the limits of their liability insurance. (CP 555-56)

The Linvogs' insurer issued a \$20,000 check payable to Mr. Barton and his lawyers on February 22, 2007. (CP 665) Mr. Spencer prepared a "Stipulation of the Parties Regarding Advance Payment By Mutual of Enumclaw" reflecting the parties' agreement. That stipulation recited that (1) the payment would be credited toward any judgment entered against the Linvogs, (2) Barton would not execute against Mr. and Mrs. Linvog beyond the limits of their liability insurance, and (3) the stipulation and payment "does not represent a settlement of any claims Plaintiff Jared Barton has brought in this matter against Defendants." (CP 663-64)

Mr. Spencer never signed the stipulation. Mr. Brindley signed the stipulation but never returned it to Mr. Spencer. The document was never filed in court. (CP 556, 562) Neither Mr. Spencer nor Mr. Brindley gave the State notice of a settlement or sought a reasonableness determination from the trial court pursuant to RCW 4.22.060.

(CP 563-64) Mr. Brindley forgot that the stipulation existed until he searched his files in 2009 at the State's request. (CP 562-63, 567)

D. Barton's And Linvogs' Lawyers Inadvertently Failed To Supplement Their Discovery Responses.

Trial was set for October 2007. Prior to trial, Mr. Brindley supplemented his responses to the State's interrogatories by providing updated information regarding Mr. Barton's lay and expert witnesses. (CP 562-63) However, he did not supplement his response to the State's interrogatory regarding the receipt of funds or the execution of any agreements regarding the collision. The trial court expressly found that the failure to supplement was not deliberate, but "due to oversight." (CP 385)

E. Mr. and Mrs. Linvog Were A "Non-Presence" At Trial.

Selecting three isolated passages of argument from this 16-day trial, the State contends that as a result of their agreement the Linvogs' and Barton's counsel embarked on a joint strategy to appeal to the jury's sympathy in order to shift liability to the State. (App. Br. 7) The trial court expressly rejected this argument. Not only were the Linvogs not witnesses at trial, they were not present at counsel table, and were only introduced to the jury to explain why they had been named as defendants under the family car doctrine:

The only time the Linvog parents were even mentioned at trial was in passing in opening statement to explain why they were on the case caption. The parents did not sit at counsel table. They were such a non presence at trial that they were not on the verdict form and no one noticed.

(CP 390)⁴

The trial court also rejected the State's argument that the Linvogs' and Mr. Barton's "obvious strategy was to hope that the jury would feel sorry for Mr. and Mrs. Linvog" (App. Br. 34), finding that "no one made any statement or argument to the jury suggesting they do this." (CP 390) The trial court had entered orders in limine, on both Mr. Barton's and the State's motions, that precluded any argument based on the financial condition of the defendants (CP 1443, 1449), and instructed the jury at trial not to be swayed by "sympathy, bias or personal preference." (CP 1458) In closing argument, Mr. Spencer did not even mention Mr. and Mrs. Linvog, asking the jury to focus on his 19-year-old client and decide whether "she did everything a reasonably careful driver would do . . ." (CP 1208, 1212)

There is no evidence that plaintiff's trial strategy was affected

⁴ The trial court also found that regardless whether Mr. Brindley's signature on the unexecuted stipulation made it a legally binding contract, the statement that the "parents are on the hook, as well," (CP 785), was in fact true, since the Linvogs were personally liable to the State in contribution under a joint and several judgment. As the trial court found, "They were still potentially on the hook all the way." (CP 390)

in any way by the forgotten stipulation regarding advance payment. Mr. Brindley's strategy was always to establish the State's and Korrine's liability while ensuring that his client's recovery was not reduced by any allocation of fault for contributory negligence. In plaintiff's opening statement, Mr. Brindley emphasized that "there's nothing Mr. Barton could have done to avoid this accident," and sought to place responsibility on both the State and Korrine Linvog. (CP 965) Mr. Brindley argued that Korrine Linvog "clearly" failed to yield the right of way to Mr. Barton's vehicle as it approached the intersection and that, "it will be your job, at the end of this case . . . to determine how much fault, if any, should go to the State, how much fault, if any, should go to Ms. Linvog." (CP 964-65)

The trial court also found no evidence to support the State's allegation that the Linvogs' trial strategy was in any way influenced by an undisclosed secret agreement with the plaintiff (CP 386-89), in particular rejecting the State's argument that the Linvogs should have attempted to establish Mr. Barton's contributory fault. The trial court found that the Linvogs' attempt to blame the State rather than Mr. Barton was "the best plausible supportable theory Linvogs could put forward to avoid liability," given the undisputed fact that Korrine "had the stop sign," and found the strategy "not surprising" given the

alternative of “pointing fingers” at a “sympathetic Plaintiff.” (CP 387) Instead of joining in the State’s argument that Mr. Barton was contributorily negligent, one that the trial court rejected as a matter of law “because it was based entirely on speculation,” (CP 387), Mr. Spencer argued that the collision was unavoidable from the perspective of his 19-year old client, and aligned his clients with the State in attacking Barton’s damages, in an effort to minimize an adverse judgment against his clients. (CP 557, 1208-09, 1212-29)

The State’s assertion that the trial court told the jury “that the Linvog parents would have to pay any judgment awarded against their daughter” (App Br. 38) is also flatly contradicted by the record. The trial court gave, without objection, WPI 72.05, the family car doctrine 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 the motor vehicle.” (CP 1235) The instruction does not mention the Linvogs by name (or parental status), and says nothing about the legal consequences of a verdict against Korrine. The jury was asked to decide Korrine Linvog’s liability but not that of her parents, and their name does not even appear on the special verdict form. (CP 565, 1463-65)

F. This Court Affirmed The Judgment Establishing That The State And The Linvogs Were Jointly And Severally Liable For The Full Amount Of Barton's Damages.

