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SUPREME COURT OF THE STATE OF WASHINGTON

JARED K. BARTON,
a single man,

Respondent,

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

Respondents,

v.

STATE OF WASHINGTON, Department of Transportation,

Petitioner.

BRIEF OF THE STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION IN RESPONSE TO BRIEF OF AMICUS CURIAE OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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ORIGINAL

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I. INTRODUCTION

Amicus Washington State Association for Justice Foundation (Foundation) agrees with Petitioner State of Washington (State) that pretrial agreements effecting partial settlements must be disclosed to the court and all parties as a matter of course. The Foundation also agrees with the State that the operative legal effect of a covenant not to execute, including the covenant not to execute at issue in this case, is to discharge contribution liability. *See* RCW 4.22.060(2). However, the Foundation argues that a covenant not to execute, unlike a release or other form of settlement, does not negate joint liability. Recognizing that its position is inconsistent with numerous decisions of the court of appeals and this Court, the Foundation requests this Court to disapprove (overrule) all of those decisions. This argument and issue has never been raised at any point in this lawsuit by any of the parties and therefore is not properly before this Court and should not be considered. Even if considered, the argument should be rejected as contrary to statutory language, case law, and common sense.

II. ARGUMENT

A. The Foundation Is Correct That The Non-Disclosure Of Pretrial Partial Settlement Agreements Seriously Undermines The Integrity Of The Judicial Process

The Foundation agrees with the State that ". . . pretrial agreements between parties that arguably impact their liability or ostensible alignment must be disclosed as a matter of public policy, in order to preserve the integrity of the adversary process and pure administration of justice. These duties to disclose are not dependent upon a discovery request seeking this information." *See* Brief of Amicus Foundation at 11.

Of course, in this case the State did send specific interrogatory requests to the plaintiff Jared Barton and the Linvog co-defendants, requesting disclosure of the covenant not to execute and advance payments. CP at 831-41. In addition to these discovery obligations, RCW 4.22.060(1) requires disclosure of pretrial settlements, including covenants not to execute. The trial court found that both counsel for Mr. Barton and counsel for the Linvogs were aware of this statutory disclosure requirement "and failed to comply with it." CP at 9.

The Foundation recognizes the inherent prejudice that arises from such non-disclosure, and reinforces the State's rationale for a strong sanction by acknowledging that absent notice of the advance payment, the non-participating defendant loses the opportunity at trial to challenge the

parties involved in the agreement for bias, on cross examination in front of the jury. *See* Brief of Amicus Foundation at 11.[1] To protect the integrity of the Tort Reform Act of 1986 (TRA) and to ensure fair trials this Court should adopt a rule requiring the imposition of substantial sanctions and presumptive entitlement to a new trial when release agreements are hidden.

B. The Foundation Correctly Acknowledges That Covenants Not To Execute, Including The One At Issue In This Case, Discharge All Contribution Liability

Not only does the Foundation agree with the State regarding the importance of disclosing agreements such as the one between the Linvogs and Barton, but the Foundation also agrees with the State's primary reason for disagreeing with the court of appeals: pursuant to the terms of the TRA, covenants not to execute judgment discharge contribution liability. Brief of Amicus Foundation at 7, 19, 22-24. In doing so, the Foundation merely recognizes that RCW 4.22.060(2) means what it says when it mandates that "[a] release, covenant not to sue, **covenant not to enforce judgment, or similar agreement** entered into by a claimant and a person

[1] Throughout this case the State has argued that the non-disclosure of the plaintiff's agreement to limit the liability of Korrine Linvogs parents to $100,000, their insurance policy limits, prevented the State from cross examining her and putting before the jury the question of whether the agreement that had spared her parents from the possibility of financial ruin affected her bias or credibility. *See* State's Petition for Review at 13; Brief of Appellant State at 17, 31; State's Supplemental Brief at 6; State's Motion to Vacate Judgment and for Sanctions; CP at 1319.

