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SUPREME COURT  
OF THE STATE OF WASHINGTON

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JARED K. BARTON,  
a single man,

Respondent,

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

Respondents,

v.

STATE OF WASHINGTON, Department of Transportation,

Petitioner.

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JARED K. BARTON'S ANSWER TO AMICUS CURIAE BRIEFS  
OF THE WASHINGTON DEFENSE TRIAL LAWYERS  
AND WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

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## I. INTRODUCTION

Both the Washington Defense Trial Lawyers and Washington State Association for Justice Foundation address issues that need not be resolved to reject the State's appeal of the trial court's denial of its motion to vacate and for a new trial. The courts below denied the State's motion to vacate based on extensive findings that the parents of Korrine Linvog always believed they were and in fact remained liable for their daughters' proportionate share of fault, and that no party's trial strategy, evidence or argument to the jury was affected in any way by an agreement that respondents inadvertently failed to disclose. WDTL's discourse on the "corrosive effect" of "Mary Carter" agreements ignores entirely these findings. WSAJ Foundation correctly argues that a covenant to execute only against a defendant's insurance policy is not a "release" under RCW 4.22.070, but its suggestion that the elder Linvogs could be discharged from contribution as a matter of law disregards the record in this case, as nothing in RCW ch. 4.22 prohibits the Linvog parents from agreeing to share their daughter's liability to the State for contribution -- a liability that they not only expressly assumed but that the State actively enforced.

The courts below had no need to analyze in the abstract the legal effect of an agreement to execute against only a defendant's insurance policy on the vicarious liability of the elder Linvogs for their daughter's

primary and unchallenged joint and several liability to Jared Barton under RCW 4.22.070(1) and their liability to the State in contribution under RCW 4.22.060(2), in order to deny the State's motion to vacate. The State did not ask the trial court to eliminate the elder Linvogs' contribution liability for their daughter's fault. The State instead sought to vacate the judgment, arguing that the jury's verdict was tainted by fraud and collusion – a contention that the trial court that had presided over a four week jury trial thoughtfully considered and thoroughly rejected as a matter of fact. This Court need not address the issues raised by either amicus in affirming the decision below.

## **II. ARGUMENT IN RESPONSE TO AMICI**

### **A. The Trial Court Made Extensive Factual Findings In Exercising Its Discretion To Deny The State's Motion To Vacate Judgment On The Jury's Verdict And For A New Trial And In Assessing Sanctions Against Barton and His Counsel.**

The trial court made extensive factual findings explaining why the State was not entitled to the relief that it was seeking – an order vacating the judgment in favor of Barton and granting a new trial on the grounds of misconduct of counsel and fraud. (CP 28-39) The Court of Appeals affirmed, deferring to the trial court's finding that the outcome of this trial and the State's liability would not have changed whether or not there was an agreement to limit the elder Linvogs' personal exposure, whether or not

this agreement was disclosed to the State, and regardless how the court interpreted the Tort Reform Act.

The trial court's findings entirely refute WDTL's Statement of the Case, including its contention that counsel misrepresented to the jury "the true nature of the Defendants' liability." (WDTL Br. 1-2) Instead, those findings establish:

- Before trial, Barton sought and the Linvogs' insurer advanced \$20,000 to Barton in exchange for an agreement not to execute against Korrine Linvog's parents beyond the limits of their insurance. (CP 32-33)
- Korrine Linvog was not a party to any agreement limiting Barton's right to collect or execute on a judgment. (CP 33)
- A stipulation was prepared, but not signed by the Linvogs' counsel. (CP 33, 664)
- Barton's and Linvogs' counsel failed to disclose the payment in supplementing their discovery responses due to oversight and not intentionally. (CP 33)
- The advance payment and agreement did not realign the parties, did not affect their trial strategy, and did not affect Korrine Linvog's testimony. (CP 35-38)
- Disclosure of the agreement to the jury "would likely have been very prejudicial to the State" at trial. (CP 37)
- The Linvog parents were a "non presence at trial," were not on the verdict form, and counsel made no attempt to elicit sympathy for them. (CP 38)
- The jury's "verdict was not contrary to the evidence or surprising." (CP 39)

The Court of Appeals properly relied on these findings in rejecting the State's argument that the trial court erred in denying its motion to

vacate under CR 60(b)(4) and in affirming the trial court's sanctions decision under CR 26(e), contrary to the dire factual scenarios asserted by WDTL in its amicus brief.