The trial court dismissed the defense of Mr. Barton's contributory negligence pursuant to CR 50 before sending the case to the jury. (CP 385) Finding both the State and Korrine Linvog negligent, the jury allocated 95% of the fault to the State and 5% to Korrine, and awarded Mr. Barton \$3.6 million in damages. (CP 1463-65)

The fact that the trial court entered a joint and several judgment for the full amount of damages against each of the Linvogs and against the State substantially refutes the State's current contention that the Linvogs and Barton had entered into an agreement to defeat the Linvogs' joint and several liability. (CP 1237-39) When Mr. Barton received the balance of the Linvogs' policy limits, Mr. Brindley executed only a partial satisfaction of judgment in the amount of \$100,000. (CP 1241-42) Korrine Linvog and her parents remained jointly and severally liable, along with the State, on the remaining unsatisfied portion of the judgment. (CP 557-58, 567)

The State appealed the judgment, challenging only the trial court's refusal to allow the jury to consider the issue of Mr. Barton's contributory negligence. (CP 1466-67) This court affirmed that

decision and the Supreme Court denied review. ***Barton v. State***, noted at 147 Wn. App. 1021, 2008 WL 4838687 (2008), rev. denied, 166 Wn.2d 1012 (2009).

G. Barton's Counsel Freely Disclosed The Linvogs' Advance Payment When He Sought Satisfaction Of The Remaining Judgment From The State And Asserted That The State Should Seek Contribution From the Linvogs.

Upon return of the mandate, Mr. Brindley demanded payment of the unsatisfied balance of the judgment, plus interest, from the State. (CP 643) In the course of those discussions, Mr. Brindley expressed his (mistaken) belief that upon entry of the partial satisfaction in favor of the Linvogs, the parties had agreed to vacate the judgment against Mr. and Mrs. Linvog, based upon a proposal made by Mr. Spencer when the Linvogs' insurer paid their liability limits. When he mentioned the (nonexistent) stipulation to vacate the judgment, the State's new counsel asked Mr. Brindley for a copy of it. (CP 566-68)

Mr. Brindley reviewed his files and found the proposed, partially executed stipulation reflecting the \$20,000 advance payment. (CP 568) Mr. Brindley did not hesitate to send the State's counsel documentation concerning the advance, including a copy of the \$20,000 check and the uncompleted stipulation that he located in his

files. (CP 569) He apologized for his confusion, and informed new counsel for the State that he expected the State to pay the remaining unsatisfied portion of the judgment, stating that “[i]f the state wishes to pursue a contribution claim against the Linvogs, that is probably its option.” (CP 575)

H. The Trial Court Denied The State’s Motion To Vacate And For Sanctions, Finding That the State Was Not Prejudiced.

Rather than paying the judgment, the State placed funds in the registry of the court, insisting that they be maintained in trust and not released to Barton (CP 888), and moved to vacate the judgment under CR 60(b)(4), alleging that its “interests were profoundly compromised by the hidden release agreement between the plaintiff and the Linvog parents.” (CP 1307) In addition to a new trial, the State sought as sanctions its “reasonable attorneys’ fees and costs for the trial and appeal,” (CP 1309), in excess of \$400,000. (CP 534)

The trial court denied the State’s motion in its memorandum decision of March 14, 2010, and the State’s motion to reconsider on June 4, 2010. (CP 25-39) The trial court also denied Barton’s motion for an award of interest from the State on the funds that were not released from trust until nine months after they had been deposited into the court registry, pending the trial court’s decision on the State’s

motion. (CP 20-21) The trial court held that the loss of interest was an appropriate sanction for the inadvertent failure to supplement interrogatory responses pursuant to CR 26(e). (CP19)

Although it asserted that Mr. and Mrs. Linvog had been discharged from all liability for contribution as a matter of law, the State nonetheless presented a judgment on its claim for contribution against all of the Linvogs after satisfying the remaining balance of the judgment. On August 27, 2010, the trial court entered judgment against Thomas and Madonna Linvog, as well as Korrine Linvog, in favor of the State on its claim for contribution in the amount of \$92,632.30, plus interest at the judgment rate. (Supp. CP_, Dkt. 321)

IV. ARGUMENT

A. Standard Of Review: The Trial Court's Refusal To Vacate The Judgment And Sanctions Decision Will Not Be Disturbed On Appeal Absent A Manifest Abuse of Discretion.

This court reviews the trial court's decision on the State's motion to vacate the judgment under CR 60(b)(4), as well as its decision on the State's request for discovery sanctions, for manifest abuse of discretion. *Stoullil v. Edwin A. Epstein, Jr., Operating Co.*, 101 Wn. App. 294, 297 n.4, 3 P.3d 764 (2000) ("A decision under CR 60(b) will not be overturned on appeal unless it plainly appears that

the trial court exercised its discretion on untenable grounds or for untenable reasons.”); ***Panorama Village Homeowners Ass’n v. Golden Rule Roofing, Inc.***, 102 Wn. App. 422, 431, 10 P.3d 417 (2000) (“We review the trial court’s decision on a motion for sanctions under CR 26(g) for abuse of discretion.”), *rev. denied*, 142 Wn.2d 1018 (2001). The appellate court gives deference to the judge who presided over the trial and is therefore “better positioned than another to decide” issues of discovery abuses and litigation misconduct. ***Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.***, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (quotation omitted).

The abuse of discretion standard recognizes that the trial court is best positioned to assess the nature of the alleged misconduct, the state of mind of the participants, the materiality of the information at issue, the resulting prejudice, ***Perry v. Costco Wholesale, Inc.***, 123 Wn. App. 783, 806-07, 98 P.3d 1264 (2004), and whether, under CR 60(b)(4), allegations of fraud or misrepresentation are sufficient to overcome the presumption of finality given to a judgment. See ***Guardianship of Adamec***, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983) (affirming probate court’s refusal to vacate order confirming

sale of property by decedent to her attorney on ground of fraud or misconduct); **Bergren v. Adams County**, 8 Wn. App. 853, 857, 509 P.2d 661, *rev. denied*, 82 Wn.2d 1009 (1973) (rejecting contention that default judgment was result of plaintiff's fraud, misrepresentation or misconduct.).

