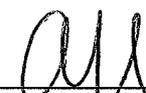


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Court of Appeals No. 65673-2-I

  
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SUPREME COURT  
STATE OF WASHINGTON

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JARED K. BARTON,

Appellant,

v.

STATE OF WASHINGTON, DEPT. OF TRANSPORTATION, ET AL,

Respondents.

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RESPONDENT LINVOGS' ANSWER TO PETITION FOR REVIEW

Brent W. Beecher  
HACKETT, BEECHER & HART  
1601 – 5th Avenue, Suite 2200  
Seattle, WA 98101-1651  
Phone: (206) 624-2200  
Fax: (206) 624-1767  
bbeecher@hackettbeecher.com

ORIGINAL

## TABLE OF CONTENTS

A.	Identity of Respondents	1
B.	Summary of the Argument	1
C.	Respondents Linvogs' Statement of the Case	2
D.	Argument Why Review Should be Denied	7
1.	The Appellate Opinion Supports, Not Diminishes, Public Policy	7
2.	The Trial Court's Denial of the State's Motion To Vacate Was Discretionary, and Not In Conflict with Case Law	9
a.	The Denial of the State's Motion to Vacate and for New Trial was Discretionary, and the Trial Court did not Abuse Its Discretion	10
b.	The Trial Court did Not Abuse Its Discretion In Finding that the State Suffered No Prejudice	12
i.	The State was not Prejudiced in its Defense at Trial	12
ii.	The State was not Prejudiced by Operation of the Advance	15
c.	The Court of Appeals Decision is Not in Conflict With Decisions of this Court, Other Decisions of the Court of Appeals, or Public Policy	17
E.	Conclusion	20

## STATEMENT OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Barton v. State, Dept. of Transport.</i> , Case No. 61015-5-I, 2008, WL 4838687 (Wn. App. Div. 1, 2008).	2
<i>Boguch v. Landover Corp.</i> , 153 Wn. App. 595, 619, 224 P.3d 795 (2009).	11
<i>Bunting v. State</i> , 87 Wn. App. 647, 943 P.2d, 347, 348 (1997).	19
<i>Burnet v. Spokane Ambulance</i> 131 Wn.2d, 484, 494, 933 P.2d 1036 (1997).	11
<i>Dalton v. State</i> , 130 Wn. App. 653, 668, 124 P.3d 305 (2005).	11
<i>Kottler v. State</i> , 136 Wn.2d 437, 963 P.2d 834 (1998).	19
<i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 596, 794 P.2d 526 (1990).	11
<i>Maguire v. Teuber</i> , 120 Wn. App. 393, 85 P.3d 939 (2004).	15, 18
<i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wn.2d 674, 684, 41 P.3d 1175 (2002).	11
<i>Romero v. West Valley Sch. Dist.</i> , 123 Wn. App. 385, 98 P.3d 96 (2004).	15, 18
<i>Shelby v. Keck</i> , 85 Wn.2d 911, 918, 541 P.2d, 365 (1975).	19

<u>Cases</u>	<u>Page</u>
<i>Stanley v. Cole</i> , 157 Wn. App. 873, 879, 239 P.3d 611 (2010).	10
<i>State v. Schaffer</i> , 120 Wn.2d 616, 619, 845 P.2d 281 (1993).	14
<u>Other Authorities</u>	
RCW 4.22	9
RCW 4.22.060	16, 18
RCW 4.92.090	9

### **A. Identity of Respondents**

The Linvogs are these Answering Respondents, opposing review.

### **B. Summary of the Argument**

The State frames its Petition for Review as a chance to “prevent subversion” of the Tort Reform Act (“TRA”). The State repeatedly points out that this statute represents Public Policy, preventing deep pocket defendants from being forced to pay for liability expressly apportioned to their shallow pocket co-defendants. This, however, is not a case where the State can complain that it is shouldering someone else’s liability; the State will not pay one dollar more than was apportioned *to it* by the jury. Joint versus several liability is not the State’s real complaint. The State’s *real* complaint is that it is unhappy with the jury’s determination that *it* bore 95% of the responsibility for the plaintiff’s grievous injuries. Although the State’s superficial objection is based on whether the Judgment was joint or several, what it does not tell the Court is that it moved for, and was granted, a full contribution judgment. Now the State wants this Court to accept review, to correct the alleged “error” in *granting* its own motion for that contribution judgment. And the State’s proposed remedy is *not* to re-enter the judgment as several rather than joint; it is to vacate the jury’s finding that the State bore the overwhelming majority of blame. The Court should bear in mind that the State would be in exactly the same place,

financially, if the judgment were several rather than joint. The relief requested by the State is elegant proof that its goal is not to honor public policy or precedent, but to re-try the case with the hope that a new jury will be receptive of its defense arguments – arguments the trial court judge characterized as “weak and speculative.” CP 11.

It is deeply unfortunate that through inadvertent non-disclosure of the advance stipulation (“the Advance”), the Linvogs and Mr. Barton opened the door even a crack to these hollow arguments. However, the trial court thoroughly considered the State’s contentions, and determined that while failure to supplement discovery responses and comply with Tort Reform disclosure requirements are serious transgressions, the consequences under the particular circumstances of this case were not<sup>1</sup>. As will be discussed, the trial court determined that the State had suffered *no* prejudice, and declined the State’s invitation to vacate the results of the 16-day jury trial. That discretionary ruling is congruent with precedent and policy, and this Court should deny the State’s Petition for Review.

### **C. Respondents Linvog’s Statement of the Case**

The highway on which Korrine was driving on the night of the accident came to a “T” with another. *Barton v. State, Dept. of Transp.*,

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<sup>1</sup> A copy of the trial courts findings of fact and conclusions of law is attached as an Appendix to this Answer.