While WSAJ Foundation acknowledges the trial court's findings, WSAJ ignores the procedural posture of the case and the relief that the State actually sought in the trial court and on appeal – a new trial on all issues. Rather than seeking a reasonableness determination and offset under RCW 4.22.060 after disclosure of the stipulation, as WSAJ suggests was the proper course, the State chose to enforce, rather than to eliminate, its right of contribution against the elder Linvogs, taking a judgment against them that remains fully enforceable to this day. (CP 1507-08) As the Court of Appeals noted, the State's argument that the elder Linvogs and Barton entered into an agreement to discharge the Linvogs' liability for contribution as a matter of law "is contradicted by the fact that the State successfully sought and obtained such contribution, in the amount of \$92,632.30, plus interest." (Op. 8 n.1)<sup>1</sup>

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<sup>1</sup> WSAJ notes that the State argued that it was forced to seek contribution in order to avoid losing its rights under RCW 4.22.050. (WSAJ Br. 5 n. 5) However, the State could have preserved its right to contribution from the elder Linvogs by filing, and then staying, a claim for contribution without obtaining an enforceable and final judgment from which the State took no appeal. *See* RCW 4.22.050(3) ("action for contribution must be commenced within one year after the judgment becomes final.").

WSAJ also ignores that the elder Linvogs did not seek the benefit of a settlement under RCW 4.22.060(2). Instead, Mr. and Mrs. Linvog continually maintained that they remained liable to the State for contribution to the same extent as their daughter Korrine, the primary tortfeasor, who was not a party to any agreement with Barton. (CP 556; 1/15/10 RP 28, 56)

**B. The Inadvertent Failure To Disclose A Non-Collusive Agreement Is Not Grounds To Vacate A Judgment And Grant A New Trial In The Absence of Prejudice.**

**1. Counsel Acknowledge They Had An Obligation To Disclose The Advance Payment And Stipulation Between Barton And The Elder Linvogs.**

Barton's counsel has repeatedly conceded, and no party disputes, that trial counsel had the obligation to disclose the terms of the \$20,000 advance payment from the Linvogs' insurer and the stipulation to limit the assets available for collection against the elder Linvogs to their liability insurance. (CP 555, 563) This Court need not address amici's argument in favor of imposing a duty of disclosure as a matter of "public policy," as the courts below properly treated the case as one involving the failure to timely update discovery responses under CR 26(e). See *Bryant v. Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 223, 829 P.2d 1099 (1992) (in imposing obligations and sanctions, court should apply the

more specific rule governing the particular conduct at issue, rather than rely on the more general rule or principle).

WSAJ correctly notes that imposing an obligation to disclose the advance payment and stipulation as a matter of public policy is unnecessary to fairly resolve the instant case. (WSAJ Br. 9) Barton agrees with WSAJ that in order to protect the integrity of the adversary system all agreements between any parties (including co-defendants) that impact in any way the nature and amount of a party's liability should be disclosed. (WSAJ Br. 11-12) In particular, agreements between co-defendants relating to allocation of fault, payment of attorney fees, and even the cost of discovery can affect the amount a defendant has to pay, or the parties' true interests. It is thus ironic that WDTL now advocates an absolute "death sentence" for any verdict reached after an agreement between a plaintiff and a defendant that is inadvertently not disclosed given defendants' routine resistance to disclosure of joint defense agreements, even when demanded in discovery and even when these agreements affect their ultimate liability.<sup>2</sup>

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<sup>2</sup> See, e.g., *Gum v. Dudley*, 202 W. Va. 477, 505 S.E.2d 391, 398 (1997) (settlement of contribution and indemnity claims amongst co-defendants "should be promptly disclosed" but affirming denial of new trial in absence of prejudice).

**2. A Court Should Not Vacate A Judgment And Grant A New Trial In The Absence of Prejudice.**

This Court should reject WDTL's unprecedented argument that counsels' failure to disclose the advance payment or agreement to execute only against the elder Linvogs' insurance policy mandates a new trial as a matter of law and in the absence of any collusion, realignment of the parties, or prejudice. Instead, as with any other misconduct, the remedy for the failure to disclose an agreement between parties necessarily depends upon the resulting prejudice, which is a determination properly committed to the trial court that has presided over the litigation.

