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COURT OF APPEALS  
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NO. 65673-2-I

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

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JARED K. BARTON, a single man,

Plaintiff-Respondent,

v.

STATE OF WASHINGTON, Department of Transportation,

Defendant-Appellant.

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

Co-Defendants-Respondents.

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**STATE OF WASHINGTON'S REPLY TO BRIEF OF  
RESPONDENT BARTON**

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## I. INTRODUCTION

Mr. Barton does not deny that his failure to disclose the \$20,000 advance payment and the covenant not to execute was improper. Instead he argues: (1) that the covenant not to execute was immaterial because it did not affect the liability of the Linvog parents to the State for contribution; and (2) that the State has not shown that his non-disclosures prejudiced the outcome of the trial.

This first point is thoroughly addressed in the Brief of Appellants State of Washington (Br. Appellant). The covenant not to execute was material because it negated contribution rights and joint liability between the Linvog parents and the State. That is what RCW 4.22.060 provides:

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. . . .**" (Emphasis added.)<sup>1</sup>

As for the prejudicial effect of the non-disclosure, Mr. Barton states the wrong standard for relief under CR 60(b)(4). The State is not required to prove that if the covenant and advance payment had been disclosed the outcome of the trial would have changed. The State need

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<sup>1</sup> See also *Shelby v. Keck*, 85 Wn.2d 911, 918, 541 P.2d 365 (1975) (covenant not to execute that set the upper limits of a parties liability in exchange for \$25,000 must be viewed as a binding settlement and dismissal of that party by the court was proper); *Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, review denied, 152 Wn.2d 1026, 101 P.3d 421 (2004) (the fact that Maguire's agreement did not specifically "release" the defendants is irrelevant; what matters is the covenant's operative legal effect); *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004) (covenant not to execute constitutes a release under RCW 4.22.060 and .070).

only show that the hidden information was material to an issue in the case.<sup>2</sup> Any doubt that the non-disclosure effected the verdict must be resolved against the verdict.<sup>3</sup>

The non-disclosure of the covenant not to execute and \$20,000 advance payment were directly material to a fair presentation of the State's case. The Linvog parents stayed in the case as sham parties. Their liability was misrepresented to the jury in opening statements and Jury Instruction 18.<sup>4</sup> Korrine Linvog's credibility was not subject to cross exam based upon the fact that the plaintiff let her parents off the hook once she provided deposition testimony establishing plaintiff's liability theory against the State. Finally, and ultimately, the jury spared the Linvog parents from financial ruin on its \$3.6 million verdict by only allocating 5 percent of the fault to their daughter. What the jury didn't know was that the Linvog parents' liability had been limited by a secret agreement to \$100,000.

The judicial system should condemn hidden covenants, payments, and agreements between parties in litigation. Judgments tainted by such hidden "wink-wink deals" should be vacated. RP(6/4/10) at 38.

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<sup>2</sup> *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004).

<sup>3</sup> *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1983).

<sup>4</sup> Importantly, the standard for relief regarding the constitutional err in Jury Instruction 18 is significantly lower than the standard under CR 60(b)(4). Prejudice is presumed and the burden to rebut it was on Mr. Barton. Const. art. IV, § 16, *see* Br. Appellant at 37-39.

## COUNTER STATEMENT OF THE CASE

### II. FACTUAL HISTORY

#### A. **Since Her Meeting With Plaintiff's Counsel And His Highway Liability Expert Ms. Linvog Has Consistently Asserted That The State's Trees Blocked Her View of Mr. Barton's Motorcycle**

Given the extent of Mr. Barton's injuries, both plaintiff and defendants understood that a damage award would exceed a million dollars. RP(1/15/10) at 22. The Linvogs knew they only had \$100,000 in insurance coverage. Korrine Linvog undoubtedly understood that she had exposed her parents to financial ruin because under the family car doctrine they would be liable for her negligence. Before Ms. Linvog was ever deposed she went out to the accident scene and met with Mr. Brindley, plaintiff's counsel, and his highway design expert, Ed Stevens in April 2005. CP at 484-85. After that meeting she testified in a deposition and at trial that she did not "creep" forward closer to the edge of the road where she would have had an unobstructed view to the left to Mr. Barton's approaching motorcycle even though the law required her to do so. CP at 935, 940 (deposition); CP at 1113 l. 23; 1119 l. 45 (trial testimony). *See* Br. Appellant, Appendix (App.) 1 (photo showing unobstructed view).

