

NO. 65673-2-I

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

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.

BRIEF OF APPELLANT STATE OF WASHINGTON

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the State's Motion to Vacate Judgment based on a hidden agreement that limited the liability of co-defendants Thomas and Madonna Linvog ("Linvog Parents").

2. The trial court erred in denying the State's Motion for Sanctions based on the failure to disclose in discovery, and pursuant to RCW 4.22.060(1), a covenant not to execute against the co-defendant Linvog parents above their \$100,000 insurance policy limits.

3. The trial court erred in denying the State's Motion to Reconsider the Order Denying the Motion to Vacate Judgment based on the trial court's erroneous conclusion that Thomas and Madonna Linvog had joint liability with the State for \$3.6 million when the covenant not to execute limited their liability to \$100,000.

4. The trial court erred in finding that the State was not prejudiced when the jury was erroneously led to believe by Jury Instruction 18 and the opening statements of counsel that Thomas and Madonna Linvog were responsible to pay for any liability apportioned to their daughter Korrine, when their liability was limited by a secret covenant not to execute.

5. The trial court erred in finding the State was not prejudiced when the State was unable to utilize the covenant not to execute to show

bias and motive on the part of Korrine Linvog to make a deal with the plaintiff to protect her parents because the covenant not to execute had been concealed by her attorney and the attorney for the plaintiff.

6. The trial court erred in making inconsistent findings that if the jury had been told that Thomas and Madonna Linvog could be liable above their \$100,000 insurance policy limits that would have prejudiced the State, but then also finding that when the jury was not told that they were not liable above \$100,000 that did not prejudice the State.

II. STATEMENT OF THE ISSUES

1. Did the trial court error in denying the State's Motion to Vacate Judgment after it was discovered that counsel for plaintiff and the co-defendants Linvog had hidden from the State an agreement that limited the liability of and released Thomas and Madonna Linvog? (Assignments of Error Nos. 1, 2, 4, 5, and 6.)

2. Did the trial court error in denying the State's Motion for Sanctions (new trial) after it was discovered that counsel for the plaintiff and for the co-defendants Linvog had failed to disclose a covenant not to execute against Thomas and Madonna Linvog above their insurance policy limits, when such disclosure was specifically requested by the State in discovery and required by RCW 4.22.060(1)? (Assignment of Error No. 2.)

3. In denying the State's Motion to Vacate and Reconsideration of the that denial did the trial court error in concluding that the secret covenant not to execute entered into between plaintiff and Thomas and Madonna Linvog did not negate joint liability and contribution rights between the State and Mr. and Mrs. Linvog when that conclusion conflicts with the specific mandate of RCW 4.22.060(2) and is contrary to the intent of the legislature in its enactment of the Tort Reform Act of 1986? (Assignments of Error Nos. 3-6.)

III. STATEMENT OF THE CASE

This case arises from the collision between a motorcycle and an automobile on November 27, 2004. Nineteen-year-old Korrine Linvog pulled out from the intersection on Moores Garden Road in front of a motorcycle that was being driven by plaintiff, Jared Barton, who was westbound on State Route 536 (SR 536). Ms. Linvog was on her way home from her sister's house. She had traveled through the intersection numerous times prior to the date of the accident. The car she was driving had been provided by her parents, Thomas and Madonna Linvog. They were liable for her negligence under the family car doctrine.

Several months after the accident, Korrine and her parents went to the scene of the accident and met with the plaintiff's lawyer and his highway design expert witness, Ed Steven. CP at 484-85. On August 25,

2005, Mr. Barton filed this lawsuit against the State of Washington, Korrine Linvog, and her parents. The claim against the State alleged the Department of Transportation had negligently placed the stop bar in a location where two memorial highway trees blocked the view of a motorist who stopped at the stop bar of traffic approaching from the motorist's left.

From early on, Mr. Barton's attorney, Ralph Brindley, indicated to William Spencer, counsel for the Linvogs, his expectation that his client would be found fault free and that this was a case of joint and several liability in which the plaintiff would collect against the State any judgment over and above the insurance limits available to the Linvogs. CP at 560-61.

On October 25, 2006, Korrine Linvog was deposed and stated that when she stopped at Moores Garden Road the two trees to her left blocked her view of Mr. Barton's approaching motorcycle. CP at 860-61. Ms. Linvog's testimony was key, the only evidence establishing that the State's trees, in conjunction with the location of the stop bar, had caused the accident.¹

¹ At trial the evidence was undisputed that if Ms. Linvog had pulled forward to the edge of the road and looked left again she would have had a clear view of approaching westbound traffic on SR 536. CP at 780. *See* Ex. 51, Appendix (App.) 1.

After providing the testimony to make the plaintiff's claim against the State, the Linvogs' attorney and the plaintiff's attorney entered into an agreement in which the plaintiff agreed not to execute against Korrine Linvog's parents above their \$100,000 in insurance policy limits in exchange for an advance payment of \$20,000.² CP at 647-49, 662-65. Rather than just dismiss Thomas and Madonna Linvog, this agreement kept them in the case where the jury would believe that they would be responsible to pay any verdict entered against their daughter.

In discovery, the State requested a copy of any agreements or covenants from both the plaintiff and the Linvogs. CP at 831-41. In addition, the State requested from the plaintiff to disclose any advance payment or compensation that had been paid in relation to the accident. Before the covenant not to execute was made and the \$20,000 was paid, both counsel for the plaintiff and counsel for the Linvogs denied the existence of any agreement or payment. CP at 833, 838. The covenant not to execute was entered into on March 1, 2007, but trial did not begin until October 29, 2007, nearly eight months later. Neither Mr. Brindley nor Mr. Spencer supplemented their discovery answers to disclose the existence of the covenant not to execute or the \$20,000 payment. CP at 9.

² The Linvogs previously tendered the entire \$100,000 in policy limits to the plaintiff, but that offer had been rejected because the plaintiff wanted to maintain joint liability between the Linvogs and the State. CP at 555.

Despite the existence of the agreement limiting the Linvog parents' liability, in opening statement counsel for the plaintiff and counsel for the Linvogs both represented to the jury that Thomas and Madonna Linvog would be responsible for any judgment entered against Korrine Linvog.

Mr. Brindley, in his opening statement, told the jury:

Korrine Linvog lived in Bellingham, with her folks. And the reason her folks are in this case is because there's a law in the State of Washington that says if we, as parents, provide a car for our kids and something happens and it's the kid's fault, **parents are on the hook, as well**. So that's the reason Mr. and Mrs. Linvog are named in this case.

CP at 785 (emphasis added). Mr. Spencer, in his opening statement followed up:

I represent both Korrine Linvog, who can't be with us today and will be back tomorrow, and obviously, her parents, as well, who are present in the court.

CP at 797.

As Mr. Brindley already alluded to that Mr. and Mrs. Linvog are here because they own the car she was driving. They provided that car to Korrine, to use that day. And we'll talk about what she was doing and why, and because of that, as he's indicated, **they're going to be responsible for her acts**, and they are parties to this lawsuit, as well. I don't think either one will testify, they don't know anything about the accident, but that's why they're here, as parties in this lawsuit.

CP at 801-02 (emphasis added).

Plaintiff also proposed (CP at 1232) and the court gave Jury Instruction 18, which told the jury that Thomas and Madonna Linvog were “responsible for the acts of” their daughter, Korrine Linvog, because they had provided a motor vehicle for her use. CP at 1235. During the trial, the Linvogs not only joined the plaintiff in blaming the State, but also joined in the plaintiff’s CR 50 motion (CP at 1031-40) in requesting the court to rule that the plaintiff was not at fault. CP at 1036.³

On December 14, 2007, the State filed a Notice of Appeal. CP at 1-18. A Partial Satisfaction of Judgment by Mr. Spencer was filed on January 24, 2008, but was not served on the State. CP at 844. On November 10, 2008, (CP at 124-42) the court of appeals affirmed the judgment and on July 7, 2009, the supreme court denied the State’s Petition for Review. *Barton v. State Dep’t of Transp.*, 147 Wn. App. 1021, 2008 WL 4838687 (Wn. App. Div. 1, Nov 10, 2008), *review denied*, 166 Wn.2d 1012, 210 P.3d 1018 (2009). Even before the case had been

³ The jury returned a verdict of \$3.6 million and apportioned 5 percent of the fault for the accident to the Linvogs (\$180,000) and 95 percent of the fault to the State (\$3.24 million). CP at 224-26. At the time judgment was entered, the existence to the covenant not to execute remained hidden so the judgment amount against Thomas and Madonna Linvog was \$3.6 million, not the \$100,000 agreed to in the covenant. The judgment also did not reference the \$20,000 credit that the Linvogs were entitled to. CP at 227-29. The State was also entitled to that \$20,000 credit because the judgment was for joint and several liability. *See* RCW 4.56.050-.075. The existence of the covenant not to execute was not disclosed at this time to limit the judgment amount against the Linvog parents to \$100,000. Their counsel agreed to have a judgment in favor of plaintiff entered against them for the full \$3.6 million verdict. CP at 1237-39.

mandated, the State undertook the process of paying the judgment in order to stop the accrual of post judgment interest. In discussing who would pay the remaining \$80,000 plus interest owed by the Linvogs, the State learned for the first time of the existence of the covenant not to execute. CP at 843-45. This occurred at the same time the State paid its share of the judgment with interest into the Snohomish County Superior Court registry, \$3,420,000.00, plus \$359,636.33 in interest. CP at 218.

Counsel for the State asked both counsel for Mr. Barton and counsel for the Linvogs why the agreement had not been disclosed. CP at 1283-85. Mr. Spencer did not respond on behalf of the Linvogs. CP at 476. Plaintiff's counsel said there was no final agreement even though he had signed the agreement and cashed and disbursed the \$20,000 check from Mutual of Enumclaw. CP at 667-68. On November 3, 2009, the State filed a Motion to Vacate Judgment and for Sanctions. CP at 635-887, 909-1297, 1304-23. At the same time the State requested plaintiff's counsel not to disburse the \$3.7 million that he had withdrawn from the registry of the court that was in the Luvera Law Firm's trust account. CP at 1468. The State's Motion to Vacate and for Sanctions was heard by the court on January 15, 2010. On May 3, 2010, Judge Farris issued a memorandum decision outlining the reasons why she intended to deny the

motion to vacate and for sanctions.⁴ Plaintiff's counsel then, without notice to the State, immediately disbursed the judgment proceeds from the trust account of the Luvera Law Firm. Report of Proceedings (RP) (6/4/10) at 19. On May 26, 2010, the State filed a Motion to Reconsider the Order Denying the State's Motion to Vacate, arguing that the covenant not to execute had eliminated joint liability and contribution rights as a matter of law. CP at 266-71, 290-382. Following a hearing on June 4, 2010, the court entered an order denying the motion to vacate that incorporated its memorandum decision. CP at 40-42. On the same date the court denied the State's Motion for Reconsideration. CP at 25-27. The court also granted the plaintiff's motion to require the State to pay the unpaid portion of the Linvogs' share of the judgment, \$80,000 plus interest accrued, which totaled \$92,632.30. CP at 40-42. In denying reconsideration and ordering payment of the Linvogs remaining share of the judgment, the court rejected the State's argument that the agreement limiting the Linvog parents' liability at \$100,000 negated joint liability between them and the State.

At the June 4, 2010 hearing, the court also denied the plaintiff's motion to require the State to pay additional post-judgment interest on the

⁴ A copy of the memorandum decision is attached as App. 2. CP at 278-86.

\$3.7 million that had been held in the Luvera Law Firm's trust account.⁵ CP at 20-22. On July 1, 2010, the State filed a timely Notice of Appeal of the Order Denying the State's Motion to Vacate and for Sanctions as well as the Order Denying Reconsideration of that order. CP at 1-18.

IV. SUMMARY OF TRIAL COURT'S MEMORANDUM DECISION

The trial court issued its memorandum decision on May 3, 2010, which was incorporated into the Order Denying the State's Motion to Vacate and for Sanctions entered on June 4, 2010. The pertinent portions of the memorandum decision are outlined below.

A. Terms Of The Agreement

The trial court found that in March 2007 the Linvogs' attorney and the plaintiff's attorney reached an agreement that if the Linvog parent defendants (Thomas and Madonna Linvog) paid \$20,000 to plaintiff, then the plaintiff agreed that he would not execute on any judgment against the Linvog parents that exceeded the \$100,000 limits of their insurance coverage. Defense counsel placed the agreement in writing and sent a copy of it with a \$20,000 check from the Linvogs' insurance company Mutual of Enumclaw to plaintiff's counsel. Plaintiff's counsel signed the

⁵ Because plaintiff had received a significantly lower rate of interest on those funds while they held it in the Luvera Law Firm trust account during the pendency of the State's Motion to Vacate, plaintiff sought \$143,769.39 in additional interest. CP at 20-22, 188-95.

agreement and cashed the check. The court rejected the plaintiff's argument that because the Linvogs' attorney had not signed the agreement not to execute, it was never finalized. The court concluded that the lack of signature would not likely render the agreement invalid under Washington law given that the Linvogs' attorney drafted the document, the check was cashed resulting in performance, and both sides agreed on the terms of the agreement.

The State argued the covenant not to execute had the legal effect of completely, or at least partially, releasing the Linvog parents and negated joint liability. The court rejected that argument and indicated that in judging whether the agreement had any prejudicial effect it had to be judged according to its actual terms and not some version rewritten by the court or the State. Accordingly, the court concluded that what was relevant was whether the parties to the agreement believed it was valid. The court then found that the parties to the agreement did believe it was valid according to the terms they agreed on. The court noted that it was (1) possible the agreement was invalid or unenforceable, (2) that it might be against public policy, (3) violated RCW 4.22.060 or be legally impossible, and (4) based on mutual mistake. The court made no final determination on the validity of the agreement. CP at 8-10.

B. The Hidden Nature Of The Agreement

Judge Farris noted that at the time the 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. She ruled that counsel had a duty under the court rules to supplement their answers but failed to do so. The court found that pursuant to RCW 4.22.060 both counsel were required to give the State notice of the payment and agreement five days prior to entering into it. “Both counsel were aware of this statutory requirement and failed to comply with it.” CP at 9. The court acknowledged that the State did not become aware of the pretrial agreement until after trial and after appeal of the case was completed. Without any analysis, the memorandum decision did not impose any sanction.

C. Effect Of The Agreement

In its Motion to Vacate, the State claimed it was prejudiced when the plaintiff and Linvogs hid the covenant not to execute and the advance payment in discovery and throughout the trial. Specifically, the State argued that Korrine Linvog could have been cross examined as to her bias and motive to protect her parents from liability by setting up the State. Her testimony that she stopped in the precise location where the trees

blocked her view of Mr. Barton’s approaching motorcycle—and her testimony that she did not pull forward to the edge of the road and look again before pulling out in front of him—was critical. Once she had provided this testimony in her deposition, the liability of her parents above their insurance policy limits was eliminated through the execution of the covenant not to execute. CP at 1317-20. The trial court rejected the argument and concluded that inquiry into the agreement would not have been helpful to show bias to the State but in fact “would likely have 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 judgment above that amount.”⁶

D. Jury Sympathy Analysis

The State also asserted that it had been prejudiced because both Mr. Spencer and Mr. Brindley had led the jury to believe that the Linvog parents were “on the hook,” responsible to pay any judgment awarded against their daughter. CP at 1308-20. The court also gave plaintiffs proposed family car doctrine instruction, Jury Instruction 18.⁷ CP at 1233-35. The court rejected the State’s false sympathy argument as speculative and held that, even though the Linvog parents’ liability to the plaintiff was

⁶ The court also indicated that it was not holding that inquiry into the agreement would have been admissible. CP at 13.

⁷ The court did not analyze the prejudice from or even mention Jury Instruction 18 in its memorandum decision.

limited by the covenant not to execute at \$100,000, they were still liable through having to reimburse the State in a contribution action for any and all portions of their percentage of a joint and several judgment above \$100,000. “They were still potentially on the hook all the way.”⁸ CP at 14.

Finally, the court indicated that if the State felt that the large percentage of liability awarded against it (95 percent) was based upon inappropriate sympathy, those issues could have and therefore had to be raised on direct appeal. CP at 15. Again, the State was not aware of the existence of this secret covenant not to execute until after the appeal of the case was completed, so it did not know the jury was misled and the sympathy was false.

V. SUMMARY OF ARGUMENT

Counsel for the plaintiff and counsel for the Linvogs had a duty to disclose both the \$20,000 advance payment and the covenant not to execute against defendants Thomas and Madonna Linvog (Linvog parents) above their \$100,000 insurance policy limits. The duty to disclose arose from both the State’s outstanding discovery requests that specifically

⁸ Both the State’s Motion to Vacate and Motion for Reconsideration argued that the Linvog parents were not on the hook because the covenant not to execute limited their liability to \$100,000, negated any joint liability above \$100,000, and therefore precluded any contribution claim against them. *See* RCW 4.22.060(2). Judge Farris rejected that argument and ordered the State to pay the unpaid portion of the judgment against the Linvogs.

requested information about advance payment and covenants, as well as RCW 4.22.060(1) that requires five days advance notice to all parties and the court prior to entering into a covenant not to execute. The trial court correctly concluded that by keeping the covenant and the \$20,000 payment secret both counsel had breached these duties.

However, in analyzing the prejudicial effect of this misconduct the trial court erred by concluding that the covenant not to execute against the Linvog parents did not eliminate joint liability and contribution rights between the State and the Linvog parents. In other words, the court held that even though the covenant not to execute limited the Linvog parents' liability to plaintiff at \$100,000, they still had joint liability with the State for the full amount of the verdict, \$3.6 million. The trial court's misapprehension of this point of law tainted its analysis of the covenant's prejudicial effect on two critical aspects of the trial. First, the jury was told in opening statement by both counsel and in a family car doctrine jury instruction that the Linvog parents were "on the hook," responsible to pay any liability assessed against their daughter Korrine. Yet, because the covenant not to execute operated as a release and limited the Linvog parents' liability to \$100,000, these statements of law and fact were untrue. The affirmative misrepresentation created a false sympathy for the Linvog parents that they would be exposed to financial ruin if the jury

assigned a large percentage of fault on its \$3.6 million verdict against their daughter, Korrine Linvog. In denying the State's Motion to Vacate, the court erroneously ruled that the Linvog parents were still "on the hook all the way" (CP at 14), if the State sought contribution after paying their percentage of fault based on joint liability. The trial court failed to appreciate that RCW 4.22.060(2) expressly provides that a covenant not to execute discharges any claim for contribution.

Equally prejudicial was the inability of the State to cross examine Korrine Linvog about the fact that after she provided testimony in her deposition to establish the plaintiff's liability theory against the State (state trees blocked her view), the plaintiff rewarded her by eliminating the potential destruction of her parents' financial security through the consummation of the covenant not to execute above their insurance policy limits. The trial court concluded that this was not prejudicial to the State because disclosure of the covenant not to execute would have made it clear to the jury that the Linvog parents could still be liable for a verdict above their \$100,000 insurance policy limits. CP at 13. Again, this ruling was based on the trial court's erroneous conclusion that the Linvog parents had liability above \$100,000 through a potential contribution claim brought by the State.