The State ignores this standard of review in the instant case, asking this court to make a *de novo* determination that Mr. Brindley's failure to supplement his interrogatory response was intentional, when the trial court found it to be inadvertent, and that the consequence to the State was serious and prejudicial, when the trial court found it to be utterly harmless. Moreover, the State's legal arguments regarding the effect under RCW 4.22.060 of Mr. Barton's receipt of a \$20,000 advance are misplaced, because it is undisputed that neither the Linvogs' joint and several liability, nor their liability for contribution, has been eliminated. The State is in exactly the same position that it would be in had the \$20,000 advance payment never been made, and having obtained a judgment for contribution, is in fact in a better position than it would be in were this court to accept the State's argument that the Linvogs' liability for contribution terminated by operation of law.

B. The Trial Court Properly Refused To Vacate A Judgment On The Basis Of Fraud After Finding No Prejudice To The State Because The Linvogs Were Never Released But Remained Jointly And Severally Liable. The State Has Now Accepted The Benefit Of That Judgment By Obtaining Its Own Judgment For Contribution Against The Linvogs.

1. The State Had The Burden To Establish That It Was Prejudiced As A Result of Fraud Or Misconduct Under CR 60(b)(4).

The State based its motion to vacate on CR 60(b)(4), which allows the trial court to set aside a judgment for “[f]raud, . . . misrepresentation, or other misconduct of an adverse party.” A party seeking to vacate a final judgment under CR 60(b)(4) must establish prejudice, regardless whether the allegations at issue, if proved, would establish “fraud” or “other misconduct” within the meaning of the rule. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989), *rev. denied*, 113 Wn.2d 1029 (1989). See Tegland 4 *Wash. Pract.* 554 (5th Ed. 2006) (“Fraud or misconduct that is harmless will not support a motion to vacate.”)

The trial court did not abuse its discretion in rejecting the State’s CR 60(b) motion for lack of prejudice. The State argues that by paying Barton an advance of \$20,000 and obtaining a covenant not to execute beyond the limits of their insurance, Mr. and Mrs. Linvog obtained a release by operation of law under RCW 4.22.060

that protected them from any further liability to Barton or to the State for contribution. But at the conclusion of trial, the court entered judgment making the Linvogs jointly and severally liable with the State for the full amount of Mr. Barton's damages, and the Linvogs were liable for contribution after the State paid a portion of the Linvogs' pro rata share of the judgment. The State has now accepted the benefit of the trial court's decision that the Linvogs were never discharged by obtaining its own judgment in contribution against Mr. and Mrs. Linvog.

The State argues that it was prejudiced because the failure to disclose the agreement deprived the State of the opportunity to impeach Korrine Linvog's testimony with evidence that she had an incentive to blame the State, and to protect Barton. However, the trial court held that the prejudicial effect of the parties' stipulation should be assessed "according to its actual agreed terms, not some version rewritten by the court or the State." (CP 386) The trial court properly rejected the State's argument because the stipulation regarding advance payment did not realign the Linvogs with the plaintiff and because, regardless of the legal consequences of settlements under RCW 4.22.060(2), here the Linvogs were never "released" from liability but remained fully "on the hook." (CP 390) The trial court did

not abuse its discretion in holding that because the parties did not believe the Linvogs were released, and always treated them as jointly and severally liable for the entire judgment, the State could not establish prejudice as a matter of law and fact.

2. The State Has Accepted The Benefit Of An Enforceable Judgment Against The Linvogs By Obtaining Its Own Judgment For Contribution.

The State contends that Mr. and Mrs. Linvog were released by operation of law, but in fact the trial court entered a joint and several judgment against them for \$3.6 million. The State ratified that judgment when it sought and obtained its own judgment against the Linvogs for contribution. Having accepted the benefit of an enforceable judgment that provided for the Linvogs' joint and several liability, the State is now barred from arguing that the judgment must be vacated and the Linvogs released from any further liability by operation of law. This court should hold that State is estopped from arguing that the judgment is void while simultaneously reaping its benefits.

When a party accepts the benefit of a trial court decision, that party loses the right to appellate review of that decision unless he or she would be entitled to the benefit regardless of the outcome of the review. See RAP 2.5(b). In ***Buckley v. Snapper Power Equipment***

Co., 61 Wn. App. 932, 813 P.2d 125, *rev. denied*, 118 Wn.2d 1002 (1991), this court held that a minor's appeal of the trial court's approval of a \$30,000 settlement of her personal injury action was barred after the minor withdrew the settlement funds from the court registry. The appellant could not challenge the settlement while simultaneously taking advantage of the trial court's ruling that it was reasonable. The court held that "[w]hether the party who accepted the benefits actually intended to waive his or her right to appeal is generally immaterial." **Buckley**, 61 Wn. App. at 942.⁵

The acceptance of benefit rule, which is codified in RAP 2.5(b), has several exceptions, but none of them are applicable here. First, the decision at issue "is not one which is subject to modification by the" trial court. RAP 2.5(b)(i). Nor is this a marital dissolution decision in which one of the spouses may take possession of the property divided by the trial court. RAP 2.5(b)(iv). While the State could have stayed enforcement of the trial court's order requiring it to pay the Linvogs' share of damages, thus preserving its right to contribution only if that decision became final, it took no action to supersede it. To

⁵ In this case, the State's assertion that its contribution judgment against the Linvogs "is in no way intended as an abandonment of the State's arguments" (Supp. CP ___, Dkt. 311 at p.2) is similarly "immaterial." **Buckley**, 61 Wn. App. at 942.

the contrary, by obtaining a judgment for contribution against the Linvogs, the State has actively enforced the very judgment it now seeks to vacate. RAP 2.5(b)(ii).

