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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JARED K. BARTON, a single man,

Plaintiff/Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Defendant/Petitioner.

and

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

Defendants/Respondents.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation or Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the disclosure of pretrial partial settlement agreements, and the proper interpretation and application of Ch. 4.22 RCW.¹

II. INTRODUCTION AND STATEMENT OF THE CASE

This review arises out of a personal injury action by Jared K. Barton (Barton) against Korrine C. Linvog (Linvog), her parents Thomas and Madonna Linvog (the Linvog parents) and the State of Washington, Department of Transportation (State).² The case presents the Court with the opportunity to determine whether pretrial partial settlement agreements involving covenants not to execute preclude modified joint and several

¹ Plaintiff/Respondent Jared K. Barton's legal representatives include the law firm of Luvera, Barnett, Brindley, Beninger & Cunningham of Seattle, WA. David M. Beninger is a principal in this firm, and one of the lawyers representing Barton before this Court. Although Mr. Beninger is a member of the WSAJ Foundation Amicus Committee, neither he nor any member of his firm participated in the determination of the Committee to seek amicus curiae status in this case, nor in the preparation of this amicus curiae brief.

² Linvog and the Linvog parents are collectively referred to as "Linvogs."

liability under RCW 4.22.070(1)(b) for a settling defendant's proportionate share of fault.

The facts are drawn from the Court of Appeals opinion and the parties' briefing. See Barton v. State Dep't of Transp., 2011 WL 5175599 (Wn.App., Oct. 24, 2011), *review granted*, 174 Wn.2d 1008 (2012); State Br. at 3-14; Barton Br. at 1-2, 3-19; Linvogs Br. at 1-11; State Reply Br. to Barton Br. at 1-13; State Reply Br. to Linvogs Br. at 1-7; State Pet. for Rev. at 1-3, 4-10; Barton Ans. to Pet. for Rev. at 1-2, 3-9; Linvogs Ans. to Pet. for Rev. at 2-7; State Supp. Br. at 1-2, 3-8, Appendix 1 & Appendix 3³; Barton Supp. Br. at 1-3, 4-8; Linvogs Supp. Br. at 1-5.

For purposes of this amicus curiae brief, the following facts are relevant: Barton was severely injured when his motorcycle collided with a vehicle operated by Linvog, and owned by the Linvog parents. Barton brought this negligence action, contending that Linvog failed to yield the right of way, that the Linvog parents are vicariously liable under the family car doctrine, and that the State is liable for negligent highway design or maintenance.

Prior to trial, Barton and Linvogs entered into the Pretrial Stipulation. See Appendix. Under this agreement, the Linvogs' insurer paid \$20,000 to Barton, as an "advance payment against any future

³ State Supp. Br. Appendix 1 includes a copy of the "STIPULATION OF PARTIES REGARDING ADVANCED PAYMENT" between Barton and Linvogs, hereafter referred to as "Pretrial Stipulation." Appendix 3 is a copy of the superior court's March 14, 2010 letter to counsel constituting its memorandum decision on the State's motion to vacate judgment and for sanctions, hereafter referred to as "Memorandum Decision." Copies of both these documents are provided in the Appendix to this brief.

settlement or verdict" against the Linvogs. The agreement is not conditioned upon obtaining any such future settlement or verdict, and it does not address whether the payment has to be repaid under any circumstances. The parties agreed that the payment would be offset against any judgment or settlement against Linvogs. In exchange for the payment, Barton agreed that he would not "execute on any judgment he obtains against Defendants Thomas and Madonna Linvog in excess of the [\$100,000] liability insurance coverage" available to them. Pretrial Stipulation at 2. The covenant not to execute does not apply to Linvog. The agreement recites that "the advance payment does not represent a settlement of any claims Plaintiff Jared Barton has brought in this matter against Defendants." *Id.*

Neither Barton nor Linvogs disclosed the Pretrial Stipulation to the State before trial, and it is conceded by them that the existence of the agreement should have been revealed before trial in supplementation of answers to discovery requests submitted by the State.

The case proceeded to trial against all defendants. The State's claim that Barton was contributorily negligent was dismissed as a matter of law before the case was submitted to the jury. The jury returned a verdict for Barton for \$3.6 million, finding the State 95% at fault and Linvog 5% at fault.⁴ A judgment was entered against the State and

⁴ The Linvog parents' participation at trial was limited, and they were not listed on the jury verdict form as defendants. *See Barton, supra* at *2; Linvog Supp. Br. at 3. The jury was told in opening statements by counsel for both Barton and Linvogs that the Linvog parents were legally responsible for any negligence on the part of their daughter, and the

Linvogs imposing joint and several liability pursuant to RCW 4.22.070(1)(b). Thereafter, the State unsuccessfully appealed the jury verdict, particularly the dismissal of the State's contributory negligence claim against Barton. See Barton, supra at *1; Barton Ans. to Pet. for Rev. at 7.

During post-appeal exchanges between the parties about payment of the judgment, the State became aware of the Pretrial Stipulation and brought a CR 60(b) motion before the trial court seeking vacation of the judgment and a new trial, and imposition of sanctions. The State argued that the failure of Barton and Linvogs to disclose the agreement was essentially fraudulent and prejudiced the State's rights. Specifically, the State contended that these parties were secretly realigned and that, had the agreement been disclosed, the legal effect of the advance and covenant not to execute would have been dismissal of the Linvog parents as parties defendant, thereby eliminating undue jury sympathy for the parents' that arguably influenced the allocation of fault. The State further asserted that the nondisclosure deprived it of the opportunity to cross-examine Linvog at trial to demonstrate that her testimony was improperly influenced by her parents' diminished liability exposure as a result of the agreement.