Misconduct in the absence of prejudice has never been grounds for a new trial. *See Trosper v. Heffner*, 51 Wn.2d 268, 269, 317 P.2d 530 (1957) (trial court abuses its discretion by granting a new trial where alleged improprieties in the trial did not prejudice the complaining party); *State v. Thorgerson*, 172 Wn.2d 438, 442-43, ¶8, 258 P.3d 43 (2011) (requiring defendant to establish "a substantial likelihood that the instances of misconduct affected the jury's verdict") (citations and alterations omitted); *Alcoa v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 539-41, 998 P.2d 856 (2000) (moving party bears burden of demonstrating that misconduct is prejudicial in context of entire record). This Court defers to the trial court's findings that no collusion, and therefore, no

possibility of prejudice, arose in the instant case, and reviews for abuse of discretion the trial court's decision regarding whether misconduct tainted the conduct of the litigation. See *Teter v. Deck*, 174 Wn.2d 207, 222-23, ¶29, 274 P.3d 336 (2012) (Barton Supp Br at 9-11); *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103, 841 P.2d 1300 (1992), *aff'd on other grounds*, 125 Wn.2d 1, 882 P.2d 157 (1994) (WDTL Br. 7).

WDTL's contrary assertion – that a new trial is automatically required when *any* agreement between a plaintiff and a defendant is not disclosed – is not supported by case law in Washington or in any other jurisdiction. Courts require a clear showing of prejudice arising from an agreement between a plaintiff and one of several defendants in deciding whether to vacate a judgment for nondisclosure. See, e.g., *Monti v. Wenkert*, 287 Conn. 101, 947 A.2d 261, 277 (2008) (“the defendant was not prejudiced by the nondisclosure of the agreement so as to warrant a reversal”); *Medical Staffing Network, Inc. v. Connors*, 313 Ga. App. 645, 722 S.E.2d 370, 374 (2012). (“there is nothing in the record to show that Medical Staffing's ignorance of the litigation agreement rendered the trial fundamentally unfair”); *Ryals v. Hall-Lane Moving & Storage Co., Inc.*, 122 N.C. App. 134, 468 S.E.2d 69, 72 (1996) (“We conclude the latter were not prejudiced by ignorance until mid-trial of a settlement agreement”); *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992) (documenting

in detail the prejudice suffered by the non-settling defendant) (WDTL Br. 10 n.9); *Gen. Motors Corp. v. LaHocki*, 286 Md. 714, 410 A.2d 1039, 1045 (1980) (“GM’s assertion that the agreement effected a change in its relationship as a co-defendant with Contee is adequately borne out by the record.”) (WDTL Br. 3, 9).

There is not an irrebuttable presumption of prejudice under CR 60(b)(4). The trial court’s extensive findings that the State was not prejudiced in any respect dispose of WDTL’s arguments.

**3. An Agreement That Does Not Realign The Parties Or Result In Collusion Does Not Prejudice A Co-Defendant.**

The touchstone of prejudice is whether an undisclosed agreement results in collusion or a secret realignment of the parties. As WSAJ points out, not all agreements between opposing parties alter their relationship or undermine the integrity of the adversary process. (WSAJ Br. 25-26) WDTL advances the unremarkable proposition that agreements that realign nominally adverse parties threaten the integrity of the adversary system, and then fails to address the extensive findings that utterly refute WDTL’s factual premise that the advance payment stipulation was akin to a basketball player’s agreement to “deliberately miss shots” or “Olympic athletes throwing a badminton match.” (WDTL Br. 5)

No one “took a dive” for money (or credit) when this case went to trial. As WDTL notes, the “common feature” of the various forms of such “Mary Carter” agreements is that “the settling defendant[’s] . . . exposure is reduced in proportion to any increase in the liability of his codefendants over an agreed amount.” (WDTL Br. 3 (*quoting* John E. Benedict, *It’s A Mistake To Tolerate The Mary Carter Agreement*, 87 Colum. L. Rev. 368, 369-70 (1987))<sup>3</sup> The cases cited by WDTL affirm that an essential element of a Mary Carter agreement is a provision giving the settling defendant a financial interest in the plaintiff’s recovery from a non-settling defendant. *Hoops v. Watermelon City Trucking, Inc.*, 846 F.2d 637, 640