Case No. 61015-5-I, 2008 WL 4838687 (Wn. App. Div. 1, 2008). Preparing to turn left, she saw the stop sign, and stopped at the stop bar painted on the road by the State. Seeing no approaching traffic, she pulled forward across the lane of perpendicular traffic, and Jared Barton's motorcycle collided with the side of her car. *Id.* His injuries led to this lawsuit against Korrine, her vicariously liable parents, and the State Department of Transportation for negligent highway design. *Id.*

The legal defenses available to Korrine are not mysterious. Korrine consistently testified, both at her deposition and at trial, that she had not seen Mr. Barton coming. CP 928-941, 7-15. Under a "reasonable care" standard, either she should have seen him, or not. The defense to this case was, from the very beginning to the very end, that despite her careful observations, Korrine's view of Mr. Barton was blocked by something she could not see at night, and had no reason to suspect was there: a line of trees along the highway. CP 7-15.

Korrine could have pursued a legal defense that Mr. Barton had somehow been negligent as he approached the intersection, and therefore ought be assigned some percentage of the blame, and some corresponding percentage of liability. Aside from the fact that the evidence to support this defense was weak (CP 11), the TRA itself was a strong financial disincentive to implicating Mr. Barton. If Mr. Barton were free of fault,

then any liability that was ultimately allocated to the Linvogs would be joint and several with the State. The severity of Mr. Barton's damages suggested a large verdict from the outset, and joint and several liability would at least give him the option of collecting it from the State. While this would leave the State with contribution rights, the State might make a business decision to forgo collection, and the contribution judgment could at least delay collection against Korrine and her parents. Thus from the beginning, the Linvog's attorney, Mr. Spencer, was *most* concerned about avoiding the consequences of *several* liability. CP 555. Korrine's joining in Mr. Barton's position that he was free of fault, and joining the State to argue for lower damages, was the most natural alignment of these parties based on the facts of the accident and the consequences of the TRA.

Korrine gave her deposition in October 2006, at which time her testimony was consistent with the testimony she would later give at trial. CP 928-941. The State sent discovery requests to both the Linvogs and Barton, which inquired into whether they had reached any settlement or any other deals between themselves. Barton and the Linvogs, along with their attorneys, truthfully responded that there were no such deals.

In early 2007, Mr. Brindley approached Mr. Spencer because Barton was in need of funds for urgent medical expenses related to the accident. CP 555. Mr. Brindley and Mr. Spencer agreed that the Linvogs

would advance Barton the sum of \$20,000, to be credited against any future judgment. *Id.* In exchange, Mr. Spencer, still worried about the consequences of a several judgment if the State were successful in putting blame on Barton, requested that Barton agree not to execute on any judgment against the Linvog Parents in excess of their \$100,000 policy limits. *Id.* Barton agreed, and the parties exchanged a stipulation to that effect. *Id.* The trial court would later enter findings of fact, unchallenged on appeal, that neither Mr. Brindley nor Mr. Spencer believed this agreement would have any impact on the State's right to a contribution judgment against the Linvog Parents (CP 9); the Advance *specifically stated that it was not a release.* CP 849-850. In any event, the Advance did not even touch on Korrine, who was in exactly the same position after it occurred as she had been beforehand. *Id.* As the trial court later found, the Advance had *no impact* on the alignment of the parties at trial (CP 11) (*a fact which the State has now expressly acknowledged*<sup>2</sup>).

The genesis of the State's complaint is that the Advance was not produced prior to trial<sup>3</sup>. The Linvogs do not deny that CR 26(e)(4) required them to supplement the State's discovery requests, previously

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<sup>2</sup> State's Reply to Linvogs' Appellate Response Brief at 8.

<sup>3</sup> During the course of working out the payment to satisfy the judgment, both Mr. Brindley and Mr. Spencer voluntarily explained to the State that the Linvog parents had advanced \$20,000, and shared a copy of the Advance Stipulation with the State. CP 848.

truthfully answered negatively, to reflect the new fact of the Advance. The trial court later entered *unchallenged* findings of fact that this unfortunate failure to supplement was inadvertent, on the part of both Mr. Spencer and Mr. Brindley. CP 9. Without knowledge of the Advance, the State proceeded to present its defenses at trial. The Linvog Parents were present in the courtroom, but they never testified, and did not sit at counsel table. CP 14. Both Mr. Brindley and Mr. Spencer referred to them in passing during opening statements, simply explaining that the reason for their presence was that to the extent Korrine was liable, they were “on the hook” because of the family car doctrine – the trial court’s unchallenged findings recount that both (ultimately *correctly*) believed this to be true when they said it to the jury, because the Advance had no effect on the State’s contribution rights. CP 8-9. Thus *all parties* at the trial conducted it with the common understanding that Korrine and her parents were “on the hook, all the way” for the percent that her alleged negligence contributed to Mr. Barton’s injuries. *Id.* As noted in trial court’s unchallenged findings, the jury’s verdict allocating none of the blame to Barton, 5 percent to Korrine and 95 percent to the State, reflected the well-proven fact that Korrine could not see Barton because of the trees. CP 15.

The State’s Petition is based on what it argues was the “actual legal effect” of the Advance – namely eliminating joint liability with the Linvog

Parents, and with it, the State's right to a contribution judgment. The extraordinary hole in the State's narrative is that after it had seen a copy of the Advance, it moved for and was granted *exactly the contribution judgment it now complains was legally prohibited*. CP Sup. Design., sub no. 321. The State has an *un-appealed judgment* against the Linvog parents for \$80,000 *in excess of* the covenant not to execute<sup>4</sup>. It is remarkable that the State now asks this Court to rule that it was not entitled to a judgment *it sought and obtained* from the trial court<sup>5</sup>.

As will be shown below, the unpublished court of appeals opinion in this case is no threat to TRA. The trial court specifically demurred with respect to whether the Advance was properly cognized as a full release of the Linvog Parents because there was no prejudice to the State either way; either the Advance legally left the Linvog Parents jointly liable, or alternatively, was void for mutual mistake, impossibility, or violation of public policy. The court of appeals endorsed this approach in affirming.