Most importantly, the State cannot claim that “regardless of the result of the review . . . [it] will be entitled to at least the benefits of the trial court decision.” RAP 2.5(b)(iii). See **Scott v. Cascade Structures**, 100 Wn.2d 537, 541, 673 P.2d 179 (1983) (tort plaintiff did not accept benefits by challenging inadequacy of damages after accepting amount of judgment: “The only question is whether appellant is entitled to \$40,000 *more*.”) (emphasis in original). The relief the State seeks – vacation of the judgment, a new trial and an order releasing Mr. and Mrs. Linvog from any further liability – will only prejudice the State’s ability to recover in contribution from the only other solvent parties – the elder Linvogs, whose assets far exceeded those of their college-age daughter, according to the evidence presented by the State post-trial. (CP 290-91).

Moreover, were this court to vacate the judgment and order a new trial as the State requests, that new trial would affect the allocation of liability between the Linvogs and the State, but would not affect the State’s joint and several liability with Korrine Linvog or the amount of Barton’s damages – issues that were unaffected by any

alleged agreement between the Linvogs and Barton. As to damages, it is undisputed, and the trial court found, that the State and the Linvogs were aligned at trial on the issue of damages and that Linvogs' counsel competently and thoroughly focused their defense strategy on limiting Barton's ultimate recovery. (CP 388).

Further, the State and Barton have thoroughly litigated the issue of Barton's comparative fault not only in the trial court, which dismissed the defense of comparative fault under CR 50, but also in this court, in an appeal in which the Linvogs did not even participate. The State, which focused its appeal on its allegation that Barton had a defective headlight on his motorcycle and that its expert established that Barton had ample time to avoid the intersection collision (CP 1467), does not now argue that the other parties withheld any evidence of Barton's comparative fault, or that it was otherwise denied the opportunity to prove Barton's negligence.

While the trial court properly analyzed the interpretation and effect of the stipulation based upon the parties' words and their actions (§ B.3, *infra*), this court need not review its decision because the State has unconditionally accepted the benefit of that decision. As the State recognizes in arguing that a proper alternative sanction

would be to leave the judgment in place and direct forfeiture of all attorney fees received by counsel to the State (§ C.4, *infra*), any benefit to the State in potentially reducing its share of liability is entirely speculative, compared to the certainty that were the State to prevail in its appellate argument that the Linvogs were released by operation of law, the State would not be able to recover from Korrine Linvog's parents the amount that exceeds the State's share of Barton's judgment. The State has enforced its right to contribution against the Linvogs, just as Barton and the Linvogs always believed it could when Barton accepted the Linvogs' \$20,000 advance. The State has waived its challenge to the trial court's refusal to vacate the joint and several judgment against the Linvogs and the State.

3. The Trial Court Correctly Evaluated The Effect of the Stipulation Regarding Advance Payment Based Upon The Interpretation Given To It By The Parties.

The trial court did not "misapprehen[d] Washington's Tort Reform Act." (App Br. 30) The trial court understood that a release or covenant not to execute under RCW 4.22.060 discharges the settling defendant from any further liability, but held that the parties in this case had no intent to release the senior Linvogs, and they in fact remained "on the hook" for Mr. Barton's damages as jointly and severally liable defendants who were personally liable in contribution

for any judgment in excess of their insurance limits. (CP 390) In holding that the State suffered no prejudice, the trial court correctly analyzed the practical effect of the parties' agreement based upon their objectively manifested interpretation, rather than potential ramifications under RCW 4.22.060 of which the participants were unaware.

Overwhelming evidence supports the trial court's findings that the parties did not believe that Mr. and Mrs. Linvog were released. First, it is undisputed that Korrine Linvog was not a party to any agreement. The State makes no argument that she was released or that she received any protection against joint and several liability for the entire amount of damages awarded by the jury. Thus, the stipulation with the Linvog parents did not, and could not as a matter of law, release Korrine, defeat her joint and several liability, or her liability for contribution under RCW 4.22.060.

Second, the liability of the Linvogs' insurer, along with Korrine, was also unaffected by any agreement. To the extent that Korrine Linvog has any claim against her insurer for payment beyond policy limits, the stipulation regarding advance payment leaves the insurer's liability unaffected.

Third, the stipulation by its terms did not constitute a release or “a settlement of any claims Plaintiff Jared Barton has brought in this matter against Defendants,” including the Linvog parents (CP 663-64), who remained vicariously liable under the family car doctrine for all fault assigned to their daughter.⁶ The State argues that this language is a nullity by operation of law, but the important fact, as the trial court found, was that the parties themselves did not objectively manifest any intent to release the Linvogs from liability. See **Henry v. Lind**, 76 Wn.2d 199, 204, 455 P.2d 927 (1969) (in discerning contractual intent, “the practical interpretation given by the parties themselves is entitled to great, if not controlling influence.”).