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<sup>3</sup> See, e.g., *Doty v. Bishara*, 123 Idaho 329, 848 P.2d 387, 392 (1992) (although specific provisions vary, an essential element of a Mary Carter is that “the agreeing defendant’s liability for payment is decreased in direct proportion to the increase in the non-settling defendant’s liability for payment”) (*citing* *Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 726 P.2d 706 (1986) (WDTL at 9 n.8), *Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 741 P.2d 124, 131 (1987) (“in all such agreements the settling defendant’s ultimate liability to the plaintiff is dependent, at least in part, on the amount of money which the plaintiff recovers from the nonsettling defendants”); *Charles McArthur Dairies, Inc. v. Morgan*, 449 So.2d 998, 999 (Fla. App. 1984) (agreement was not a Mary Carter because “the settlement was for a straight \$150,000 with no contingencies”); *Elbaor v. Smith*, 845 S.W.2d 240, 247 (Tex. 1992) (“A Mary Carter agreement exists when the settling defendant retains a financial stake in the plaintiff’s recovery *and* remains a party at the trial of the case.”) (emphasis in original); *Holly Springs Realty Group, LLC v. BancorpSouth Bank*, 69 So.3d 19, 26 (Miss. App. 2010) (“The essential feature of the so-called Mary Carter agreement is the repayment of the loan from money recovered from the non-settling codefendants.”), *cert. denied*, 69 So.3d 767 (Miss. 2011); *Ryals v. Hall-Lane Moving & Storage Co., Inc.*, 468 S.E.2d 69, 72 (N.C. App. 1996) (agreement was not a Mary Carter because “there is no contention in the case *sub judice* that the settlement between plaintiff and Jensen and Hall-Lane was not in the fixed, pre-determined amount of \$10,000.”).

(10<sup>th</sup> Cir. 1988) (“the essential element of the typical Mary Carter agreement . . . is missing from the contingency agreement; Leeway had no interest in Hoops’ verdict against WCT.”) (WDTL Br. 10 n.9). Because of the settling defendant’s financial incentive to increase the non-settling defendant’s liability, such an agreement “creates the most unfair prejudice to the non-agreeing defendant and his right to a fair trial.” *Cox v. Kelsey-Hayes Co.*, 594 P.2d 354, 357 (Okla. 1978) (WDTL Br. 10 n.9).

Such collusion affects the integrity of the adversary system and justifies a presumption that nondisclosure results in prejudice to the non-settling co-defendant. Without this liability-shifting element, however, a settling defendant continues to have an interest in the outcome at trial, and no “built-in incentive . . . to increase [the plaintiff]’s damages.” *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St.3d 10, 615 N.E.2d 1022, 1029 (1993) (agreement that did not give the settling defendant a financial interest in the plaintiff’s recovery was not Mary Carter agreement), *overruled on other grounds by Fidelholtz v. Peller*, 81 Ohio St.3d 197, 690 N.E.2d 502 (1998). As the trial court found here, for instance, the Linvogs were adverse to the State on liability but aligned with the State on damages before, during and after trial. (CP 35: “this alignment did not come about because of the agreement.”)

Because not all agreements between adverse parties result in collusion or a realignment of the parties, not all undisclosed agreements prejudice a co-defendant. One example of an agreement that may not realign the parties is a “high-low” agreement, in which the plaintiff and defendant agree to a minimum and maximum recovery depending on the jury’s verdict. In *Monti v. Wenkert*, 287 Conn. 101, 947 A.2d 261 (2008), for instance, a physician agreed with a medical malpractice plaintiff during trial that “the plaintiffs would recover a maximum of \$1 million and a minimum of \$300,000 . . . . In exchange, the plaintiffs relinquished rights to recovery against Wenkert personally . . . .” 947 A.2d at 273. The trial court denied the non-settling defendant’s motion to set aside the verdict and for a new trial following disclosure of the agreement. The Connecticut Supreme Court affirmed, deferring to the trial court’s factual determination that “there is no evidence that the agreement created a more adversarial relationship between the defendant and Wenkert than that which predated the agreement.” 947 A.2d at 277. *Accord, Hodesh v. Korelitz*, 123 Ohio St.3d 72, 914 N.E.2d 186, 191 (2009) (affirming

verdict notwithstanding refusal to disclose terms of high-low agreement between plaintiff and surgeon).<sup>4</sup>