The prejudice that the State is arguing from, its inability to cross examine Ms. Linvog, does not relate to the fact that she changed her story (Brief of Respondent Barton [Br. Resp't Barton] at 6), but rather that she was collaborating with the plaintiff long before the lawsuit was ever filed in order to make a deal limiting her parents' liability. The deal is evidenced by the fact that after Ms. Linvog provided the critical liability/causation testimony for the plaintiff's highway negligence claim against the State,<sup>5</sup> plaintiff executed an agreement taking the Linvog parents off the hook for any liability above their insurance policy limits. This bargain was undoubtedly extremely important to Ms. Linvog, since it allowed her to neutralize the legal consequences to her parents of her negligent driving.<sup>6</sup>

Mr. Barton criticizes the State's suggestion that Korrine Linvog only came up with the notion that the trees blocked her view when she met with plaintiff's traffic engineer Ed Stevens, and his attorney, Ralph Brindley at the accident scene in April 2005. He asserts the State has ignored the hand written statement that she gave to the investigating officer on the night of the collision and testimony that she went back to the intersection only days after the collision. *See* Br. Resp't Barton at 6 n.2.

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<sup>5</sup> Korrine Linvog's deposition was taken on October 25, 2006. CP at 857.

<sup>6</sup> Of course, if the agreement had been disclosed before trial, the State could have deposed the Linvogs about the circumstances surrounding its creation.

However, Ms. Linvog's hand written statement on the evening of the accident does not mention the trees at all and only indicates that she looked left and did not see the headlight on Mr. Barton's motorcycle.<sup>7</sup>

The other statement made by Ms. Linvog, that she went back to the intersection "only days after the collision" and concluded that the trees must have blocked her view, was given a trial on November 13, 2007, eight months after the secret agreement was executed, and long after her meeting with Mr. Brindley and his highway design expert Mr. Stevens, in April 2005.<sup>8</sup> CP at 484-85.

**B. Mr. Barton Had Nearly Eight Months To Disclose The Existence Of The Advance Payment And Covenant Not To Execute**

Mr. Barton argues that in subheading C of his brief, p. 9; "**Shortly Before Trial, Barton Accepted A \$20,000 Advance From The Linvogs' Insurer. . .**"(emphasis in original). In fact the covenant not to execute was entered on March 1, 2007. CP at 919. Trial did not begin until nearly eight months later, on October 29th. CP at 1043. Mr. Barton also implies that information regarding the existence of the advance payment and

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<sup>7</sup> Mr. Barton does not mention the fact that two eye witnesses to the accident provided statements to the police on the evening of the accident that the headlight on Mr. Barton's motorcycle was very dim, dimming in and out as it approached the intersection. This was an equally plausible basis as to why Ms. Linvog did not see the headlight on Mr. Barton's motorcycle. CP at 1147-54.

<sup>8</sup> Moreover, what Ms. Linvog actually testified to was "I don't remember if someone told me or if it was when we went back to the scene. . . ." CP at 1008. This suggests that someone else may have given Ms. Linvog the idea that the reason why she did not see Mr. Barton's motorcycle was because of the tress.

covenant not to execute didn't create an obligation to supplement his prior incorrect interrogatory responses until "the eve of trial." See Br. Resp't Barton at 4, 42. However, what Mr. Barton is referring to is the fact that he chose not to supplement his interrogatory responses until the "eve of trial." The duty to supplement arose March 2, the day after the covenant not to execute was entered into and the \$20,000 check was cashed, long before trial.<sup>9</sup> CR 26(e).