While the State argues that this language in the Stipulation regarding advance payment was “self serving” and a “sham,” it can

⁶ The State argues that this instruction, which told the jury that “[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 the motor vehicle,” (CP 1235), was an unconstitutional “comment on the evidence,” (App. Br. 38), but the instruction was an accurate statement of the law, and not an instruction on a disputed issue of fact. See **State v. Becker**, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997) (instruction that “removes a disputed issue of fact from the jury’s consideration” is impermissible comment on the evidence). Even were this instruction tantamount to a statement that the Linvogs were liable as a matter of law for the actions of their daughter, as the State maintains, the application of the law to undisputed facts is a legal question and not an impermissible comment on the evidence. **McDonald v. Irby**, 74 Wn.2d 431, 437, 445 P.2d 192 (1968) (identification of plaintiffs as “paying passengers” in instruction was not comment on evidence where defendant’s status as a common carrier was undisputed).

point to no evidence establishing that any of the parties ever believed that the Linvogs had been released. When judgment was entered on the jury's verdict in 2007, Mr. and Mrs. Linvog were held jointly and severally liable for the jury's entire award of \$3.6 million. (CP 1237-38) When the State objected to paying more than its proportional share of damages, Mr. Brindley stated that the State retained its full right of contribution against the Linvogs. (CP 575) When the State sought a judgment for contribution against the Linvogs, the Linvogs did not claim that they had been released under RCW 4.22.060. (Supp. CP __, Dkt. 315)

The State relies on *Maguire v. Teuber*, 120 Wn. App. 393, 85 P.3d 939, *rev. denied*, 152 Wn.2d 1026 (2004) and *Romero v. West Valley School Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004), *rev. denied*, 154 Wn.2d 1010 (2005) to argue that the "the operative effect" of the parties' stipulation was to eliminate the Linvog Parents' liability by operation of law, regardless of the stipulation's actual language or the parties' contractual intent. (App. Br. 27-29) However, those cases do not stand for the proposition that the parties' contractual intent is irrelevant to determining whether they intended to enter into a full settlement and "release" within the meaning of RCW 4.22.060.

In **Maguire**, the court held that RCW 4.22.060 “uses the word ‘release’ to refer to all of the ‘similar’ settlement agreements enumerated in RCW 4.22.060 used to memorialize a settlement in which the settling defendants have no further liability.” 120 Wn. App. at 396-97. In **Maguire**, the parties’ agreement recited that they intended to make “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.” 120 Wn. App. at 397-98 (emphasis in original). This court held that the plaintiff could not create joint and several liability by amending his complaint to add a highway design claim against the State after intending “a complete resolution of all claims” with the individual defendants. 120 Wn. App. at 399. See also **Romero v. West Valley School Dist.**, 123 Wn. App. 385, 98 P.3d 96 (2004) (following **Maguire** and holding that “Settlement and Covenant Not To Execute” was intended as a release and defeated joint and several liability); **Shelby v. Keck**, 85 Wn.2d 911, 918, 541 P.2d 365 (1975) (defendant properly dismissed upon paying insurance limits under agreement that “set the upper limits of his liability” and left “no justiciable issue to be resolved between these parties.”) (App. Br. 28)

By contrast, in this case, the parties' incomplete stipulation did no more than confirm Mr. Brindley's practice not to execute against an individual defendant's personal assets where an institutional defendant is jointly liable for the entire amount of the judgment. (CP 560) As the Linvogs in fact remained liable in contribution for any amount in excess of their limits, the State's contention that the stipulation regarding advance payment "negated the possibility that the Linvog parents would ever have to pay more than their insurance policy limits of \$100,000" is simply wrong. (App. Br. 32) As the trial court held, the parties believed that their agreement was based "on the terms the parties agreed on" and not the potential legal consequences of which they were unaware. (CP 386)⁷ The trial court correctly rejected the State's contention that it was prejudiced by a secret "release" of Mr. and Mrs. Linvog under a stipulation that did not release them at all.

⁷ Barton argued below that were the uncompleted stipulation to operate as a release as a matter of law, it should be rescinded on the basis of mutual mistake. (CP 589) The trial court recognized that treating the stipulation as a release based upon RCW 4.22.060, in contravention of the parties' contrary intent, would raise issues regarding whether the agreement was voidable on grounds of impossibility, mistake or public policy, but held that it was not necessary to address those issues because the State could not establish prejudice. (CP 386) In the event this court holds irrelevant the parties' own interpretation of the Stipulation, it should remand to the trial court for resolution of the contractual issues regarding its enforceability.

4. As The Parties Did Not Enter Into A “Mary Carter” Agreement, The Trial Court Correctly Held That The State Could Not Establish Prejudice.

Because the stipulation regarding advance payment did not defeat Korrine Linvog’s joint and several liability, and did not bar the State’s claim for contribution against the Linvogs under RCW 4.22.060, the State’s discourse on the evils of “Mary Carter” agreements has no bearing on the consequences of the parties’ incomplete stipulation in this case. The trial court correctly held that the State was not prejudiced by being denied the opportunity to bring to the jury’s attention the details of the parties’ agreement because the stipulation regarding advance payment did not secretly realign the Linvog parents with Mr. Barton.

As the trial court recognized, a true Mary Carter agreement realigns a settling defendant with the plaintiff, by making “what one party receives contingent on a certain outcome produced at trial.” (CP 386) See Phillips, *Looking out for Mary Carter: Collusive Settlement Agreements In Washington Tort Litigation*, 69 Wash. L. Rev. 255, 256 (1994) (“Mary Carter” agreement is one in which “the settling defendant retains a financial stake in the plaintiff’s recovery. . .”); ***Booth v. Mary Carter Paint Co.***, 202 So.2d 8, 10 (Fla. App. 1967) (plaintiff agreed to limit settling defendant’s exposure up to a

maximum of \$12,500 and refrain from collecting anything from the settling defendant if plaintiff's recovery exceeded \$37,500 from the solvent co-defendant); ***Romero v. West Valley School Dist.***, 123 Wn. App. 385, 388-89, 98 P.3d 96 (2004) (characterizing agreement giving settling defendant the right to recover half of everything collected by plaintiff in excess of the settling defendant's insurance limits, up to the amount of the settling defendant's personal financial contribution, as "a classic 'Mary Carter' agreement."). As the State discusses (App. Br. 24-32), the Legislature equated such agreements to full releases under RCW 4.22.060 in order to preclude collusive attempts to artificially manufacture joint and several liability and thus require a financially solvent defendant to pay for the share of fault assigned by the jury to a less solvent defendant who has settled with the plaintiff.