The stipulation for advance payment in this case was similar to a “high-low” agreement because it kept the elder Linvogs fully interested in the outcome of the case, but capped their direct exposure to Barton. The trial court not only rejected the State’s contention that the advance payment stipulation gave the elder Linvogs any financial interest in Barton’s recovery, but expressly found that the parties “did not become secretly realigned,” and did not “then collude to bring about a certain result at trial.” (CP 34) The trial court rejected the State’s argument that the stipulation for advance payment would have been admissible at trial to establish bias, and, in addition found that disclosure to the jury would not have helped the State’s defense even if the trial court had allowed it because it would have put the limits of the Linvogs’ insurance squarely before the jury and generated sympathy for Korrine Linvog and her parents. (CP 37)

The trial court’s analysis comports with the law of Washington that precludes the trier of fact from considering a settlement (or the

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<sup>4</sup> “High-low” agreements are common in medical malpractice litigation because federal law requiring reporting of settlements as well as adverse judgments to the National Practitioner Data Base under 42 U.S.C. § 11131 creates a strong incentive to obtain a defense verdict.

defendant's liability insurance) in the absence of a showing of bias. ER 408, 411. See *Northington v. Sivo*, 102 Wn. App. 545, 549-50, 8 P.3d 1067 (2000) (abuse of discretion to admit settlement agreement in absence of "circumstance in which settlement's content provides a motive for the witness to offer biased testimony"). See also *Diaz v. State of Washington*, \_\_ Wn.2d \_\_, No. 86049-1 \*19 (Sept. 20, 2012) (rejecting argument that "corrosive" effect of evidence of settlement "requires reversal irrespective of the fact that it had no identifiable effect on [the] case.")

In determining the collusive effect of an agreement, courts compare a party's pre- and post-agreement conduct. If that conduct is consistent, then the existence of an agreement cannot "deceive the trier of fact," as WDTL alleges occurred here. (WDTL Br. 5) See, e.g., *Northington*, 102 Wn. App. at 550 (requiring a showing of "clear conflict in a witness's testimony"); *Montgomery v. Clubb*, 907 S.W.2d 174, 176 (Mo. App. 1995) (affirming trial court's refusal to allow cross-examination on alleged Mary Carter because there was "no significant change in [plaintiff]'s testimony at trial from her deposition testimony two years earlier"); *Slusher v. Ospital by Ospital*, 777 P.2d 437, 444 (Utah 1989) (finding no prejudice from refusal to disclose agreement to jury because non-settling defendant "draws to our attention no significant

instance of discrepancy between [plaintiff]’s presettlement deposition testimony and his post-settlement trial testimony”). Here, the trial court found that the State had ample opportunity to point out any inconsistent statements by Korrine Linvog (CP 38), who consistently asserted she was unable to see Barton’s oncoming headlight on the night of the accident, at her deposition taken before the advance payment, and at trial. (CP 860-61, 1006-08; Tr. Ex. 11)

Courts also consider, as did the trial court here, whether the defendants had an incentive to blame each other prior to the agreement. *McCluskey*, 68 Wn. App. at 104-05 (“it would not be unreasonable for experienced trial counsel to seek to minimize the jury’s negative reaction to his client by having the client show remorse, accept some responsibility, but then identify another defendant equally or more responsible but lacking in remorse”) (WDTL Br. 7); *Monti*, 947 A.2d at 277 (“there is no evidence that the agreement created a more adversarial relationship between the defendant and Wenkert than that which predated the agreement”); *Riggle v Allied Chemical Corp.*, 180 W.Va. 561, 378 S.E.2d 282, 287 (1989) (no prejudice from refusal to disclose agreement to jury where “even before the settlement agreement, Allied and appellant were in an adversarial posture”); *Hackman v. Dandamudi*, 733 S.W.2d 452, 457 (Mo.App. E.D. 1986) (no prejudice where “both parties were in a

sense pointing their fingers at each other long before trial”). Here, the trial court found that the Linvogs always had an incentive to blame the State, and always had an incentive to cooperate with the State to minimize Barton’s damages, just as they did at trial. (CP 35)

WDTL’s argument for an irrebutable presumption of prejudice also fails to take into account the undisputed fact that the elder Linvogs and their counsel, along with Barton’s counsel, believed that Mr. and Mrs. Linvog remained personally liable to the State in contribution, regardless of Barton’s promise to refrain from execution beyond the limits of their liability policy. (CP 555, 563) The trial court found no possibility of collusion because it interpreted the agreement that the parties believed they made rather than imposing upon the parties the legal obligations advanced by amici that the parties did not consider in agreeing to an advance payment. (CP 34)<sup>5</sup> Substantial and undisputed evidence supports the trial court’s findings. This Court should affirm denial of the State’s motion to vacate based on the trial court’s findings that the agreement was not collusive and that the State suffered no prejudice.