The trial court's memorandum decision also inexplicably states that the State's attorney had full opportunity to explore Korrine Linvog's motive to lie during cross examination at the time of trial. CP at 14. This ruling is incorrect. Lots of witnesses have a motive to lie. But being able to show the jury a written agreement that constitutes a substantial subornation from a plaintiff to Ms. Linvog for having set up the State is the quintessential core of effective cross examination.⁹ Because the covenant not to execute was hidden from the State at the time of trial, the State was unable to inform the jury of the agreement or explore it in the cross examination of Korrine Linvog.

Finally, despite finding that counsel for Linvogs and for plaintiff simultaneously failed to disclose existence of the covenant not to execute in violation of CR 26 and 37, the memorandum decision without any analysis imposes no sanction.

The trial court's erroneous interpretation of the legal effect of the covenant not to execute is an error of law that is subject to de novo review.¹⁰

⁹ Part of this cross examination would have included the fact that Ms. Linvog and her parents went to the accident scene and met with plaintiff's counsel and his highway design expert Ed Stevens months before the lawsuit was even filed. RP (12/15/09) at 12, 22.

¹⁰ See *Conom v. Snohomish Cy.*, 155 Wn.2d 154, 118 P.3d 344 (2005) (questions of statutory interpretation are questions of law subject to de novo review); *Mayer v. STO Indus.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (a court abuses its discretion when it applies the law to the facts on untenable grounds); *Richards v. Overlake Hosp. Med. Ctr.*,

VI. 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 Attorneys For The Plaintiff And Co-Defendants Linvog Had A Duty To Disclose The Covenant Not To Execute And Advance Payment In Discovery

State Interrogatory 49 and Request for Production 11 to plaintiff propounded September 10, 2005, required the plaintiff to identify and produce copies of agreements or covenants such as the Stipulation of Parties Regarding Advance Payment (the covenant not to execute). State Interrogatory 48 to the plaintiff specifically requested identification of any monetary payments related to the lawsuit, such as the \$20,000 that was paid by Mutual of Enumclaw in consideration for the covenant not to execute. CP at 830-34.

The State also sent interrogatories to the co-defendants Linvog. Interrogatory 17 and Request for Production "M" propounded on July 11, 2006, required the Linvogs to identify and produce copies of agreements or covenants such as the Stipulation of Parties Regarding Advance

59 Wn. App. 266, 271, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014, 807 P.2d 838 (1991) (trial court's decision to grant a new trial afforded greater deference than decision to deny one).

Payment. CP at 836-40. CR 26(e)(2) requires that each party seasonably amend their prior negative responses to these discovery requests.¹¹

The trial court concluded that counsel for plaintiff and for the Linvogs had breached their duty to disclose to the State the existence of the covenant not to execute and the advance payment. CP at 9. Uncoincidentally, both Mr. Spencer, counsel for the Linvogs, and Mr. Brindley, counsel for the plaintiff, failed to supplement the same interrogatories. Each firm had between March 1, 2007, the date the \$20,000 payment and agreement were made, and October 29, 2007, the date the trial started, to comply with their duty to supplement their discovery responses pursuant to CR 26(e)(2). Neither offered any justification for their failure to do so.¹²

After the jury's verdict, neither counsel for the plaintiff nor counsel for the Linvogs bothered to include in the judgment any credit for the \$20,000 payment. CP at 1236-39. Since the court had ruled that Mr. Barton was fault-free, the \$3.6 million judgment that was entered against the State and the Linvogs was for joint and several liability,

¹¹ In addition to their duty to supplement under CR 26(e)(2), the discovery sent by the State to the plaintiff and to the co-defendants Linvog contained language reminding them and their counsel of their continuing duty to supplement their responses. CP at 831-32, 836-37.

¹² In opposition to State's Motion to Vacate, Mr. Brindley, counsel for the plaintiff, did argue that, even though he signed the agreement and cashed the \$20,000 check from Mutual of Enumclaw and disbursed the funds, the agreement was never finalized because Mr. Spencer had not signed it. Not surprisingly, the trial court rejected Mr. Brindley's argument. CP at 10.

entitling the State to a \$20,000 set off against the judgment. *See* RCW 4.56.050-.075. While the case was on appeal, the Linvogs' insurance carrier paid the outstanding \$80,000 of the insurance policy limits (\$100,000) minus \$20,000 paid per the agreement. On January 24, 2008, counsel for the plaintiff filed a partial satisfaction of judgment in the amount of \$100,000. The State was not served with or otherwise given notice of this payment either. *See* CR 5; CP at 844.

B. Counsel For The Plaintiff And For The Linvogs Breached A Duty To Disclose The Covenant Not To Execute Pursuant To RCW 4.22.060(1)

The trial court found that the existence of the secret release agreement was not disclosed to the State or the court as required by RCW 4.22.060(1), that provides, in pertinent part:

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 trial court also agreed with the State that, pursuant to RCW 4.22.060, both counsel were required to give the State five days prior notice of the agreement and payment. The court specifically found:

Both counsel were aware of the statutory requirement and failed to comply with it.

CP at 9 (emphasis added).

The requirement in RCW 4.22.060(1) for the disclosure of Mary Carter type agreements has specifically been recognized by numerous courts. See *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103-04, 841 P.2d 1300 (1992), *aff'd*, 125 Wn.2d 1, 882 P.2d 157 (1994), citing *Daniel v. Penrod Drilling Co.*, 393 F. Supp. 1056 (E.D. La. 1975); *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973); *Maule Indus. v. Rountree*, 284 So.2d 389 (Fla. 1973); *Ratterree v. Bartlett*, 238 Kan. 11, 707 P.2d 1063 (1985); Christopher Vaeth, J.D., Annotation, *Validity and effect of "Mary Carter" or similar agreements setting maximum liability of one cotortfeasor* 22 A.L.R.5th 483 (1994). The reason why disclosure is required is because the existence of undisclosed agreements can prejudice the proceeding by misleading the trier of fact. When such agreements are disclosed, the trial court can advise the jury so the jurors can consider the relationship of parties in evaluating evidence and the credibility of witnesses. *Id.*¹³

C. Counsels' Breach Of Their Duties To Disclose The Covenant Not To Execute Constituted Fraud And Misrepresentation

On a motion to vacate judgment under CR 60(b)(4), the moving party can prove fraud or misrepresentation by showing that the non-moving party breached an affirmative duty to disclose a material fact.

¹³ Part of the legislative rationale for requiring five days notice for a covenant not to execute and other types of settlement agreements was . . . "a legitimate concern that claimants will enter into 'sweetheart' releases with certain favored parties." 1 Senate Journal, 47th Leg., Reg., Sess. at 636 (Wash. 1981). See App. 3

Crisman v. Crisman, 85 Wn. App. 15, 21-23, 931 P.2d 163, *review denied*, 132 Wn.2d 1008, 940 P.2d 653 (1997) (when a duty to disclose exists, the suppression of material fact is tantamount to an affirmative misrepresentation). In failing to let the State know about the covenant not to execute, counsel for the plaintiff and for the Linvogs breached: (1) the duty to respond to the State's specific discovery requests about covenants and advance payments, and (2) the statutory duty to disclose imposed by RCW 4.22.060(1).

Interrogatories propounded pursuant to CR 33 create a duty to disclose. When the person responding to the interrogatory asserts the non-existence of a fact of which that party has or should have knowledge the requesting party may rely on such statements. *Seals v. Seals*, 22 Wn. App. 652, 655-57, 590 P.2d 1301 (1979) (husbands failure to disclose community assets in dissolution proceeding in response to interrogatories satisfied the fraud element of CR 60(b)(4)).

In this case, the State was entitled to rely upon the negative responses it received from counsel for the Linvogs and counsel for the plaintiff indicating that no advance payments or agreements had been made.

In addition, their failure to disclose the existence of the covenant not to execute in accordance with the mandate of RCW 4.22.060(1)

breached a statutory duty to disclose and constitutes fraud and misrepresentation warranting relief pursuant to CR 60(b)(4). *See Favors v. Matsky*, 53 Wn. App. 789, 796, 770 P.2d 686, *review denied*, 113 Wn.2d 1033, 784 P.2d 531 (1989) (failure to comply with a statutory duty to disclose amounts to fraud).

D. The Trial Court Erred In Concluding That The Covenant Not To Execute Did Not Negate Any Claim For Contribution Between The State And The Linvog Parents

Trial court correctly concluded that counsel for the plaintiff and counsel for the Linvog parents breached their duties under the discovery rules and RCW 4.22.060(1) in failing to disclose the covenant not to execute. CP at 9.

Unfortunately, the trial court erred in its analysis of the operative legal effect of the covenant not to execute. Instead of analyzing the prejudice from the nondisclosure of the covenant based on its actual operative legal effect (it was a release), the trial court judged the prejudicial effect of the agreement based on its actual terms (it was not a settlement). The court suggested the State was trying to rewrite the terms of the agreement. CP at 9-15. To the contrary, it was the State's position that the covenant not to execute operated as a release in spite of the fact that it contained self-serving inconsistent language stating it was not a settlement. The State argued that what Mr. Brindley and Mr. Spencer

thought about the agreement was irrelevant because the prejudice from the nondisclosure of the agreement should be judged based upon the operative legal effect that the agreement had – that it operated as a release. *See 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 did not specifically “release” the defendants is irrelevant; what matters is the covenant’s operative effect). Joint liability – Use Of Covenant Not To Execute, 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law And Practice* § 12.25 (3d. ed. 2010) (courts look to the effect of a covenant not to execute rather than its form or label).¹⁴

Ultimately, the trial court concluded that the covenant not to execute did not operate as a matter of law to release the Linvog parents and therefore its nondisclosure had not prejudiced the State. CP at 14. The trial court’s erroneous conclusion that the covenant not to execute did not constitute a complete, or at least a partial release of the Linvog parents

¹⁴ Two passages from Mr. Brindley’s declaration showed his inconsistent, self-contradiction as to his understanding of the legal effect of the covenant not to execute:

I am certain that neither Mr. Spencer nor I ever considered a covenant not to execute to affect any type of release or settlement
(Emphasis added.)

However, in ¶ 7 to his declaration, Mr. Brindley says:

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

CP 562-63.

is an error of law that is subject to de novo review. *See In re Marriage of Wilson*, 117 Wn. App. 40, 45, 68 P.3d 1121 (2003) (question of statutory interpretation are reviewed de novo).

In order to fully appreciate the reasons why a covenant not to execute operates as a release it is helpful to understand the historical evolution of tort law on joint and several liability in Washington; most importantly the policy and changes implemented in the Tort Reform Act of 1986.¹⁵ An excellent outline of this is set forth in a law review article, J. Michael Phillips, *Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255, 266-67 (1994).¹⁶ As the law review article notes:

Washington began moving away from traditional common law principles of fault determination in its 1973 legislation adopting a system of “pure” comparative negligence, with the purpose of facilitating recovery by injured persons and thereby serving the compensatory function of tort law. The Washington Supreme Court later rejected pleas to abandon joint and several liability, holding that comparative negligence did not necessitate such an action, and that abandoning joint and several liability would only frustrate the goal of compensation. Fairness among tortfeasors was deemed subordinate to the goal of fairness to the injured party. In 1981, the legislature established contribution

¹⁵ The preamble of the Tort Reform Act of 1986 specifically states that comprehensive reform is necessary *inter alia* to address the escalating costs of insurance and increased exposure to lawsuits of governmental entities in order to improve the availability and affordability of quality governmental services. In other words a purpose of this enactment was to protect “deep-pocket” government defendants. For ease of reference a copy of the preamble is attached as App. 4 to this brief.

¹⁶ A copy of the entire law review article, including footnotes, is attached as App. 5 to this brief.

among joint or concurrent tortfeasors to mitigate any “unfairness” to defendants who may have been compelled to pay more than their proportionate share of damages.

In 1986, the Washington Legislature modified the state’s tort system and, in particular, substantively changed rules regulating joint and several liability. The legislature adopted a general rule of several liability based on proportionate fault, with joint and several liability restricted to a few specific situations. An example is when a plaintiff is free from fault.

The 1986 law requires a trier of fact to allocate liability comparatively among all entities causing damage, including the plaintiff, based on each party’s share of fault. The liability of each is to be several only, except when the plaintiff is free of fault; in that case, the defendants are jointly and severally liable for the sum of the shares of all parties against whom judgment is entered. Thus, when a faultless plaintiff settles with one defendant prior to judgment, the amount of joint and several liability is reduced by whatever amount of fault the trier of fact later allocates to the settling defendant. One effect of this provision is to require faultless plaintiffs to exercise extreme caution in entering into any pre-judgment settlement agreement.

(Footnotes omitted).

Under the Tort Reform Act of 1986, contribution rights only exist between tortfeasors who are jointly and severally liable and then only in limited situations such as when one tortfeasor pays more than that party’s equitable share of the judgment. See RCW 4.22.050(1); Stewart A. Estes, *The Short Happy Life Of Litigation Between Tortfeasors: Contribution, Indemnification, And Subrogation After Washington’s Tort Reform Act*, 21

Seattle U. L. Rev. 69, 87 (1997). Therefore, in order for the Linvog parents to be liable to the State for potential contribution, they had to be jointly and severally liable with the State for the entire amount of the jury's \$3.6 million verdict. The conclusion of the trial court that the covenant not to execute did not negate any claim for contribution between the State and the Linvog parents was erroneous. The trial court's decision is contrary to statute and case law.

First and foremost, RCW 4.22.060(2) specifically 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**, but it does not discharge any other persons liable upon the same claim unless it so provides.

(Emphasis added.)

In *Maguire v. Teuber*, 120 Wn. App. at 395, n.3 (2004), this court specifically held that a covenant not to execute operates as a release. As in this case, the plaintiff in *McGuire* attempted to keep co-defendants Teuber and Hadsel in the lawsuit by referring to the possibility that judgment would be entered against them and stating in the agreement that it was not to be construed as benefitting the State in any way. Nonetheless this court concluded that even though the agreement did not specifically "release" the defendants, its operative legal effect was to release them

from the case. Joint and several liability requires each tortfeasor to be liable for the entire harm – the plaintiff can obtain full recovery from one or all of the tortfeasors. *Maguire*, 120 Wn. App. at 395 n.3.

The covenant not to execute limited the Linvog parents' liability to plaintiff to \$100,000. Because they were released by the covenant not to execute and their liability to the plaintiff was limited to \$100,000, the Linvog parents did not have joint and several liability with the State above that amount. *Maguire*, 120 Wn. App. at 395. *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); *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004) (covenant not to execute constitutes a release under RCW 4.22.070). *See also Kottler v. State*, 136 Wn.2d 437, 447, 963 P.2d 834 (1998) (interpreting RCW 4.22.070 to require that settling parties are not parties against whom judgment is entered and will not be jointly and severally liable); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992) (“Settling, released defendant’s do not have judgment entered

against them within the meaning of RCW 4.22.070(1) and therefore are not jointly and severally liable defendants.”).¹⁷

Both of the leading commentators on the Tort Reform Act of 1986 recognize that settlement type agreements such as covenants not to execute must be treated as a full release in order to fully implement the intent of the Legislature.

B. Construing Mary Carter Agreements as Settlements Is Consistent with the Language and Intent of the 1986 Tort Reform Act

1. The Language of the Statute Indicates That Mary Carter-type Agreements Constitute Settlements

The language of the 1986 Tort Reform Act and its interrelationship with the “effects of settlement” statute suggest that the legislature intended Mary Carter-type agreements to be treated as settlements. Section 4.22.060, the effects of settlement statute, specifically identifies releases, covenants not to sue, covenants not to enforce judgment, or similar agreements as settlements. While this section is intended only to come into effect in the case of joint and several liability, which itself only applies when there is judgment against the defendants, it appears by inference that the legislature also intended that when one of the listed types of settlements is entered into before judgment, that settlement would prevent judgment against the settling party, and thereby exclude that party’s damages from the amount of joint liability. A Mary Carter agreement, effectively a pre-judgment covenant not to execute or enforce judgment, should therefore be viewed as

¹⁷ Mr. Brindley’s awareness of the holdings in *Maguire* and *Romero* is reflected by the fact that in 2006, two of his partners wrote an article in the WSTLA Trial News lamenting the fact that both cases had held under the Tort Reform Act of 1986 a covenant not to execute constitutes a release. For ease of reference, a copy of that article is attached as App. 6.

a settlement within this general statutory definition of settlements. This will foil schemes designed to achieve joint and several liability by keeping the settling parties in the lawsuit.

Phillips, 69 Wash. L. Rev. at 273-74 (footnotes omitted).

A contrary and more forceful argument can be made that the settling defendant has been “released” by the plaintiff, or has an individual defense, or is immune from liability because the plaintiff cannot recover any money from that defendant. The 1986 Act provides that “[j]udgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant[,]” or who have prevailed on an individual defense. Thus, the 1986 Act does not authorize a judgment to be entered against an immune or released defendant, or one with a defense. Alternatively, it can be argued that a “judgment” (as that term is used in the 1986 Act) with real, adverse consequences has not been entered. Such a hollow judgment cannot create joint and several liability.

Estes, 21 Seattle U. L. Rev. at 81 (footnotes omitted).

The trial court’s misapprehension of this aspect of the Tort Reform Act of 1986 turned its analysis of the prejudicial effect of the covenant not to execute on its head. The State argued that when Mr. Spencer and Mr. Brindley told the jury that the Linvog parents were “on the hook” in their opening statements (*see supra*, p. 6) and then Mr. Brindley had the court instruct the jury that the Linvog parents were responsible for the acts of their daughter (Jury Instruction 18), these constituted material misstatements of fact and law. The trial court rejected this argument based on its determination that the statements were true and that the

Linvog parents were “on the hook all the way” through having to reimburse the State on a contribution claim for any percentage on a joint and several judgment above \$100,000. CP at 14.

In its Motion to Vacate the State also argued that because the covenant not to execute had been hidden the State couldn’t use it to cross examine Korrine Linvog as to her motive and bias to protect her parents. CP at 1317-20. She was undoubtedly fearful her car accident, that had seriously injured Mr. Barton, exposed her parents to financial ruin. Her testimony was critical to establishing the State’s liability. CP at 860-61. Once she had provided that deposition testimony, the plaintiff entered into the secret agreement to limit her parents’ liability exposure to \$100,000, their insurance policy limits. CP at 1263-66.¹⁸ Here again the trial court’s analysis of the prejudicial effect of the State’s inability to utilize the covenant not to execute to challenge Ms. Linvog’s credibility on cross examination was distorted by its erroneous conclusion that the covenant not to execute did not eliminate contribution rights between the State and the Linvog parents. The trial court specifically concluded that “it would have likely been prejudicial to the State by placing the limits of the Linvogs insurance before the jury and making it very clear they could still

¹⁸ Prior to trial the entire \$100,000 had been tendered by the Linvogs to the plaintiff. However, that offer was rejected because the plaintiff wanted to maintain joint liability between the Linvogs and the State. CP at 555.

be liable for a verdict above that amount.”¹⁹ CP at 13. What the trial court misunderstood was that the covenant not to execute negated the possibility that the Linvog parents would ever have to pay more than their insurance policy limits of \$100,000.