Here, however, the State concedes that the stipulation could not have defeated joint and several liability under RCW 4.22.060, because Korrine Linvog was not a party to the stipulation. The State also recognizes that the Stipulation did not defeat any of the Linvogs' liability for contribution, which the State is currently enforcing. Finally, as the trial court found, the Linvogs did not in fact become aligned with Barton, but actively sought to minimize the award of damages.

Their attorney “pointed the finger” at the State at trial not because the parents had received Barton’s promise not to execute against their personal assets, but because it was a smart defense strategy to argue the liability of a financially solvent institutional co-defendant, which the Linvogs had pursued from the inception of the case. (CP 387-88) As the parties’ agreement did not realign the Linvogs, the trial court correctly determined that the State could not establish that it was prejudiced by its nondisclosure.

The State relies on cases from other jurisdictions that hold that a true Mary Carter agreement creates the type of bias that is relevant in challenging credibility. See, e.g., *Trampe v. Wisconsin Tel. Co.*, 214 Wis. 210, 252 N.W. 675, 678 (1934); *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987) (App. Br. 35). But courts also recognize that an agreement that provides no incentive for collusion and that leaves co-defendants with the same incentive to blame each other but united in attempting to minimize the jury’s assessment of damages is inadmissible to establish bias. See, e.g., *Hodesh v. Korelitz*, 123 Ohio St. 3d 72, 914 N.E.2d 186 (2009) (undisclosed “high-low” agreement between plaintiff and one defendant not collusive and did not warrant new trial); *Sequoia Mfg. Co., Inc. v.*

Halec Const. Co., Inc., 117 Ariz. 11, 570 P.2d 782 (1977) (agreement should be disclosed to jury only when settling defendant can improve his financial position by ensuring a plaintiff's verdict above a certain amount).

The State's out-of-state authority is contrary to the holding of this court that a trial court abuses its discretion in admitting evidence of a co-defendant's settlement in the absence of clear evidence that the agreement produced an incentive for the witness to change his or her testimony. *Northington v. Sivo*, 102 Wn. App. 545, 550, 8 P.3d 1067 (2000) ("In the absence of clear conflict in a witness's testimony or a circumstance in which the settlement's content provides a motive for the witness to offer biased testimony, ER 408 does not permit the jury to consider settlement evidence."). In this case, the trial court found that the parties' stipulation regarding advance payment could not help the State challenge anyone's credibility at trial. (CP 389) The Linvog parents did not testify at all. It was unclear that Korrine Linvog even knew the Stipulation existed. Had the State cross-examined Korrine Linvog with the Stipulation, her lawyer would have certainly emphasized to the jury the fact that she was individually liable for any amount over her parents' limits, and that her parents too would be liable to the State for any amount of Korrine's liability above

their insurance limits. Admission of the stipulation would have injected the fact and the limits of the Linvogs' insurance squarely into the jury's deliberations. Unless the jury found Korrine Linvog fault free, it remained a fact that the more the plaintiff recovered in damages, the more the Linvogs would have to pay.

The State criticizes the trial court's refusal to decide "what, if any inquiry into the agreement, would have been admissible," (CP 389), but cannot show that the trial court abused its discretion in finding that any inquiry into the terms of the agreement would not have helped the State at trial.⁸ The trial court correctly rejected as speculation the State's contention that it was prejudiced by the other parties' failure to disclose the Linvogs' \$20,000 advance and the plaintiff's agreement not to execute beyond the limits of the Linvogs' insurance. This court should affirm its denial of the State's motion to vacate.

⁸ In seeking to vacate the judgment and obtain a new trial, the State can not ask this court to hold that the stipulation was admissible as a matter of law. Even were this court to grant the relief the State requests, the trial court would still retain substantial discretion to exclude any reference to the stipulation. See, e.g., *Northington v. Silvo*, 102 Wn. App. 545, 549, 8 P.3d 1067 (2000) (abuse of discretion to admit settlement agreement to show bias in absence of "significant inconsistency" between pre-settlement statements and trial testimony); *Mackey v. Irisari*, 191 W.Va. 355, 445 S.E.2d 742, 750 (1994) (disclosure to jury of Mary Carter agreement lies within discretion of trial court, which is best suited to determine whether it realigns the parties).

C. The Trial Court Did Not Abuse Its Discretion In Refusing To Vacate The Judgment And Award The State Its Attorney Fees From Trial and Appeal As Sanctions After Finding That the Failure To Supplement Was Inadvertent, That The Stipulation Was Immaterial, And That Its Nondisclosure Did Not Prejudice The State.

The State again ignores the trial court's extensive findings in arguing that it was entitled to both a new trial and an award of all its attorney fees at trial and on appeal as a sanction for counsel's failure to disclose the stipulation regarding advance payment. While the State argues that sanctions are mandated because Mr. Brindley and Mr. Spencer "lied" to the jury, "hid the covenant not to execute," and "substantially prejudiced the State, (App. Br. 12, 33, 45), the trial court rejected each of these factual contentions that underlie the State's legal argument, holding that an inadvertent nondisclosure, which had no effect on the State's ability to prepare and mount a defense at trial, did not justify the severe sanctions sought by the State.

1. The Trial Court Correctly Exercised Its Discretion Under CR 26(e) In Ruling On A Motion For Sanctions For The Failure To Timely Supplement Discovery Responses.

The State's reliance on CR 26(g) and CR 37(d) as a basis for sanctions is without merit, as it is undisputed that counsel accurately answered the State's initial discovery requests. No advance payment

had been made or stipulation signed in October 2005 when the State received its responses to discovery. Thus, the State's contention that Mr. Brindley's initial certification violated CR 26(g), or that those initial responses were "evasive or misleading" under CR 37(d), is simply incorrect.