liable **discharges that person from all liability for contribution . . . .**" (Emphasis added.) Brief of Amicus Foundation at 17, 19, 22-24. The Foundation recognizes that by agreeing with the State that the covenant not to execute discharged contribution liability; this means that the superior court [and court of appeals] erred in concluding that the Linvog parents remained subject to a claim of contribution by the State. The Foundation does not address whether this conclusion materially affects the prejudice analysis of the trial court and the court of appeals, but obviously it does. Brief of Amicus Foundation at 24, n.21. Both the trial court's and court of appeals' opinions rely heavily on their erroneous conclusion that the Linvog parents remained "on the hook" for contribution liability in their prejudice analysis. *See Barton v. State Dep't of Transp.,* No. 65673-2-I, 2011 WL 5175599, at *4-5 (Wash. Ct. App. Oct. 24, 2011).

Since the covenant not to execute in this case discharged any claim of contribution by the State against the Linvog parents, and limited their liability to the plaintiff to $100,000 (CP at 924-26), the Linvog parents were never going to be obligated to pay anyone more than $100,000. Therefore, the jury was given inaccurate information when it was told that the Linvog parents *would* be liable for any amount of damages awarded against their daughter in the opening statements of both Mr. Barton and the Linvogs, and in Jury Instruction 18. CP at 785, 1235.

The court of appeals based its prejudice analysis entirely on the existence of contribution liability. *See Barton,* 2011 WL 5175599, at *4-5. The court of appeals erred in concluding that the covenant not to execute did not discharge contribution liability based on the asserted intent of the lawyers for Mr. Barton and the Linvogs, that they didn't intend it to discharge liability. The law is not so arbitrary. The operative legal effect of a covenant not to execute is governed by the express and unequivocal mandate of RCW 4.22.060(2)—it discharged "all liability for contribution" regardless of contractual language to the contrary. Once the prejudice from the secret covenant is properly analyzed, it is clear that the jury was affirmatively misled about the liability of two highly sympathetic defendants Thomas and Madonna Linvog. The decision of the court of appeals is unsupported in the law and should be reversed.

C. The Request Of Amicus For This Court To Overrule Numerous Cases Which Have Held That A Settlement And/Or Covenant Not To Execute Is A Release Under The Tort Reform Act Is A New Issue Raised For The First Time And Should Be Rejected

This Court should reject the Foundation's attempt to raise a new issue in its brief. In an argument not previously raised or briefed by any party in this case the Foundation asserts that the term "released" in RCW 4.22.070(1) does not include a covenant not to execute because that form of settlement is not a complete surrender of a claim and only a

complete surrender of a claim can prevent joint liability among defendants when there is a fault free plaintiff. In making this newly raised argument, the Foundation specifically requests this Court to overrule two lines of authority. First, the Foundation requests that this Court hold that a covenant not to execute is not a release for purposes of RCW 4.22.070(1) and to overrule two cases that hold the opposite. *Maguire v. Teuber*, 120 Wn. App. 393, 85 P.3d 939, *review denied,* 152 Wn.2d 1026, 101 P.3d 421 (2004), and *Romero v. West Valley Sch. Dist.,* 123 Wn. App. 385, 98 P.3d 96 (2004), *review denied*, 154 Wn.2d 1010, 113 P.3d 481 (2005). Second, the Foundation criticizes as unnecessary and unsupported this Court's decisions that have held that both settling and released defendants are not parties against whom judgment is entered within the meaning of RCW 4.22.070(1), and, therefore, are not jointly and severally liable defendants.[2] *See* Brief of Amicus Foundation at 18-26.