**C. The Linvogs' Liability To Pay Any Damages Awarded Against Their Daughter Was Mentioned By Both Counsel In Opening Statement And By The Court In Jury Instruction 18**

Mr. Barton asserts that Mr. and Mrs. Linvog were a "Non-Presence" at trial. Br. Resp't Barton at 12. He quotes from the trial courts memorandum decision stating that no one made any argument or statement to the jury suggesting that they feel sorry for Mr. and Mrs. Linvog. Br. Resp't Barton at 13. However, the trial record shows that the Linvog parents' own counsel, after he introduced the Linvog parents to the jury at the beginning of the trial (CP at 797) then told the jury that they were going to be responsible for the acts of their daughter Korrine. CP at 801-02. This statement was made in spite of the existence

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<sup>9</sup> Waiting until the "eve of trial" to supplement interrogatory responses is not consistent with the obligations imposed by CR 26(e). See *Magana v. Hyundai Motor America Inc.*, 167 Wn.2d 570, 220 P.3d 191 (2009) (failure to supplement discovery responses shortly before trial warranted imposition of a default judgment to alleviate prejudice). In this case plaintiff's pre-trial disclosure of the covenant not to execute in discovery was not belated—it never occurred.

of the agreement limiting the parents' liability to their insurance policy limits of \$100,000.

Mr. Brindley, counsel for plaintiff Barton, also told the jury in opening statement that the "parents are on the hook." CP at 785. Mr. Barton then proposed and the trial court gave Jury Instruction 18 informing the jury, as a matter of law, that the Linvog parents were "responsible for the acts of" their daughter Korrine. CP at 1232, 1235. While Mr. Barton is correct that the instruction did not specifically mention the Linvog parents by name, it would be naive to assume that the jury didn't understand that in deciding Korrine Linvog's liability they were also deciding the liability of her parents. *See* Br. Resp't Barton at 15. The opening statements of two counsels and the court's jury instruction told that to the jury. Indeed, that is what the trial court understood when it entered a \$3.6 million judgment against Thomas and Madonna Linvog.<sup>10</sup> CP at 1237-39

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<sup>10</sup> Again, the reason why the State did not object to Jury Instruction 18 as a comment on the evidence was because the covenant not to execute had been hidden by Mr. Barton and the Linvogs. As a result, the State was unaware that the Linvog parents had been released and were therefore no longer liable for the acts of their daughter. Had the existence of the covenant not to execute been disclosed as required by CR 26 and RCW 4.22.060(1) the State would have moved to have the Linvog parents dismissed, Jury Instruction 18 would never have been given, and this constitutional error would never have occurred. RP(1/15/10) at 7-8.

**D. Barton's Counsel Only Acknowledged The Existence Of The Covenant Not To Execute And \$20,000 Payment After A Copy Of The Agreement Had Been Sent To The State By The Linvogs' Counsel**

The Brief of Respondent Barton suggests that plaintiff's counsel freely disclosed the existence of the covenant not to execute and advance payment. *See* Br. Resp't Barton at 1, 17. That is not what happened. After the supreme court denied review of this court's decision affirming denial of the State's initial appeal in this case, counsel for the State undertook to satisfy the judgment in order to stop the accrual of post judgment interest. Mr. Brindley demanded that the State pay not only its 95 percent share of the judgment, but also the \$80,000 plus interest that the Linvog's still owed, but had not paid on their five percent share of the judgment. In the course of that discussion Mr. Brindley indicated that there had been an order entered dismissing Mr. and Mrs. Linvog as parties to the case. CP at 644. Counsel for the State did not believe that such an order existed and requested a copy of that from both Mr. Brindley and then from Mr. Spencer. In response, Mr. Spencer did not send a copy of such an order, because it didn't exist. Instead, it was Mr. Spencer who disclosed the existence of the covenant not to execute and advance payment. CP at 647. The copy he sent the State was unsigned and so counsel for the State then asked Mr. Brindley if he had a signed copy of

the agreement. Only after Mr. Spencer had already disclosed the existence of the agreement did Mr. Brindley send a copy of the \$20,000 check and the agreement, which he had signed. CP at 923-26. Prior to Mr. Spencer's disclosure, Mr. Brindley never mentioned a \$20,000 payment or an agreement containing a covenant not to execute. But for Mr. Spencer's disclosure, there is no indication that Mr. Brindley would ever have revealed the existence of the secret agreement.

**E. Barton's Counsel Knew That The Covenant Not To Execute Against The Linvog Parents Released Them From Further Liability Both To His Client And The State**

Even though Mr. Brindley had signed the agreement and cashed the \$20,000 check, once the existence of the secret agreement became known he asserted that there was no binding agreement because Mr. Spencer had not signed the agreement.<sup>11</sup> Contrary to his statement to this court (Br. Resp't Barton at 42 n.9), Mr. Brindley did argue to the trial court that the reason he did not disclose the agreement was because it was not final. RP(1/15/10) at 54. Mr. Brindley even denied the effectiveness of the agreement in opposition to the State's Motion to Reconsider. RP(6/4/10) at 29.