As the trial court recognized (CP 385), this case is instead governed by the duty to supplement previous answers to discovery under CR 26(e)(2), which provides that a party is under a "duty seasonably to amend a prior response if he obtains information upon the basis of which . . . he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Civil Rule 26(e)(4), and not CR 26(g) or CR 37, governs sanctions for the failure to supplement prior responses. See ***Fisons***, 122 Wn.2d at 340 ("the sanctions provision of CR 37 do not apply where, as here, the more specific sanction rule better fits the situation.") Civil Rule 26(e)(4) specifically provides that a failure to timely supplement a discovery response "will subject the party to such terms and conditions as the trial court may deem appropriate." This rule by its terms vests the trial court with discretion to determine what, if any, sanction is "appropriate" for the failure to timely supplement.

The State's argument that a new trial and award of all of its fees are mandatory whenever a party fails to supplement an answer would negate the trial court's substantial discretion in addressing an allegation of discovery abuse – discretion that this court, and the Supreme Court, have repeatedly recognized:

In determining whether an attorney has complied with the rule, the trial court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request.

Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 431, 10 P.3d 417 (2000), *citing Fisons*, 122 Wn.2d at 343.

The trial court properly considered all of the "surrounding circumstances" in rejecting the State's request for severe sanctions in this case. The trial court found that the failure to supplement was "due to oversight" and not intentional (CP 385), based on Mr. Brindley's uncontroverted testimony that because the stipulation was never finalized, he forgot that it existed and overlooked the modest

payment to Mr. Barton when focusing on supplementing responses concerning plaintiff's witnesses on the eve of trial.⁹ (CP 562-63)

2. The Trial Court Properly Rejected The State's Request For Severe Sanctions Based On Its Findings That The State Was Not Prejudiced.

While the State argues that the trial court's finding that counsel lacked a reasonable excuse established that the failure to supplement was "willful," this court has specifically rejected the State's argument that more severe sanctions, such as a new trial, or the exclusion of evidence, are mandatory regardless of whether or not the opposing party was prejudiced. Such sanctions are appropriate "only where willful noncompliance substantially prejudices the opponent's ability to prepare for trial . . ." *Estate of Foster*, 55 Wn. App. 545, 549, 779 P.2d 272 (1989), *rev. denied*, 114 Wn.2d 1004 (1990).

The State relies upon cases where the intentional concealment of relevant evidence substantially and immediately impacted a party's ability to prepare and present its case to argue that the trial court abused its discretion here. But, as discussed in the preceding

⁹The State's contention that Mr. Brindley did not believe the agreement was finalized, though accurate, is not the "reason given by plaintiff's counsel for his failure to disclose" it. (App. Br. 43) Mr. Brindley did not disclose the Stipulation because he "completely forgot that it existed." (CP 563)

sections, the trial court here made extensive findings refuting each one of the State's allegations of prejudice and found that pretrial disclosure of the Stipulation regarding advance payment would not have helped the State establish bias and would, if introduced at trial, likely "have been prejudicial to the State." (CP 389)

These findings stand in stark contrast to the facts in the cases relied upon by the State. In ***Magana v. Hyundai Motor America***, 167 Wn.2d 570, 220 P.3d 191 (2009) (App. Br. 40), plaintiff alleged that Hyundai's cars had a design defect causing the seat to collapse on impact, and Hyundai withheld evidence that it had received nine reports of seat back failure involving the same vehicle model. Holding that it could "disturb a trial court's sanction only if clearly unsupported by the record," 167 Wn.2d at 582, the Court affirmed the trial court's finding that the plaintiff had been substantially prejudiced in preparing its case at trial. ***Magana***, 167 Wn.2d at 587.

In ***Roberson v. Perez***, 123 Wn. App. 320, 96 P.2d 420 (2004), *rev. denied*, 155 Wn.2d 1002 (2005) (App. Br. 42), plaintiffs discovered that the defendant City had withheld personnel records and internal investigation files relating to the lead investigating officer after two jury trials alleging that the officer had fabricated evidence and negligently conducted the investigation in which the plaintiffs were

charged with perpetrating child abuse in what became known as the “Wenatchee sex ring.” The Superior Court specifically found that the records were “*material to the Plaintiffs’ fair presentation of their case*” at trial, 123 Wn. App. at 330 (emphasis in original), and Division Three affirmed the trial court’s decision to grant a new trial after deferring to the “superior court’s assessment of the violations and their impact.” **Roberson**, 123 Wn. App. at 325-26.

The findings of prejudice and materiality in these cases only confirm the absence of harm that the trial court found here. The trial court properly refused the State’s request for severe sanctions based upon its determination that the State suffered no harm in preparing or presenting its case at trial.

3. The Trial Court Held That Barton and His Lawyers Were Effectively Sanctioned Because They Were Deprived Of Use Of The Judgment Proceeds And Interest For Almost One Year.

Contrary to the State’s contention that the trial court failed to impose any sanctions at all, the trial court expressly held that Barton and his lawyers had in fact been sanctioned by being deprived of use of the judgment funds and interest for almost a year while the trial court resolved the State’s motion to vacate. (CP 19) The State had deposited its share of the judgment into the court registry upon

conclusion of its appeal in August 2009, but insisted that the funds be held in counsel's trust account pending resolution of the motion to vacate, and opposed Mr. Barton's motion to allow distribution of the funds in October 2009. (CP 219-20, 247-49) In denying Mr. Barton's motion for approximately \$146,000 in interest on these funds, the trial court recognized that Mr. Barton and his lawyers could not access the funds posted by the State to satisfy the judgment for nine months. Although it refused to require the State to pay interest on these funds, it held that this loss of interest represented an effective monetary sanction given the nature of the discovery violation and the lack of prejudice that resulted from it. (CP 19)

The State argues that Barton and his lawyers were not sanctioned at all because, under RCW 4.92.160(2), the State was not liable for additional interest once it deposited the judgment amount into the court registry. The State's argument is flawed, first, because its conditional tender – one that restricted the judgment creditor's unfettered access to funds – did not terminate the accrual of post-judgment interest. See *Estate of Bailey*, 56 Wn.2d 623, 628, 354 P.2d 920 (1960); *Lindsay v. Pacific Topsoils, Inc.*, 129 Wn. App. 672, 678-80, ¶¶ 11-17, 120 P.3d 102 (2005), *rev. denied*, 157 Wn.2d

1011 (2006); **Steele v. Lundgren**, 96 Wn. App. 773, 787, 982 P.2d 619 (1999), *rev. denied*, 139 Wn.2d 1026 (2000).