Throughout the CR 60(b) proceedings, Barton and Linvogs took the position that they never intended the Pretrial Stipulation to extinguish any contribution right the State might have against the Linvog parents,

jury was given a pattern instruction at the close of the case regarding vicarious liability under the family car doctrine. See Barton, supra at *2; State Supp. Br. at 5.

while the State contended any such right did not survive the agreement because the Linvog parents were effectively "released" by operation of law. Barton and Linvogs further argued that the State was not actually prejudiced by their inadvertent failure to timely disclose the agreement.

The superior court denied the State's motion for vacation of judgment and new trial, although it imposed sanctions on Barton's counsel in relation to the award of certain post-judgment interest. See Barton, supra at *7; Barton Supp. Br. at 7-8; but see State Br. at 45 & n.27. The court concluded that Barton and Linvogs' failure to disclose was inadvertent, and that the State failed to prove it was actually prejudiced by the nondisclosure. See Memorandum Decision (pp. 7-9). In reaching its decision, the court seems to have concluded that the Pretrial Stipulation did not extinguish the State's contribution right against the Linvog parents. See id. (pp. 2-4).

As a consequence of the trial court's determination, the State paid the judgment. The State also expressly sought and obtained a judgment for contribution against the Linvogs for the amount it had paid on the judgment based on Linvogs' proportion of fault, less an offset for the Linvog parents' insurance proceeds.⁵

The State appealed the trial court's CR 60(b) determination, and Division I affirmed. The court concluded the trial court did not abuse its

⁵ The State contends that it was necessary to protect its contribution right in this manner in light of the trial court's determination that such right existed, and because of the one-year statute of limitations for enforcing contribution rights. See State Reply Br. to Barton Br. at 13.

discretion in any respect, and upheld the trial court determination that the State was not prejudiced as a result of nondisclosure of the Pretrial Stipulation. See Barton, *supra* at *1, 4-7.

In the course of review, the Court of Appeals agreed with the trial court determination that it was not necessary to decide whether the Pretrial Stipulation was unenforceable because the parties assumed the agreement preserved contribution rights, and the agreement contemplated the Linvog parents would remain parties defendant. The trial court reasoned that, however these issues were resolved, the outcome in this case would have been the same. See Barton, *supra* at *5.⁶

The State petitioned this Court for review, urging the trial court abused its discretion, and also posing two pointed legal questions:

1. When there is a covenant not to execute that limits the liability of some defendants to pay to the plaintiff no more than \$100,000, are those defendants jointly liable with other defendants to pay the entire amount of a jury's \$3.6 million verdict?
2. RCW 4.22.060(2) mandates that a covenant not to execute negates contribution liability. Can a covenant not to execute be written in a way so that it does not negate contribution liability?

State Pet. for Rev. at 3-4. This Court granted review.

III. ISSUES PRESENTED

1. Whether pretrial agreements bearing on liability and/or damages between some but not all parties to a tort action must be disclosed to the court and nonparticipating parties, regardless of whether a formal discovery request about any such agreement has been made?

⁶ The Court of Appeals nevertheless states "[w]e reject the State's assertion that the agreement somehow operated as a release and hold that it did not sever Linvog's parents' joint and several liability." Barton, *supra* at *5.

2. Whether all pretrial settlements, including covenants not to execute, are deemed "releases" for purposes of RCW 4.22.070(1), thereby preventing a settling defendant from remaining in the case and being included in determining any modified joint and several liability under RCW 4.22.070(1)(b)?

IV. SUMMARY OF ARGUMENT

Re: Disclosure of Partial Settlements and Related Agreements

In tort litigation involving multiple defendants, pretrial settlements subject to RCW 4.22.060, including covenants not to execute, must be disclosed to the trial court and nonparticipating parties. Similarly, other pretrial agreements between parties that arguably impact their liability or ostensible alignment also must be disclosed as a matter of public policy, in order to preserve the integrity of the adversary process and pure administration of justice. These duties to disclose are not dependent upon a discovery request seeking this information.

Re: Covenants Not To Execute And RCW 4.22.070

Under the plain language of RCW 4.22.060 and RCW 4.22.070, a plaintiff may effect a partial settlement based upon a covenant not to execute which serves to keep the settling defendant in the litigation, thereby preserving the potential for modified joint and several liability pursuant to RCW 4.22.070(1)(b). When this occurs, the nonsettling defendant subject to modified joint and several liability may not seek contribution against the settling defendant, but is entitled to an offset as determined under RCW 4.22.060(2). This reading of RCW 4.22.060-.070 is neither inconsistent with the intent of the Legislature, nor violative of public policy. To the extent Maguire v. Teuber, 120 Wn.App. 393, 85 P.3d

939, *review denied*, 152 Wn.2d 1026 (2004), and Romero v. W. Valley Sch. Dist., 123 Wn.App. 385, 98 P.3d 96 (2004), *review denied*, 154 Wn.2d 1010 (2005), hold otherwise, they must be disapproved.

V. ARGUMENT

Introduction

The argument below primarily focuses upon proper interpretation and application of RCW 4.22.060 and RCW 4.22.070, and the interplay between these statutes when there is a pretrial partial settlement in a multi-defendant context. This question is largely addressed in the abstract, although there is some discussion of certain features of the Pretrial Stipulation in this case.