None of the parties, in the trial court, before the court of appeals, or in their briefing before this Court, has ever argued that *Maguire* and *Romero* were incorrect in holding that a covenant not to execute is a release under RCW 4.22.070(1), or that this Court erred in holding that a

[2] *See Washburn v. Beatt Equip. Co.,* 120 Wn.2d 246, 294, 840 P.2d 860 (1992); *Kottler v. State*, 136 Wn.2d 437, 447, 963 P.2d 834 (1998); and *Mazon v. Krafchick*, 158 Wn.2d 440, 452, 144 P.2d 1168 (2006).

settlement is a release under the TRA in *Washburn, Kottler,* and *Mazon.*[3] As a rule, this Court should only address claims made by a petitioner, and not those made solely by amicus curiae. *Cummins v. Lewis Cnty.*, 156 Wn.2d 844, 465, 133 P.3d 458 (2006). This Court does not consider issues raised first and only by amicus. *Madison v. State*, 161 Wn.2d 85, 102, 163 P.3d 757 (2007) (per Fairhurst J., with two justices concurring and three justices concurring in result); *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 629, n.30, 90 P.3d 659 (2004) ("[W]e have many times held that arguments raised only by amicus curiae need not be considered.").

The judicial reluctance to address issues raised by amicus is even stronger here, where the Foundation is asking this Court to reverse numerous cases and establish a new rule of law. Moreoever, the Foundation does not explain why the Court must address this newly-raised argument in order to resolve the case before it. What the Foundation is requesting is that this Court overrule or limit *Maguire, Romero, Washburn, Kottler* and *Mazon*, and hold that a non-settling defendant can be subjected to joint liability and be made to pay the proportionate sum of

[3] In the decision below, the court of appeals did not overrule *Maguire* but rather cited *Maguire's* holding that ". . . 'release' refers to all similar agreements listed in RCW 4.22.060 that memorialize a settlement in which the settling defendants have no further liability." *Barton,* 2011 WL 5175599, at *4, citing *Maguire,* 120 Wn. App. at 396-97. The court of appeals then distinguished *Maguire* based on the fact that the parties in this case had stated their intention that the agreement not constitute a settlement. *Id.*

money that represents the fault apportioned to a party who has settled prior to trial, **if the form of the settlement is a covenant not to execute.** Such a ruling would completely undermine the main purpose of the TRA, which adopted a rule of several liability and limited joint liability to only a few, narrow situations. *See Washburn,* 120 Wn.2d at 294; *Kottler*, 136 Wn.2d at 447.

Any determination of an issue of this import needs the benefit of thorough and comprehensive briefing that delves into the legislative history of the TRA, and analyzes the numerous scholarly articles which have discussed the issue. Although some of those articles are cited in the amicus brief submitted by the Foundation,[4] none of those articles have been analyzed by the Foundation other than to note on page 21 of its brief that Professor Sisk disagrees with its position. *See* Brief of Amicus Foundation at 21, n.19.

This Court should decline to let such an important issue be interjected into this case at the eleventh hour when none of the parties, nor

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[4] Stewart A. Estes, *The Short Happy Life of Litigation Between Tortfeasors: Contribution Indemnification and Subrogation After Washington's Tort Reform Acts*, 21 Seattle U.L. Rev 69 (1997); Cornelius J. Peck, *Reading Tea Leaves: The Future of Negotiations for Tort Claimants Free From Fault*, 15 U. Puget Sound L. Rev. 335 (1992); J. Michael Philips, *Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev., 255 (1994); Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. Puget Sound L. Rev. 1 (1992),

other interested amici have the time or opportunity to fully present all sides of the issue.

D. When RCW 4.22.060 And .070 Are Read Together, As They Should Be, It Is Clear That The Legislature Intended That A Covenant Not To Execute Negates Both Contribution Liability And Joint Liability

Even if this Court considers the Foundation's newly raised argument, it should be rejected as contrary to statutory language, precedent, and common sense. Despite its acknowledgment that the covenant not to execute discharged contribution liability under RCW 4.22.060(2), the Foundation asserts that a covenant not to execute does not prevent joint liability under RCW 4.22.070. The validity of the Foundation's analysis depends upon its mistaken argument that the two statutes should be read in isolation, rather than be read together as a whole. Significantly, RCW 4.22.070(2) specifically directs that:

> If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) (1)(b) of this subsection, **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.**

(Emphasis added.)