More importantly, however, even if the State was not liable for additional interest, Barton and his counsel were nonetheless penalized because they were deprived of these funds for the better part of a year. The State's contention that the trial court imposed no sanction at all is based on the flawed notion that monetary sanctions must provide compensation to the State.

Sanctions rules are not simple "fee shifting rules." **Fisons**, 122 Wn.2d at 356. Because the purpose of sanctions is not purely compensatory, the trial court has wide discretion in selecting the nature of sanctions. For instance, the payment of a fine to the court or to a court related fund may be a proper sanction. **Fisons**, 122 Wn.2d at 356. The trial court properly exercises its discretion when it considers the totality of the circumstances and arrives at a sanction that is "severe enough to deter these attorneys and others from participating in this kind of conduct in the future." **Fisons**, 122 Wn.2d at 356.

Thus, the trial court's rejection of the State's demand for compensatory sanctions does not mean that the trial court failed to

impose any sanctions at all. See *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 805, 98 P.3d 1264 (2004) (“nothing in the rules diminishes a trial court's broad discretion as to the type of sanction to impose for the violation of a discovery order or discovery rules.”). The loss of use of funds to Barton and his counsel represented a reasonable sanction given the lack of any prejudice to the State.

4. The Trial Court, Not This Court, Should Determine Whether Additional Sanctions Are Warranted.

The trial court's sanction order was not an abuse of discretion. However, in the event this court disagrees with the trial court's determination that the loss of funds provided a sufficient sanction given the lack of prejudice suffered by the State, the proper remedy is a remand to the trial court, which retains the discretion to “fashion appropriate sanctions” in the first instance. See *Fisons*, 122 Wn.2d at 355 (where trial court erred in finding no discovery violation remedy is to remand to trial court to choose “appropriate” sanction).

This court must therefore reject the State's alternative argument that it is entitled as a matter of law to an order directing counsel to pay, in addition to the State's costs and attorneys fees, “all funds that their law firms received in profit . . . as a sanction for their

discovery violations and in restitution.” (App. Br. 49) First, like its request that the court order vacation of the judgment, the State’s argument rests on the faulty premise, rejected by the trial court, that Mr. Barton and his counsel “profited from their wrong.” (App. Br. 49) Second, ordering that the fees that Barton paid to lawyers be paid instead to the tortfeasor that caused Barton’s injuries is not only unsupported by any authority, but would give the State an unjustified windfall, particularly given the trial court’s finding that the State in fact suffered no harm. Third, the State did not request this relief below, nor did it even attempt to stay or supersede release of any portion of the judgment proceeds to Barton pending this appeal.

Finally, the State’s contention that forfeiture of fees is necessary because it would be “unfair” to penalize Barton for his attorney’s inadvertent nondisclosure, effectively recognizes, as did the trial court, that Barton deserved every penny he got from the \$3.6 million judgment that his lawyers procured at a trial that was eminently fair and unaffected by alleged misconduct. As the trial court held:

[H]aving personally viewed this trial the verdict was not contrary to the evidence or surprising. The theory of liability was well thought out, supported by very solid facts, and presented by lawyers that clearly knew how to orally deliver a case to a jury. The theories raised were not likely to result in an equal split of liability

between the co-defendants. Either Mr. Linvogs view was obstructed or it was not. Clearly the jury thought it was.

(CP 391)

To the extent the principles of restitution cited by the State have any relevance at all, they confirm the trial court's substantial discretion in determining whether "appropriate circumstances" justify this equitable remedy. See *Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 159 P.3d 407 (2007). The trial court thoughtfully and thoroughly considered the nature of the conduct and the lack of prejudice to the State in rejecting the State's request for the most severe sanctions for the inadvertent failure to supplement discovery responses. This court should defer to its discretionary ruling and reject the State's request for a de novo assessment of that conduct and its consequences.

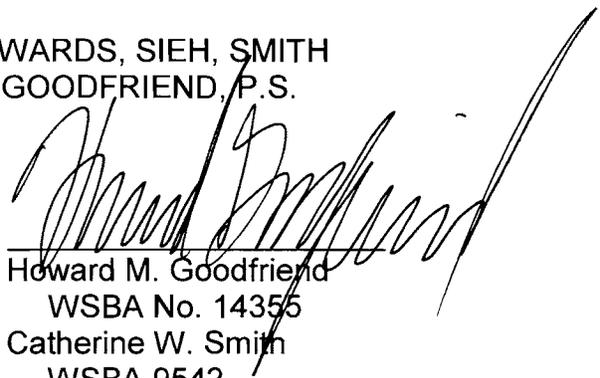
V. CONCLUSION

The State was not prejudiced by counsel's inadvertent failure to supplement discovery to disclose a \$20,000 advance payment and stipulation that did not let the Linvogs "off the hook" or affect their joint and several liability. The State has accepted the benefits of the court's judgment making the Linvogs liable for contribution to the State for their share of the judgment. The trial court did not abuse its

discretion in refusing to vacate the judgment or to award additional sanctions beyond depriving the plaintiff and his counsel use of the judgment proceeds while it decided the factual issues raised by the State's motion to vacate. This court should affirm.

Dated this 1st day of December, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

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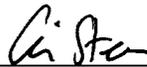
DECLARATION OF SERVICE

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

That on December 1, 2010, I arranged for service of the foregoing Brief of Respondent Jared K. Barton, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 1st day of December, 2010.



Carrie Steen