There are numerous references in the briefing to so-called "Mary Carter" settlement agreements, and the controversy regarding their effect and validity. See e.g. State Br. at 29-30; Barton Br. at 34-38; Linvog Br. at 15-19; State Supp. Br. at 18; Barton Supp. Br. at 15-17; Linvog Supp. Br. at 10. The Foundation does not consider the Pretrial Stipulation to be a Mary Carter agreement because a key element of such agreements is missing here, i.e., that "the settling defendant retains a financial stake in the plaintiff's recovery." J. Michael Philips, Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation, 69 Wash. L. Rev., 255, 256 (1994); see also John E. Benedict, It's a Mistake to Tolerate the Mary Carter Agreement, 87 Colum. L. Rev. 368, 369-70 (1987); Romero, 123 Wn.App. at 389 (describing Mary Carter agreements

as providing opportunity for recoupment or extinguishment of settlement payment depending on outcome with nonsettling defendant). Because this case does not require the Court to resolve the complex issues surrounding these agreements, these issues are not briefed here.

Before examining the intricacies of Ch. 4.22 RCW, the Foundation finds it necessary to comment on the extent to which pretrial agreements either effecting partial settlements or impacting the ostensible alignment of the parties must be timely disclosed to the trial court and nonparticipating parties.

A.) Pretrial Agreements Effecting Partial Settlements Or Impacting The Liability Or Ostensible Alignment Of Parties Must Be Timely Disclosed To The Trial Court And Nonparticipating Parties As A Matter Of Course.

All parties to this appeal agree that the Pretrial Stipulation between Barton and the Linvogs should have been timely disclosed, because this information was called for in discovery requests submitted by the State. See Barton, supra at *3. This recognition is wholly consistent with "the letter, spirit and purpose of the discovery rules," and is dispositive here. Washington State Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 344, 858 P.2d 1054 (1993). However, given how infrequently this type of issue comes before it, the Court should seize this occasion to confirm that such disclosure is also required by Washington law and public policy, not just because a party happened to ask for the information in discovery. Although any remarks by the Court would be dicta, they would be dicta in the best sense of the word.

Unquestionably, RCW 4.22.060(1) requires parties involved in partial settlements based upon a "release, covenant not to sue, covenant not to enforce judgment, or similar agreement" to give timely notice of the agreement to the court and all parties.⁷ This notice requires the settling parties to prove the reasonableness of the settlement, subject to court approval. See RCW 4.22.060(1). Under the processes established by this statute, the court serves as a fail-safe against so-called "sweetheart deals." See generally Glover v. Tacoma General Hosp., 98 Wn.2d 708, 711-18, 658 P.2d 1230 (1983); Cornelius J. Peck, Reading Tea Leaves: The Future of Negotiations for Tort Claimants Free From Fault, 15 U. Puget Sound L. Rev. 335, 337 (1992); Stewart A. Estes, The Short Happy Life of Litigation Between Tortfeasors: Contribution, Indemnification and Subrogation After Washington's Tort Reform Acts, 21 Seattle U.L. Rev. 69, 84-86 (1997).

The scope of RCW 4.22.060 is, nonetheless, limited. For example, it does not appear to cover an "advance" made by a defendant against a future settlement or verdict. On one hand, such advances are to be encouraged in the law because of their salutary effect. Cf. Jensen v. Beaird, 40 Wn.App. 1, 7-12, 696 P.2d 612 (recognizing salutary effect of loan agreements between a defendant and plaintiff; common law claim), *review denied*, 103 Wn.2d 1038 (1985). On the other hand, this type of arrangement may arguably result in a subtle realignment of the parties'

⁷ The text of the current version of RCW 4.22.060 is reproduced in the Appendix to this brief. As explained infra n.14, a covenant not to execute should be viewed as a "similar agreement" under RCW 4.22.060(1).

interests, to the disadvantage of other parties in the action. Absent notice of the advance, a nonparticipating defendant loses the opportunity to challenge the parties involved in the agreement for bias, for example, by cross-examination before the jury. Cf. McCluskey v. Handorff-Sherman, 68 Wn.App. 96, 103-04, 841 P.2d 1300 (1992) (discussing dangers of undisclosed agreements involving behind-the-scenes collaboration between seeming adversaries, and tolerance of some courts for such agreements when disclosed and subject to safeguards for jury evaluation of resulting bias or distortion), *aff'd on other grounds*, 125 Wn.2d 1, 882 P.2d 157 (1994); see also State Pet. for Rev. at 19 n.13 (urging recognition of common law duty to disclose covenant-type agreements).

Ultimately, it is within this Court's power to recognize a "self-evident policy principle" when the proper functioning of the adversary process is at stake. Robert F. Brachtenbach, Public Policy in Judicial Decisions, 21 Gonz. L. Rev. 1, 14 (1985/86). To this end, the Court should declare that, as a matter of public policy, pretrial agreements between parties effectuating partial settlements or arguably impacting parties' liability or ostensible alignment must be disclosed in order to protect the integrity of the adversary process and pure administration of justice. Cf. Wright v. Corbin, 190 Wash. 260, 266-69, 67 P.2d 868 (1937) (striking

down on public policy grounds arrangement by which expert witness fees would be doubled contingent upon the outcome of the case).⁸

B.) Under The Plain Language Of RCW 4.22.070(1)(b) A Covenant Not To Execute Preserves Modified Joint And Several Liability For The Settling Defendant's Proportionate Share Of Fault, Because It Differs From A Release And Allows Judgment To Be Entered Against The Defendant.