However, Mr. Brindley knew what the operative legal effect of a covenant not to execute was—a release. Two of his partners had written

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<sup>11</sup> Mr. Spencer contended, and the trial court agreed, the lack of his signature did not render the agreement invalid. RP(6/4/10) at 30-31; CP at 10.

an article in the WSTLA Trial News specifically addressing and criticizing the holdings in *Maguire* and *Romero*, that a covenant not to execute constituted a release. *See* Br. Appellant, App. 6. David Beninger and Joel Cunningham, *Settlement Agreements: Are Lions Now Tiger and Bears (Oh My)?*, Trial News at 5, 9 (January 2006).

Indeed, Mr. Brindley stated in his declaration, the reason that he and Mr. Spencer limited the agreement to the parents was because “we did not want to do anything that would impact joint and several liability between Korrine and the State.” CP at 561. The obvious import of this statement is that they knew that the agreement did impact the joint liability of the Linvog parents with the State. The following page of Mr. Brindley’s declaration is equally as telling, where he states:

**While it is possible** that we decided not to finalize the stipulation because either Mr. Spencer or **I realized**, that, **by operation of law, such a stipulation might operate as a settlement and may release Mr. and Mrs. Linvog**, contrary to our intent, I have only general recollection of discussing this with Mr. Spencer.

CP at 562 (emphasis added).

Mr. Barton’s assertions that it is “undisputed” or “conceded” (Br. Resp’t Barton at 10, 18, 21, 35) that the covenant not to execute did not eliminate the Linvog parents’ joint liability, or that Mr. Brindley did not

think that it did, are incorrect. The State has conceded neither of those issues.

Next, Mr. Barton's request to have the enforceability of the covenant not to execute remanded to the trial court (Br. Resp't Barton at 33), if this court finds that it operated as a release, is improper because that issue was never raised below. Mr. Brindley did state that had he and Mr. Spencer been aware that the covenant not to execute operated as a release, they would have rescinded their agreement. CP at 562, 589. However, Mr. Barton did not request the court to rescind the agreement.

Furthermore, because Mr. Barton had accepted and spent the entire \$100,000, in satisfaction of the agreement it would be contrary to public policy and a procedural sham to allow them to now rescind the agreement. *Bunting v. State*, 87 Wn. App. 647, 653-54, 943 P.2d 347 (1997) (neither public policy nor equity favor such manipulation of the Tort Reform Act of 1986).

More to the point, at the time of the trial in this case the secret covenant not to execute on the Linvog parents was in effect and it negated joint liability and contribution rights between them and the State and limited their liability to Mr. Barton at \$100,000. Therefore, the misrepresentations made in Mr. Brindley's and Mr. Spencer's opening statements and in Jury Instruction 18, that the parents were responsible for

any damages awarded against their daughter, were untrue, requiring a new trial.

### III. PROCEDURAL HISTORY

#### A. The Trial Court Did Not Enter Findings Of Fact

The hearing on the State's Motion to Vacate Judgment in this case was heard on January 15, 2010. Although dated March 14, 2010, the trial court's memorandum decision was not sent to the parties until May 3, 2010. The formal order denying the State's Motion to Vacate was entered on June 4, 2010. CP at 27-39. That order did not contain any findings of fact or conclusions of law.<sup>12</sup> Pursuant to CR 52(a)(5)(B) findings and conclusions are not necessary when a court is ruling on a CR 60(b) motion to vacate a judgment. Mr. Barton is incorrect in stating that the trial court made extensive findings of fact. Br. Resp't Barton at 4, 43.

Where the trial court's decision is based on review of only documentary evidence, as in the case at bar, and there are no findings of fact, an appellate court can weigh all the evidence and draw its own inferences from it and all of the surrounding circumstances. *Auger v. Shideler*, 23 Wn.2d 505, 507, 161 P.2d 200 (1945); *In re Riley Estate*, 78 Wn.2d 623, 654, 479 P.2d 1 (1970) (trial court findings based on a written

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<sup>12</sup> The order did incorporate Judge Farris' Memorandum Decision, but the Memorandum Decision does not constitute findings and conclusions of law. It only sets forth the rationale for the courts decision.

record, rather than live testimony, may be disregarded and an appellate court will determine what findings should have been made).