The fundamental flaw in the court’s analysis was that pursuant to RCW 4.22.060(2) the covenant not to execute against the Linvog parents had the operative, legal effect of releasing them and thereby negating joint and several liability. If the existence of the covenant not to execute had been disclosed, the State would have moved to have the Linvog parents dismissed prior to trial based on RCW 4.22.060(2), and this court’s interpretation of it in *Maguire*, 120 Wn. App. at 395; *Romero*, 123 Wn. App. at 385. *See also, Phillips*, 69 Wash L. Rev at 275-76 (Self serving statement in covenant not to execute agreement that it is not to be construed as a settlement should not prevent a court from identifying the agreement for what it is: a settlement of plaintiff’s claims.). *See App. 4.*

The operative effect of the covenant not to execute was to eliminate the Linvog parents’ liability to the plaintiff above \$100,000. The trial court’s analysis of the prejudice to the State was completely skewed by its erroneous conclusion that the liability of the Linvog parents

¹⁹ Conversely, the trial court concluded the State was not prejudiced when the jury was not told the Linvog parents’ liability was limited to \$100,000. The latter conclusion is irreconcilably inconsistent with the former and constitutes plain error. CP at 14.

had not been limited and that they were still potentially exposed to liability above their \$100,000 insurance policy limits through a contribution action by the State. Once the secret covenant not to execute is analyzed in accordance with its actual operative legal impact – that it was a release of the Linvog parents – the prejudice from its nondisclosure is patent, and the Order Denying the State’s Motion to Vacate and for Sanctions should be reversed.

E. Misconduct Of Counsel In Lying To The Jury And Hiding Evidence Requires A New Trial

1. Misleading The Jury And The Court Into Believing The Linvog Parents Would Have To Pay A Large Verdict Against Their Daughter Improperly Injected False Sympathy Into The Trial That Resulted In A Disproportionate Verdict Against The State

When the legal effect of the covenant not to execute is properly analyzed – as limiting the Linvog parents’ liability exposure to \$100,000 – the prejudice of its nondisclosure becomes clear. In their opening statements Mr. Brindley and Mr. Spencer falsely implied to the jury that Mr. and Mrs. Linvog were “on the hook” for any damages assessed against their daughter. *Supra*, p. 6. At Mr. Brindley’s request, the jury was erroneously instructed that:

A person who maintains or provides a motor vehicle for the use of a member of his or her family is responsible for the acts of that individual in the operation of that motor vehicle.

Plaintiff's Proposed Jury Instruction 15, (CP at 1230-32); court's Jury Instruction 18 (CP at 1233-34). These statements and the court's instruction deliberately created a false impression in the minds of the jury that the Linvog parents were responsible to pay the entire amount of any judgment awarded against their daughter Korrine.

Given the serious nature of Mr. Barton's injuries, the jury's award of \$3.6 million in damages was not unexpected. The obvious strategy was to hope that the jury would feel sorry for Mr. and Mrs. Linvog. After all, they had done nothing wrong other than to provide a car for their daughter. Yet, a multimillion dollar verdict would have been financially disastrous for them.²⁰ This strategy worked brilliantly, with the jury awarding 95 percent of the fault for the accident against the deep pocket defendant, the State of Washington (\$3.4 million) and only 5 percent against the Linvogs (\$180,000).²¹ CP at 224-26.

²⁰ This also explains why Mr. Brindley and Mr. Spencer did not just dismiss the Linvog parents in exchange for the \$20,000 advance payment. They did not need them in the case in order to collect the \$100,000 in insurance policy limits. That money would have been paid on any verdict against their daughter Korrine, who was also covered by the insurance policy, but was not protected by the covenant not to execute, and would have remained in the case.

²¹ The efficacy of this strategy was clairvoyantly predicted in the law review article of Phillips, 69 Wash. L. Rev. at 257. Mr. Phillips hypothesized a car accident scenario where the plaintiff and the driver who injured him joined together in a highway liability claim against the governmental entity that owned the road where the accident occurred. They then enter into some type of Mary Carter type agreement, for example a covenant not to execute that limits the liability of the defendant driver. They then join together to try to inflate the damages against the deep-pocket defendant governmental entity. The law review article concludes that:

The denunciation of this type of clandestine scheme has been long-standing. In 1934, the Wisconsin Supreme Court held that it was against public policy to enter into secret settlement agreements because doing so impeded the regular administration of justice – it resulted in the trial of issues that were not real. The court reversed the judgment in favor of the plaintiff and condemned the practice of keeping such agreements secret. *Trampe v. Wisconsin Telephone Co.*, 214 Wis. 210, 252 N.W. 675, 678 (1934). The closest case the State’s research has revealed to the situation presented in the case at Bar is *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987). *Poston* involved a student who was injured when the school district van in which he was a passenger was involved in an auto accident. He brought suit against Mr. Barnes, the driver of the other car, and the school district. Prior to trial, Poston and Barnes entered into a “Covenant Not to Execute or Proceed Against Norvell Barnes.” By its terms, the agreement provided that Mr. Barnes would pay Poston \$180,000 over a period of years, remain a party defendant, and that Poston would not execute against Barnes for any amount in excess of \$500 above the

Because Mary Carter agreements can influence determinations of proportionate fault, [FN8] their use in Washington Courts—which determine liability on a “pure” comparative basis [FN9]—could inflate the liability of non-agreeing defendants. As a result, Mary Carter’s conflict with Tort Reform laws enacted in Washington that were designed at least in part to protect deep-pocket defendants from bearing more than their fair share of liability.”

See Apps. 4 and 5.

\$180,000 settlement. Unlike this case, the agreement was disclosed, but the trial court did not allow the jury to know about the agreement. In reversing, the Supreme Court of South Carolina noted that secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion. *Poston*, 294 S.C. at 264, citing *Ward*, 284 So.2d at 387. The court recognized that, like the covenant not to execute in this case, the settlement agreement's label was essentially a façade that allowed Barnes to remain a defendant. The South Carolina Supreme Court held that as a result of the nondisclosure of the agreement:

[T]he jury was denied information to which it was entitled as to the sources of remuneration available to the plaintiff and by whom such remuneration would be paid. The fact that the agreement was not disclosed to the jury in this instance facilitates inequity and injustice in the judicial process. Openness and fairness of trials are essential to preserving the effectiveness of our judicial system. Under the circumstances of this case, the agreement should have been allowed into evidence to insure that an equitable verdict was reached.

Poston, 294 S.C. at 265.

In this case, both Mr. Spencer and Mr. Brindley knew there was an undisclosed covenant not to execute that limited the liability of Thomas and Madonna Linvog to their insurance policy limits. Because they did not disclose that agreement the State did not know to move to have the

Linvog parents dismissed. *See Estate of Bordon v. State of Washington*, 122 Wn. App. 227, 234, 95 P.3d 764 (2004) (Co-defendant dismissed on State's motion after entering into Stipulation for Partial Payment of Damages and Covenant not to Execute with plaintiff). The State did not know to object when Mr. Spencer and Mr. Brindley told the jury in opening statement that the Linvog parents were responsible for the actions of their daughter, "on the hook" to pay all damages awarded against her. Accordingly, the State did not recognize that Jury Instruction 18 was a misstatement of the law to which it should object.

In failing to vacate the judgment in this case the trial court allowed Mr. Brindley and Mr. Spencer to get away with their deception of the jury and the deception in getting the court to give an instruction under the family car doctrine telling the jury that the Linvog parents were responsible for the acts of their daughter when they weren't. Such misconduct should not be condoned in Washington. It is not condoned in any other state. *Id.*

2. As A Comment On The Evidence, Jury Instruction 18 Is Presumed To Be Prejudicial

Washington Const. art. IV, § 16 states:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

It is error for a judge to instruct the jury that matters of fact have been established as a matter of law. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). For example, in *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006), the court held that including a victim's birth date in jury instruction where the victim's age was an element of the crime charged violated the prohibition on judges commenting on the evidence. The practical effect of Jury Instruction 18 was to tell the jury that the Linvog parents would have to pay any judgment awarded against their daughter. The trial judge was unknowingly duped into giving this instruction because the covenant not to execute that limited the liability of the Linvog parents had been kept hidden from the State, and from the court.²² See RCW 4.22.060(1) (requiring parties to a lawsuit to give prior notice to the parties and the court of intent to enter into settlement agreements, including a covenant not to execute). Errors of law in a jury instruction are reviewed *de novo*. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (It is an error of law to submit an issue to jury that is not warranted by the evidence.).

A judicial comment on the evidence in a jury instruction is not structural error or prejudicial per se. *State v. Levy*, 156 Wn.2d 705, 725, 132 P.3d 1076 (2006). Rather, it is presumed prejudicial and the plaintiff

²² The trial court's Memorandum Decision does not even mention Instruction 18 or analyze the State's argument that it was an erroneous misstatement of law.

and the Linvogs bear the burden to show the absence of prejudice. As noted previously, because the jury's verdict was so heavily in favor of the Linvogs (5 percent fault) and against the State (95 percent fault) the presumption of prejudice cannot be overcome. The Order Denying the State's Motion to Vacate Judgment and for Sanctions should be vacated and a new trial ordered.²³

3. Hiding Relevant Evidence Should Be Presumed Prejudicial

Like destroyed evidence, hidden evidence should be presumed prejudicial because it denies a party the opportunity to present it to a jury. With regard to the spoliation of evidence, courts apply a rebuttable presumption that shifts the burden of proof to the party who destroys or alters important evidence. *Pier 67, Inc. v. King Cy.*, 89 Wn.2d 379, 385, 573 P.2d 2 (1977) (failure to produce evidence in the possession of one party allows an inference that the evidence was prejudicial). In determining whether to apply the rebuttable presumption, courts consider:

- (1) the potential importance or relevance of the missing evidence;
- (2) the culpability or fault of the adverse party.

Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 381, 972 P.2d 475 (1999).

²³ See sections H and I *infra*, discussing the appropriate relief to now be afforded to the State.

In *Magana v. Hyundai Motor America, Inc.*, 167 Wn.2d 570, 580, 220 P.3d 191 (2009), *Hyundai* had failed to produce documents, falsely answered interrogatories, and willfully spoiled evidence. Unlike the case at bar, *Hyundai* actually disclosed the existence of the evidence prior to trial. However, that did not sway the court from concluding that the only suitable remedy under these circumstances was a default judgment.

The conduct at issue here is more egregious, because the existence of the covenant not to execute was hidden throughout the trial and its legal effect was affirmatively misrepresented to the jury. The conduct of opposing counsel in this case was antithesis of justice – *omnia presomentra contra spoliatum* – let all be presumed against a despoiler of evidence. Because the secret covenant was relevant to significant issues before the court and jury, its non-disclosure should be presumed to have prejudiced the outcome of this case. The order denying the State’s Motion to Vacate and for Sanctions should be reversed.

F. Counsel Should Not Be Rewarded For Their Failure To Disclose The Covenant Not To Execute In Discovery

The concept of presenting full, truthful evidence to a judge and jury is well rooted in the law.²⁴ An essential component of the American judicial system is contained in the rules of discovery that were violated by

²⁴ “If he has born false witness in a civil case, he shall pay damages in that suit.” Code of Hammurabi, ca. 1760 B.C.

both Mr. Brindley and Mr. Spencer when they failed to disclose the existence of the \$20,000 advance payment and the covenant not to execute. Their legal transgressions were compounded by affirmative misrepresentations to the jury that the Linvogs were “on the hook,” responsible to pay all damages the jury chose to assess against their daughter Korrine.

The Washington Supreme Court has approved decisive and substantial relief when discovery violations prejudice the rights of the litigant. In *Wash. State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1154 (1993), the court discussed the issue of discovery sanctions in light of CR 11 and CR 26(g) noting that both take the position sanctions are mandatory when a violation of the rule is found. The court noted that misconduct, once tolerated, will bring more misconduct when those who might seek relief against abuse will instead sort to it in self defense.²⁵ The standard for determining what sanctions are appropriate requires the sanctions ensure that the wrong doer does not profit from the wrong. *Fisons*, 122 Wn.2d at 355-56; *Gamon v. Clarke Equip. Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff’d*, 104 Wn.2d 613, 707 P.2d 685 (1985) (sanctions held to be inadequate and new trial granted).

²⁵ Judge Farris poignantly observed that an assortment of these types of “wink-wink deals” go on in personal injury litigation. RP (6/4/10) at 38.

In a situation such as that presented here, where the discovery violations are not discovered until after the trial is concluded, the appropriate remedy should be an order vacating the judgment. *Roberson v. Perez*, 123 Wn. App. 320, 96 P.3d 420 (2004), *review denied*; 155 Wn.2d 1002 (2005) (judgment vacate based on failure to disclose relevant evidence in discovery).

In *Roberson* the court noted the distinction between the standard for a new trial based on newly discovered evidence under CR 60(b)(3), and the standard for “a new trial based on evidence that was withheld in discovery, under CR 60(b)(4). CR 60(b)(3) requires that newly discovered evidence would probably change the result of the trial before relief can be granted. To the contrary, CR 60(b)(4) does not require a showing that the new evidence would have materially affected the outcome of the first trial. *Roberson*, 123 Wn. App. at 336, quoting *Seaboldt v. Pennsylvania R.R.*, 290 F.2d 296, 300 (3d Cir. 1961):

[I]t cannot be stated with certainty that all of this would have changed the result in the case. But, . . . a litigant who has engaged in misconduct is not entitled to “the benefit of calculation, which can be little better than speculation, as to the extent of wrong inflicted upon his opponent.”

In short, substantial prejudice in the context of discovery non-compliance is not determined by whether the evidence probably would have changed the result of the trial. Instead 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. If the covenant not to execute had been disclosed, Thomas and Madonna Linvog would have either been dismissed on the State's motion, or if that motion were denied, the jury would have been made aware of their limited liability exposure and Korrine Linvog would have been cross examined about the fact that once she provided the testimony to set up the plaintiff's liability case against the State, her lawyer and the plaintiff's lawyer entered into an agreement that eliminated the potential economic disaster she had created for her parents. Mr. Brindley and Mr. Spencer should not be allowed to profit from their deceptions and misrepresentations. *Fisons*, 122 Wn.2d at 355-56.

G. The Trial Court Abused Its Discretion In Failing To Sanction Serious Discovery Violations

Although the trial court's memorandum decision explains why it [erroneously] denied the State's Motion to Vacate the Judgment, it contains no analysis and gave no basis for its denial of the State's Motion for Sanctions under CR 26 and 37. The reason given by plaintiff's counsel for his failure to disclose the covenant not to execute was that the

agreement was only “proposed because even though he signed it Linvogs lawyer had not.”²⁶

Mr. Brindley offered no explanation for his failure to disclose his \$20,000 payment. Mr. Spencer explained that he did not disclose the existence of the agreement because he was not involved in drafting the Linvogs’ responses to discovery and, although it is his practice to do so, he has no recollection of reviewing the answers “it never crossed [his] mind to review the prior discovery responses,” notwithstanding the clear mandate of CR 26(c)(2). CP at 556-57.

Whether an attorney has engaged in a reasonable inquiry is judged by an objective standard. *Amy v. Kmart of Wash. LLC*, 153 Wn. App. 846, 223 P.3d 1247 (2009). CR 26(g) requires an attorney to sign all discovery responses certifying that the attorney has made a reasonable inquiry. Again, this case is similar to the *Magana* case where Hyundai’s defense counsel, purportedly relying on their previously gathered information and without checking with their client Hyundai, denied the existence of prior seatback failures in initial responses to plaintiff’s discovery requests, and “then Hyundai failed to supplement its incorrect responses, as required by CR 26(e)(2).” *Magana*, 220 P.3d ¶ 27 [167 Wn.2d 570]

²⁶ Again, based on the fact that he signed the agreement and cashed the \$20,000 check this argument was summarily rejected by the trial court that found the lack of signature by Mr. Spencer did not render the agreement invalid. CP at 10. That ruling has not been appealed.

The failure to disclose the covenant not to execute in violation of the discovery rule substantially prejudiced the State and its ability to prepare for and try this case. The trial court abused its discretion in failing to impose any sanction against Mr. Brindley and Mr. Spencer under CR 26 and 37. The Order Denying the State's Motion to Vacate Judgment and for Sanctions should be reversed.²⁷

H. The State Is Entitled To Its Reasonable Attorneys Fees And Costs

Pursuant to RAP 18.1, the State requests an award of the reasonable attorneys fees and costs incurred during the first trial, the appeal from that trial, the litigation of the State's Motion to Vacate and for Sanctions, and this appeal. CR 26(g) provides:

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

²⁷ After the State paid its portion of the judgment and those funds were withdrawn from the registry of the Snohomish County Superior Court into the Luvera law firm's trust account, during the pendency of the motion to vacate, Mr. Brindley sought additional interest based on the difference between the rate of return the money was earning in the trust account and the rate of interest stated in the judgment. As an alternative basis for denying that motion, the court did indicate that it was sanctioning Mr. Brindley. CP at 43-47, 217-55. However, that assumed the court had the authority to order the payment of additional interest by the State when, pursuant to RCW 4.92.160(2), once payment had been made to the court for the benefit of the judgment creditors, the judgment against the State was satisfied. CP at 67-182.

As the trial court concluded, Mr. Brindley and Mr. Spencer violated the rules of discovery by failing to make a reasonable inquiry before certifying their discovery responses. *See* CR 26(g). A monetary penalty is the appropriate sanction. *See Amy*, 153 Wn. App. at 865-66 (amount of sanctions imposed was more than six times the verdict). Since the first judgment was the product of misrepresentation and fraud, this case will need to be retried and all expenses from the first trial onward have been for naught. *See Mayer*, 156 Wn.2d 677 (upholding compensatory award of attorney fees for first trial and appeal as a proper discovery sanction under CR 26(g)). There are no lesser sanctions that will make the State whole. *Fisons*, 122 Wn.2d at 355-56.

I. At A Minimum, The Appropriate Remedy For Counsels' Misconduct Is To Require Them To Disgorge Any Funds They Have Received In Profit

Here again, CR 26(g) and 37(d) authorize a court to impose sanctions against a party for failing to respond to an interrogatory or a request for production. CR 37(d) states that an evasive or misleading answer is treated as a failure to answer. Under CR 37(d) it is not necessary for a party seeking a sanction to prove a willful or intentional failure to respond – sanctions are available regardless of state of mind. Similarly, a subjective belief or good faith alone, will not shield an attorney from sanctions under CR 26(g). As noted in the proceeding

section, neither Mr. Brindley nor Mr. Spencer offered any legitimate excuse for their failure to disclose the \$20,000 advance payment and the covenant not to execute that were specifically requested by the State in discovery. Moreover, as the trial court noted, both counsel were well aware of their obligation to disclose the existence of the covenant not to execute pursuant to RCW 4.22.060(1) “Both counsel were aware of the statutory requirement and failed to comply with it.” CP at 9.