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<sup>5</sup> The trial court thus found it unnecessary to consider Barton’s argument that the court would have to rescind the agreement if the elder Linvogs and Barton were legally incapable of agreeing that the Linvogs would remain liable to the State in contribution for their daughter’s share of fault. (CP 34)

**C. The Stipulation For An Advance Payment Did Not Defeat Joint and Several Liability And Did Not Discharge The Linvogs' Liability For Contribution.**

**1. The Elder Linvogs Agreed To Assume Their Daughter's Liability For Contribution And The State Chose To Accept The Benefit Of That Agreement.**

No provision of the Tort Reform Act precluded the elder Linvogs from agreeing to be liable to the State in contribution for their daughter's share of damages. Ignoring the elder Linvogs' repeated concession that they continued to be liable to the State in contribution for their daughter's share of fault, WSAJ nonetheless suggests that the stipulation for advance payment released the elder Linvogs from contribution liability to the State as a matter of law under 4.22.060(2). (WSAJ Br. 24 n.21) Mr. and Mrs. Linvog expressly acknowledged their contribution liability not only in the stipulation itself (CP 664), but in their counsel's declaration (CP 555), and in his statements in open court. (1/15 RP 25, 56-57) Even if the elder Linvogs could have claimed that their liability for contribution was discharged as a matter of law under RCW 4.22.060(2), as WSAJ suggests, no public policy prohibited them from waiving that protection. *See Schnall v. AT & T Wireless Services, Inc.*, 171 Wn.2d 260, 266, ¶6, 259 P.3d 129 (2011) ("We interpret contract provisions to render them enforceable whenever possible.")

Further, just as the elder Linvogs could choose to waive any benefits of RCW 4.22.060(2), so could the State. Once the advance payment stipulation came to the State's attention, the State did not ask the trial court to pass upon the reasonableness of the settlement, as WSAJ suggests it had a right to do under RCW 4.22.060(2), and did not seek to modify the judgment by eliminating the elder Linvogs as judgment debtors, as dictated by WDTL's and the State's interpretation of the statute. See *Unigard Ins. Co. v. Mutual of Enumclaw Ins. Co.*, 160 Wn. App. 912, 923, ¶ 20, 250 P.3d 121 (2011) (party may waive right to reasonableness hearing). Instead, the State made an informed choice to enforce a right of contribution against the elder Linvogs pursuant to RCW 4.22.050(1). (CP 1507-08). Given the State's acceptance of the benefits of the agreement as the parties understood it, the Court need not decide whether an agreement limiting the plaintiff's ability to execute against only a defendant's insurance policy eliminates a co-defendant's contribution liability for that co-defendant's relative share of fault under RCW 4.22.060(2) in order to affirm the denial of the State's CR 60 motion.

**2. The Parties' Stipulation For Advance Payment Was Not A Release, And Could Under No Circumstances Eliminate The State's And The Linvogs' Joint And Several Liability Under RCW 4.22.070 Or The Elder Linvogs' Contribution Liability Under RCW 4.22.060.**

WSAJ correctly argues that the stipulation and advance payment did not prevent entry of judgment against the vicariously jointly and severally liable elder Linvogs under RCW 4.22.070(1). (WSAJ Br. 12-19) However, WSAJ's suggestion that Barton's promise to execute only against the elder Linvogs' insurance policy nonetheless released the elder Linvogs from any contribution liability under RCW 4.22.060(2) not only ignores the fact that their liability was entirely derivative of their daughter Korrine's, but also erroneously characterizes the stipulation in this case as a "covenant not to enforce judgment."

This Court need not address the interplay between RCW 4.22.060 and RCW 4.22.070 to hold that the stipulation for advance payment could not, as a matter of law, defeat the State's joint and several liability in this case because Korrine Linvog's primary liability as the driver of the car that injured Barton is unaffected by the agreement. *Vanderpool v. Grange Ins. Assoc.*, 110 Wn.2d 483, 756 P.2d 111 (1998) (release of principal does not release primarily liable agent). The elder Linvogs were liable only for their daughter's fault, and not for any fault of their own. See RCW 4.22.070(1)(a) (retaining joint liability where party is "responsible

for the fault of another” under principal-agent relationship). They were not listed on the verdict form as a potential “entity which caused the claimant’s damages.” RCW 4.22.070(1). Where, as here, the elder Linvogs’ liability under the family car doctrine “is premised on subsection (1)(a) [of RCW 4.22.070] . . . one of two parties acting in concert, or in agency situations, can settle while still being a jointly and severally liable defendant.” *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 296, 840 P.2d 860 (1992).