This is the first time the Court will address a case involving a covenant not to execute since the 1986 Tort Reform Act (TRA) was promulgated. See Laws of 1986, ch. 305. Relying on the Court of Appeals' opinions in Maguire and Romero, supra, and secondary authorities, the State argues a covenant not to execute is the equivalent of a release for purposes of determining modified joint and several liability under RCW 4.22.070(1)(b). Before responding directly to the State's arguments in § C, infra, it is necessary to place the issues presented in the larger context of "tort reform" generally, and explain the Foundation's view on how the current statutory scheme should be interpreted.

Historically, under Washington common law, contributory negligence was a complete defense to a negligence claim, multiple tortfeasors were jointly and severally liable, and there was no contribution among tortfeasors. See Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 633 n.1, 244 P.3d 924 (2010) (re: contributory negligence, now comparative fault under RCW 4.22.005); Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 234-39, 588 P.2d 1308 (1978) (re:

⁸ Application of this public policy should not be limited to agreements between plaintiffs and defendants, as the potential for mischief may also be present in undisclosed agreements between co-plaintiffs or co-defendants.

joint and several liability and contribution).⁹ Furthermore, a tort victim could not enter into a settlement that *released* one tortfeasor without releasing all other tortfeasors by operation of law. See J.E. Pinkham Lumber Co. v. Woodland State Bank, 156 Wash. 117, 123-24, 286 Pac. 95 (1930); see also Mills v. Inter Island Tel. Co., 68 Wn.2d 820, 827-32 n.2, 416 P.2d 115 (1966) (noting criticism of rule and modern hesitancy to apply it).

Before the advent of legislative tort reform, the use of covenants not to sue developed to ameliorate the harsh effects of this rule and to encourage settlements. See Mills, 68 Wn.2d at 827 n.2, 828. A covenant not to sue does not release a nonsettling tortfeasor, unless the court finds that it provides full compensation. See id.¹⁰ The amount paid by a settling tortfeasor in exchange for the covenant not to sue would simply be offset against any verdict obtained against the nonsettling tortfeasor(s). See Elliott, 89 Wn.2d at 645; Mills, 68 Wn.2d at 828-29.¹¹

⁹ Tortfeasors are characterized as “joint” if they act in concert or breach a joint duty, and “concurrent” if they breach separate duties. See Shoreline Concrete, 91 Wn.2d at 235. A third category is “successive” tortfeasors, which refers to those causing divisible harms. See id. at 235 n.3.

¹⁰ Mills, 68 Wn.2d at 829, refers to “reasonably compensatory consideration.” Finney v. Farmers Ins. Co., 92 Wn.2d 748, 754, 600 P.2d 1272 (1979), states this threshold is not met unless there is a “danger of double recovery,” and Christianson v. Fayette R. Plumb., Inc., 7 Wn.App. 309, 312, 499 P.2d 72, *review denied*, 81 Wn.2d 1008 (1972), equates it with “full compensation.” Elliott v. Kundahl, 89 Wn.2d 639, 645, 574 P.2d 732 (1978), holds that the verdict is the measure of whether the amount paid in exchange for a covenant not to sue is “reasonably compensatory.”

¹¹ Maguire states that “before the TRA’s enactment, courts treated contracts not to execute as releases or settlements even though the agreement stated that it was only a contract not to enforce a judgment.” See 120 Wn. App. at 398. Maguire paraphrases Professor Peck, who, in turn, relies on older common law cases predating Mills. See id. at 398 & nn.22-23; Peck, *supra*, 15 U. Puget Sound L. Rev. at 344 & n.30 (citing Haney v. Cheatham, 8 Wn.2d 310, 318, 111 P.2d 1003 (1941); Rust v. Schlaitzer, 175 Wash. 331, 336, 27 P.2d 571 (1933)). Maguire is addressed in § C, *infra*.

In 1973, the Legislature eliminated contributory negligence as a complete defense to tort liability, replacing it with a form of comparative negligence that reduced the tort victim's recovery in proportion to his or her own negligence. See Laws of 1973, 1st Ex. Sess., ch. 138, § 1 (codified as RCW 4.22.010).¹² The 1973 legislation did not alter defendants' traditional joint and several liability for the injured person's damages, nor the prohibition of contribution among multiple tortfeasors. See Shoreline Concrete, 93 Wn.2d at 234-39. The amount paid by a settling tortfeasor in exchange for a covenant not to sue would still be offset against any verdict. See Elliott, 89 Wn.2d at 645.

In 1981, the Legislature provided for a right of contribution among jointly and severally liable tortfeasors. See Laws of 1981, ch. 27, §§ 12-14 (codified as RCW 4.22.040-.060); see also id. at § 11 (recognizing joint and several liability, codified as RCW 4.22.030; subsequently amended by 1986 TRA). Under the 1981 TRA, a settlement with fewer than all tortfeasors discharges the settling tortfeasor from liability for contribution, but the liability of nonsettling defendants is expressly preserved. See RCW 4.22.060(2).¹³ Any verdict obtained against a nonsettling defendant is offset by the reasonable value of the settlement, which may or may not correspond to the amount paid. See id. Reasonableness of the settlement

¹² The 1981 TRA repealed former RCW 4.22.010 and replaced it with current RCW 4.22.005, regarding comparative fault. See Laws of 1981, ch. 27, §§ 8 & 17.

¹³ See also Seafirst Center Ltd. Partnership v. Erickson, 127 Wn.2d 355, n.5, 898 P.2d 299 (1995) (stating "by enacting RCW 4.22.060(2) in 1981, the Legislature rejected the common law rule releasing all joint tortfeasors when one is released"; involving non-tort obligor).