The true remedy to which the State is entitled is to have the judgment vacated, be repaid the \$3,888,406.16 the State has already paid to satisfy that judgment with interest and be reimbursed for all costs and attorneys fees wasted from the beginning of trial though the resolution of this appeal.²⁸ Unfortunately, it is likely that Mr. Barton has already expended a substantial amount of the judgment proceeds and neither he nor the Linvogs have the financial means to reimburse the State for its attorneys fees which exceeded \$400,000 at the time of the State’s Motion to Vacate. CP at 473-74. Accordingly, even assuming this court reverses

²⁸ At the time when the State’s Motion to Vacate and for Sanctions was pending in the trial court, the \$3,795,773.86 (\$3,779,636.33 plus \$16,137.53) the State had paid to satisfy its 95 percent share of the judgment, plus interest, was being held by plaintiff’s counsel in the Luvera Law Firm trust account. CP at 217-21. However, Mr. Brindley disbursed that money to his client and undoubtedly to his law firm on May 3, 2010, the date the trial court issued its memorandum decision indicating an intent to deny the State’s Motion to Vacate. Pursuant to the trial court’s order entered on June 4, 2010, the State has also satisfied the remaining of the unpaid portion of the Linvogs’ share of the judgment of \$80,000 plus interest amounting to \$92,632.30. CP at 40-42. The total paid by the State was \$3,888,406.16. *See App. 7.*

the trial court and orders the judgment be vacated that is likely to be a Pyrrhic victory for the State of Washington. Furthermore, requiring Mr. Barton and the Linvogs to pay for the wrongdoing of their attorneys is unfair.

Therefore, as an alternative to ordering a new trial, the State of Washington requests by way of relief that Mr. Brindley and Mr. Spencer be required to pay the State's costs and attorneys fees and to disgorge all funds that their law firms received in profit (income minus costs) and pay that amount to the State of Washington as a sanction for their discovery violations and in restitution. *See* RAP 12.8; *Goldberg v. Sanglier*, 96 Wn.2d 874, 887, 639 P.2d 1347 (1982) (disgorging of profits is the appropriate restitutionary remedy to prevent unjust enrichment from wrong-doing). This will avoid the expenses of a new trial in this case, and any potential malpractice actions that would arise against Mr. Brindley and Mr. Spencer depending upon what the outcome was if this case were tried again. This remedy also affords substantial compensation to Mr. Barton. Most importantly, this sanction would “. . . insure that the wrong doer does not profit from the wrong.” *Magana*, 167 Wn.2d at 590, quoting *Fisons*, 122 Wn.2d at 355-56.

VII. CONCLUSION

The trial court misinterpreted the legal effect of the secret covenant not to execute that was wrongfully hidden by counsel for plaintiff and counsel for the Linvogs. That covenant not to execute eliminated joint liability and contribution claims, operating as a release of the Linvog parents. When correctly analyzed the prejudice to the State from the nondisclosure of the covenant not to execute is apparent requiring that the judgment below be vacated. CR 60(b)(4). In addition, the attorneys that engaged in this misconduct should be sanctioned so as not to profit from their deception. The order denying the State's Motion to Vacate and for Sanctions should be reversed, and counsel for both the Linvogs and plaintiff should be ordered to pay the State's costs and attorneys fees and

disgorge all profit they received in the litigation of this matter in compensation to the State of Washington.

RESPECTFULLY SUBMITTED this 15th day of September, 2010.

ROBERT M. McKENNA
Attorney General

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

MICHAEL P. LYNCH, WSBA No. 10913
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PROOF OF SERVICE

I certify that I served a copy of on all parties or their counsel of record on the date below as follows:

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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 15th day of September, 2010, at Olympia, WA.



HILARY GALLIGAN, Legal Assistant

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Photo of Ms. Linvog's View Exhibit 51

Appendix 1

- Driver view position 10' back from the extension of hwy edge stripe
Unobstructed sight distance. (View too long to practically measure)



**Memorandum Decision on the State of Washington's
Motion to Vacate and for Sanctions**

Appendix 2

Superior Court of the State of Washington
for Snohomish County

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

MAY 04 2010

Office of Luvera Barnett Brindley
Beninger & Cunningham

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

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

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

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

This conclusion is supported by the fact that Linvogs' lawyer and Plaintiff's lawyer later sought an actual agreement. Plaintiff's lawyer sought an agreement because his client needed money for medical care. Defendants' lawyer sought to get some limit on liability because he knew the prior discussions were not binding. In March of 2007 the Linvogs' attorney and Plaintiff's attorney reached an agreement on behalf of their clients. Specifically the Plaintiff's attorney refused to agree to anything that would release Korrine Linvog's liability and thereby prevent joint and several liability. The agreement was that if the Linvog parent Defendants (Thomas and Madonna Linvog) paid \$20,000 to Plaintiff, then Plaintiff agreed that he would not execute on any judgment against the Linvog parents that exceeded the \$100,000 limits of their

insurance coverage. It was the understanding and intent of both parties that the agreement would not affect or prevent Plaintiff from executing on any judgment amount exceeding \$100,000 from defendant Korrine Linvog. It was also their mutual intent that the agreement would not prevent the Plaintiff from seeking full payment of any judgment against the State including the Linvogs' portion of any joint and several judgment even if that exceeded \$100,000. It was also their understanding and intent that the agreement did not prevent the State from seeking reimbursement from the parents Linvog for any percentage of the Linvogs' liability, even if that exceeded \$100,000. Plaintiff's counsel and Linvogs' counsel believed the agreement was valid and enforceable on these terms.

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

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

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

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

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

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

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

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

Secret "Mary Carter" type agreements generally only result in reversal if they prejudice a party. Prejudice can occur because the agreement can cause a secret realignment of the parties which may result in some circumstance at trial which then deny the non agreeing party a fair trial. While 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

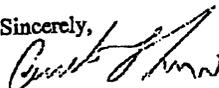
like this where there is a deep pocket defendant and individual defendants. That possibility existed in this case because there was a government entity and individuals as defendants.

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

Journal of Senate Tort Reform Act 1981

Appendix 3

SENATE JOURNAL

—1981—

REGULAR SESSION

FORTY-SEVENTH LEGISLATURE

STATE OF WASHINGTON

AT

OLYMPIA, the State Capitol

Convened January 12, 1981

Adjourned *SINE DIE* April 26, 1981

VOLUME 1

Compiled, Edited and Indexed by
SIDNEY R. SNYDER, Secretary of the Senate



Dorothy Greeley
Minute and Journal Clerk

JOHN A. CHERBERG, *President of the Senate*
H. A. "BARNEY" GOLTZ, *President Pro Tempore*

*SAM C. GUESS, *President Pro Tempore*

DON L. TALLEY, *Vice President Pro Tempore*

*GEORGE W. CLARKE, *Vice President Pro Tempore*

Commencing February 13, 1981

The Committee believes that with the creation of the right to contribution a party defendant will be able to join another party who may be liable for contribution in the original action under current Civil Rule 14, relating to third party practice. This means that a defendant will not be bound by the plaintiff's choice of defendants. It is in the interests of judicial economy to have all of the liability issues determined in one action. The judge will naturally continue to have authority to require separate trials as to issues or parties where justice requires.

This section also essentially eliminates the doctrine of implied indemnity between active and passive tortfeasors. Under current law where the active/passive analysis can be applied, the entire liability can be shifted from the passive tortfeasor to the active tortfeasor. *Rulter v. Scott*, 46 Wn. 2d 240 (1955); *Nelson v. Sponberg*, 51 Wn. 2d 37 (1957). The implied indemnity doctrine thus is another form of the "all-or-nothing" rule which is being departed from in this bill which favors comparative fault principles.

A party who settles with the claimant is entitled to seek contribution from other liable parties if in settling with the claimant the liability of party against whom contribution is sought has been extinguished and to the extent that the amount paid in settlement was reasonable at the time of settlement.

Section 13. Enforcement of Contribution

This section sets out the procedure for enforcing the right of contribution against another liable party. It addresses both the situation where the comparative fault of the two parties involved has previously been established by the court and where the comparative fault of the two parties has not been previously established. In those cases where it has been established, the parties seeking contribution must commence the contribution action within one year after the judgment which established the comparative fault has been rendered. In those cases where the comparative fault has not already been established, the party may enforce the right of contribution whether or not a judgment has been rendered against the parties seeking contribution or the party against whom contribution is sought. This means that neither party need have a defendant in the lawsuit brought by the claimant. All that is required to start an action for contribution is that the party must allege that he has paid more than his proportionate share of the fault. The party seeking contribution must have either discharged the common liability within the statute of limitations and commenced an action for contribution within one year of that payment, or have agreed while the action was pending to discharge that liability and within one year both paid the claimant and commenced this action for contribution.

Section 14. Effect of Release

This section differs from the Uniform Comparative Fault Act in that the final judgment of the claimant is reduced by the amount paid for a release (unless the amount paid was unreasonable at the time the release was granted) instead of the comparative fault of the released party as determined in the lawsuit. This approach was decided upon in order not to discourage parties from settling with claimants. It was a concern of the Committee that if a released party could not be guaranteed that he would not be subject to additional liability at some point in the future depending upon some comparative fault apportionment, it would discourage parties from entering into such releases.

The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Legislature. The reasonableness of the release will depend on various factors including the provable liability of the released parties and the liability limits of the released party's insurance.

There is a legitimate concern that claimants will enter into "sweetheart" releases with certain favored parties. To address this problem, the section requires that the amount paid for the release must be reasonable at the time the release was

entered into. Furthermore, it requires parties desiring to enter into such releases to give five days notice to all other parties of the terms of the release. A special provision allowing the court to shorten that notice period for good cause is included to accommodate eve of trial settlements. The potential release party must also secure court approval that the amount paid for the release was reasonable.

The release granted to one party does not discharge any other parties liable upon the same claim unless the release so provides. Under current Washington law, the release of a concurrent tortfeasor does not release other concurrent tortfeasors unless 1) the claimant intended to release all tortfeasors, or 2) the release constituted a satisfaction of the entire obligation. *Callan v. O'Neill*, 20 Wn. App. 32 (1978). The release of one joint tortfeasor, however, releases all tortfeasors regardless of an expressed reservation in the release that it shall not apply to other tortfeasors. *White Pass Co. v. Saint John*, 71 Wn. 2d 156 (1967).

Section 15. Applicability

In order to avoid the question of retroactive versus prospective application of the act, this section clearly states that the act applies to all claims accruing on or after the effective date of the act. An exception to this rule is a partial retroactive application in the case of actions for contribution involving actions which have not gone to trial as of the effective date of the act. In these cases, a right of contribution would still exist except as to a party which has obtained a release prior to the effective date of the act.

Section 16. Legislative Directive

The act will be codified in two different parts of the Revised Code of Washington. Sections 2 through 7 which deal only with the product liability area will be codified in Title 7 which concerns special proceedings and actions. Sections 8 and 9 and 11 through 14 will be codified in Chapter 4.22 RCW which is the current comparative negligence chapter.

MOTION

On motion of Senator Clarke, the Senate resumed consideration of Senate Bill No. 3000.

SECOND READING

SENATE BILL NO. 3000, by Senators von Reichbauer, Clarke, Bottiger, Hayner, Sellar, Goltz, Talmadge and Jones (by request of Senate Select Committee on Confirmation of Appointments):

Modifying provision relating to confirmation of gubernatorial appointees.

The Senate resumed consideration of Senate Bill No. 3000. Earlier today the committee amendment was not adopted. Senator Gould had moved adoption of an amendment.

There being no objection, on motion of Senator Gould, the amendment was withdrawn.

Senator Gould moved adoption of the following amendment:

On page 17, following line 26, add a new section as follows:

"NEW SECTION Sec. 22. There is added to chapter 43 RCW a new section to read as follows:

The appointments by the governor to the Pacific Northwest Electrical Power and Conservation Planning Council created pursuant to chapter 43 RCW (sections 1 through 5, chapter (BSSB 3041), Laws of 1981), shall be subject to the advice and consent of the senate."

Renumber remaining sections consecutively.

The Preamble Tort Reform Act 1986

Appendix 4

words are used in this subsection, do not include a bond counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

NEW SECTION. Sec. 2. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed the Senate February 16, 1986.

Passed the House March 6, 1986.

Approved by the Governor April 4, 1986.

Filed in Office of Secretary of State April 4, 1986.

CHAPTER 305

[Engrossed Substitute Senate Bill No. 4630]

TORT LAW REVISIONS

5. 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.

PART I

ACCELERATED PHYSICIAN-PATIENT PRIVILEGE

Sec. 101. Section 294, page 187, Laws of 1854 as last amended by section 1, chapter 56, Laws of 1982 and RCW 5.60.060 are each amended to read as follows:

(1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian, nor to a proceeding under chapter 71.05 RCW: PROVIDED, That the spouse of a person sought to be detained under chapter 71.05 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2) An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

(3) A clergyman or priest shall not, without the consent of a person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

(4) A ((registrar)) physician or surgeon or osteopathic physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was

**Looking Out For Mary Carter: Collusive Settlement
Agreements In Washington Tort Litigations**

Appendix 5

LOOKING OUT FOR MARY CARTER: COLLUSIVE SETTLEMENT AGREEMENTS IN WASHINGTON TORT LITIGATION

J. Michael Philips

Abstract: Courts and commentators disagree as to the propriety of Mary Carter agreements, pseudo-settlement devices used in multiparty litigation that unite the interests of a plaintiff and a cooperating defendant, and maintain that defendant's presence at trial. Most courts tolerate these arrangements provided that they are disclosed, while a distinct minority render them void. Washington courts have not espoused a definite position, although recent decisions suggest a tolerant stance. This Comment argues that the use of Mary Carters is inconsistent with Washington tort law, and that Washington courts should therefore prohibit them entirely. This may be accomplished by treating all Mary Carters as final settlements of a plaintiff's claim against an agreeing defendant and requiring dismissal of that defendant, an approach suggested by the nature of the agreements themselves.

Driving home from work one day, Alice was unfortunately caught in the path of Bill, an individual who drove with the slightest of care, and worse, the slightest of insurance coverage. Alice was severely injured when the slightly intoxicated Bill lost control of his speeding auto, crossed the center line, and collided with Alice. Aware that Bill's insurance coverage would fail to fully compensate her, Alice chose to sue both Bill and the city, claiming negligence in the construction of the road due to the city's failure to build a solid median structure. To hedge her bets, and to increase the chances of a judgment against the city, Alice entered an agreement with Bill, in which Bill guaranteed Alice recovery to the extent of his insurance coverage regardless of the outcome at trial. In return, Alice promised not to collect from Bill in the event that she was able to recover an amount in excess of Bill's coverage from the city. Moreover, under the agreement Bill was required to remain a defendant in the action.

Alice was thus able to buy an ally at trial, as both she and Bill would benefit from a large judgment against the city. Bill viewed the agreement as an opportunity to escape as much blame and consequent liability as possible, and enthusiastically developed a story to the effect that it was faulty highway design that caused him to lose control of his car. The result was that the two exploited the trial process, improperly influenced the jury, and secured an enhanced finding of fault against the "deep-pocket" city. And the device making it all possible was the Mary

Carter agreement,¹ a controversial pseudo-settlement tool that in many cases has become a powerful plaintiff's weapon.²

Debate has raged for years over the validity of such agreements. The potential variations on the basic agreement are infinite,³ and jurisdictions have adopted individual approaches in response to various forms. The important features, however, embodied in most Mary Carters are: 1) that the settling defendant retains a financial stake in the plaintiff's recovery, and 2) that the settling defendant remains a nominal defendant at trial.⁴

Because of their tendency to alter traditional aspects of the trial process, Mary Carter agreements have received mixed reviews from courts and commentators. Much of the debate focuses on whether adopting procedures to prevent them from remaining secret is sufficient to ensure trial fairness. The majority of courts argue that while these agreements might threaten trial fairness, they are tolerable if completely disclosed to the court and non-agreeing parties.⁵

Although Washington courts have yet to definitively establish a position, the recent case of *McCluskey v. Handorff-Sherman*⁶ suggests that they lean toward the majority view. If Washington courts fully adopt this position in the future, the implications will be critical, particularly for deep-pocket defendants who often become targets of

1. The name comes from *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). The agreements are occasionally known by different names. See June F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 U. Fla. L. Rev. 521, 522 n.1 (1986).

2. This hypothetical is based loosely on the case of *McCluskey v. Handorff-Sherman*, 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted*, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993). In *McCluskey*, the existence of an agreement was never established. Nevertheless, the case presented an ideal opportunity for the use of a Mary Carter agreement. *McCluskey* was different in that the defendant was insolvent and lacked insurance altogether. In such a situation, the Mary Carter agreement would be equally effective. While it would not guarantee any amount from Bill (B) to Alice (A), A and B would still contract to work together at trial to foist maximum liability on the city (C). The incentives for A, as in the hypothetical, are obvious. B, although insolvent, might still be encouraged to cooperate if A promises to place all blame upon C and not to enforce judgment; thus, B has a chance to escape much, if not all, responsibility for the accident.

3. *Maule Indus., Inc. v. Rountree*, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973).

4. *Elbaor v. Smith*, 845 S.W.2d 240, 247 (Tex. 1992). As discussed, Mary Carters may vary. This Comment discusses only those agreements containing these two major elements.

5. See Entman, *supra* note 1, at 530.

6. 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted*, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993). Washington courts have previously confronted agreements that may be classified under the general definition of Mary Carter agreements. See *infra* note 47 and accompanying text.

Mary Carter Agreements in Washington

personal injury litigation.⁷ Because Mary Carter agreements can influence determinations of proportionate fault,⁸ their use in Washington courts—which determine liability on a “pure” comparative basis⁹—could inflate the liability of non-agreeing defendants. As a result, Mary Carters conflict with Tort Reform laws enacted in Washington that were designed at least in part to protect deep-pocket defendants from bearing more than their fair share of liability.

Part I of this Comment examines Mary Carter agreements in depth, analyzing the split in authority concerning their validity, and their status under existing Washington tort law. Part II develops the implications of such an agreement in a typical litigation setting under Washington tort law. Part III concludes that Washington courts should render Mary Carters void by treating them as final settlements of the plaintiff’s claim against the agreeing defendant and dismissing that defendant from trial. This approach properly serves the legislative goals underlying the Washington Tort Reform Act and comports with basic legal principles requiring a justiciable issue among adversarial parties.

I. OVERVIEW OF MARY CARTER AGREEMENTS

A. *Details of a Mary Carter Agreement*

The key elements of a Mary Carter agreement are a limitation of the settling defendant’s liability, a requirement that that defendant remain in the trial, and a guarantee of a certain sum of money to the plaintiff.¹⁰ A typical Mary Carter agreement might contain several additional provisions. For example, the plaintiff might be prohibited from settling with non-agreeing defendants for an amount less than the guaranteed amount without the agreeing defendant’s consent.¹¹ The agreement

7. See Cornelius J. Peck, *Washington’s Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 Wash. L. Rev. 233, 238 (1987) [hereinafter Peck, *Rejection and Modification*].

8. See, e.g., John E. Benedict, Note, *It’s a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum. L. Rev. 368, 374–75 (1987); Entman, *supra* note 1, at 574.

9. See *infra* note 73 and accompanying text. A “pure” comparative negligence system is one in which a plaintiff’s contributory negligence serves to reduce his or her damages in proportion to his or her fault; all defendants are liable to the plaintiff for their respective shares of the loss, even though they may be less negligent than the plaintiff. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 67, at 471–72 (5th ed. 1984); see Wash. Rev. Code § 4.22.070 (1993).

10. *Elbaor v. Smith*, 845 S.W.2d 240, 247 (Tex. 1992).