As WSAJ demonstrates, the plain language of RCW 4.22.070(1) precludes entry of judgment against, and therefore bars the joint and several liability of, only those defendants “who have been released by the claimant.” (WSAJ Br. 10) WSAJ also correctly notes that a release refers to the “complete surrender of a claim.” WSAJ Br. 18, *citing DeNike v. Mowery*, 69 Wn.2d 357, 366, 418 P.2d 1010, *amended*, 422 P.2d 328 (1966). The State’s and WDTL’s contention that the stipulation for advance payment barred entry of judgment against the elder Bartons as a matter of law is not supported by the plain language of RCW 4.22.070(1).

Moreover, the stipulation for advance payment was *not* a “covenant not to enforce judgment” within the meaning of RCW 4.22.060(1) and (2) that released the elder Linvogs from contribution liability, as WSAJ erroneously suggests. Subsection (1) of that statute

requires notice and court approval of “a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant.” RCW 4.22.060(1). Subsection (2) discharges the contribution liability of one who obtains a “release, covenant not to sue, covenant not to enforce judgment or similar agreement.” RCW 4.22.060(2). Should this Court reach this issue, it should hold that a “covenant not to enforce judgment” under RCW 4.22.060(a) refers to the type of agreement that is “similar” to a release and covenant not to sue – one that bars the imposition of liability against a person or entity that is potentially liable on a claim and not an agreement that simply limits a judgment creditor to certain assets of the debtor. See *Mills v. Inter Island Tel. Co.*, 68 Wn.2d 820, 829, 416 P.2d 115 (1966); *Hargreaves v. American Flyers Airline Corp.*, 6 Wn. App. 508, 509-11, 494 P.2d 229 (1972) (“covenant not to sue” releases only the party to the covenant, and not all other persons or entities potentially liable on the claim.)

The elder Linvogs’ agreement to pay an advance to Barton in return for an agreement from Barton not to “execute on any judgment . . . in excess of the liability insurance coverage available,” (CP 664), does not constitute a “covenant not to enforce judgment or similar agreement” within the plain meaning of RCW 4.22.060. WSAJ fails to distinguish between a “covenant not to enforce judgment” under the statute and a

“covenant not to execute.”<sup>6</sup> A “covenant not to execute” is simply an agreement to seek recovery only from a specific asset.” *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002), quoting *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992).

By contrast, like the other types of agreements listed in RCW 4.22.060(1) and (2), a “covenant not to enforce judgment” effectively discharges a defendant from having to pay anything to the plaintiff, and thus is tantamount to a full settlement and release. (Op. 8-9) See *Maguire v. Teuber*, 120 Wn. App. 393, 397-98, 85 P.3d 939 (2004) (parties “intended to constitute a complete resolution of all claims”), *rev. denied*, 152 Wn.2d 1026; *Romero v. West Valley School Dist.*, 123 Wn. App. 385, 392, 98 P.3d 96 (2004) (agreement “effectively released Ms. Romero”), *rev. denied*, 154 Wn.2d 1010. But where, as here, an agreement only limits the assets available for execution, it is not comparable to an agreement in which a party surrenders a claim, and is not a “similar agreement” to a “release, covenant not to sue, or covenant not to enforce judgment” under RCW 4.22.060. See *Dean v. McFarland*, 81 Wn.2d 215,

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<sup>6</sup> See WSAJ Br. 18 (citing *Mills*, 68 Wn.2d at 829 to equate “covenant not to execute” with “covenant not to sue.”)

221-22, 500 P.2d 1244 (1972) (general term in statute must be defined by reference to the specific terms that precede it).

WSAJ also ignores the title of RCW 4.22.060: “Effect of settlement agreement.” The common understanding of a “settlement is an agreement in which the claimant’s recovery is contractually fixed and no longer dependent upon the outcome of a lawsuit,” i.e., a release. *See Restatement (Third) of Torts: Apportionment Liability* § 24(a) (2000) (“A settlement is a legally enforceable agreement in which a claimant agrees not to seek recovery outside the agreement for specified injuries or claims from some or all of the persons who might be liable for those injuries or claims.”). Thus, “a release, covenant not to sue, covenant not to enforce judgment, or similar agreement” precludes both entry of an enforceable judgment and discharges a defendant from liability for contribution.