#### **D. Argument why Review should be Denied.**

1. *The appellate opinion supports, not diminishes, public policy.*

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<sup>4</sup> This reflects a total liability of \$160,000 – 5% of the \$3.6 million total.

<sup>5</sup> The State's Petition recites, "[T]he court of appeals further erred in concluding that the covenant not to execute that limited the parents' liability to \$100,000 did not discharge their contribution liability to the State." *Petition at 15*. Whether the Advance discharged the Linvog Parent's contribution liability was not even an issue before the court of appeals; the State did not appeal the contribution judgment.

The State's policy argument as to why this Court should accept review is based on the undisputed proposition that the TRA embodies the policy that deep pocket defendants should only be subjected to joint liability with shallow pocket defendants under certain circumstances. The State complains that the unpublished court of appeals decision:

undermines the TRA of 1986 by allowing joint liability to be imposed against a deep pocket defendant (the State), for the percentage of fault apportioned to shallow pocket defendants who do not actually have joint liability . . . [and] allows parties in a lawsuit to impose joint liability on a deep pocket defendant for the percentage of fault apportioned to a shallow pocket defendant who is not actually responsible to pay even the percentage of fault apportioned by the jury.

Petition at 2, 16.

Contrary to the State's assertions, there is no public policy ground in this case on which to vacate the judgment. Here, the jury found that the State, not Korrine Linvog, was the real instrument of harm by a ratio of 95 to 5. There is nothing unfair about requiring the State to pay its 95%, especially where, as here, the Linvogs already paid \$100,000, and the State has a collectable<sup>6</sup> judgment against them for the entire remaining \$80,000 of their 5%, plus interest. The result in this case is that the State will pay exactly the amount the jury intended it to. Far from *contrary* to public policy, this result *is* the announced public policy of this State:

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<sup>6</sup> The State informed the court that there will be no problem collecting this judgment, because the Linvogs own over \$4 million in real property (Appellant's Reply to Linvogs at 7, CP 291), against which the State's judgment is a lien.

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090

The State's argument that this Court should grant its Petition and vacate the judgment does not promote the policy of the TRA; it frustrates the policy that the State should pay for the damage it negligently causes.

2. *The trial court's denial of the State's Motion to Vacate was discretionary, and not in conflict with case law.*

Our Civil Rules specifically contemplate the circumstances under which a judgment entered by the Superior Court should be vacated, as well as the remedies for discovery transgressions. In neither context is there a *per se* rule that a judgment should be vacated or a new trial ordered. Just the opposite. Case law is ample on the application of both of these remedies, and reveals that neither ought to be administered mechanically, but discretely, case-by-case according to the facts. It is the State, not Respondents, that seeks a New Rule, that in this particular context, there is a *per se* mandate that judgment based on a jury verdict be vacated. RCW 4.22 does not require this result. The Court Rules do not require this result. There is no need for a New Rule because conventional rules adequately protect the litigants in this, and future, cases.

Applying these rules in the well-established manner, the trial court

found that, under the idiosyncratic facts of this case, the inadvertent failure to share the Advance with the State did *not* subvert or undermine the TRA, and did *not* prejudice the State's presentation of its defense. The unpublished court of appeals opinion affirming does not present a threat to the TRA nor the public policy on which it is based; it simply confirms the unquestionable proposition that there are some missteps by parties in litigation which should not automatically invalidate the result reached by the jury. Showing such deference to the judge in the first instance, who presided over the trial of this case, is consonant with both precedent and policy, and does not call for review by this Court.

The remainder of this Answer will address three issues. First, that the relevant standard of review is abuse of discretion. Second, that the trial court did not abuse its discretion. Third, that this discretionary ruling by the trial court, affirmed by unpublished opinion of the court of appeals, does not merit review pursuant to RAP 13.4(b)(1), (2) or (4).

*a. The denial of the State's Motion to Vacate and for New Trial was Discretionary, and the trial court did not Abuse its Discretion.*

The trial court denied the State's motion to vacate the Judgment under CR 60 and request for a new trial as a sanction for failure to supplement discovery requests. Under either theory, the decision of the trial court is reviewed for abuse of discretion. *Stanley v. Cole*, 157 Wn.

App. 873, 879, 239 P.3d 611 (2010) (*denial of CR 60(b) Motion to Vacate reviewed for abuse of discretion*), *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002) (*Trial court given wide latitude to fashion remedy for discovery violations*). A trial court properly exercises its discretion so long as its decision is not manifestly unreasonable or based upon untenable grounds. *Boguch v Landover Corp.*, 153 Wn. App. 595, 619, 224 P.3d 795 (2009).

Our courts have formulated the proper inquiry for the trial court when ruling on a Motion to Vacate under CR 60(b)(4); it is this inquiry that provides the context in which it exercises its discretion. For a trial court to vacate a judgment, “the fraudulent conduct or misrepresentation must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990) (emphasis in original). *See also Dalton v. State*, 130 Wn.App. 653, 668, 124 P.3d 305 (2005) (“[I]t is important to remember that relief from judgment under CR 60(b)(4) requires the movant to show misconduct *that prevented it from fully and fairly presenting its case.*”)

Similarly, in order for the trial court to impose the harsh sanction of a new trial for a discovery violation, the court should consider whether the violation was “willful or deliberate and substantially prejudiced the

opponent's ability to prepare for trial." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). In either event, the trial court must exercise its broad discretion to determine whether the alleged wrong prejudiced the complaining party. *Id.*

*b. The trial court did not abuse its discretion in finding that the State suffered no prejudice.*

Prejudice to the State is the heart of this case. There are only two kinds of prejudice the State could conceivably claim. The first is that not knowing about the Advance prejudiced the State's defense at trial. The second is that the legal effect of the Advance was to cut off a post-verdict right of the State to a contribution judgment. The comprehensive findings and conclusions entered by the trial court, as well as the court of appeals decision, address the former, concluding that the State was not prejudiced at trial as a factual matter. The State's Petition for Review addresses *only* the latter, complaining that the Advance legally obliterated the Linvog Parents' joint liability, and with it, the State's right to a contribution judgment. Each kind of alleged prejudice will be separately addressed.