The Legislature has made it clear that contribution liability exists between jointly liable defendants. *Id. Kottler,* 136 Wn.2d at 442. Yet, the

rule that the Foundation requests this Court to adopt is that a covenant not to execute allows joint liability to arise under RCW 4.22.070, but eliminates contribution liability under RCW 4.22.060. This interpretation is not only wrong, it is directly contrary to RCW 4.22.070(2). In order to harmonize the directive in RCW 4.22.060 that a covenant not to execute discharges contribution liability, a covenant not to execute must be treated as a release under RCW 4.22.070 that eliminates joint liability.[5] Otherwise, the contribution rights of jointly liable defendants is not governed by RCW 4.22.060, as RCW 4.22.070(2) directs. Instead there is no contribution liability.

RCW 4.22.060 and .070 relate to the same subject matter—agreements that operate as a release under the TRA. RCW 4.22.070 specifically cross references RCW 4.22.060 in defining the contribution

[5] Notwithstanding the Foundation's assertions, this is the interpretation this Court gave the TRA in *Washburn,* 120 Wn.2d at 294-96. Over 20 years ago, the Foundation's predecessor, the Washington State Trial Lawyers Association, argued that the combined effect of RCW 4.22.060 and .070 is to include the fault of settling defendants in the "sum of proportionate shares" liability of non-settling defendants when the claimant is found fault free. This Court rejected that argument then and should again reject it today. Any agreement that discharges a defendants obligation to pay the entire amount of the jury's verdict is a release that prevents the entry of judgment for the purpose of creating joint liability under RCW 4.22.070(1). Artificially distinguishing a covenant not to execute from all other settlements and releases for the sole purpose of allowing plaintiffs and shallow pocket defendants to impose joint liability on deep pocket defendants is a blatant attempt to circumvent the primary purpose of the Tort Reform Act of 1986, and should be rebuffed now, as is was in *Washburn.* 120 Wn.2d at 297-98 (WSTLA's argument that the sum of proportionate shares in RCW 4.22.070(1)(b) includes the shares of settling at fault entities, with judgment then being entered against non settling defendants for the entire amount rejected as "unconvincing" for three reasons).

rights of jointly liable defendants. When statutes are in *pari materai* (relate to the same subject matter) they should be construed together to achieve a logical and consistent meaning. *See Maguire,* 120 Wn. App. at 396, n.12 (since RCW 4.22.060 and .070 relate to the same subject they should be read together).. Because RCW 4.22.070(2) provides that contribution rights exist between jointly liable defendants, and RCW 4.22.060 discharges all contribution liability against a party who has entered into a covenant not to execute, a covenant not to execute should be interpreted as a release that negates joint liability under RCW 4.22.070(1). Put simply, since a covenant not to execute operates like a release under RCW 4.22.060(2) to eliminate contribution liability, it should also operate like a release under RCW 4.22.070(1) to eliminate joint liability. Any other interpretation renders the two statutes irreconcilable. Both *Maguire* and *Romero* properly held that a covenant not to execute *is* a release under RCW 4.22.070 (the TRA of 1986).

Both RCW 4.22.060(3) and .070(1) use the word release in its verb form. RCW 4.22.060(3) states "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 effect 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." Clearly

the "released and releasing persons" refers to parties entering into any of the named agreements, not just those who have signed a "release". RCW 4.22.070(1) refers to "entities **released** by the claimant". It follows that, just as in .060(3) when the Legislature referred to released and releasing persons, "released" in .070 refers to any of the named agreements. When the Legislature uses the same words in the same statutes they should be interpreted alike, just as when different words are used in the same statute, it's presumed that a different meaning was intended to attach to each word. *Simpson Inv. Co. v. Dep't of Rev.*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000).

As the court in *Maguire* correctly observed:

> RCW 4.22.060 sets forth the types of arrangements that may constitute a settlement and treats as equivalent a "[a] release, covenant not to sue, covenant not to enforce judgment, or similar agreement[.]" RCW 4.22.070, the statute imposing joint and several liability, refers to "release" not as a noun but as a verb, providing that "[j]udgment shall be entered against each defendant except those who have been released[.]" Read as a whole, this statute suggests that releases, covenants, and "similar agreements" all constitute "releases" for purposes of determining who has been "released" under RCW 4.22.070.