(with the possibility of increased offset) is determined in a court-supervised proceeding with notice to and the participation of all parties. See RCW 4.22.060(1).

The 1981 TRA groups a variety of settlement devices together for purposes of describing the effect of settlement on contribution rights, including “a release, covenant not to sue, covenant not to enforce judgment, or similar agreement.” RCW 4.22.060(2). The Act expressly affirms the validity of covenants not to enforce judgment, along with the other settlement devices listed. See RCW 4.22.060(3). By its very nature, a covenant not to enforce judgment contemplates the entry of judgment against the settling tortfeasor.¹⁴ In this way, the 1981 Act does not dictate dismissal of a settling tortfeasor from a pending lawsuit, depending upon the nature of the settlement device employed.

In 1986, the Legislature created a system of proportionate liability for most cases, RCW 4.22.070(1); provided for modified joint and several liability in some cases, RCW 4.22.070(1)(a)-(b); and retained common law joint and several liability in a limited number of cases, RCW 4.22.070(3)(a)-(c). See Laws of 1986, ch. 305, § 401 (codified as RCW 4.22.070); id. § 402 (amending RCW 4.22.030). The 1986 TRA does not alter the contribution scheme enacted by the 1981 TRA. Instead,

¹⁴ A covenant not to execute is a “similar agreement” to a covenant not to enforce judgment under RCW 4.22.060(2). The difference between the two devices is, whereas a covenant not to enforce judgment would preclude any execution, a covenant not to execute may and usually does limit execution to certain assets. See Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 397-99, 823 P.2d 499 (1992) (indicating a covenant not to execute is an agreement to seek recovery from a specific asset, such as the proceeds of an insurance policy).

it incorporates provisions of this earlier act by reference, confirming its applicability in determining contribution rights when the judgment results in modified joint and several liability. See RCW 4.22.070(2).

Under the 1986 TRA, modified joint and several liability is imposed as follows:

If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

RCW 4.22.070(1)(b).¹⁵ The plain and unambiguous language of this provision is controlling. See Kottler v. State, 136 Wn.2d 437, 448, 963 P.2d 834 (1998) (stating “[w]e find the requirements of RCW 4.22.070(1)(b) unambiguous and will apply the statutory text as written”); Anderson v. Seattle, 123 Wn.2d 847, 851, 873 P.2d 489 (1994) (relying on “the plain language of RCW 4.22.070(1)(b)”).

The plain language of RCW 4.22.070(1)(b) imposes joint and several liability “if two events occur: (1) the trier of fact concludes the claimant or the party suffering bodily injury is fault free; and (2) judgment is entered against two or more defendants.” Anderson, 123 Wn.2d at 851. Under these circumstances, the defendants against whom judgment is entered are jointly and severally liable for the sum of their proportionate shares of the plaintiff’s damages.

¹⁵ The full text of the current version of RCW 4.22.070 is reproduced in the Appendix to this brief.

“[A] defendant against whom judgment is entered, as that term is used in RCW 4.22.070(1)(b), must be a named defendant in the case when the court enters its final judgment.” Anderson at 852; see also Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 293, 840 P.2d 860 (1992) (recognizing RCW 4.22.070 employs “terms of art”). Thus, there is no modified joint and several liability for the fault of a defendant who is dismissed beforehand. See Washburn, 120 Wn.2d at 294 (stating “*settling, released defendants* do not have judgment entered against them within the meaning of RCW 4.22.070(1)”; emphasis added); see also Anderson at 852 (recognizing “dismissal [because of bankruptcy discharge] eliminated joint and several liability”). However, nothing in RCW 4.22.070 prevents defendants who enter into covenants not to execute from remaining in the case and subject to entry of judgment. In this way, they may be part of a judgment imposing modified joint and several liability.

RCW 4.22.070(1) provides that judgment shall not be entered against any defendant “released by the claimant,” but a release is not equivalent to a covenant not to execute. Although the term “released” is not specially defined in the 1986 TRA, it should be given its common law meaning. See New York Life Ins. Co. v. Jones, 86 Wn.2d 44, 47, 541 P.2d 989 (1975) (stating “[i]f the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law”); see also Washburn, 120 Wn.2d at 293 (referring to “terms of art” used in RCW 4.22.070). At common

law, a release refers to the complete surrender of a claim. See DeNike v. Mowery, 69 Wn. 2d 357, 366, 418 P.2d 1010, 422 P.2d 328 (1966). Under this definition, a covenant not to execute does not result in a release of the settling defendant. Cf. Mills, 68 Wn.2d at 829 (stating “the distinction between a covenant not to sue and a release will be preserved according to the intention of the parties”).¹⁶

Unfortunately, this Court’s decision in Kottler, *supra*, which dealt with contribution rights, appears to equate *any* form of settlement with a release, based on an expansive and unwarranted reading of the Court’s prior decisions in Washburn and Anderson, *supra*. The Court states:

Settling parties, released parties, and immune parties are not parties against whom judgment is entered and will not be jointly and severally liable under RCW 4.22.070(1)(b). Washburn, 120 Wn.2d at 294, 840 P.2d 860; Anderson, 123 Wn.2d at 852, 873 P.2d 489 (a released party “cannot under any reasonable interpretation of RCW 4.22.070(1)(b) be a defendant against whom judgment is entered.”).