*i. The State was not prejudiced in its defense at trial.*

In its Petition, the State has wisely abandoned its position that the oversight in failing to produce the Advance prevented the free and adequate presentation of its defenses. However, because the State

obliquely mentions that it raised this issue at the trial court (Petition at 8), this Court ought to be informed that the argument was baseless and rejected. The trial judge considered and squarely rejected the State's two arguments in support its "prejudice" position; first that two fleetingly brief references to the Linvog Parents as being "on the hook" in opening statements and the "family car" jury instruction elicited unfair ("false") juror sympathy because the Linvog Parents had allegedly been released; and second, that not knowing about the Advance deprived the State of its right to cross-examine Korrine to show a "re-aligned" bias to "set the State up." The trial court made the following findings regarding "false sympathy" for the Linvog Parents:

There is nothing to support this argument except speculation. No one made any statement or argument to the jury suggesting they do this. Such argument was forbidden by a motion in limine. The jury was given an instruction to not be swayed by sympathy and there is no evidence they ignored that. 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. If mere speculation a jury based its decision on a desire to not financially ruin defendants were enough to vacate a verdict, no verdict could ever stand. . .

This kind of potential prejudice the State argues existed in this case does not arise from the existence of the pretrial agreement. It is the potential for jury misconduct that exists in every case like this where there is a deep pocket defendant and individual defendants. That possibility existed in this case because there was a government entity and individuals as defendants.

With respect to the alleged “re-alignment” caused by the Advance, and cross-examination, the trial court found as follows:

Prejudice can occur because [a secret] agreement can cause a secret realignment of the parties, which may result in some circumstance at trial which then deny the non-agreeing party a fair trial. While the agreement in this case was secret, it did not secretly realign the parties.

Defendants Linvog made their intentions to blame the State and not blame Plaintiff known to the State’s lawyer long before trial by to join with the State to proffer experts on the State’s liability theories. The Linvogs’ lawyer stated at trial that they were not aligned with the State on liability, only on damages. The State’s lawyer . . . knew they were going to try and pin all the blame on the State. This alignment of the parties was out in the open and clear throughout the trial to the lawyers, this sitting judge, and to the jurors. There was no secret realignment.

Furthermore, this alignment did not come about because of the agreement. It existed because it was the best plausible supportable theory Linvogs could put forward to avoid liability. Ms. Linvog had the stop sign. Thus she was liable unless she could blame something or someone else. . . [T]he alignment was not secret so did not affect the fairness of the trial.

Furthermore, having personally viewed this trial the verdict was not contrary to the evidence or surprising. . . The theories raised were not likely to result in an equal split of liability between the co-defendants. Either Ms. Linvog’s view was obstructed or it was not. Clearly the jury thought it was.

CP 10-11, 12, 15.

The State does not seek review of these discretionary findings, and they are verities on appeal.<sup>7</sup> The State makes no argument that these findings were an abuse of discretion.

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<sup>7</sup> *State v. Schaffer*, 120 Wn.2d 616, 619, 845 P.2d 281(1993).

ii. *The State was not prejudiced by operation of the Advance.*

The State argues the Advance should be characterized as a “release” under RCW 4.22.060; accordingly, the State posits, the Linvog parents were not parties against whom judgment could be entered, and were thus legally insulated from joint and contributory liability. Thus the State contends the court of appeals erred by affirming a judgment jointly, rather than separately, against the Linvogs and the State. As noted by both the trial court and the court of appeals, however, the precise legally correct characterization of the Advance as a “release,” or not, is ultimately immaterial to this case. In their appellate briefs, both Barton and the Linvogs asserted a number of reasons to conclude that it was *not* a release, harmonizing this result with existing case law, including *Maguire*<sup>8</sup> and *Romero*<sup>9</sup>. Rather than re-arguing this point, however, the most salient fact is that, regardless of its theoretically “proper” place in the legal hierarchy of partial settlements, it was, in this case, *empirically not* a release because it did not function as one; it did not prevent joint liability, and it did not inhibit the State’s right to a contribution judgment.

There are a number of ways to deconstruct the process that led to this result. For example, the State rhetorically characterizes it as follows:

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<sup>8</sup> *Maguire v. Teuber*, 120 Wn. App. 393, 85 P.3d 939(2004).

<sup>9</sup> *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004).

The court of appeals failed to afford the covenant not to execute the operative legal effect mandated by RCW 4.22.060 and .070. Instead, it held that the covenant not to execute didn't negate joint and contribution liability because the plaintiff and the two defendants didn't want it to.

*Petition at 2.*

This straw-argument mischaracterizes the holding, suggesting that parties can simply opt-out of Tort Reform by private agreement. *Of course* neither court came to this conclusion. The trial court's findings and conclusions were that *either* a) the fact that the Advance indisputably left the Linvog Parents exposed to at least an additional \$80,000 judgment and was not intended to release them *at all* meant that it should not properly be considered a "release" under RCW 4.22.060; *or* b) the Advance was *void in its entirety* because 1) the parties did not intend for it to be a release, destroying the meeting of the minds, 2) because it was legally impossible, or 3) because it violated the public policy of Tort Reform. The court of appeals did not endorse the kind of cherry picking posited by the State, where the parties could enjoy the benefit of the covenant without terminating joint and contribution liability; the court of appeals *treated* the Advance as entirely void *ab initio*.

This approach was both correct and an elegant solution to an inelegant predicament. It neutralized the threat to Tort Reform identified by the State by eliminating any advantage Barton or the Linvog Parents

may have taken from the Advance's covenant. It preserved the result of 16-day jury trial in which *all* participants correctly believed the Linvog Parents were exposed to unlimited liability. It rendered the "secrecy" of the Advance harmless, because it became a secret not worthy of repeating. And the State's contribution judgment *itself* was functionally its own sanction, exactly mirroring and negating whatever benefit the Linvog Parents might have expected from the Advance. The State suffered no prejudice from the Advance. At the end of the day, the State will pay not one dollar more than the jury allocated to it, the same result as if the Linvog Parents' liability were properly understood as several.