11. See Entman, *supra* note 1, at 524–25.

might even explicitly urge a verdict exceeding the guaranteed amount.¹² Further, it might require that the parties conceal the agreement not only from the jury, but also from the court and other parties.¹³ This secrecy has been a focus of controversy, with most, if not all, courts requiring disclosure of the agreement.¹⁴

Specific provisions regarding the guaranteed payment might also vary. For example, rather than guarantee a payment, the defendant might loan the funds to the plaintiff under a variation known as a "loan receipt" agreement.¹⁵ While the terminology differs, the essential premise is the same: the settling defendant guarantees recovery to the plaintiff of a specified amount. Whether funds actually change hands prior to trial and judgment or whether the transfer is purely on paper makes little difference.¹⁶

Such an arrangement has significant effects on the parties' conduct at trial. In its recent decision to ban Mary Carters, the Texas Supreme Court remarked that these agreements create a substantial interest for the defendant in a sizable plaintiff's recovery, and therefore encourage that defendant to assist the plaintiff at trial in any manner possible.¹⁷ Settling defendants are thus pressured to cooperate with the plaintiff in discovery, peremptory challenges, trial tactics, witness examination, and influencing the jury.¹⁸

B. *Judicial Treatment of Mary Carters: Generally*

While debate continues over whether trial processes will be unfairly distorted, most authorities accept that Mary Carters skew the parties' interests. A key problem acknowledged by courts and commentators on both sides of the issue is how to overcome secrecy.¹⁹ Even those courts

12. See, e.g., *Lum v. Stinnet*, 488 P.2d 347, 348 (Nev. 1971).

13. See, e.g., *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8, 10 (Fla. Dist. Ct. App. 1967).

14. See *Benedict*, *supra* note 8, at 370.

15. See, e.g., Meriwether D. Williams, Comment, *Blending Mary Carter's Colors: A Tainted Covenant*, 12 Gonz. L. Rev. 266, 268 (1977). A "loan receipt" agreement provides for payment prior to judgment, with reimbursement made later, rather than a mere guarantee of payment with later reduction.

16. However, whether there is actual payment might be important to a court attempting to determine the true nature of the agreement. See *infra* note 123.

17. *Elbaor v. Smith*, 845 S.W.2d 240, 247 (Tex. 1992).

18. *Id.* at 249 (citing *Benedict*, *supra* note 8, at 372-73).

19. "The chief problem associated with a Mary Carter agreement is that a hidden alteration of the relationship of some of the parties will give the jury a misleading and incomplete basis for evaluating the evidence." *Id.* at 254 (Doggett, J., dissenting).

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that tolerate Mary Carters recognize the potential for trial misconduct when the agreeing parties assist each other to the complete bewilderment of the court, other defendants, and the jury. This problem may or may not be controllable through various disclosure and instructional devices, and the sufficiency of such measures is a major issue dividing those courts that tolerate Mary Carters from those that prohibit them.

1. *The Majority View*

The vast majority of states allow Mary Carter agreements if trial courts implement procedural safeguards to overcome secrecy.²⁰ As long as a Mary Carter is disclosed to the court and opposing parties prior to trial, these courts are satisfied that the nonsettling parties will not be surprised or unfairly disadvantaged. Additionally, when the court is aware of the agreement, it may consult the parties on how best to instruct the jury concerning the arrangement and the true interests of the parties. Once instructed, the jury is said to be able to properly judge the credibility of witnesses.²¹

Some courts have developed specific procedures to eliminate bias that may result from collusive or abnormal conduct of the agreeing defendants. In *Elbaor v. Smith*,²² for example, the trial court gave the non-agreeing defendant the same number of peremptory challenges as the plaintiff and settling defendants combined, denied the settling parties the customary right of an opponent to lead opposing witnesses, and changed the order of presentation to guarantee that the non-agreeing defendant always had the final opportunity to present evidence and examine witnesses. By balancing procedural advantages, these courts hope to overcome the shifting alliances created by a Mary Carter agreement that might unfairly skew the trial process.²³

20. *Id.* at 256 (Doggett, J., dissenting).

21. *See, e.g.*, *General Motors Corp. v. Lohocki*, 410 A.2d 1039, 1046 (Md. 1980).

22. *Elbaor*, 845 S.W.2d at 255 (Doggett, J., dissenting).

23. *Id.* at 254-55 (Doggett, J., dissenting). The maintenance of Mary Carters in the face of various challenges is attributable to what some courts refer to as the "salutary effects" of these agreements. *See Reese v. Chicago, B. & Q. R.R.*, 303 N.E.2d 382, 386 (Ill. 1973) (holding that a loan receipt agreement was beneficial in that it meant funds would be more readily available to an injured plaintiff, and that private settlement would be facilitated). While the justification of encouraging settlement has been adopted by several courts, this line of reasoning has recently been attacked as short-sighted because these agreements encourage only partial settlements. *See infra* note 27.

2. *Minority Position*

A clear minority of jurisdictions have elected to ban Mary Carter agreements or to render them entirely ineffective.²⁴ In a major recent case, the Texas Supreme Court determined that these arrangements skew the trial process, mislead the jury, promote unethical collusion between nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full amount of any judgment.²⁵ The court concluded that the agreements and their effects are therefore inimical to the adversary system.²⁶ The court further noted that such agreements do not promote settlement, but rather provide only partial settlement, ensuring that the plaintiff will go to trial against the remaining defendant to obtain high damages.²⁷

Based on these concerns, the Texas court denounced Mary Carters as completely incompatible with a system of fair trials, despite measures designed to mitigate harmful effects.²⁸ The court found such remedial measures insufficient to overcome the harm caused by collusion between the settling parties when the defendant retained a substantial financial interest in the plaintiff's recovery.²⁹ The court reasoned that its policy of

24. Only Texas, Nevada, Oklahoma, and Wisconsin have banned the use of Mary Carter agreements. See *Elboar*, 845 S.W.2d at 250 n.21. Some argue that Wisconsin, in *Trampe v. Wisconsin Tel. Co.*, 252 N.W. 675 (Wis. 1934), banned only *secret* Mary Carter agreements. See *Elboar*, 845 S.W.2d at 256 (Doggett, J., dissenting).

25. *Elboar*, 845 S.W.2d at 250.

26. *Id.* at 248 (citing *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 8 (Tex. 1986) (Spears, J., concurring)).

27. *Id.* at 248-49. The existence of a settlement "veto" power in the hands of the settling defendant makes settlement with the remaining defendant even less likely, as the settling defendant is unlikely to approve of any settlement which defeats reimbursement of the guaranteed amount.

28. The trial judge, aware of the potential bias against the non-settling doctor, undertook various remedial measures to mitigate any harmful effects. See *supra* note 22 and accompanying text. Despite these provisions, the court noted an extremely abnormal effect on the parties' conduct. *Elboar*, 845 S.W.2d at 246-47. The court discussed the ways in which a settling defendant might assist the plaintiff, including cooperating in discovery, peremptory challenges, trial tactics, supportive witness examination, and influencing the jury. *Id.* at 249 (citing *Benedict*, *supra* note 8, at 372-73 (detailing the tactical and procedural advantages that cooperating parties enjoy)).

29. *Elboar*, 845 S.W.2d at 250. Earlier, in *Scurlock Oil v. Smithwick*, 724 S.W.2d 1 (Tex. 1986) (Spears, J., concurring), Justice Spears argued that disclosure provisions are insufficient to overcome unfairness, because it would be difficult for jurors, already unfamiliar with trial procedure and practice, to fully grasp the implications of the relationship between the settling parties created by the Mary Carter agreement. *Id.* at 11. To illustrate the problem, Spears referred to a companion case arising from the same accident as *Scurlock Oil* and containing identical facts, *Missouri Pacific v. Huebner*, 704 S.W.2d 353 (Tex. Ct. App. 1985). The outcome in *Missouri Pacific* was virtually opposite from the jury findings in *Scurlock Oil*. *Scurlock Oil*, 724 S.W.2d at 11. In *Scurlock Oil*, the jury found the Mary Carter defendant (Mo-Pac) not negligent and the non-settling defendant

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favoring fair trials far outweighed any policy favoring partial settlements.³⁰

Texas is not alone in its rejection of Mary Carters. In a much earlier decision, the Nevada Supreme Court, in *Lum v. Stinnett*,³¹ declared Mary Carter agreements void as against public policy. The court determined that remedial measures such as disclosure to the jury are not only inadequate, but might present additional problems such as unwarranted jury bias.³² While it confessed to being unsure of the effects such an agreement might actually have on the jury, the court argued that defendants have the right to litigate without the risk that a Mary Carter might affect a jury's verdict.³³

As an alternative to outright banning, Oklahoma adopted a somewhat novel approach to Mary Carter agreements. In *Cox v. Kelsey-Hayes Co.*,³⁴ the Oklahoma Supreme Court recognized that Mary Carters deprive a trial of its adversarial nature, and that the more culpable defendant usually avoids liability through them.³⁵ The court therefore required trial courts to adopt one of two alternative approaches: either dismiss the agreeing defendant prior to trial or prohibit the portion of the agreement granting the defendant an interest in a large plaintiff's recovery.³⁶ The court reasoned that if the settling defendant is dismissed and subsequently appears as a witness, cross-examination regarding the defendant's interests and credibility will sufficiently protect the non-settling defendant's interests.³⁷ Alternatively, allowing the settling defendant to remain in the suit but voiding the reimbursement provision

(Scurlock) 100 percent negligent; in *Huebner*, where Mo-Pac did not enter a settlement agreement, it was found 90 percent negligent and Scurlock only 10 percent negligent. *Id.* The concurring justice reasoned that "[o]nly the Mary Carter agreement can account for these variations in the juries' findings." *Id.*

30. *Elbaor*, 845 S.W.2d at 250.

31. *Lum v. Stinnett*, 488 P.2d 347 (Nev. 1971) (banning Mary Carters because they violate policies against champerty and maintenance, violate rules of professional ethics, and are "inimical to true adversary process," thus preventing fair trial). For a detailed examination of this case, see Entman, *supra* note 1, at 531-40.

32. *Lum*, 488 P.2d at 352-53.

33. *Id.*

34. 594 P.2d 354 (Okla. 1978).

35. *Id.* at 359.

36. *Id.* ("In no circumstances should a defendant who will profit from a large plaintiff's verdict be allowed to remain in the suit as an ostensible defendant.")

37. *Id.*

will preserve the adversarial nature of the proceedings and make the agreement irrelevant.³⁸

Although the *Cox* court required the defendant's dismissal, it did not elect to view Mary Carters in general as settlements. In fact, the court commented that Mary Carter-type agreements cannot be classified as settlements because the controversy is only contingently settled.³⁹ The agreeing defendant remains a party, and the jury still determines the extent of his or her liability.⁴⁰

In contrast to Oklahoma's conclusion that Mary Carters are not settlements, the Maryland Supreme Court, in *General Motors Corp. v. Lahocki*,⁴¹ did view a Mary Carter-type arrangement as a settlement. Citing nineteenth century precedent, the court stressed that the very essence of compromise involves the waiver of preexisting claims in favor of a right or claim fixed by a new agreement.⁴² The court reasoned that because the defendant limits the extent of its liability and guarantees a sum to the plaintiff through a Mary Carter, such arrangements are essentially settlements.⁴³ The court therefore determined that disclosure to the trial court was necessary.⁴⁴ It did not, however, consider the propriety of dismissing the defendant, apparently because the non-agreeing defendant in the case had not requested dismissal.⁴⁵ This treatment suggests that the court considered Mary Carters acceptable if disclosed, indicating compliance with the majority view.

C. *Mary Carters Under Washington Law*

1. *Judicial Treatment of Mary Carters*

Consideration of Mary Carter arrangements by Washington courts has been extremely limited. A few cases, while not specifically referring to "Mary Carters," have dealt with similar arrangements. Only two cases have actually used the term "Mary Carter," and only one of these was decided since 1986, when the legislature amended laws governing

38. *Id.* at 359-60.

39. *Id.* at 358.

40. *Id.*

41. 410 A.2d 1039 (Md. 1980).

42. *Id.* at 1044 (citing *St. John's College v. Purnell*, 23 Md. 629, 640-41 (1865)).

43. *See id.*

44. The court held that disclosure was necessary because "in judging the credibility of a witness, the jury is entitled to know of his interest in the outcome" of the trial. *Id.* at 1046.

45. *See id.*

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determinations of fault.⁴⁶ Indications are that Washington courts lean toward allowing these arrangements if fully disclosed.

In *Monjay v. Evergreen School District*,⁴⁷ an appellate court confronted a Mary Carter-like arrangement that it called a “loan agreement.” The contract guaranteed a recovery amount to the plaintiff, who agreed to reimburse the settling defendant in the event of judgment against the non-settling party.⁴⁸ The settling party did not, however, remain at trial as a defendant; instead, the plaintiff agreed not to sue that party.⁴⁹ Troubled primarily by the guarantee clause of the arrangement, the court declared only that portion void. It held that such a provision was repugnant to the principle of pro tanto reduction attendant to the covenant not to sue,⁵⁰ and was potentially coercive because it forced the non-settling defendant, whose responsibility for injury might be questionable or unclear, to either litigate or settle, thereby compelling contribution from that defendant.⁵¹

Ten years later, the same court overruled this holding in *Jensen v. Beaird*.⁵² Attacking the reasoning in *Monjay*, the court joined the majority of states by lending its approval to Mary Carter-type settlements.⁵³ The court specifically rejected the lower court’s reliance

46. These cases are *McCluskey v. Handorff-Sherman*, 68 Wash. App. 96, 841 P.2d 1300 (1992), review granted, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993), and *Giambattista v. National Bank of Commerce*, 21 Wash. App. 723, 586 P.2d 1180 (1978). The *Giambattista* court referred to Mary Carters only in passing, holding that the agreement in question did not fall within such a category. *Id.* at 735 n.5, 586 P.2d at 1187 n.5; see *supra* note 9.

47. 13 Wash. App. 654, 537 P.2d 825 (1975), review denied, 85 Wash. 2d 1017 (1975).

48. *Id.* at 658.

49. *Id.* at 655. See *Williams*, *supra* note 15, at 273–74.

50. Pro tanto reduction, whereby the plaintiff’s total recovery against remaining defendants is reduced by the amount of settlement, was in use in Washington at the time of *Monjay*. The 1986 Tort Reform Act has rejected this principle in favor of a comparative reduction system in the case of joint tortfeasors. See *infra* notes 74–80 and accompanying text.

51. *Monjay*, 13 Wash. App. at 660–61, 537 P.2d at 829. The court also expressed concern that the agreement was champertous. *Id.* at 661, 537 P.2d at 830. Cf. *Lum v. Stinnet*, 488 P.2d 347 (Nev. 1971). Champerty is a disfavored practice in which a stranger to a suit agrees with a party to carry on the litigation at his or her own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered. *Black’s Law Dictionary* 231 (6th ed. 1990).

52. 40 Wash. App. 1, 696 P.2d 612 (1985), review denied, 103 Wash. 2d 1038 (1985). The agreement at issue in *Jensen* consisted of a covenant by the plaintiff not to execute any judgment against the settling defendant in exchange for \$110,000. Note a critical difference from *Monjay*—the agreeing defendant in *Jensen* remained a party at trial.

53. *Id.* at 10, 696 P.2d at 618.

on *Monjay*,⁵⁴ concluding that loan agreements violate neither the pro tanto reduction principle nor any other public policy.⁵⁵

The *Jensen* court concluded that a loan agreement did not involve an actual payment in settlement of the plaintiff's claim.⁵⁶ While a loan might deprive the remaining tortfeasor of a reduction in any judgment against it, this would not violate pro tanto reduction principles. The court suggested that *Monjay* confused the pro tanto principle with prohibitions against contribution.⁵⁷ In any event, it held that rules barring contribution were not violated, even though the settling defendant might therefore obtain indemnification to which it otherwise would not be entitled. The court reasoned that the principle objection behind the no-contribution doctrine—that the courts should not be used for the relief of wrongdoers—was absent in this case because the agreement was indirect, private, and “out of court.”⁵⁸

The *Jensen* court also noted certain salutary effects of a loan agreement, including that such agreements encourage private settlement, make funds immediately available to injured persons, and simplify complex multiparty litigation.⁵⁹ The court further dismissed the *Monjay* arguments that loan agreements were coercive, reasoning that disclosure and limiting instructions can alleviate any collusive or abnormal effects.⁶⁰ In rejecting any argument that such agreements undermine the adversarial nature of trial or produce coercive effects, the court rather summarily cited “the great weight of authority.” It relied on the notion that the law does not require that codefendants be friendly.⁶¹

However, while *Jensen* thus dismissed *Monjay* and suggested that *Mary Carters* might be acceptable in Washington, it was decided prior to tort reform. While its analysis indicates how Washington courts may act,

54. The trial court found that the agreement violated pro tanto reduction in that it resulted in indemnity or contribution for the settling defendant to which it otherwise would not have been entitled. *Id.* at 6-7, 696 P.2d at 616.

55. *Id.* at 7, 696 P.2d at 617.

56. *Id.* at 9, 696 P.2d at 618.

57. *Id.* at 10, 696 P.2d at 618.

58. *Id.* (citing *Reese v. Chicago, B.& Q. R.R.*, 303 N.E.2d 382, 386 (Ill. 1973)).

59. *Id.* citing *Reese*, 303 N.E.2d at 386.

60. *Id.* at 11-12, 696 P.2d at 619. This dismissal of the *Monjay* argument appears to have missed the point. In *Monjay*, the agreeing defendant clearly was not required to remain at trial. The *Monjay* court discussed the coercive potential of the agreement as forcing a non-agreeing defendant to either litigate or settle; it did not deal with the collusive effects of a plaintiff and cooperative defendant aligned at trial. See *Monjay*, 13 Wash. App. at 661, 537 P.2d at 829.

61. *Jensen*, 40 Wash. App. at 12, 696 P.2d at 619.

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the changes wrought by tort reform call its continuing validity into question.

In the one case discussing Mary Carters after tort reform, *McCluskey v. Handorff-Sherman*, the Washington Court of Appeals did not reach the issue of the validity of Mary Carters, due to a lack of evidence that such an agreement actually existed.⁶² In dictum, however, the court cited cases from other states for the proposition that secret agreements might prejudice a trier of fact and that pretrial disclosure is therefore necessary.⁶³ Those cases suggest that through disclosure, the jury will be able to sufficiently consider the parties' relationships in evaluating evidence and the credibility of witnesses.⁶⁴ The implication is therefore that Washington courts might uphold disclosed Mary Carter agreements even under modern tort law.

On the other hand, Washington courts have given no indication as to whether Mary Carter agreements will be viewed as settlements. However, they have concluded that a similar device—a straight “covenant not to execute”⁶⁵—will be. In *Shelby v. Keck*, the Washington Supreme Court held that such a covenant made dismissal of the agreeing defendant appropriate.⁶⁶ The arrangement set the upper limit of the defendant's liability. The court reasoned that once the plaintiff accepted the funds, the plaintiff was protected in the event that the jury held against that defendant for a lower amount.⁶⁷ The court held that the covenant was a settlement because it left no justiciable issue between the parties; dismissal was proper despite the plaintiff's objection that the agreement did not call for it.⁶⁸

62. 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted*, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993).

63. *Id.* at 103–04, 841 P.2d at 1304–05.