Maguire, 120 Wn. App. at 396.

The Foundation's argument to maintain common law distinctions between a covenant not to execute and a release has also been rejected.[6] In *Maguire*, the Court of Appeals implemented the intent of the Legislature:

> Maguire argues that the "release" should be strictly defined because **RCW 4.22.070** is in derogation of the common law and must received a narrow and restrictive construction. But the statute **uses the word "release" to refer to all of the "similar" settlement agreements enumerated in RCW 4.22.060** used to memorialize a settlement in which the settling defendants have no further liability. This interpretation is consistent with the Legislature's intent.

Maguire, 120 Wn. App. at 396-97 (emphasis added).

Under the TRA the only parties that will be jointly and severally liable are "the defendants against whom judgment is entered."[7] *Id.* Settling parties, released parties, and immune parties are not parties

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[6] In *Shelby v. Keck*, 85 Wn.2d 911, 917-18, 541 P.2d 365 (1975), this Court affirmed the dismissal of defendant *Keck* who had entered into a covenant not to execute that set the upper limits of his liability at $25,000. In *Shelby*, which was a pre-TRA case, this Court held that: ". . . the covenant must be viewed as a binding settlement between the plaintiff and *Keck*, leaving no justiciable issue to be resolved between these parties." *Id.* In attempting to distinguish the *Shelby* decision, the Foundation mischaracterizes its holding. *See* Brief of Amicus Foundation at 18, n.16. This Court's holding on the evidentiary rulings under CR 21 was completely separate from its decision upholding the trial court's dismissal of defendant *Keck* based upon the covenant not to execute. *See id.* at 917-18.

[7] *See* RCW 4.22.070(1)(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 [sic] total damages." (Emphasis added.)

against whom judgment is entered and will not be jointly and severely liable under RCW 4.22.070(1)(b).[8]

Here again, the purpose of the TRA of 1986 was to change the general rule of joint liability among tortfeasors to one of proportionate and several liability, which required the trier of fact to allocate liability based on each party's share of fault. RCW 4.22.060 equates releases, covenants not to execute, and similar agreements. They all have the operative legal effect of discharging contribution liability. It would be illogical to not treat releases, covenants not to execute, and similar agreements the same under RCW 4.22.070, as preventing joint liability.

The Foundation would have this Court adopt a rule that makes a non-settling defendant liable for the proportionate share of liability a jury awards against a settling defendant, even though the settling defendant does not actually owe the plaintiff the money. Such a statutory interpretation would not only be unfair, it can not be harmonized with the rule of several and proportionate liability that is the basis of the TRA. *See Washburn,* 120 Wn.2d at 294-98. The Foundation's proposed

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[8] RCW 4.22.070(1) directs: "**Judgment shall be entered against each defendant except those who have been released** by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint . . . ." (Emphasis added.)

interpretation would reinstate joint liability and completely subvert the primary intent of the TRA.

As noted previously, the Foundation acknowledges that Professor Sisk disagrees with its position, but doesn't elaborate. *See* Brief of Amicus Foundation at 21, n.19. The Court of Appeals in *Maguire*, 120 Wn. App. at 398-99, outlines Professor Sisk's analysis in more detail and artfully articulates why a covenant not to execute is a release under the TRA, RCW 4.22.070(1).

Other leading commentators on the TRA have also recognized that settlement type agreements, such as covenants not to execute must be treated as a full release in order to effectuate the intent of the Legislature. The court in *Maguire* also quoted from Professor Cornelius Peck's law review article.