Kottler, 136 Wn.2d at 447 (emphasis added). The notion that judgment cannot be entered against (presumably) non-released “settling parties” is not present in either Washburn or Anderson. Washburn dealt only with “released” defendants. See 120 Wn.2d at 290. Anderson dealt with a defendant who was dismissed by agreement, based on a discharge in

¹⁶ The State relies on Shelby v. Keck, 85 Wn.2d 911, 917-188, 541 P.2d 365 (1975), for the proposition that covenants not to execute require dismissal in all instances. See State Br. at 28; State Reply Br. to Barton Br. at 1 n.1; State Pet. for Rev. at 13; see also Maguire, 120 Wn.App. at 397 & n.16 (citing Shelby). The facts of Shelby establish that the covenanting defendant (Keck) was, in effect, out of the suit. See 85 Wn.2d at 918. It also appears that the covenant at issue fully resolved the dispute between the plaintiff and the defendant, leaving no justiciable issues for trial. See id. at 912-13 & 918. The Court did not purport to hold that covenants not to execute, ipso facto, require dismissal of the covenanting defendant. Instead, the Court held that the trial court did not abuse its discretion under CR 21 in dismissing defendant Keck under these circumstances, in light of evidentiary concerns regarding the admission of the defendant’s hearsay statements. See id. at 918.

bankruptcy, before any judgment was entered. See 123 Wn.2d at 852. Neither case dealt with covenants not to execute or other settlement devices not constituting a release. The reference to “settling parties” in Kottler was unnecessary because, like Washburn, Kottler dealt only with “released parties.” See 136 Wn.2d at 439, 440. The Court should not allow its unsupported statement in Kottler to overcome the plain language of RCW 4.22.070(1)(b).¹⁷

The text of RCW 4.22.070 does not prevent use of a covenant not to execute in effecting a partial settlement, thus allowing the settling defendant to remain a party for purposes of modified joint and several liability under RCW 4.22.070(1)(b). The Legislature used the phrase “*released* by the claimant,” not “*settled* with the claimant” in RCW 4.22.070(1). RCW 4.22.060 does not alter the analysis, as it only addresses the various settlement devices as they relate to contribution rights. Yet, the State argues that this view is inconsistent with Court of Appeals cases and secondary authorities, and otherwise is contrary to Legislative intent and public policy.¹⁸ These arguments are addressed below.

¹⁷ The Court has since repeated the statement in Kottler in Mazon v. Krafchick, 158 Wn.2d 440, 452, 144 P.3d 1168 (2005), where the “settling parties” language is not pivotal to the outcome of the case. The Court of Appeals relied on the same passage in Maguire, 120 Wn.App. at 397 & n.17. Maguire is also discussed in § C, *infra*.

¹⁸ Under the proposed analysis, the Linvog parents are properly parties defendant for modified joint and several liability purposes. Linvog is subject to modified joint and several liability because the covenant not to execute did not involve her. (For that matter, even if the Court determines the covenant here constitutes a release of the Linvog parents, this would not mean Linvog is released. See Vanderpool v. Grange Insurance, 110 Wn.2d 483, 486-90, 756 P.2d 111 (1988) (holding settlement with principal does not automatically release primarily liable agent)).

C.) The State's Arguments Against Modified Joint And Several Liability Do Not Overcome The Plain Meaning Of RCW 4.22.070(1)(b); *Maguire* And *Romero* Should Be Disapproved To The Extent Necessary.

The State primarily argues that a defendant who is party to a covenant not to execute is "released" within the meaning of RCW 4.22.070(1), thereby precluding joint and several liability. In making this argument, the State focuses on the effect of a covenant not to execute in limiting the defendant's liability to the claimant, and its effect on contribution under RCW 4.22.060(2), rather than the language of RCW 4.22.070(1)(b), which governs the imposition of modified joint and several liability. As noted in § B, supra, the plain language of the joint and several liability provision, in particular the language referring to entry of judgment, preserves modified joint and several liability for the proportionate share of fault of a defendant who enters into a covenant not to execute precisely because a covenant not to execute allows judgment to be entered against the covenanting defendant.

The State's argument equating a covenant not to execute with a release is at odds with the language of RCW 4.22.070(1) and (1)(b). "[T]he sections of RCW 4.22.070 must be carefully read together because terms of art found in some sections are explained in other sections." Washburn at 293. Section (1) distinguishes between defendants who have been released etc., and those against whom "[j]udgment shall be entered." Subsection (1)(b) describes "the defendants against whom judgment is entered," i.e., those not released etc., as being jointly and severally liable

for the damages corresponding to the sum of their proportionate shares of fault. By asking the Court to treat a covenant not to execute as a release, the State overlooks the statutory distinction between defendants who are released and those against whom judgment is entered.¹⁹

In order to equate a covenant not to execute with a release, the State points to RCW 4.22.060, regarding the effect of settlement on contribution, enacted as part of the 1981 TRA. See e.g. State Supp. Br. at 9-10 (relying on Maguire, supra). As noted above, RCW 4.22.060 groups various settlement devices together, including covenants not to execute, requiring notice of such settlements in RCW 4.22.060(1), describing their effect on contribution and the amount of offset received by nonsettling defendants in section (2), and confirming their validity in section (3).