64. *Id.* (citing *Daniel v. Penrod*, 393 F. Supp. 1056 (E.D. La. 1975); *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973); *Maule v. Rountree*, 284 So. 2d 389 (Fla. 1973); *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985)).

65. “In a covenant not to execute, the defendant's liability is limited to an agreed sum regardless of the judgment amount.” Sara Connelly, Note, *Loan Agreements as Settlement Devices*, 25 DePaul L. Rev. 792, 795 (1976).

66. 85 Wash. 2d 911, 918, 541 P.2d 365, 370 (1975).

67. *Id.*

68. *Id.*

2. Background on 1986 Tort Reform

Washington began moving away from traditional common law principles of fault determination in its 1973 legislation adopting a system of "pure" comparative negligence, with the purpose of facilitating recovery by injured persons and thereby serving the compensatory function of tort law.⁶⁹ The Washington Supreme Court later rejected pleas to abandon joint and several liability, holding that comparative negligence did not necessitate such an action, and that abandoning joint and several liability would only frustrate the goal of compensation.⁷⁰ Fairness among tortfeasors was deemed subordinate to the goal of fairness to the injured party.⁷¹ In 1981, the legislature established contribution among joint or concurrent tortfeasors to mitigate any "unfairness" to defendants who may have been compelled to pay more than their proportionate share of damages.⁷²

In 1986, the Washington Legislature modified the state's tort system and, in particular, substantively changed rules regulating joint and several liability. The legislature adopted a general rule of several liability based on proportionate fault, with joint and several liability restricted to a few specific situations. An example is when a plaintiff is free from fault.⁷³

69. See Peck, *Rejection and Modification*, *supra* note 7, at 235-39, for a detailed history of the common law principles and their modification in Washington.

70. *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash. 2d 230, 236, 588 P.2d 1308, 1313 (1978); *see also* Peck, *Rejection and Modification*, *supra* note 7, at 237.

71. *Id.*

72. See 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) [hereinafter Peck, *Tea Leaves*].

73. The Washington statute provides, in pertinent part:

(1) In all actions involving fault of more than one entity, [the trier of fact shall determine the fault of each entity, with judgment entered against each defendant except those released by 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:

...

(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 claimants 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.

Wash. Rev. Code § 4.22.070 (1993).

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The 1986 law requires a trier of fact to allocate liability comparatively among all entities causing damage, including the plaintiff,⁷⁴ based on each party's share of fault. The liability of each is to be several only, except when the plaintiff is free of fault; in that case, the defendants are jointly and severally liable for the sum of the shares of all parties against whom judgment is entered.⁷⁵ Thus, when a faultless plaintiff settles with one defendant prior to judgment, the amount of joint and several liability is reduced by whatever amount of fault the trier of fact later allocates to that settling defendant.⁷⁶ One effect of this provision is to require faultless plaintiffs to exercise extreme caution in entering into any pre-judgment settlement agreement.⁷⁷

In cases in which a faultless plaintiff enters into a post-judgment settlement with one of the joint tortfeasors, the effects of that settlement are governed by section 4.22.060.⁷⁸ That provision specifically lists any release, covenant not to sue, covenant not to enforce judgment, or similar agreement as a settlement within its scope.⁷⁹ On the other hand, when liability is several only, settlement appears to have no effect on the liabilities of remaining tortfeasors.⁸⁰

II. ANALYZING MARY CARTER AGREEMENTS IN WASHINGTON

Much of the impact of Mary Carter agreements in a given jurisdiction depends on how the jurisdiction in question handles contribution, joint and several liability, and determinations of fault. A brief examination of how a Mary Carter agreement might affect a typical personal injury suit in Washington provides a better understanding of these agreements and why they are incompatible with the purposes behind tort reform.

Note that joint and several liability is traditionally reserved for cases involving hazardous wastes, tortious interference with contracts or business relations, and generic products. See, e.g., Peck, *Tea Leaves*, *supra* note 72, at 341 n.24.

74. Wash. Rev. Code § 4.22.070(1).

75. Note that joint and several liability is also available in the separate context of concurrent tortfeasors. See *supra* note 73.

76. For a detailed discussion of the intricacies of this system and criticism of its effects on negotiation and claim settlement, see generally Peck, *Rejection and Modification*, *supra* note 7; Peck, *Tea Leaves*, *supra* note 72.

77. See Peck, *Tea Leaves*, *supra* note 72, at 351.

78. Wash. Rev. Code § 4.22.070(2).

79. Wash. Rev. Code § 4.22.060.

80. See Peck, *Tea Leaves*, *supra* note 72, at 340 n.21.

A. Application of a Mary Carter Agreement

The use of Mary Carter agreements in Washington will have a distinctly negative impact on deep-pocket defendants. This is demonstrated by the simple automobile collision suit discussed at the beginning of this Comment.⁸¹

Where the plaintiff (*A*) is faultless, its advantages from a Mary Carter agreement are clear. Washington law holds the defendants against whom judgment is entered jointly and severally liable for the sum of their proportionate shares of the claimant's total damages.⁸² Because the settling defendant (*B*) is financially limited to its insurance coverage, any judgment against *B* will be limited for purposes of actual recovery. By making the city (*C*)—a typical "deep-pocket defendant"—a defendant, and by agreeing with *B* to encourage the jury to allocate fault to the city, *A* greatly increases chances for recovery of full damages,⁸³ with *C* jointly and severally liable for all damages.

In fact, *A*'s and *B*'s job of convincing the jury is made relatively easy, because the city technically need be only 1 percent at fault to be responsible for the entire amount of damages. Thus, an imaginative plaintiff might concoct a multitude of arguments as to how a city negligently constructed a road. A defendant in *B*'s position will likely be extremely willing to adopt a common argument, finding that his recollection of the accident coincides quite closely with *A*'s theory against the city. While the story might otherwise fail, its chances for success are greatly enhanced when the settling defendant cooperates. Potentially huge liability in a myriad of injury situations is therefore foisted onto states, municipalities, and other deep pockets by the operation of a simple Mary Carter contract.

Nor does the defendant's right of contribution⁸⁴ offer any consolation to a deep-pocket defendant on the short end of an agreement. The distortive effects of supposedly opposing parties' cooperative conduct on a jury's fault determinations are well-chronicled.⁸⁵ A jury might allocate

81. See *supra* note 1 and accompanying text.

82. Wash. Rev. Code § 4.22.070(1)(b); see *supra* note 76 and accompanying text.

83. See Wash. Rev. Code § 4.22.070(1)(b).

84. See Wash. Rev. Code § 4.22.070(2) (indicating that right to contribution is to be determined according to sections 4.22.040–.060).

85. See *supra* note 25 and accompanying text. One commentator notes that the very nature of a Mary Carter is deceit and fraud practiced by the contracting parties against the outside defendant. Warren Freedman, *The Expected Demise of "Mary Carter": She Never Was Well*, 633 Ins. L.J. 602,

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substantial fault to a city that is charged, for example, with negligence in failing to construct a median barrier.⁸⁶ The agreeing defendant's liability will thus likely be lower, which means that contribution to the extent of that liability will be substantially lower than in the absence of such an agreement.⁸⁷ Further, because the state bears the risk that other tortfeasors will be unable to pay damages, it lacks recourse when the agreeing defendant is insolvent.⁸⁸

The potential for abuse of the trial process is substantial even when the plaintiff is partially at fault, and the defendants' liabilities are therefore several only. As discussed, the impact on the jury of cooperative conduct between the settling parties may increase a non-settling party's liability far beyond what it might have been absent the agreement. *A* and *B* will work to decrease *B*'s fault while attempting to increase both the total damages and the outside defendant's responsibility for them.⁸⁹ All defendants, deep-pocket or otherwise, are thus exposed to unjustifiably high fault determinations when the plaintiff and settling defendant coordinate their efforts against them. As

604 (1975). The *Scurlock* concurrence describes the anomalous results reached in companion cases based on the same accident and identical facts. See *supra* note 29.

86. In fact, the jury in *McCluskey* allocated 50 percent of the fault to the state and 50 percent of the fault to the defendant driver who had been smoking marijuana and speeding at the time of the accident. On appeal, the state noted indications of improper collaboration in the allegedly agreeing parties' trial conduct, including the agreeing defendant's (*DI*) failure to object to plaintiff's motions in limine or to her damages, *DI*'s agreement with plaintiff's jury challenges and selection, *DI*'s targeting of the State as the responsible party, plaintiff's and *DI*'s buttressing of each other's cases through cross-examination of witnesses, and various other measures taken by the plaintiff to reduce the liability of *DI*. The court nevertheless held that such behavior was not sufficiently indicative of a possible collaborative agreement to warrant further discovery. *McCluskey v. Handorff-Sherman*, 68 Wash. App. 96, 102-05, 841 P.2d 1300, 1304-05 (1992), review granted, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993).

87. See *Benedict*, *supra* note 8, at 375 (arguing that as the focus of the parties is to try to increase the non-settling defendant's liability, while decreasing that of the settling defendant, the non-settling defendant is naturally likely to pay more than if there is no Mary Carter arrangement).

88. See *Peck, Rejection and Modification*, *supra* note 7, at 239. Another possibility might be that the settling parties, nearing conclusion of the trial and confident of a high negligence finding against the deep pocket, agree to drop the settling party from the suit. This will cost the plaintiff the chance of joint and several liability, but will save the settling defendant any risk of contribution. When the settling party's negligence is found to be low anyway, this may be a viable part of a creative agreement. See generally *Entman*, *supra* note 1, at 545-46.

89. For a discussion of the attractiveness of Mary Carters in comparative contribution jurisdictions, see *Benedict*, *supra* note 8, at 375-76 ("[T]he settling defendant's negligence only reduces the plaintiff's recovery by the percentage of fault attributable to him. The settling parties attempt to decrease the settling defendant's percentage of liability, while increasing both the total judgment and the nonsettling defendant's percentage of fault.")

contribution is not allowed when liability is several only,⁹⁰ the agreeing parties need not concern themselves with the possibility of the outside defendant seeking reimbursement from *B*.

B. Mary Carter Agreements Frustrate the Purposes Behind 1986 Tort Reform

Because Mary Carter agreements have the potential to unduly influence the jury and thereby to thrust excessive liability onto a deep-pocket defendant, such agreements frustrate the purposes of the Washington Legislature's modification of joint and several liability under the 1986 Tort Reform Act.⁹¹ The preamble to the 1986 modification states that the reforms were enacted to create a more equitable distribution of the cost and risk of injury and to increase the availability and affordability of insurance.⁹² The aim is to reduce costs associated with the tort system while providing "adequate and appropriate" compensation to injured parties.⁹³ Because of their capacity to greatly inflate or even create the non-settling defendant's share of responsibility for injury, Mary Carter agreements defeat these purposes.

The possibility of inflated allocations of fault based on the cooperative and manipulative conduct of the agreeing parties, rather than on the true facts of the case, frustrates the legislative goal of an equitable allocation of the cost and risk of injury. Whether liability is joint or several, deep-pocket defendants face drastically increased liability. Allocations of fault in these cases are not "equitable," because they are the products of jury influencing and strategic gamesmanship rather than legitimate fact-finding.⁹⁴ Recovery from the deep-pocket defendant is therefore not an appropriate compensation, because it is not based on the true facts of the case and does not accurately reflect the actual responsibilities for injury.

90. *See supra* note 73.

91. *See id.*

92. 1986 Wash. Laws 1354-55.

93. *Id.*

94. *See Entman, supra* note 1, at 574-75.

III. TREATING MARY CARTER AGREEMENTS AS SETTLEMENTS AND REQUIRING DISMISSAL OF THE DEFENDANT IS A SOLUTION TO THE PROBLEM

The use of Mary Carter agreements is inconsistent with modern Washington tort law. While the position of Washington courts is unclear, the *Jensen* and *McCluskey* holdings have suggested that Mary Carters are acceptable when tempered by prophylactic measures.⁹⁵ A better rule, however, would be to eliminate Mary Carters entirely.

First, the *Jensen* view is outdated and incorrect. Not only is its reasoning inconsistent with the legislature's subsequent effort to curb inflated deep-pocket liability, but the court also appears to have relied on the reasoning of the majority of other jurisdictions without a thorough, independent assessment of the true effects of a Mary Carter-type agreement under Washington law. The court merely commented that the majority of states' courts reject arguments that these arrangements undermine the adversarial process or produce collusion, apparently because there is no requirement that codefendants be friendly.⁹⁶ The evidence of the impact of cooperative conduct,⁹⁷ however, demonstrates that the problem goes beyond unfriendly codefendants. Washington courts should therefore abandon *Jensen*'s short-sighted approach.

A sounder and more logical approach to Mary Carter agreements is to treat them as outright settlements between the agreeing parties, and to require dismissal of the agreeing defendant. This alternative is appropriate because the Mary Carter actually resolves the plaintiff's claim against the defendant and eliminates all justiciable issues between them. Further, this approach is consistent with the language and intent of the 1986 Tort Reform Act. Finally, treating the agreements as settlements best serves the principles of the adversarial process.

A. *Mary Carter Agreements Resolve the Plaintiff's Claim*

The logistics of the parties' new relationship under a Mary Carter agreement demonstrate that the agreements resolve the plaintiff's claim against the agreeing defendant; therefore, courts should view the agreements as settlements and dismiss the agreeing defendant. This

95. See *supra* notes 52-64 and accompanying text.

96. *Jensen v. Beard*, 40 Wash. App. 1, 12, 696 P.2d 612, 619 (1985), *review denied*, 103 Wash. 2d 1038 (1985).

97. See *supra* note 25.

conclusion is supported by the Washington Supreme Court's reasoning in *Shelby v. Keck*. There, the court dismissed the agreeing defendant in a covenant not to execute, due to the absence of a justiciable issue.⁹⁸ A covenant not to execute is virtually identical to a Mary Carter agreement.⁹⁹ Under a Mary Carter agreement, the plaintiff and defendant have also resolved the plaintiff's claim, completely replacing it with a separate contractual relationship in which the defendant pays the agreed sum and the plaintiff reimburses the defendant to the extent warranted by the final judgment.¹⁰⁰ The trial serves only as the engine for the contract's execution.

The Mary Carter agreement thereby eliminates any justiciable issue between the plaintiff and the agreeing defendant. Although the agreeing defendant retains an interest in the outcome of the litigation, this interest is now tied to the jury's allocation of fault to the non-agreeing party; this interest has no relationship to the plaintiff's original claim against the agreeing defendant. Most importantly, the proceedings between the plaintiff and settling defendant are no longer adversarial. Having settled their differences, they are now working together to achieve a maximum verdict against the non-agreeing party. There is a complete lack of dispute over a now non-existent claim, between parties who are nevertheless nominally opposed and treated as adversaries in the formal trial structure.¹⁰¹

98. See *supra* note 66 and accompanying text.

99. The only real differences between *Shelby's* covenant not to execute and a Mary Carter are the contractual ramifications for final payment or reimbursement amounts. Under a Mary Carter, agreeing defendants effectively limit their liability to the agreed upon sum, just as in a covenant not to execute. Mary Carters only differ to the extent that the defendant may or may not recover some or all of its commitment, depending on the non-settling party's allocation of fault; the plaintiff receives the same security as in a covenant not to execute. More importantly, the defendant is effectively receiving an unspoken covenant not to execute, because any judgment against it will be deemed ineffective due to its contractual right. See generally Connelly, *supra* note 65, at 792; Benedict, *supra* note 8, at 371 n.12 (labeling all Mary Carters covenants not to execute, as the plaintiff promises not to enforce a court's judgment against the settling defendant). Note that many Mary Carters contain an explicit covenant not to execute. See, e.g., Williams, *supra* note 15, at 268.

100. See *General Motors Corp. v. Lahocki*, 410 A.2d 1039, 1043-44 (Md. 1980); see also *supra* note 1.

101. Cf. *Gatto v. Walgreen Drug Co.*, 337 N.E.2d 23, 29 (Ill. 1975), cert. denied, 425 U.S. 936 (1976) ("No 'justiciable matter' exists where two former adversary parties have settled their differences as to all the issues they are purportedly litigating before the trial court." (emphasis added)). See also Connelly, *supra* note 65, at 798-99 (arguing that the *Gatto* holding "indicates that once a loan agreement is executed, the signing defendant must be dismissed from the action"); David R. Miller, Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 Sw. L.J. 779, 800 (1978) ("Since no justiciable issue exists between the parties entering the Mary Carter agreement, dismissing the settling defendant is appropriate."); Entman, *supra* note 1, at 563, 564 n.241 (arguing that if a Mary Carter is treated as valid and given full effect, there are no issues left to be tried on the

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Allowing the settling party to remain a defendant therefore presents the court with a sham controversy.¹⁰² The settling defendant effectively circumvents Washington law forbidding contribution from remaining defendants,¹⁰³ under the guise of adversity and within the auspices of a formal trial designed to resolve adversarial disputes. Allowing a defendant to remain nominally opposed to the plaintiff, while its only interest concerns the non-settling defendant and the "contribution" it may effectively receive from that defendant, is therefore utterly incompatible with the traditional trial system.¹⁰⁴

B. *Construing Mary Carter Agreements as Settlements Is Consistent with the Language and Intent of the 1986 Tort Reform Act*

1. *The Language of the Statute Indicates That Mary Carter-type Agreements Constitute Settlements*

The language of the 1986 Tort Reform Act and its interrelationship with the "effects of settlement" statute¹⁰⁵ suggest that the legislature intended Mary Carter-type agreements to be treated as settlements.

claim against the agreeing defendant, thus "demonstrat[ing] the absurdity of upholding the validity of a Mary Carter agreement while still allowing the settling defendant to remain as a party defendant").

102. Cf. *Gatto*, 337 N.E.2d at 29 ("While [the Illinois Constitution] provides that 'Circuit Courts shall have original jurisdiction of all justiciable matters' . . . it does not confer jurisdiction to decide sham controversies.").

103. A right to contribution among defendants is available only to defendants against whom judgment has been entered. See *supra* note 77. Here, however, the settling defendant is clearly seeking contribution towards its payment (or promise to pay) of the guaranteed amount. The *Jensen* court remarked that it was not concerned with the potential for contribution between parties despite prohibition of such a result, as the real objection to contribution—"use of the courts for relief of wrongdoers"—was absent from what it called an "indirect, private out-of-court arrangement." *Jensen v. Beard*, 40 Wash. App. 1, 10, 696 P.2d 612, 618 (1985). In the hypothetical at hand, however, where the only interest of the settling defendant involves what it will in fact receive from the non-settling defendant as contribution, the court is being used for the relief of wrongdoers, and in an underhanded manner at that. This result weighs in favor of banning Mary Carters, at least insofar as they maintain the settling defendant's presence at trial. For a discussion of how Mary Carters violate no contribution rules, see Entman, *supra* note 1, at 540-49.

104. Compare the *Shelby* court's reasoning for approving the lower court's dismissal of the agreeing defendant: The plaintiff hoped to use certain pre-trial statements of the settling defendant, and could do so only under the hearsay exception for party admissions. This was apparently the sole purpose of maintaining the defendant's presence, and the lower court was deemed to be acting within its discretion in dismissing the defendant "to avoid a possible misuse of the evidence by the jury." *Shelby v. Keck*, 85 Wash. 2d 911, 918, 541 P.2d 365, 370 (1975).