*c. The court of appeals decision is not in conflict with decisions of this Court, other decisions of the court of appeals, or policy.*

The State identifies a number of cases, both from courts of appeal and this Court, allegedly in conflict with the decision at bar. Each will be briefly addressed below, but there are several *universal* distinctions. First, not one of them addresses whether the nature of a particular agreement in its factual context so infected the results of a trial that those results can no longer be considered justice. *That* is the issue in this case under CR 60(b) and the discovery rules. Second, not one of them involved a "settlement" with a non-testifying party, whose only liability was uncontestedly co-extensive with that of the unprotected accused tortfeasor. Third, every one

of them involved an *intentionally complete release* – by “covenant not to execute” or other means. Here, the Advance left the Linvog Parents exposed to liability to Barton, and (actual) contribution liability. Finally, no case involves a defendant taking a contribution judgment and later attempting to convince the appellate courts it had no right to do so. A discussion of each of these cases follows.

*Maguire v. Tauber*<sup>10</sup>: This case involved a complete covenant not to execute against the primary tortfeasors, and the court determined that this was intended to be a full “release” under RCW 4.22.060. The court ruled that this eliminated joint liability. The court focused on whether the terms reflected “a settlement in which the settling defendants have *no further liability*.” *Id.* at 397 (*emphasis added*).

*Romero v. West Valley School Dist*<sup>11</sup>. In *Romero*, the settling defendant *remained a party at trial*, and the only issue was whether he was jointly liable. The court held that liability was separate only, and the District was only liable for the 75% of the damages attributed to it by the jury. That is *exactly* the functional result achieved by the trial court in the case at bar<sup>12</sup>.

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<sup>10</sup> 120 Wn. App. 393.

<sup>11</sup> 123 Wn. App. 385.

<sup>12</sup> In *Romero*, the issue of whether the jury was even entitled to know about the settlement agreement is not addressed in the published section of the opinion.

*Kottler v. State*<sup>13</sup>. *Kottler* stands for the proposition that a defendant that settles prior to judgment is not entitled to seek contribution for what would otherwise be a joint liability with some other defendant. *Kottler* would perhaps provide some guidance if the question before the Court was whether the State was entitled to a contribution judgment. But here, the State has that judgment, which is not part of this appeal. Whether the State *should* have moved for contribution in light of *Kottler* is a distinct (academic) question. As it bears on *this* case, *Kottler's* primary importance is its recitation of the public policy embodied by the TRA: “Under proportionate liability a negligent party is liable for his own proportionate share of fault and no more.” *Id. at 445*. That result in this case negates the State’s claim that Review should be granted because of public policy concerns, RAP 13.4(b)(4).

*Bunting v. State*<sup>14</sup>. The issue in *Bunting* was whether settling defendants could be allowed to repudiate their pre-trial, inter-family, settlement, and thus force the State to pay more than its apportioned share of the judgment. No one here is arguing that the State should end up making a net payment of any more than the jury awarded.

*Shelby v. Keck*<sup>15</sup>. *Shelby* is a pre-Tort Reform case that contains

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<sup>13</sup> 136 Wn.2d 437, 963 P.2d 834 (1998).

<sup>14</sup> 87 Wn. App. 647, 943 P.2d 347, 348 (1997).

<sup>15</sup> 85 Wn.2d 911, 918, 541 P.2d 365 (1975).

nothing more than a passing reference to the trial court's decision to dismiss a settling defendant (the defendant joined in the motion to dismiss). Nothing about this case is in conflict with *Shelby*.

#### **E. Conclusion**

Because the court of appeals decision to affirm the trial court's discretionary ruling that State had not been prejudiced, under the facts of this case, does not conflict with other rulings from this court of appeals or this Court, the State's Petition should be denied under RAP 13.4(1) and (2). Similarly, because the result of this case honors the public policy embodied in the TRA by effectively leaving the parties with separate liability, as proportionately determined by the jury, the State's Petition should be denied under RAP 13.4(4).

Respectfully submitted this 30th day of January 2012.

HACKETT, BEECHER & HART

/s/\*

Brent W. Beecher, WSBA #31095

Attorneys for Respondents Linvog

\*Original Signature on File

CERTIFICATE OF SERVICE

I, Nancy Boyd, declare that on the date noted below, I caused to be delivered via ABC legal messengers, Respondent Linvogs' *ANSWER IN OPPOSITION TO PETITION FOR REVIEW* to:

Michael Nicefaro  
Office of the Attorney General of WA Torts Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188

With copy *via U.S. Post* to:

Michael P. Lynch  
Assistant Attorney General  
7141 Cleanwater Drive SW  
Olympia, WA 98504

David Benninger and Ralph J. Brindley  
Luvera, Barnett, Brindley, Beninger & Cunningham  
701 Fifth Avenue, Suite 6700  
Seattle, WA 98104-7106

Howard M. Goodfriend  
Edwards Sieh Smith & Goodfriend, P.S.  
1109 First Avenue, Suite 500  
Seattle, WA 98101-2988

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed in Seattle, Washington this 30th day of January 2012.