**B. The State Only Entered A Contribution Judgment After It Was Ordered To Pay The Remaining Portion Of The Linvogs Share Of The Judgment, Over Its Objection**

After Judge Farris sent the parties the memorandum decision on May 3, 2010, Mr. Barton filed a motion for an order mandating the State's payment of judgment balance. CP at 53-57, 217-61. The State opposed that motion. CP at 80-182. Over the State's opposition, the court granted plaintiff's motion mandating the State pay the remaining judgment balance owed by the Linvogs. CP at 40-42. In compliance with the court's order, the State paid the remaining \$80,000 share of the Linvogs' portion of the judgment, plus interest accrued. Given the one year statute of limitations, under RCW 4.22.050(3), the State entered a contribution judgment against the Linvogs in order to protect its rights pending outcome of this appeal. CP at 1507-09. No payment has been made on that judgment into the registry of the court, and if such payment were made, the State would only disburse the funds once this appeal was final, and if the State did not prevail. The State has received no benefit from the contribution judgment other than to protect what was left of its financial interest pending final resolution of this appeal.

#### IV. ARGUMENT

##### **THE TRIAL COURT ERRED IN DENYING THE STATE'S MOTION TO VACATE BASED ON THE FRAUD AND MISREPRESENTATION THAT RESULTED FROM A SECRET COVENANT NOT TO EXECUTE**

##### **A. The Trial Court Abused Its Discretion When It Misapplied The Law In Interpreting The Legal Effect Of The Covenant Not To Execute**

Generally, the denial of a motion to vacate under CR 60(b)(4) is governed by an abuse of discretion standard of review. *Roberson v. Perez*, 123 Wn. App. 320, 330, 96 P.3d 420 (2004). However, an abuse of discretion occurs when a court decides a case on untenable grounds. *Wash. Fed'n of State Employees, Counsel 28, AFLS-CIO v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). When a court misapplies the law in interpreting a statute, the court has decided the case on untenable grounds. A trial court's interpretation of the statute is an issue of law subject to de novo review. *Conom v. Snohomish Cy.*, 155 Wn.2d 154, 118 P.3d 344 (2005). In this case, the trial court's erroneous interpretation of the legal effect of the covenant not to execute under RCW 4.22.060(2) and .070 is an error of law that is subject to de novo review. *Id.*

**B. To Obtain Relief Under Civil Rule 60(b)(4) The State Does Not Have To Prove That The New Evidence Prejudiced The Outcome Of The Trial, But Need Only Show That The Information That Was Withheld Was Material To A Fair Presentation Of Its Case**

At the outset, it is important to note Mr. Barton does not argue that his failure to disclose the covenant not to execute and the advance payment as required by statute, court rule, and case law was not fraud. *See Crisman v. Crisman*, 85 Wn. App. 15, 21-23, 931 P.2d 163, *review denied*, 132 Wn.2d 1008, 940 P.2d 653 (1997); *see* Br. Appellant at 21-22. Instead, he argues that his fraud was harmless. However, he misstates the standard in arguing that the State has the burden to establish that it was prejudiced as a result of his fraud. *See* Br. Resp't Barton at 22. To the contrary, the applicable standard is whether the withheld documents were material to the aggrieved parties' fair presentation of its case at the time of trial. *Roberson*, 123 Wn. App. at 336; *see* Br. Appellant at 41-42. The existence of the covenant not to execute was material because if it had been disclosed, Thomas and Madonna Linvog would not have been allowed to remain in the case as sham parties. And, Korrine Linvog would have been deposed and cross examined about how the plaintiff let her parents off the hook for the ruinous liability she had created for them after she cooperated with plaintiff's highway liability expert and provided

testimony that was the sole basis for the plaintiff's liability theory against the State.<sup>13</sup>

**C. The Covenant Not To Execute Negated Joint Liability And Contribution Between The State And The Linvog Parents**

Conspicuously absent from the Brief of Respondent Barton is any discussion or analysis of the express statutory mandate in RCW 4.22.060(2) that:

A release, covenant not to execute, **covenant not to enforce judgment or similar agreement** entered into by a claimant and the person liable **discharges that person from all liability for contribution**. . . .(Emphasis added.)