105. Wash. Rev. Code § 4.22.070, .060; see *supra* notes 74-81 and accompanying text.

Section 4.22.060, the effects of settlement statute, specifically identifies releases, covenants not to sue, covenants not to enforce judgment, or similar agreements as settlements.¹⁰⁶ While this section is intended only to come into effect in the case of joint and several liability,¹⁰⁷ which itself only applies when there is judgment against the defendants,¹⁰⁸ it appears by inference that the legislature also intended that when one of the listed types of settlements is entered into before judgment, that settlement would prevent judgment against the settling party, and thereby exclude that party's damages from the amount of joint liability. A Mary Carter agreement, effectively a pre-judgment covenant not to execute or enforce judgment, should therefore be viewed as a settlement within this general statutory definition of settlements. This will foil schemes designed to achieve joint and several liability by keeping the settling parties in the lawsuit.¹⁰⁹

In cases when liability is several only, the effects of settlement statute¹¹⁰ does not apply; the language of the general fault determination statute¹¹¹ nevertheless indicates the same legislative intent to treat Mary Carter-type agreements as settlements. The statute specifically directs that judgment shall be entered against all parties, except those released by the claimant, or immune from liability, or prevailing on any other defense.¹¹² While this section does not specifically list the types of settlements considered releases, it can be inferred that a release is intended to include those arrangements listed in the effects of settlement statute.¹¹³ Further, at least one commentator argues that the fact that the fault determination statute was amended in 1987 gives rise to an inference that the two statutes cover the same general types of agreements.¹¹⁴ This suggests that a Mary Carter-type agreement would

106. See *supra* note 79 and accompanying text.

107. See, e.g., *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 840 P.2d 860 (1992) (when there is no joint and several liability, § 4.22.070(2) does not apply, and thus does not direct that .040, .050, or .060 is to be applied).

108. See *supra* note 75 and accompanying text. See also *Peck, Tea Leaves*, *supra* note 72, at 340.

109. See *Peck, Tea Leaves*, *supra* note 72, at 343-44.

110. Wash. Rev. Code § 4.22.060; see *supra* notes 73-80 and accompanying text.

111. Wash. Rev. Code § 4.22.070; see *supra* notes 73-80 and accompanying text.

112. Wash. Rev. Code § 4.22.070(1).

113. See *Peck, Tea Leaves*, *supra* note 72, at 344 (section .060 refers to "a release, covenant not to sue, covenant not to enforce judgment, or similar agreement" as being "interchangeable" for the purpose of determining the effect of settlement).

114. *Id.*

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be considered by the legislature to be a release; the released defendant should therefore be dismissed.

2. *Treating Mary Carters as Settlements Comports with Legislative Intent*

In limiting the application of joint and several liability to situations in which there is an actual judgment against the defendants,¹¹⁵ the legislature sought to hold an entity responsible only for its proportionate share of fault.¹¹⁶ Joint and several liability is clearly the exception, not the rule. Further, in excluding the fault of settling parties from the amount considered joint, the legislature was apparently putting the burden of inadequate settlement on the plaintiff, rather than on the remaining parties against whom judgment is entered.¹¹⁷

A Mary Carter agreement, however, circumvents these intentions. It provides the plaintiff with the security of a settlement while maintaining the defendant's presence until judgment is reached. If that judgment results in joint and several liability, the non-settling defendant must shoulder the burden of any shortcomings in the amount of the settlement. That the agreeing defendant's fault may later be determined to be in excess of that contemplated in the agreement will be irrelevant, because the plaintiff may recover the full amount from the non-settling defendant.

C. *Dealing with Mary Carter Agreements Purporting Not To Be Settlements*

Recitals within a Mary Carter that it is not to be construed as a settlement, that the defendant is not to be released, or that it is not

115. See *supra* note 76 and accompanying text; *Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 293-96, 840 P.2d 860, 885-89 (1992). When parties were acting in concert or when a person was acting as an agent or servant of the other party, there is no judgment requirement. Wash. Rev. Code § 4.22.070(1)(a).

116. *Washburn*, 120 Wash. 2d at 294, 840 P.2d at 886.

117. *Id.* at 299, 840 P.2d at 888-89. The Washington Supreme Court has argued that the plaintiff bears the risk of an adverse settlement when liability is several only because of uncertainty about the ultimate recovery following trial. The uncertainty built into the general rule of several liability, combined with the fact that the plaintiff often will not know whether it will be at fault until the end of the trial, indicated to the court that the legislature did not intend to burden non-settling parties with the effects of a plaintiff's settlement. *Id.* (citing Thomas Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 Gonz. L. Rev. 67, 82 (1986-87)).

intended as a covenant not to execute should not prevent a court from identifying the agreement for what it is: a settlement of the plaintiff's claim. Washington courts, in similarly attempting to distinguish between releases and covenants not to sue, have consistently held that the court will look to the true nature of the agreement rather than to the language of the contract itself.¹¹⁸ Courts should similarly treat a Mary Carter agreement as a settlement or release despite any recitals within the agreement to the contrary.¹¹⁹

Finally, courts should treat Mary Carter agreements as settlements whether or not money has actually changed hands between the plaintiff and settling defendant. The issue arises under an agreement such as a loan receipt,¹²⁰ in which the defendant turns money over to the plaintiff prior to judgment instead of merely guaranteeing the sum.¹²¹ The defendant will receive reimbursement in the event of sufficient recovery against the non-settling defendant. The crucial point is that, whether or not money has actually changed hands, the settling defendant has made an unconditional promise to provide the sum, and the plaintiff is guaranteed at least that amount regardless of the outcome of trial.¹²² While the fact that money has changed hands may provide direct evidence that the agreement is in fact unconditional,¹²³ a true Mary Carter will always involve the unconditional promise. Courts in Washington should therefore not hesitate to identify them as settlements, whether or not the plaintiff has received funds prior to trial.

D. Benefits of Treating Mary Carter Agreement as Settlement and Dismissing the Agreeing Defendant

The benefits of dismissing the defendant are many. The plaintiff may no longer obtain the underhanded assistance at trial that it initially sought to purchase through the Mary Carter agreement. This eliminates the

118. See *Haney v. Cheatham*, 8 Wash. 2d 310, 111 P.2d 1003 (1941); *Hargreaves v. American Flyers Airline Corp.*, 6 Wash. App. 508, 511, 494 P.2d 229, 231 (1972) ("Appellate courts have ignored the stated intent of the parties . . . if it is clear from the surrounding circumstances that the actual intent was other than as stated.").

119. *Peck, Tea Leaves*, *supra* note 72, at 344.

120. See, e.g., *Jensen v. Beard*, 40 Wash. App. 1, 696 P.2d 612 (1985).

121. See *Entman*, *supra* note 1, at 522-23.

122. *Id.* at 544-45.

123. See *Cullen v. Atchison, Topeka & Santa Fe Ry.*, 507 P.2d 353 (Kan. 1973) (where parties had entered a loan receipt-type agreement, court held the agreement to be a conventional, unconditional settlement; money paid was treated as a credit to subsequent judgment against non-settling defendant). See also *Entman*, *supra* note 1, at 544.

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potential for skewing the adversarial process. While most courts recognize this problem, the majority have attempted to deal with it by providing limiting instructions, balancing procedural advantages, and disclosing the agreement.¹²⁴ The success of such measures is debatable, as argued by some courts and commentators.¹²⁵ Removing the defendant achieves the purpose of ensuring trial fairness¹²⁶ while avoiding debates as to the propriety of disclosing the agreement and sufficiency of balancing measures. While the *Cox* court adopted this measure based primarily on public policy grounds,¹²⁷ Washington courts may effectively do so by viewing Mary Carters as final settlements.¹²⁸

Once the agreeing defendant is removed, the trial may produce a judgment free from collusive influence. The settling defendant's fault will still be determined by the trier of fact, but without the bias of that party's tainted input. Because the settling defendant's real interest is against the interest of the non-settling party, some courts have apparently allowed the agreeing defendant to remain at trial as a plaintiff.¹²⁹ This approach should be precluded in Washington, however, as a settling defendant is not permitted to maintain an action against other tortfeasors for contribution or indemnity.¹³⁰ Taking the next logical step, courts should similarly hold void that element of the agreement guaranteeing reimbursement to the settling defendant.

To best serve future litigants, Washington courts should unequivocally assert that all Mary Carter agreements requiring the settling defendant to remain at trial will be void. A firm policy will prevent piecemeal assessment of each agreement as it might become relevant at trial,

124. See *supra* notes 21–23 and accompanying text.

125. See *Elboar v. Smith*, 845 S.W.2d 240, 249 (Tex. 1992); *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 9–11 (Tex. 1986); *supra* note 28; see also *Entman, supra* note 1, at 563 (“The disclosure and admission approach to controlling Mary Carter agreements has been criticized as being insufficient to cure the prejudice to the nonsettling defendant.”).

126. *Entman* argues that dismissing the settling defendant eliminates trial prejudice by removing an attorney from trial who may use jury selection, examination of witnesses and jury arguments to the plaintiff's advantage. *Entman, supra* note 1, at 564; see also *Miller, supra* note 101, at 800 (“dismissing the settling defendant will frustrate the collusive intentions of the agreeing parties”).

127. See *supra* note 38 and accompanying text.

128. Dismissing the defendant under such conditions involves reasoning similar to that used in the *Shelby* case, in which the court held that dismissal of the settling defendant, who no longer was party to a justiciable issue, was proper to avoid a misuse of evidence by the jury. See *supra* note 104.

129. See *Entman, supra* note 1, at 563 n.235.

130. See *supra* note 76 and accompanying text.

thereby avoiding wasted time and energy. Ideally, parties will abandon this particular device in favor of traditional, acceptable settlements.¹³¹

IV. CONCLUSION

Mary Carter agreements distort the traditional aspects of litigation to such an extent that they are simply incompatible with the adversarial process. Practices for limiting their impact are insufficient; eliminating them completely is a more practical approach, and comports with the current state of Washington tort law. Treating Mary Carters as outright settlements and dismissing the agreeing defendant from trial is a logical method to achieve this result.

131. There is a clear potential for collusion in litigation that may escape the court's eye. It is conceivable that Mary Carter-type agreements may be made tacitly, with nothing more than oral confirmation. Such a possibility suggests that the current provision for joint and several liability should be reworked, perhaps by requiring that a defendant be at least 30 to 40 percent at fault before joint and several liability will apply.

Settlement Agreements: Are Lions Now Tiger and Bears (Oh My)?

Appendix 6

Special focus: medical negligence

Settlement Agreements: Are Lions Now Tigers and Bears (Oh My)?

by David Beninger and Joel Cunningham

Washington's civil justice system and tort laws have long rested upon the principles of full compensation to innocent injured victims and the encouragement of settlements.¹ The legislature was aware of these principles when it debated and enacted the various tort reform laws.² As a result, joint and several liability was explicitly maintained for innocent accident victims and settlement encouraged.³ Unfortunately, two recent Court of Appeals decisions suggest the legislature used a grammatical trick in 1986 to violate, if not eliminate, these fundamental principles.⁴ The result is that defendants are not able to settle, innocent plaintiffs are not willing to settle, and the trial courts are being congested with civil cases and trials that should have settled.

The fundamental principle that innocent tort victims should receive full compensation is so important to the civil justice system that our Court's have held that "the cornerstone of tort law is the assurance of full compensation to the injured party."⁵ Another long-standing and fundamental principle of our tort system is that settlements are to be encouraged as a matter of public policy.⁶ Settlements not only benefit the parties to a dispute, but save the public and court from the costs and congestion of litigating private disputes.⁷ Traditionally, the court has found that the rights of an innocent tort victim outweigh the rights of a guilty tortfeasor defendant. The court has held that the policies of encouraging settlement and protection of innocent victims of wrongdoing permit the innocent plaintiff to partially settle using various settlement vehicles with one defendant and proceed against the other tortfeasors without losing the right of joint and several liability with those remaining defendants.⁸

The principles of protecting full compensation for innocent accident victims and encouraging settlements is so important that they were specifically protected during the legislative reforms of the tort laws in 1981 and 1986. In 1981, the legislature modified the tort laws while maintaining the general rule of joint and several liability. The legislature codified this long-standing principle by enacting a statute specifically holding that joint and several liability is the general rule, subject to some limited statutory exceptions.⁹ This continued the protection of full compensation for innocent accident victims. The legislature also maintained the principle of encouraging settlement by adopting laws permitting contribution between at-fault defendants and requiring hearings to determine the reasonableness of any settlement.¹⁰ These laws recognized that there were different types of settlement agreements, including releases, covenants not to sue, covenants not to enforce a judgment and the like. RCW 4.22.060. These laws protected defendants that wanted to settle, defendants that did not want to settle but wanted credit from anyone who did, and an innocent plaintiff entitled to full compensation.

In 1986, the legislature again considered these principles in drafting legislation designed to apportion fault. After debating the various public policies, the legislature reaffirmed the common law principle that any unfairness in retaining joint and several liability for innocent accident victims should be borne by the at-fault defendants, not the innocent plaintiff.¹¹ However, joint and several liability was abolished as to plaintiffs who are also at fault for their own injuries. It was the policy of the legislature, therefore, to safeguard the rights of the innocent by creating an exception that explicitly protected innocent tort victims right to joint and several liability.¹² For innocent victims, "the defendants against whom judgment is entered shall be jointly and severally liable." RCW 4.22.070(1)(b). The legislature also mandated that "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." RCW 4.22.070(1). At the same time the legislature also retained the contribution and reasonableness statutes, including the recognition that there are various ways to settle besides a release, in order to encourage the strong public policy favoring settlements.¹³

To obtain the protection of full compensation after the 1986 legislative changes, an innocent accident victim simply needed to sue and have judgment entered against each potential at-fault defendant. An innocent

plaintiff from the risk and hardship of full compensation after the 1986 legislative changes, an innocent plaintiff needed to avoid creating an "empty chair" by giving a defendant a full release. Washington had long recognized that there are various types of settlement agreements. A release is just one type of settlement agreement used when a settling defendant wants to be completely done with, or "released," from further participation in a case. A release created an "empty chair" for that settling defendant and no trial or judgment would be entered against a released defendant.¹⁴ The other defendants would not be jointly liable with the empty chair and could point the finger and blame the released defendant to reduce their responsibility for damages. By "releasing" a defendant, the injured plaintiff bore the risk of any shortfall created by the fault allocated to that entity.¹⁵

Another well-recognized settlement agreement was a "covenant not to execute on a judgment."¹⁹ Washington courts had previously determined that a "covenant not to execute" is not a release and did not create an empty chair as the defendant still had an incentive and interest in further litigation, even if it was just the adverse credit effects of a judgment.²⁰ A covenant not to execute is different from a release in that a settling defendant is still able to defend itself at trial and vindicate its name by obtaining a defense verdict or judgment, or by minimizing the verdict and judgment to be entered against it, all with the security of protecting personal assets from execution on the judgment beyond a certain amount or only against certain assets.²¹

The 1986 tort reform act kept in effect the statute recognizing the various types of settlement agreements that had developed as part of the civil justice system and subjecting them all to a reasonableness hearing for any credit or offset of jointly liable defendants.²² Thus, just like defining "animals" to include "lions" and "tigers" and "bears" and "other similar animals," so too did the legislature retain the distinction that "settlement agreements" include "releases" and "covenants not to enforce" and "covenants not to sue" and "other similar agreements." Only one type of animal prevented a defendant from having judgment entered against it that could

destroy joint and several liability – a release.

Thus, the fundamental principles and cornerstone of Washington law remained intact for nearly 125 years. Recently, however, two Courts of Appeals decisions have suggested that the legislature intended to use a grammatical trick nearly 20 years ago to create the illusion that innocent plaintiffs were still protected and encouraged to settle, while in reality setting up a system to punish innocent tort victims who actually enter any type of settlement. The courts did not mention the long-standing policies that have ensured full compensation for the innocent of the public policy encouraging settlements. Instead, both court decisions claimed that by using the term "release" as a noun in one section and a "verb" in another, the legislature implicitly rewrote these principles in a way that punishes an innocent accident victim and has a chilling effect on the public policy of encouraging settlements. The courts did this by declaring that a "covenant not to sue" (tiger), a "covenant not to enforce judgment" (bear) and "any similar settlement" (other similar animals) are now all equated under the law with "releases" (lions). In other words, lions are now tigers and bears and any other type of animal.

The first case was *Maguire*, where an innocent plaintiff sued the driver, owner and
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Settlement Agreements: Are Lions Now Tigers and Bears (Oh My)?

(Continued from page 5)

state for an automobile accident that left him severely injured. The two individuals offered to settle for their insurance policy limits "for the sole purpose of avoidance of the uncertainties, inconvenience, and expenses of the pending lawsuit." They did not demand a release. Instead they were willing to expose themselves to a judgment in exchange for a covenant not to execute on that judgment beyond their insurance limits. The trial court upheld the agreement, prior case law and precedent to reject the State's arguments that the settlement was really a "release" and destroyed joint and several liability. The Court of Appeals reversed the trial court, ignoring the stated effect of the agreement and instead declaring that the "operative effect" for the individuals was a complete release as they had no further incentive nor interest in the lawsuit (despite the potential damage to their credit from entry of a judgment), all because they had agreed that the settlement was "intended to be a complete resolution of all claims."²⁴ The Court could have stopped there, resting its holding on the notion that a lion (release) admittedly dressed up as a bear (covenant) is still a lion. Instead, the Court went on to first suggest that the legislature used a grammatical trick in 1986 to implicitly undercut the fundamental principles of full compensation and encouraging settlement. The *Maguire* Court suggested that while the legislature retained the term "release" as a "noun" under RCW 4.22.060 when it continued to recognize that there are various types of settlement agreements, it then used "release" as a "verb" under RCW 4.22.070 to devour all the other types of settlement agreements and prevent an innocent accident victim who settles in any way from obtaining joint and several liability and full compensation. It blamed the legislature for converting all animals into lions.

Then in *Romero* an innocent kindergarten student was run over by a car at school and killed.²⁵ Several experts testified that the school district was negligent and caused the death. The trial court and Court of Appeals found that "the evidence amply supports the jury's verdict" that the school district was negligent and caused the child's death. However, before trial the school district claimed the mom who came to pick her young son up might also be negligent. As a result, the mom became both a plaintiff and a defendant. The insurer for the mom wanted to settle for her minimal policy limits and avoid incurring further costs in pursuing a defense that was already being pursued by her as a plaintiff. Since Ms. Romero was in the lawsuit and intended to prove her innocence and recover from the school for her child's negligent death, her insurer agreed to pay the limits if it could be reimbursed \$1 it paid for every \$2 collected. This was agreed in exchange for a covenant not to execute on any judgment that might be entered personally against Ms. Romero. The trial judge approved the settlement agreement as reasonable.