/s/\*

Nancy Boyd

\*Original Signature on File

# Appendix

Superior Court of the State of Washington  
for Snohomish County

ANITA L. FARRIS  
JUDGE

SNOHOMISH COUNTY COURTHOUSE  
3000 ROCKEFELLER, MS #502  
EVERETT, WASHINGTON 98201-4046

(425) 388-3449  
(425) 388-3421

March 14, 2010

Michael P. Lynch  
Michael A. Nicefaro, Jr.  
Assistant Attorney Generals  
Torts Division  
7147 Clearwater Drive SW  
PO Box 40126  
Olympia, WA 98504-0126

Ralph J. Brindley  
Luvera, Barnett, Brindley, Beninger & Cunningham  
6700 Columbia Center  
701 Fifth Avenue  
Seattle, WA 98104

William Spencer  
Murray, Dunham & Murray  
200 West Thomas Street, Ste 350  
PO Box 9844  
Seattle, WA 98109-0844

Re: Jared K. Barton v. State of Washington et. al., Snohomish Cause No. 05-2-10687-3

Dear Counsel:

Please consider this letter my memorandum decision on the State of Washington's motion to vacate and for a new trial in the above cause. I apologize for the delay to research whether there is any case authority on the affect of a similar undisclosed pretrial agreement. While there are many cases nationally ruling on undisclosed agreements, we have been unable to locate any involving an agreement exactly like the one involved in this case. There are, however, certain generalities that emerge from looking at the case law. See generally, "Validity and effect of 'Mary Carter' or similar agreement setting maximum liability of one tortfeasor": 22 ALR 5<sup>th</sup> 483 (1994).

This matter came before the court post trial by motion. Neither side requested an evidentiary hearing and all parties chose to present evidence by way of declaration or affidavit. As the

Received

MAY 04 2010

Office of Luvera Barnett Brindley  
Beninger & Cunningham

motion involves facts that occurred outside of trial, I find the facts and make the conclusions of law set forth below.

This case arose out of an automobile accident. Defendant Korrine Linvog was driving her parents' automobile. Ms. Linvog entered into an intersection and crashed into the Plaintiff, Jared Barton, who had been driving straight down the highway on his motorcycle. Mr. Barton had the right of way as he had no stop sign and Ms Linvog had a stop sign.

The Plaintiff sued Ms. Linvog and her parents under the family car doctrine and also sued the State of Washington on a theory of improper highway maintenance or design. The essence of that theory as it was later developed at trial was that the State had painted the stop line for the intersection in an improper location creating a trap at night. Plaintiff alleged if a car stopped at that line the trunks of a row of trees would line up to block the view of cars traveling toward the intersection. Furthermore, the way the trees lined up at that location and the lighting at night were such that a driver could not easily tell the view was obstructed.

Sometime prior to March of 2007, the Plaintiff's lawyer and the Linvogs' lawyer had oral conversations wherein Plaintiff's lawyer advised his general practice was to not try to collect a civil judgment against individual defendants like the Linvogs over and above the amount they were covered by insurance. The State has stated as a fact that this was an oral agreement or contract. There is no evidence to support that conclusion. Both counsel to the conversation indicate this was simply a statement of how counsel generally operated. There is no evidence Plaintiff's counsel made a binding promise to not collect against the Linvogs at this time. There is no evidence Plaintiff received any consideration for an agreement at this time. The State's claim there was an oral agreement at this time I find not true.

This conclusion is supported by the fact that Linvogs' lawyer and Plaintiff's lawyer later sought an actual agreement. Plaintiff's lawyer sought an agreement because his client needed money for medical care. Defendants' lawyer sought to get some limit on liability because he knew the prior discussions were not binding. In March of 2007 the Linvogs' attorney and Plaintiff's attorney reached an agreement on behalf of their clients. Specifically the Plaintiff's attorney refused to agree to anything that would release Korrine Linvog's liability and thereby prevent joint and several liability. The agreement was that if the Linvog parent 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. It was the understanding and intent of both parties that the agreement would not affect or prevent Plaintiff from executing on any judgment amount exceeding \$100,000 from defendant Korrine Linvog. It was also their mutual intent that the agreement would not prevent the Plaintiff from seeking full payment of any judgment against the State including the Linvogs' portion of any joint and several judgment even if that exceeded \$100,000. It was also their understanding and intent that the agreement did not prevent the State from seeking reimbursement from the parents Linvog for any percentage of the Linvogs' liability, even if that exceeded \$100,000. Plaintiff's counsel and Linvogs' counsel believed the agreement was valid and enforceable on these terms.

Defense counsel placed the agreement in writing and sent an unsigned copy of that with a \$20,000 check from Linvogs' insurance company to Plaintiff's counsel. Plaintiff's counsel signed the agreement and cashed the check. A true and accurate copy of the agreement is attached as Appendix 22 to the State's motion.

At the time this agreement was reached, both Plaintiff and Defendants Linvog had previously received and answered in the negative discovery requests which specifically inquired whether there were any payments made or covenants not to execute. Plaintiff's counsel and Defendants' counsel had a duty under the court rules to supplement their answers, but due to oversight failed to do so.

Pursuant to RCW 4.22.060 both counsel were also required to give the State notice of the agreement and payment five days prior, and the State had a right to object. Both counsel were aware of the statutory requirement and failed to comply with it.

The matter thereafter proceeded to trial. The jury returned a verdict of \$3.6 million with 95% liability attributed to the State and 5% liability attributed to Korrine Linvog. A directed verdict was granted for Plaintiff on the State's claim that Plaintiff was negligent. The State did not become aware of the pretrial agreement until after trial and after the appeal of the case was completed.

Much of the State's analysis in its motion hinges on this court rewriting the terms of the agreement on the basis that some of the terms are not legally possible. Based on *Maguire v. Tueber*, 120 Wn. App. 393, 85 P.3d 939 (2004), the State argues the agreement operated as a full release of the Linvogs even though the parties to the agreement clearly did not intend that. *Maguire* holds that where the parties intend an agreement to not enforce to be a full and complete

settlement of all issues it is a full release. That court was very careful to emphasize more than once and in italics that this was due to the intent in that case to make a full settlement. That was not the intent in this case and this case is thus distinguishable. Mcquire effectuated the true intent and effect of the parties' agreement. It does not stand for the proposition a court can completely rewrite a contract in terms contrary to the intent of the parties. If the terms the parties agreed on truly are legally impossible, then the contract is rescinded due to mutual mistake. On the other hand, if the terms are legally possible the contract is interpreted and defined by what the parties intended. In judging whether this agreement had any prejudicial effect, it must be judged, if at all, according to its actual agreed terms, not some version rewritten by the court or the State.