Mr. Barton cites no legal authority in support of his assertion that RCW 4.22.060(2) did not require that his secret agreement be treated as a release, negating joint liability and contribution rights. Instead he argues:

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

*See* Br. Resp't Barton at 23-24. This is the epitome of self serving sophistry. First, the legal consequence of the agreement is a question of law, not a matter of discretion for the trial court. Secondly, whatever legal impact Mr. Brindley and Mr. Spencer thought or pretended their secret

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<sup>13</sup> *See State v. McDonald*, 122 Wn. App. 804, 95 P.3d 1248 (2004), *review denied*, 153 Wn.2d 1006, 103 P.3d 1247 (2005) (failure to disclose material evidence that could be used to impeach the credibility of a witness whose testimony was the only evidence supporting the jury's verdict is reversible error).

covenant had is completely irrelevant. Pursuant to the express mandate of RCW 4.22.060(2) the covenant not to execute operated as a release of the Linvog parents, negating the contribution rights and joint liability of the State.

As Mr. Barton pointedly observes:

[T]he trial court held that the prejudicial effect of the parties stipulation should be assessed “according to its actual agreed terms, not some version rewritten by the court or the state.”

CP at 386. The agreement does specifically state that it “does not represent a settlement of any claims plaintiff Jared Barton has brought in this matter against Defendants.” CP at 265. However, by giving this provision the force of law when it is directly contrary to RCW 4.22.060(2), the trial court condoned legal subterfuge. In *Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, *review denied*, 152 Wn.2d 1026, 101 P.3d 421 (2004), this court explicitly refused to enforce a covenant that attempted to keep co-defendants *Teuber* and *Hadsel* in the lawsuit by referring to the possibility that judgment would be entered against them and that the agreement was not to be construed as benefiting the State in anyway. Similarly, in *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 392, 98 P.3d 96 (2004), the court rejected the language in a covenant not to execute that provided that the mother, Ms. Romero,

remained in the case as a party defendant against whom judgment could be entered. This was the decisive flaw in the trial court's analysis—giving the covenant not to execute the legal effect Mr. Brindley and Mr. Spencer claim they thought it had, rather than the operative legal effect it did have. *See* RCW 4.22.060(2); *see also* J. Michael Phillips, *Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255, 266-67 (1994).

**D. Mr. Barton Failed To Establish That The Constitutional Error In Jury Instruction 18 Was Not Prejudicial**

While Mr. Barton's attorney kept the existence of his agreement limiting the Linvog parents' liability to \$100,000 a secret from the State, he knew about it. Nevertheless, he proposed Jury Instruction 18 that falsely stated the Linvog parents were responsible for the acts of their daughter, Korrine. Because the secret agreement limited the Linvog parents' liability to \$100,000, Jury Instruction 18 was untrue and therefore a comment on the evidence. Const. art. IV, § 16; *see State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1320 (1997); *see* Br. Appellant at 37-38. A judicial comment on the evidence is presumed prejudicial. Therefore, Mr. Barton has the burden to show the absence of prejudice. *Id.* In his brief, he did not even try. Indeed, perhaps in hope this issue would go

unnoticed; his response is tucked into a footnote. *See* Br. Resp't Barton at 30 n.6.<sup>14</sup>

Jury Instruction 18, along with the misleading opening statements of both counsel, successfully injected false sympathy into the jury's deliberations. The prejudice is evident in the fact that the jury allocated 95 percent of the fault for Ms. Linvog's accident to the State. This lopsided apportionment is in conflict with the undisputed evidence at trial establishing that if Ms. Linvog had pulled forward she had an unobstructed view of Mr. Barton's approaching motorcycle.<sup>15</sup> *See* Br. Appellant at 4 n.1, App. 1.