The State reasons that the grouping of these settlement devices together for the purposes specified in RCW 4.22.060 requires them to be deemed equivalent for purposes of joint and several liability under RCW 4.22.070(1)(b). See e.g. State Supp. Br. at 9-10. If anything, the opposite is true. The fact that the Legislature expressly grouped settlement

¹⁹ Professor Sisk argues, somewhat counterintuitively, that a covenant not to execute does not cause a judgment to be entered within the meaning of RCW 4.22.070(1)(b), even though a judgment literally is entered against the covenanting defendant. See Gregory C. Sisk, Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 U. Puget Sound L. Rev. 1, 50-51 (1992). This argument is seconded by the Court of Appeals in Maguire, and the State adverts to it in reply to Linvogs. See Maguire, 120 Wn. App. at 399; State Reply Br. to Linvog Br. at 18-19. The argument is based on the assertion that a judgment entered based on a covenant not to execute is not subject to appeal, by analogy to “final decisions” under 28 U.S.C. § 1291. See Sisk, supra at 50-51. This is incorrect to the extent that the covenant does not dictate entry of judgment or the amount of judgment. A covenanting defendant would still be an aggrieved party entitled to appeal under these circumstances. Ultimately, the appealability of a judgment does not seem to be a relevant consideration because a judgment that is not appealed or is not susceptible to appeal (e.g., by stipulation, default, confession or otherwise) is still a judgment within the ordinary meaning of the term.

devices together for certain purposes under RCW 4.22.060 (i.e., notice, validity and effect on contribution), but not others (e.g., joint and several liability), suggests that the limited grouping was intentional, and that the Court should not treat them as equivalent for all purposes. See Kottler, 136 Wn.2d at 448 (stating “[i]f the Legislature wishes to amend the statute to alter its calculus of settlement it may. But we will not”).²⁰

Moreover, nothing in RCW 4.22.060 purports to abrogate the common law distinctions between these settlement devices, nor does it purport to describe their effect on joint and several liability. The observation made in a pre-tort reform case applies with equal force under the current statute: contribution “operates exclusively between or among tort-feasors,” and “has no effect upon the injured party’s initial right to recover from the multiple tort-feasors.” Shoreline Concrete, 91 Wn.2d at 238. In this way, the effect of a covenant not to execute upon contribution is an entirely different inquiry than its effect on joint and several liability.

Underlying the State’s arguments appears to be the unstated but incorrect assumption that there can be no joint and several liability for another defendant’s proportionate share of fault in the absence of a right of contribution against that defendant. The State reasons that, because the Linvog parents’ contribution liability was discharged by the covenant not to execute as a matter of law under RCW 4.22.060(2), modified joint and

²⁰ The State seems to suggest that the grouping is accomplished by the use of the term “released” as a verb rather than as a noun in RCW 4.22.070. See State Supp. Br. at 9 (relying on Maguire, *supra*). The verb form may emphasize the effect of a release, but it does not erase the distinctions between a release and a covenant not to execute or other settlement devices.

several liability is thereby extinguished. See State Supp. Br. at 11-14. This reasoning overlooks the fact that, while RCW 4.22.060(2) specifically discharges contribution liability, it does not address, let alone eliminate, modified joint and several liability. Instead, the statute replaces contribution with an offset that itself presupposes joint and several liability.

It is true that there is no contribution liability in the absence of joint and several liability. See RCW 4.22.040(1); Kottler, 136 Wn.2d at 442 (recognizing contribution requires joint and several liability). However, *the reverse is not necessarily true*. Washburn recognizes the possibility of modified joint and several liability without contribution under RCW 4.22.070(1)(a), where such liability is premised upon concerted action or agency principles, and under subsection (1)(b) where settlement occurs after judgment has been entered. See 120 Wn.2d at 295-96 (discussing potential for “jointly and severally liable settling defendants”); see also Kottler at 447 (referencing contribution against settling defendants under subsection (1)(a)). Although not specifically recognized in Washburn, the plain language of RCW 4.22.070(1)(b) also admits the possibility of joint and several liability, despite no contribution based on a covenant not to execute. Of course, nonsettling defendants

receive the benefit of a reasonable offset under the procedure delineated in RCW 4.22.060.²¹

The State also attempts to justify equating a covenant not to execute with a release based on its understanding of the purpose of the 1986 TRA in general, and RCW 4.22.070 in particular. It urges that “[t]he TRA abolished joint and several liability in favor of proportionate liability,” and limits what it pejoratively describes as “deep pocket” liability. See State Supp. Br. at 1 & 10. However, this statement of the policy underlying the TRA and RCW 4.22.070 is overbroad and unmoored to the text of the statute. The purpose of the 1986 TRA includes “assuring that adequate and appropriate compensation for persons injured through the fault of others is available.” Laws of 1986, ch. 305, § 100 (preamble); see also Laws of 1981, ch. 27, § 1 (preamble, referring to “a fairer and more equitable distribution of liability among parties at fault”).²² In keeping with this policy, RCW 4.22.070(1)(b) explicitly preserves a modified form of joint and several liability. Neither the preamble to the 1986 TRA nor its provisions express the underlying policy in the sweeping and unequivocal terms used by the State. The question should not be whether the Court can avoid applying what it has already

²¹ If a covenant not to execute discharges contribution liability under RCW 4.22.060(2), as argued, this would mean the superior court erred in concluding that the Linvog parents were subject to a claim of contribution by the State under the Pretrial Stipulation. Whether this materially affected the court’s prejudice analysis under CR 60(b), see Memorandum Decision (pp. 7-8), is beyond the scope of this brief, and is for the parties to argue and the Court to decide.

²² The full text of the preambles to the 1981 TRA and 1986 TRA are reproduced in the Appendix to this brief.

determined to be the plain language of RCW 4.22.070 based on policy considerations, but rather how the plain language of this provision applies in the context of a covenant not to execute.