Plaintiff argues that because Linvogs' attorney never signed the written document the agreement to not execute was never finalized and thus is not a reason to vacate. The lack of signature would not likely render this agreement invalid under Washington law given Linvogs' attorney drafted the document, the check was cashed resulting in performance, and both sides agree on the terms of the agreement. However, it is possible it is invalid or unenforceable, at least as against the State, for a number of reasons. It may be against public policy, violate RCW 4.22.060, be legally impossible and based on mutual mistake. I make no final determination on the validity of the agreement as counsel have not addressed all of these issues and because it is not necessary for me to do so on this motion to vacate.

The potential evil in so called "Mary Carter" agreements is that the parties to the agreement become secretly realigned and then collude to bring about a certain result at trial. Thus, for this motion what is important is not whether the agreement ultimately is found by a court to be valid and on what terms. What is relevant is whether the parties to the agreement believed it was valid at the time of trial and what terms they acted on believing them valid. I find that the parties to the agreement believed at the time of trial that the agreement was valid according to the terms they agreed on. That is why Plaintiff's attorney accepted the \$20,000 and Linvogs' attorney did not ask to have the money returned.

Secret "Mary Carter" type agreements generally only result in reversal if they prejudice a party. Prejudice can occur because the agreement can cause a secret realignment of the parties which may result in some circumstance at trial which then deny the non agreeing party a fair trial. While this agreement in this case was secret, it did not secretly realign the parties.

Defendants Linvog's alignment with the Plaintiff on liability was known to the State's lawyer well before trial. Defendants Linvog made their intentions to blame the State and not blame Plaintiff known to the State's lawyer long before trial by refusing to join with the State to proffer experts on the State's liability theories. The Linvogs' lawyer bluntly stated at trial that they were not aligned with the State on liability, only on damages. The State's lawyer expressed no surprise verbally or nonverbally as to Linvogs' alignment with Plaintiff. He knew they were going to try and pin all the blame on the State. This alignment of the parties was out in the open and clear throughout the trial to the lawyers, this sitting judge, and to the jurors. There was no secret realignment.

Furthermore, this alignment did not come about because of the agreement. It existed because it was the best plausible supportable theory Linvogs could put forward to avoid liability. Ms. Linvog had the stop sign. Thus she was liable unless she could blame something or someone else. It is not unusual or unexpected for codefendants to point fingers at each other. As between pointing fingers at the State government versus the sympathetic Plaintiff, the Linvogs' trial strategy of blaming the State was not surprising. The claim the State was at fault was strong and supported with facts, while the claim the Plaintiff was at fault was weak and speculative.

There was a directed verdict against the State on its contributory negligence claim against the Plaintiff because it was based entirely on speculation as to whether the Plaintiff's headlight met legal requirements. Furthermore, this contributory negligence claim rested on the testimony of two civilian witnesses that were not helpful to Ms. Linvog. Those witnesses were driving down the highway from the opposite direction as Plaintiff. They said the motorcycle light seemed dim. However, these witnesses were viewing the motorcycle from much further away than Ms. Linvog. The rather measured observation they testified about suggests they observed the motorcycle for an appreciable period from quite a distance away before the accident. In context, this testimony was actually very damning and not helpful to Ms. Linvog as it proved without a doubt the motorcycle was observable from her much closer location absent an obstruction. Given this testimony put on by the State, joining Plaintiff's tree blockage argument was her only way to explain why she did not see the motorcycle. Furthermore, had Linvogs attempted to join in the State's contributory dim light theory, that may well have been perceived by the jury as inconsistent with the theory the view was blocked. Experienced trial counsel understand the benefit of arguing one strong consistent theory to a jury rather than throwing up

alternate weak theories that can weaken a case and the client's credibility. In short, Linvogs had real trial strategy reasons not to join in the States' contributory negligence claim.

In contrast, the Plaintiff's claim the State was at fault was well supported by strong physical facts. These facts showed if a car stopped at the line painted by the State it would put the driver in a position where a row of trees' trunks would line up just right forming an invisible black wall blocking the view to the left. Because the obstruction was not due to leaves and bushes and did not exist except from a specific spot, it would not necessarily be known to someone who had driven the road before or noticeable at night. If a driver had stopped elsewhere before the intersection, the trees would not line up and the driver could see between the trunks. In addition, there was evidence the State had previously placed the stop line where it was supposed to be and no one from the State could explain how or why it got moved other than through oversight. In choosing trial strategy, all of this would have been known to Linvogs' experienced trial lawyer through discovery.

Blaming the State also created little risk for the Linvogs. There was little likelihood they would have to pay the State's percentage of a joint and several judgment. There was some possibility the State would end up paying their portion which might at least delay when they might have to pay. In short, I find that Linvogs' aligned with Plaintiff and not defendant on liability because it was their best trial strategy.

Furthermore, had Linvogs' attorney not believed blaming the State was the best strategy, the agreement did not prevent him from arguing other theories. While the State in its brief seems to insinuate the agreement required the Linvogs to take a position at trial, there is no such language in the written agreement and no testimony that that was a requirement. If anything, the agreement arguably gave Linvogs a motive to argue Plaintiff was negligent. If Plaintiff was found negligent there was no possibility the Linvog parents would have to pay anything above \$100,000. This again belies the claim trial strategy was driven by the pretrial agreement.

The agreement did not realign the parties in this case. Linvogs aligned with Plaintiff blaming the State because of the facts in the case. More importantly, regardless of the reasons, the alignment was not secret so did not affect the fairness of the trial.

The classic characteristic of true "Mary Carter" agreements is that they secretly make what one party receives contingent on a certain outcome produced at trial. Significantly, the agreement in this case lacks this defining characteristic of a "Mary Carter" agreement. The Linvog parents

received their benefit of the bargain that Plaintiff would not execute against them personally regardless of what they argued at trial or what the verdict was. They were free under this agreement to argue Plaintiff was 100% at fault if they wished. The covenant not to execute was enforceable even if no liability was found against the State.