**E. The State Has Not "Benefitted" From Paying \$3,795,773.86 To Satisfy A Fraudulent Judgment**

Mr. Barton now argues that the State has accepted the benefit of the \$3.6 million judgment plus interest it paid by obtaining its own judgment for contribution against the Linvogs for a small fraction of that sum, and therefore should be deprived of its right to appellate review of the trial court's order denying its motion to vacate the judgment based on RAP 2.5. This argument is disingenuous at best. The State specifically asked the trial court not to grant Mr. Barton's motion for an order

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<sup>14</sup> A court may decline to consider an argument that is relegated to a footnote. *See State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993).

<sup>15</sup> A driver has a duty to stop, before entering a highway, at a point where traffic approaching from either direction from such highway can be seen. *See Kerlik v. Jerke*, 56 Wn.2d 575, 354 P.2d 702 (1960); Jury Instruction 16; CP 480-81.

requiring the State to satisfy the Linvogs' unpaid portion of the judgment until after this appeal was decided. CP at 80-182; RP(6/4/10) at 25-26. Despite the State's opposition, the trial court ordered it to pay an additional \$92,632.30, the Linvogs' unpaid portion of the judgment, plus interest. CP at 40-42, 1508

Because the statute of limitations for obtaining a contribution judgment is one year, RCW 4.22.050(3), the State preserved its right to collect that payment by entering a contribution judgment against the Linvogs.<sup>16</sup> The State has received absolutely no benefit from having to pay \$3,795,773.86. The State has not sought to collect on the contribution judgment, and does not intend to until the issues being addressed in this appeal are resolved.

More importantly, the primary issue in this appeal is whether the trial court erred in denying the State's Motion to Vacate a Judgment that was infested with fraud. By having to pay that judgment the State was aggrieved under RAP 3.1. An order denying a motion to vacate is appealable. RAP 2.2(10).

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<sup>16</sup> In the trial court, it was suggested that the State would be vindictive if it requested contribution from the Linvogs. RP(1/15/10) at 16. However, in opposition to plaintiff's motion to require the State to pay the Linvogs share of the judgment, the State presented evidence establishing that they currently own real estate in Whatcom County valued at \$4,529,446. CP at 291.

There are two rationales behind RAP 2.5(b). First, if a party has accepted the full benefit of the trial court's order then the case is moot. *Buckley v. Snapper Power Equipment*, 61 Wn. App. 932, 941, 813 P.2d 125 (1991) (withdrawal of judgment proceeds from court registry satisfies the judgment and renders appeal moot). Second, is the ability of a party to pay restitution if a trial court's order is reversed. *Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993) (primary purpose behind RAP 2.5(b) limiting review of party who has accepted the benefit of trial court decision is to ensure party seeking review will be able to make restitution if decision is reversed on appeal). Here no money has been paid, and even if it was, the State would not remove the money from the registry of the court until this appeal is final.<sup>17</sup>

The State has received absolutely no benefit from having to pay a \$3.6 million judgment that was based on fraud. The relief the State seeks is to have the judgment vacated and the money repaid pending a new trial. The denial of the State's motion to vacate is an appealable order. RAP 2.2(10). The State is aggrieved and the issues are not moot. This case is properly before this court on appeal.

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<sup>17</sup> Korrine Linvog was not a beneficiary of the covenant not to execute portion of the agreement and therefore if the judgment in this case is not vacated the State's contribution judgment against her would remain valid. *See* RCW 4.22.050. The covenant not to execute only released Thomas and Madonna Linvog. CP at 648-49.

**F. If The Judgment Is Vacated, The Obligation Of Mr. Barton's Counsel To Repay His Contingent Fee Is Mandatory**

Mr. Barton asserts that the trial court has substantial discretion in determining the State's entitlement to restitution, citing *Ehsani v. McCullough Family P'ship*, 160 Wn.2d 586, 159 P.3d 407 (2007). See Br. Resp't Barton at 49. However, this argument confuses the issue of the court's discretion to determine the severity of a sanction for Mr. Brindley's discovery violations under CR 26 and 37 with the requirement that an attorney repay the entire contingent fee received from a judgment that is later vacated. See RAP 12.8. The importance of this distinction is explained in *Ehsani*, which specifically distinguished cases that do not involve a contingent fee from those that do. Attorneys who have been paid based upon a contingent fee agreement are a real party in interest and are required to make restitution. *Ehsani*, 160 Wn.2d at 598, citing *Cox v. Cox*, 780 N.E.2d 951, 960-63 (2002) (attorney not required to make restitution, in part, because no contingent fee arrangement or statutory equivalent making him a real party in interest); *Champion Int'l Corp. v. McChesney*, 239 Mont. 287, 119 P.2d 527, 529-30 (1989) (attorney required to make restitution, in part, because of statutorily based contingent fee arrangement). See also *Restatement (Third) of Restitution and Unjust Enrichment* § 18 illus. 15 (2001) noting the obligation of a

lawyer to repay money received pursuant to a contingent fee agreement if the judgment is reversed.