Apart from questions regarding the scope of modified joint and several liability under RCW 4.22.070(1)(b), there are good reasons why both plaintiffs and defendants would want to settle using a covenant not to execute. From the plaintiffs' perspective, agreements like this "encourage out-of-court settlements, help solve the economic needs of an injured person confronted with the delays in the court system, and tend to simplify complex multiparty litigation." Jensen, 40 Wn. App. at 10 (involving covenant not to execute coupled with complex loan-receipt agreement); accord Hargreaves v. Am. Flyers Airline Corp., 6 Wn. App. 508, 509, 494 P.2d 229 (1972) (stating plaintiff's counsel's rationale for covenant not to sue). From the defendants' perspective, a covenant not to execute can provide insulation from potentially catastrophic liability—whether modified joint and several *or* several only—while simultaneously allowing the defendant to contest liability, under circumstances where a plaintiff may be unwilling to provide an outright release. See Linvog Ans. to Pet. for Rev. at 4 (suggesting Linvogs were most concerned about the consequences of several liability for themselves); Linvog Supp. Br. at 2 n.1 (same); Barton Supp. Br. at 4 (re: resistance to release). Given the legitimate and conflicting interests of the parties, it cannot be said that covenants not to execute "manipulate" the tort system or constitute a

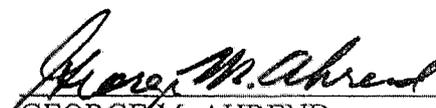
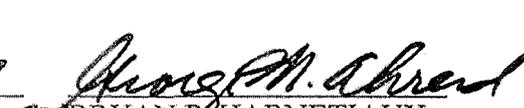
“procedural sham,” especially given the longstanding recognition and approval of them in Washington. See State Supp. Br. at 10 n.12 (equating covenant not to execute with clumsy and invalid attempt to rescind release in Bunting v. State, 87 Wn. App. 647, 943 P.2d 347 (1997)). The State’s arguments that a covenant not to execute precludes modified joint and several liability should be rejected.

Lastly, throughout its argument the State relies on the Court of Appeals decisions in Maguire and Romero, supra. Maguire relies on the questionable passage from Kottler, discussed in § B. See 120 Wn. App. at 397 & n.17 (quoting Kottler passage). Romero principally adopts the reasoning of Maguire. See Romero, 123 Wn. App. at 390-91.²³ For the reasons stated in this brief, the holdings of both cases should be disapproved to the extent the Court deems necessary.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving the issues on review.

DATED this 4th day of September, 2012.


GEORGE M. AHREND

FOR BRYAN D. HARNETIAUX
WITH AUTHORITY

On behalf of WSAJ Foundation

²³ Romero also seems to be influenced by the fact that the court considered the agreement in question to be a “Mary Carter” agreement, unworthy of enforcement. See 123 Wn. App. at 388-92.

APPENDIX

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

JARED K. BARTON, a single man,
Plaintiff,

NO. 03-2-10687-3

vs.

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

STIPULATION OF PARTIES
REGARDING ADVANCED
PAYMENT

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

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

STIPULATION OF THE PARTIES REGARDING ADVANCED
PAYMENT BY MUTUAL OF ENUMCLAW

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Plaintiff Jared Barton against Defendants Korlano Linvog and/or Defendants Thomas and Madonna Linvog.

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

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

Dated this ____ day of March, 2007.

By: *Ralph Brindley*
Ralph Brindley, WSBA #8391
Attorney for Plaintiff Jared
Barton

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

By: _____
Jared Barton, Plaintiff

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

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for Snohomish County

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ANITA L. FARRIS
JUDGE

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March 14, 2010

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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 5th 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

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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. McGuire 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 the 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

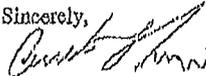
like this where there is a deep pocket defendant and individual defendants. That possibility existed in this case because there was a government entity and individuals as defendants.

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

RCW 4.22.060. Effect of settlement agreement

(1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.

(2) A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

(3) A determination that the amount paid for a release, covenant not to sue, covenant not to enforce judgment, or similar agreement was unreasonable shall not affect the validity of the agreement between the released and releasing persons nor shall any adjustment be made in the amount paid between the parties to the agreement.

[1987 c 212 § 1901; 1981 c 27 § 14.]

**RCW 4.22.070. Percentage of fault--Determination--Exception--
Limitations**

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant's [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

CHAPTER 27

[Engrossed Senate Bill No. 3158]

TORT ACTIONS—PRODUCT LIABILITY—CONTRIBUTORY NEGLIGENCE—CONTRIBUTION

AN ACT Relating to tort actions; amending section 2, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.020; creating new sections; adding new sections to Title 7 RCW as a new chapter thereof; adding new sections to chapter 4.22 RCW as a part thereof; and repealing section 1, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.010.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. PREAMBLE. Tort reform in this state has for the most part been accomplished in the courts on a case-by-case basis. While this process has resulted in significant progress and the harshness of many common law doctrines has to some extent been ameliorated by decisional law, the legislature has from time to time felt it necessary to intervene to bring about needed reforms such as those contained in the 1973 comparative negligence act.

The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion in order to deal with these problems.

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.

CHAPTER 305

[Engrossed Substitute Senate Bill No. 4630]

TORT LAW REVISIONS

AN ACT Relating to civil actions; amending RCW 5.60.060, 4.22.030, 51.24.060, 4.16.350, 4.24.115, 4.16.160, 4.16.310, and 4.16.300; adding a new section to chapter 4.22 RCW; adding new sections to chapter 4.24 RCW; adding new sections to chapter 4.56 RCW; adding new sections to chapter 5.40 RCW; adding a new section to chapter 7.70 RCW; adding a new section to chapter 48.19 RCW; adding a new section to chapter 48.22 RCW; creating new sections; repealing RCW 4.56.240; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 100. PREAMBLE. Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.