The State argues it was prejudiced because it did not get an opportunity to explore the agreement as a bias issue with Ms. Linvog. While sometimes agreements between parties may be relevant on the issue of bias, that is not always the case. The State does not exactly elaborate how it could have inquired under the facts of this agreement and this case in a manner that would have been effective or relevant to probe bias. Had the State inquired into the agreement, the other parties would have been able to delve into the specifics of the agreement to show no bias. They would have been able to bring out that Ms. Linvog would still be individually liable for any amount of any judgment against her. She could be held personally liable 100% for any joint and several liability including the State's portion. Her parents were still liable to the Plaintiff directly for up to \$100,000 and ultimately liable for an unlimited amount through having to reimburse the State for any percentage of a verdict against Ms. Linvog. The jury would be informed that the Linvog parents' liability insurance was \$100,000 and that if a verdict against their daughter came in for more they would have to reimburse the State for that amount out of their own funds. The jury would be informed that the only way the Linvog parents' liability was truly limited was if they successfully blamed the Plaintiff and he was found partly responsible, which could only make Linvogs not blaming the Plaintiff seem more credible.

I am not holding what, if any inquiry into the agreement, would have been admissible. However, I am finding that even if inquiry were allowed it would not have been helpful to the State to prove bias. Instead it would have likely been prejudicial to the State by placing the limits of Linvogs' insurance before the jury and making it very clear they could still be liable for a verdict above that amount.

The State's suggestion this agreement created bias because it left Linvogs no longer in an adversarial position with the Plaintiff would not be born out by the specifics of the agreement on cross examination. It also erroneously assumes that \$100,000 of the insurance company money is just throw away that is not sufficient for counsel to really defend. The fact it was offered in settlement does not mean that if there is no settlement insurance counsel will not attempt to vigorously defend it.

The State also argues that Korrine Linvog changed her testimony because of the agreement and the State was deprived the opportunity to show that. If Korrine Linvog changed her testimony, the State's lawyer had full opportunity to impeach her with her prior deposition and statements. Her testimony was all over the map. However, if she changed her testimony to say she did not look left then that was consistent with the State not being liable as then the cause of the accident was she just didn't look. If she changed her testimony to say she did look left, that is changing her testimony in a way to blame the other defendant for the accident. This is something co-defendants have a motive to do with or without any pretrial agreement. To the extent she had a motive to lie, it wasn't because of anything in the agreement, it was the garden variety motive to place blame on the other defendant to take blame away from herself. This kind of motive to lie was well known to the cross examining State's attorney at the time of trial. He had full opportunity to explore it.

Finally, the State argues that it was prejudiced because the jury might have felt sorry for the Linvog parents. The State argues the jury rendered a higher verdict against the deep pocket State so as to not put the individual defendants in financial ruin.

There is nothing to support this argument except speculation. No one made any statement or argument to the jury suggesting they do this. Such argument was forbidden by a motion in limine. The jury was given an instruction to not be swayed by sympathy and there is no evidence they ignored that. 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. If mere speculation a jury based its decision on a desire to not financially ruin defendants were enough to vacate a verdict, no verdict could ever stand.

While one lawyer did state consistent with the family car doctrine that the parents were liable if Korrine were liable, that was true. Liability up to \$100,000 is still liability against them even if they have insurance coverage. The State's lawyer could not object and say, they aren't liable it is their insurance company. They were still also liable through having to reimburse the State for any and all portions of their percentage on a joint and several judgment above \$100,000. They were still potentially on the hook all the way.

This kind of potential prejudice the State argues existed in this case does not arise from the existence of the pretrial agreement. It is the potential for jury misconduct that exists in every case

like this where there is a deep pocket defendant and individual defendants. That possibility existed in this case because there was a government entity and individuals as defendants.

While it is true the jury allocated a large percentage of liability to the State, if the State felt that was based on inappropriate sympathy or jury misconduct, or that the court should have modified the verdict as not supported by the evidence, those are issues that could have and therefore had to be raised on direct appeal.

Furthermore, having 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 Ms. Linvog's view was obstructed or it was not. Clearly the jury thought it was.

The State's motions to vacate the judgment and for sanctions are denied. As a memorandum decision is not an order, you must prepare a final order for signature consistent herewith. For convenience, if you wish you may attach and incorporate this memorandum decision. If you cannot reach agreement on the form of the order, please contact my law clerk at 425-388-3449 for a presentation date.

Sincerely,



Anita L. Farris

Superior Court Judge

Cc: Court File

## OFFICE RECEPTIONIST, CLERK

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**To:** Brent Beecher  
**Subject:** RE: Barton v. State Department of Transportation, et al, Cause No. 86924-3

Rec. 1-30-12

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**Sent:** Monday, January 30, 2012 4:47 PM  
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On Jan 30, 2012, at 4:44 PM, Brent Beecher wrote:

Hackett Beecher & Hart  
1601 5th Ave., Suite 2200  
Seattle, WA 98101-1651  
(206) 624-2200 main tel  
(206) 787-1828 direct dial  
(206) 624-1767 fax  
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Brent

Hackett Beecher & Hart  
1601 5th Ave., Suite 2200  
Seattle, WA 98101-1651  
(206) 624-2200 main tel

(206) 787-1828 direct dial  
(206) 624-1767 fax  
[www.hackettbeecher.com](http://www.hackettbeecher.com)

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**Sent:** Monday, January 30, 2012 4:34 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Barton v. State Department of Transportation, et al, Cause No. 86924-3

Dear Clerk,

Attached for filing is Respondent Linvogs' Answer in Opposition to Petition for Review which includes a Certificate of Service.

Supreme Ct. No. 86924-3

Barton v. State Dept. of Transportation, et al.

Thank you.

Brent Beecher

Hackett Beecher & Hart  
1601 5th Ave., Suite 2200  
Seattle, WA 98101-1651  
(206) 624-2200 main tel  
(206) 787-1828 direct dial  
(206) 624-1767 fax  
[www.hackettbeecher.com](http://www.hackettbeecher.com)

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