**G. The Trial Court Improperly Failed To Impose Any Sanction For Plaintiff's Discovery Violations**

The trial court imposed no sanction on either Mr. Barton, the Linvogs, or their counsel in its memorandum decision. However after the trial court issued its memorandum decision the plaintiff asked to be awarded over \$146,000 in interest, an amount constituting the difference between the interest rate Mr. Barton received while the State's \$3,795,773.86 payment was in the Luvera Law Firm trust account and the interest rate in the judgment originally entered on the jury's verdict. CP at 188-89.

The State argued that it had paid the money into the registry of the court and that satisfied the State's portion of the judgment by operation of law. Specifically, the State argued that RCW 4.92.160(2) was self executing and once the State paid the money into the registry of the court, the judgment was satisfied. CP at 67-72. *See In re the matter of Estate of Bailey*, 56 Wn.2d 623, 354 P.2d 920 (1960) (once the clerk was directed to apply the money to satisfy the judgment any interest obligation

terminates).<sup>18</sup> The State also asserted that plaintiff's withdrawal of the money from the court also satisfied the judgment. CP at 219. *See Murray v. Murray*, 38 Wn.2d 269, 273, 229 P.2d 309 (1951) (removal of judgment proceeds from registry of the court satisfies the judgment). Nonetheless, the trial court ruled that "interest was required" but then ruled that the State was not required to pay it, as a sanction against the Luvera Law Firm. RP(6/4/10) at 38. This was a hollow sanction because once the State satisfied the judgment any obligation to pay interest terminated. RCW 4.92.160(2).

There is no case law or other authority obligating a judgment debtor to pay interest to a judgment creditor after the judgment debtor has paid into the registry of the court the amount owed and the judgment creditor takes the money out, in satisfaction of the judgment. The trial court erred in failing to impose any sanction whatsoever on Mr. Barton and his counsel for their discovery violations.<sup>19</sup> CR 26(g). *See Br. Appellant* at 43-44.

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<sup>18</sup> Mr. Barton's responsive brief undertakes no analysis of the specific language in RCW 4.92.160(2) requiring that: "Upon receipt of payment, the clerk shall satisfy the judgment against the State."

<sup>19</sup> In lieu of the empty sanction the trial court did impose, Mr. Brindley should be required to pay the State's costs and attorneys' fees and disgorge all funds that his law firm received in profit. *See Br. Appellant* at 48. While Mr. Barton argues that the trial court found his failure to supplement his discovery responses was "due to oversight." (Br. Resp't Barton at 41) he fails to note that the trial court also concluded that both he and Mr. Spencer were aware that disclosure of the covenant not to execute was required under RCW 4.22.060(1) ". . . and failed to comply with it." CP at 385.

## V. CONCLUSION

Sadly, this case exemplifies the type of “wink-wink deals” that are done to subvert RCW 4.22.070 and the policies underlying the Tort Reform Act of 1986. The agreement in this case is just one manifestation. Entering into a secret agreement that misstates the law, making misleading opening statements, proposing a jury instruction that is a lie, and submitting a judgment that hides a \$20,000 offset are all acts that should not be condoned. Taken together, they should be condemned. The State of Washington respectfully requests that this court reverse the trial court’s order denying its Motion to Vacate Judgment and impose sanctions, and award the State its reasonable attorneys’ fees pursuant to CR 26 and 37. *See* RAP 18.1.

RESPECTFULLY SUBMITTED this 1st day of February, 2011.

ROBERT M. McKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Michael P. Lynch", is written over a horizontal line.

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**PROOF OF SERVICE**

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

DATED this 1st day of February, 2010, at Olympia, WA.

  
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HILARY GALLIGAN, Legal Assistant