Whether an agreement is intended to operate as a release is a question of contractual intent, and should be determined in the same manner as other questions of contract interpretation. *See McGuire v. Bates*, 169 Wn.2d 185, 188, 234 P.3d 205 (2010) (“This court interprets settlement agreements in the same way it interprets other contracts.”). The Court of Appeals correctly held that a court must look beyond the label given to an agreement to determine whether the parties intended a complete resolution of a pending claim against a tortfeasor, distinguishing

*Maguire v. Teuber*, 120 Wn. App. 393, 85 P.3d 939 (2004) on the ground that the parties in that case intended “to make a full settlement.” (Op. 9)<sup>7</sup>

Amici also fail to address the practical consequences of subjecting any agreement that affects the amount of money a party may ultimately pay on a claim to the reasonableness hearing requirements of RCW 4.22.060(1). WSAJ’s interpretation of the statute would logically require that all advance payments, regardless of the terms and conditions under which they are made by a defendant, be not only disclosed but also be subjected to reasonableness determinations that result in an offset and that preclude liability for contribution. The same reasoning would apply to any agreements among defendants to indemnify, allocate fault, or share in the costs of defending litigation.

WSAJ’s suggestion that *any* agreement limiting execution to certain assets requires an offset under RCW 4.22.060 would also pose difficult problems of administration. For instance, how would a court assess the reasonable settlement value of a “high-low” agreement for

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<sup>7</sup> *Accord, Romero v. West Valley School Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004) (following *Maguire*); *Bunting v. State*, 87 Wn. App. 647, 649, 653, 943 P.2d 347 (1997) (“release discharging [driver and his liability insurer] from all claims arising from the accident” could not be rescinded where plaintiffs did not return liability insurer’s payment and insurer was not party to rescission agreement); *see also Shelby v. Keck*, 85 Wn.2d 911, 918, 541 P.2d 365 (1975) (defendant properly dismissed upon paying insurance limits under agreement that left “no justiciable issue to be resolved between these parties.”).

purposes of giving a non-settling defendant an offset on the amount of the judgment? What about an agreement in which defendant agrees to an advance in exchange for an agreement that plaintiff will make his or her best efforts to first satisfy a judgment from a co-defendant before executing against the defendant making an advance payment? Here, given the Linvogs' express recognition that they would remain liable in contribution for their daughter's share of the judgment, subjecting the stipulation to the requirements of RCW 4.22.060(1) would not further the statute's purpose of avoiding sweet-heart deals and collusion.

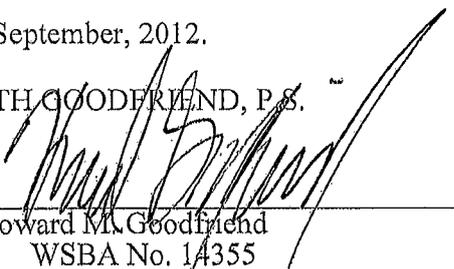
Rather than addressing such complicated issues of statutory interpretation in dicta, this Court should await a case that squarely presents these issues. As all of these parties, including the State, accepted that the elder Linvogs remained liable in contribution for their daughter's share of fault, this case presents no issue of the application of RCW 4.22.060 to a settling defendant's contribution liability.

### **III. CONCLUSION**

This Court should affirm the denial of the State's motion for relief under CR 60(b)(4) and for a new trial on liability and damages.

DATED this 21<sup>st</sup> day of September, 2012.

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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 September 21, 2012, I arranged for service of the foregoing Jared K. Barton's Answer to Amicus Curiae Briefs of the Washington State Association for Justice Foundation, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 21st day of September, 2012.



Victoria K. Isaksen

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Attached for filing in pdf format is the Motion to File Overlength Answer to Amici Briefs and Jared K. Barton's Answer to Amicus Curiae Briefs of the Washington Defense Trial Lawyers and Washington State Association for Justice Foundation, in *Barton v. State of Washington*, Cause No. 86924-3. The attorney filing this letter is Howard Goodfriend, WSBA No. 14355, email address [howard@washingtonappeals.com](mailto:howard@washingtonappeals.com).

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