Later, the jury found the school district 75% at fault. The trial judge denied the school district's attempts to avoid personal responsibility for the full damages caused by the death of an innocent kindergarten. However, the Court of Appeals reversed, again ignoring any mention of the cornerstone principles of full compensation or public policy favoring settlement. It also ignored the insurer's interest in recouping \$1 for

every \$2 collected. Instead, the court relied upon the same alleged grammatical trick used in *Maguire*, along with a 42-year-old New Mexico case, to not only punish the grieving parents and insurance company, but chill future settlements by innocent accident victims. The *Romero* Court reasoned that the alleged noun-verb sleight of hand by the legislature now also converted "Mary Carter" type of settlements agreements into "releases" to prevent the entry of a judgment for joint and several liability and full compensation. The *Romero* court claimed it could now divine the spirit when interpreting the letter of the legislature's acts nearly 20 years ago to conclude they were motivated to destroy the principles that are at the foundation of our tort system. The trial court was reversed and the school district avoided accountability for the full damages caused by the negligent death of a 5-year-old in the school parking lot.

One can speculate why the *Romero* and *McGuire* courts came down so hard against the rights of innocent tort victims. There seems to be an evolving policy underlying decisions in our appellate courts aimed at providing judicial protection to public entities that our legislature chose not to provide. This is primarily done in the area of responsibility for personal injuries. However, under our State Constitution, the legislature is given the sole responsibility for deciding responsibility, if any, of governmental entities.²⁶ The legislature has decided that governmental entities are to be responsible for causing personal injuries and torts to the same extent as private persons.²⁷ The courts are constitutionally prohibited from second guessing or rewriting the decision of the legislature in this area. However, in both of these cases, the court put the rights of public entities before the rights of the innocent victims (even a young child). Whenever a public entity is involved in an adverse verdict, it seems the reversal rate is much higher than when a private tortfeasor is involved. The problem is that this "new" policy of the law to protect public entities is *sub rosa* and not articulated in the opinions. Therefore, bad law is created for all cases. This is "judicial activism" at its worst.

Where this line of cases will take the law is unknown. The next judicial assault by the Courts of Appeal could be against high-low settlement agreements, or judgments entered as a result of a CR 68 Offer of Judgment, or post-judgment settlements that the Supreme Court in *Washburn* claimed was overlooked as a way to still maintain joint and several liability even after the 1986 tort reform. We hope the Supreme Court will "straighten this crooked stick" if it can be persuaded to look at one of these cases. The Supreme Court may be better able to divine the true spirit of a legislative body deceased for 20 years, or perhaps just more willing to logically interpret the letter of the law to protect the pillars of our civil justice system. Until a lion is just a lion again, settlements will be discouraged in any case involving an innocent plaintiff who wants full compensation. Individual defendants and their insurers will be unable to settle and will have to incur the costs and risk of trial and judgment. The courts will be further congested with trials and appeals of private disputes involving multiple parties.

Endnotes:

1. *Kotler v. State*, 136 Wn.2d 437, 452-53, 963 P.2d 834 (1998) (Talmadge concurrence).
2. *Id.*; see also *Brewer v. Fibreboard*

Corp., 127 Wn.2d 512, 531, 901 P.2d 297 (1995) (Legislature enacted the tort reform act to encourage settlement and to ensure tort victims complete satisfaction of their claims); *Seattle Western Industries Inc. v. David A. Mawai Co.*, 110 Wn.2d 1, 5, 750 P.2d 245 (1988) (the purpose of RCW 4.22 is to ensure full compensation to tort victims and encourage settlements).

3. RCW 4.22.070(1)(b)
4. *Maguire v. Teuber*, 120 Wn.App 393, 85 P.3d 939 (2004), *rev. denied* 152 Wn.2d 1026 (2004) and *Romero v. West Valley School District*, 123 Wn.App 385, 98 P.3d 96 (2004), *rev. denied* 154 Wn.2d 1010 (2005).
5. *Jensen v. Beaird*, 40 Wn.App 1.8, 696 P.2d 612 (1985), *rev. denied* 103 Wn.2d 1038 (1985); see also *Spokane Truck & Dray Co. v. Hofer*, 2 Wash. 45, 53, 25 Pac. 1072 (1891) (the argument against punitive damages is that Washington's civil justice system is designed to provide full compensation as "every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages.")
6. See footnote 1 and 2.
7. *Id.*
8. See *Jensen, supra*; see also footnote 20.
9. RCW 4.22.030.
10. RCW 4.22.040, 050 and 060.
11. See Final Report, Washington Select Committee on Tort and Product Liability Reform, January 1981, at pg. 21. By enacting the contribution statutes, the legislature recognized "that the effect of this rule may be to require a partially at fault defendant to pay more than his or her share of the joint defendants' liability in certain cases." *Id.* at 23. Despite this, the legislature determined that the defendant rather than the plaintiff should bear this burden:

This unfairness should be ameliorated in most cases by the creation of a right of contribution among tortfeasors. In those cases where it is not, the Select Committee feels that a defendant rather than a plaintiff should bear the burden of that unfairness.

12. RCW 4.22.070(1)(b)
13. See footnote 1 and 2.
14. *Washburn v. Best Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1993).
15. *Hirer v. Bridgestone/Firestone, Inc.*, 138 Wn.2d 248, 250-61, 978 P.2d 505 (1999).
16. When liability is joint and several, an injured plaintiff only had to sue one of the

jointly liability tortfeasors in order to recover full compensation. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 234-36, 588 P.2d 1308 (1978). This reduced the shotgun approach compelled by tort reform.

17. *Washburn, supra*.
18. *Id.* The *Washburn* Court left open the possibility of retaining joint and several liability even with a release if the defendant is released postjudgment: "Further, plaintiffs appear to overlook the possibility of RCW 4.22.070(2)(contribution statutes) applying to postjudgment settlements." *Id.* at 296.
19. *Jensen, supra*. This type of settlement agreement has also been referred to as a loan receipt and covenant or assignment and covenant not to execute. *Jensen, supra* and *Butler v. Besel, supra*.
20. *Id.*; *Kagele v. Aetna Life & Cas. Co.*, 40 Wn.App. 194, 198, 698 P.2d 90 (1985) (covenant not to execute is not a release); see also *Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn.App. 223, 741 P.2d 1054 (1987) (same); *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 399, 823 P.2d 499 (1992) (covenant not to execute and assignment is not a release but an agreement to execute only against a specific asset - the proceeds of the insurance policy and the rights owed by the insurer to the insured; adverse credit impact is one type of harm from covenant judgments); *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 737; 49 P.3d 887 (2002) (same).
21. Contribution can be money, loan or assignment of other assets like a bad faith claim. See *Butler, Besel, supra*.
22. RCW 4.22.060. Reasonableness hearings were only required for jointly liable defendants. *Washburn, supra*.
23. 120 Wn.App at 397-98.
24. *Id.*
25. *Romero v. West Valley School District*, 123 Wn.App 385, 98 P.3d 96 (2004), *rev. denied* 154 Wn.2d 1010 (2005).
26. Wash. Constitution, Art. II, § 26.
27. See e.g. RCW 4.92.090 "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

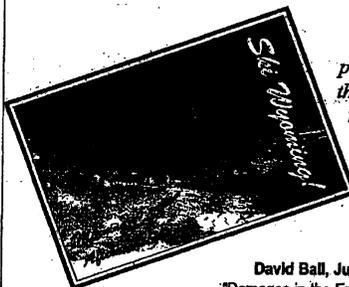
David Boatman and Joel Cunningham, both WSTLA EAGLE members, are attorneys in the Luvera Law Firm in Seattle.

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Expert Roundtables as a Tool in Proving the Reasonableness of Settlements Involving Stipulated Judgments

by William C. Smart

Statement of the Problem

What is the biggest hurdle in turning your stipulated judgment into money? Often, it can be convincing the trial judge of its reasonableness.

Stages in Settlement of a Bad Faith Insurance Case

The normal stages in the settlement of a bad faith insurance case, using a stipulated judgment and assignment of claims, are as follows:

1. The commission of bad faith by the insurer in:

- (a) Failing to defend;
- (b) Defending under a reservation of rights;

(c) Refusing to settle within policy limits.
2. Entry of a stipulated judgment between the plaintiff and the defendant insured with an assignment of bad faith rights in favor of the plaintiff.

3. The conducting of a reasonableness hearing pursuant to *Chausee v. Maryland Casualty*, 60 Wn. App. 504, 803 P.2d 1339 (1991).

4. Pursuing a bad faith claim against the insurer on the assigned claims for the purpose of collecting on the stipulated judgment and whatever other damages have been caused to the insured.

The Development of the Reasonableness Hearing: An Outgrowth of the Tort Reform Act

Reasonableness hearings find their origin in RCW 4.22.060, part of the tort reform act of 1986. The original purpose of the hearing was to determine the amount of offset that jointly and severally liable, non-settling defendants would be entitled to after the settling parties had exited the case. If the settlement was found to be reasonable, the offset was determined to be for whatever amount the court found reasonable. Non-settling defendants therefore pushed hard for a determination that the settlement was unreasonable (i.e., too low) and, correspondingly, that the offset should be for a higher amount.

With the decision in *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992), the Supreme Court largely erased the reasonableness hearing as a tool in most multi-party litigation. The reason for this was the determination that settling, released parties could not be parties against whom judgment could be taken, and they therefore could not be parties who were jointly and severally liable.

In *Chausee v. Maryland Casualty Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991), the court adopted the nine "Glover" factors as the mechanism for determining whether settlements were reasonable in bad faith cases.

After the decision in *Washburn*, there was a period of confusion regarding whether reasonableness hearings retained a place in Washington jurisprudence. The author has had trial courts refuse to perform them on the grounds that their only purpose lay in RCW 4.22.060. Insurers routinely argued that the procedure deprived them of the opportunity to have damages measured by a jury after a full trial, and the notion that the insurer should lose this right in advance of a determination of bad faith was troubling to some judges.

The Current State of The Law

It is now reasonably well settled by the Washington Supreme Court that reasonableness hearings, conducted in the tort case, are the appropriate mechanism for confirming the reasonableness of a stipulated judgment. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 49 P.3d 887 (2002); *Truck Ins. Exchange v. Van Port Homes*, 147 Wn.2d 751, 55 P.3d 276 (2002). A favorable outcome in your reasonableness hearing is the best mechanism to avoid protracted litigation over damages with insurer because:

1) "The amount of the covenant judgment is the presumptive measure of damages if the settlement is reasonable under the *Chausee* criteria." *Howard v. Royal Specialty Underwriting*, 121 Wn. App. 372, 89 P.3d 265 (2004); *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 738; and

2) "A trial court's finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence." *Brewer v. Fiberboard*, 127 Wn.2d 512, 524, 901 P.2d 297 (1995).

The conduct of the reasonableness hearing is critical. At the reasonableness hearing, the trial court should consider the "Glover" fac-

The releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative fault; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion or fraud; and the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

Chausee v. Maryland Casualty Co., 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (quoting *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983)).

The obvious concern of the Court conducting a reasonableness hearing is to prevent "sweetheart deals" (See, *Howard v. Royal Specialty Underwriting*, 121 Wn. App. 372, 89 P.3d 265 (2004)) between the plaintiff and defendant. The use of Glover/Chausee factors protects insurers from liability for excessive judgments. *Besel v. Viking Ins. Co.*, 146 Wn.2d at 738.

Conduct of the Reasonableness Hearing

Other than the Glover factors, there are few guidelines concerning how to conduct the reasonableness hearing. One recent case has found that six days notice was sufficient to allow the insurer to contest settlement, at least where the insurer was not a stranger to

the case, having been notified of the claims against its insured almost a year in advance of the hearing. See, *Condo Association v. Sunquist Holdings*, 128 Wn. App. 317, ___ P.2d ___ (2005).

In *Howard v. Royal*, 30 days notice was also deemed sufficient, especially given the fact that the insurer appeared and contested the reasonableness. In *Howard*, the plaintiffs presented declarations from two experienced plaintiff's attorneys, neuropsychological evaluations by plaintiff's treating physicians, reports from both the plaintiff's and defense doctors, medical literature supporting spinal cord and brain injuries, a life care plan, an economist report, a letter from defendant's accountant stating that the defendant was unable to pay the judgment in the case, complete correspondence between counsel for plaintiff and defendant, a list of the depositions and pleadings in the suit, liability videotape, and a rehabilitation videotape.

The insurance company countered with similar reports and declarations designed to show the settlement unreasonable. At the conclusion of the reasonableness hearing, the trial court determined that the plaintiff's figure of \$20 million was unreasonable, but did find the figure of \$17.4 million reasonable. The parties then re-negotiated their agreement after the court determined a reasonable settlement amount.

An Expert Roundtable

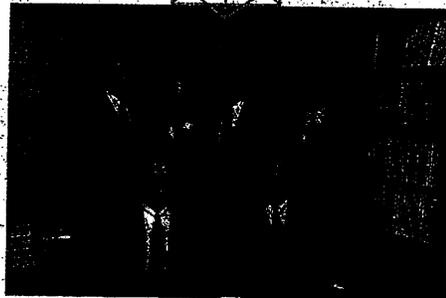
This author has had the opportunity of recently considering the challenges presented to the trial court in evaluating a stipulated judgment in a go-kart/scalping case where psychiatric damages are extensive, but difficult to prove. Rather than risk having a judge determine that the stipulated judgment was the result of a "sweetheart deal," prior to entry of the stipulated judgment, I convened a panel of experienced attorneys with the following qualifications:

- My panel consisted of three attorneys.
- One attorney did exclusively plaintiff's work. Two did mostly defense work.
- All attorneys had more than 25 years experience and were/are held in the highest regard by other members of the bar.
- I insisted on paying the panel members.
- The panel members met and questioned the plaintiff.
- The panel members were provided with medical records, deposition excerpts, photographs, deposition exhibits, and whatever else they deemed relevant or useful for their deliberations.
- The panel members were not informed of the available insurance limits prior to their evaluation.

(Continued on page 13)

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Snohomish County Superior Court Docket 07-9-11750-8

Appendix 7



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Superior Court Case Summary

Court: Snohomish Superior
Case Number: 07-9-11750-8

Sub	Docket Date	Docket Code	Docket Description	Misc Info
	11-21-2007	VERDICT	Verdict - Jury Finds For Plf And Awards Damages In The Amount Of	**against Dft State Of Wash Dept Of Transportation - \$3420000.00
	11-21-2007	JUDGMENT	Judgment On Verdict Against Dft State Of Washington In Fvr Of Plf	
	12-14-2007	ORDER	Order Amending Interest Rate To 6.151% Pa	
	01-24-2008	PARTIAL SATISFACTION OF JUDGMENT	Partial Satisfaction Of Judgment (\$100000.00)	
	08-04-2009	TRUST RCVD-TENDER	Trust Rcvd-tender - \$3,779,636.33	
	09-30-2009	TRUST RCVD-TENDER	Trust Rcvd-tender - \$16,137.53	
	06-15-2010	TRUST RCVD-GARNISHMENT	Trust Rcvd-garnishment - \$92632.30	
	06-15-2010	SATISFACTION OF JUDGMENT	Satisfaction Of Judgment On Clerks Action Pursuant To Rcw 4.92.160(2)	

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You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

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Jury Instruction And Statutory Authority

Appendix 8 Index

1. Jury Instruction 18
2. RCW 4.22.050
3. RCW 4.22.060
4. RCW 4.22.070
5. RCW 4.56.050
6. RCW 4.56.060
8. RCW 4.56.075
9. RCW 4.92.160

INSTRUCTION NO. 18

A person who maintains or provides a motor vehicle for the use of a member of his or her family is responsible for the acts of that individual in the operation of that motor vehicle.

RCW 4.22.050

Enforcement of contribution.

(1) If the comparative fault of the parties to a claim for contribution has been established previously by the court in the original action, a party paying more than that party's equitable share of the obligation, upon motion, may recover judgment for contribution.

(2) If the comparative fault of the parties to the claim for contribution has not been established by the court in the original action, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(3) If a judgment has been rendered, the action for contribution must be commenced within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (a) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within one year after payment, or (b) agreed while the action was pending to discharge the common liability and, within one year after the agreement, have paid the liability and commenced an action for contribution.

[1981 c 27 § 13.]

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 4.56.050

Effect of judgment against executor or administrator.

When a setoff shall be established in an action brought by executors or administrators, and a balance found due to the defendant, the judgment rendered thereon against the plaintiff shall have the same effect as if the action had been originally commenced by the defendant.

[Code 1881 § 500; 1877 p 107 § 504; RRS § 269.]

Notes:

Rules of court: Cf. CR 54(b).

RCW 4.56.060

Judgment in case of setoff — When equal or less than plaintiff's debt.

If the amount of the setoff, duly established, be equal to the plaintiff's debt or demand, judgment shall be rendered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only.

[Code 1881 § 503; 1877 p 108 § 507; RRS § 271 1/2.]

Notes:

Rules of court: Cf. CR 54(b).

RCW 4.56.070

Judgment in case of setoff — When exceeds plaintiff's debt — Effect of contract assignment.

If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered in favor of the defendant for the amount thereof, but no such judgment shall be rendered against the plaintiff when the contract, which is the subject of the action, shall have been assigned before the commencement of such action, nor for any balance due from any other person than the plaintiff in the action.

[Code 1881 § 504; 1877 p 108 § 508; RRS § 272. FORMER PART OF SECTION: Code 1881 § 303; RRS § 433 now codified as RCW 4.56.075.]

Notes:

Rules of court: Cf. CR 54(b).

RCW 4.56.075

Judgment in case of setoff — When exceeds plaintiff's debt or affirmative relief required.

If a setoff established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant shall be given for the excess; or if it appears that the defendant is entitled to any affirmative relief, judgment shall be given accordingly.

[Code 1881 § 303; 1877 p 62 § 307; 1869 p 74 § 305; 1854 p 173 § 231; RRS § 433. Formerly RCW 4.56.070, part.]

Notes:

Rules of court: Cf. CR 54(b).

RCW 4.92.160

Payment of claims and judgments.

Payment of claims and judgments arising out of tortious conduct or pursuant to 42 U.S.C. Sec. 1981 et seq. shall not be made by any agency or department of state government with the exception of the risk management division, and that division shall authorize and direct the payment of moneys only from the liability account whenever:

(1) The head or governing body of any agency or department of state or the designee of any such agency certifies to the risk management division that a claim has been settled; or

(2) The clerk of court has made and forwarded a certified copy of a final judgment in a court of competent jurisdiction and the attorney general certifies that the judgment is final and was entered in an action on a claim arising out of tortious conduct or under and pursuant to 42 U.S.C. Sec. 1981 et seq. Payment of a judgment shall be made to the clerk of the court for the benefit of the judgment creditors. Upon receipt of payment, the clerk shall satisfy the judgment against the state.

[2002 c 332 § 16; 1999 c 163 § 4; 1991 c 187 § 3; 1986 c 126 § 9; 1979 ex.s. c 144 § 3; 1979 c 151 § 5; 1975 1st ex.s. c 126 § 6; 1969 c 140 § 2; 1963 c 159 § 10.]

Notes:

Intent -- Effective date -- 2002 c 332: See notes following RCW 43.41.280.

Effective date -- 1999 c 163: See note following RCW 4.92.130.

Intent -- 1991 c 187: "It is the intent of the legislature that the tort claims revolving fund created under section 1 of this act have [has] the same purpose, use, and application as the tort claims revolving fund abolished effective July 1, 1989, by the legislature in chapter 419, Laws of 1989." [1991 c 187 § 2.]

Severability -- 1969 c 140: See note following RCW 4.92.130.

Duty of clerk to forward copy of judgment: RCW 4.92.040.