> Anecdotal information suggest that some attorneys representing fault-free plaintiffs have allegedly attempted to avoid losses in prejudgment settlements by agreeing with a potential defendant not to enforce or execute a judgment later entered against that person. The strategy is to keep the party with whom the agreement is reached as a defendant until judgment is entered. The plaintiff hopes that this will prevent deduction of that party's share of damages from the total damages for which all defendants will be jointly and severally liable. The party with whom the agreement is made will have contractual right precluding enforcement of the judgment against him. Moreover, RCW 4.22.070(2) provides that a defendant who has satisfied a judgment has a right to contribution to be determined pursuant to RCW 4.22.060. Subsection (2) of that provision states that

> receipt of a "covenant not to enforce judgment, or similar agreement" discharges a person from all liability for contribution.
>
> This scheme is imaginative, but it will probably fail to obtain its objective. It assumes that a contract not to execute is not a release within the meaning of RCW 4.22.070(1). RCW 4.22.060 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 a settlement agreement. The section was amended in 1987, giving rise to an inference that the meaning of the word "settlement" in the 1986 Act should include a settlement made by a covenant not to enforce or execute.

Peck, 15 U. Puget Sound L. Rev. at 343-44.

All legal scholars concur that the Legislature intended that a covenant not to execute and other similar agreements, as listed in RCW 4.22.060, prevents the entry of a judgment creating joint liability under RCW 4.22.070.

> 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 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 rule advocated by the Foundation not only exalts form over substance, but also leads to several absurd results. In a nutshell, the Foundation is arguing that a release is a settlement, and a settlement is a release unless it's a covenant not to execute. The Foundation claims that although a covenant not to execute negates contribution liability, it does not negate joint liability. Yet, the consequence of this legal paradigm would be that a non-settling defendant would be obligated to pay the liability of a settling co-defendant if the settling co-defendant has utilized

a covenant not to execute as the form of settlement; but, that form of settlement precludes the non-settling defendant from collecting through contribution from the settling defendant, money the non-settling defendant had to pay on settling defendant's apportioned share of liability.[9]

This Court should not adopt a rule that requires courts to enter sham judgments based on the fictitious liability of settling defendants, who are not obligated to pay it [due to a covenant not to execute] in order to manufacture joint liability against non-settling defendants. In other words, courts should not enter judgments imposing liability that does not exist against one defendant in order to force another defendant to pay it.

Joint liability requires each tort feasor to be liable to the plaintiff for the entire harm so the plaintiff can sue one or all of the tort feasors to obtain full recovery. *See Maguire,* 120 Wn. App. at 396. In this case, the secret covenant not to execute limited the Linvog parents' liability to the

[9] The inequity that would result from the Foundation's interpretation of the TRA is illustrated by the following example. A plaintiff, who is fault free, settles with defendant A in the form of a covenant not to execute that prevents the plaintiff from collecting more than $100,000 from defendant A. Defendant A pays plaintiff $100,000. A jury finds plaintiff's damages to be $1 million and allocates 90 percent of the fault to defendant A and 10 percent of the fault to a defendant B. A judgment is entered making both defendants A and B jointly liable to pay the plaintiff $1 million. Defendant A has already paid the plaintiff $100,000 of $900,000, its proportionate share of fault. Defendant B is required to pay the remaining $900,000 owed on the judgment even though defendant B's proportionate share of liability is only $100,000. But, because of the covenant not to execute, defendant B can't collect any of the money it paid for defendant A's share of the fault from defendant A. This would be true even if defendant A had $300,000 in available insurance. The end result is that the defendant B is forced to pay $800,000 on behalf of defendant A, yet defendant A never owed – and never could owe – the plaintiff more than $100,000.

plaintiff at $100,000, far below the jury's verdict $3.6 million. The Linvog parents didn't owe the plaintiff $3.6 million, they only owed the plaintiff $100,000. Therefore they did not have joint liability to pay the plaintiff $3.6 million. The judgment against the Linvog parents for $3.6 million (CP at 227-29) was a sham that never would have occurred if the covenant limiting their liability to $100,000 had not been hidden. *See Bunting v. State,* 87 Wn. App. 647, 651-53, 943 Pd.2d 347 (1997) (the court specifically held that it would be "procedural sham" to allow a party to settle with one tort feasor, keep the settlement proceeds, and then retain that tort feasor as a party in order to maintain joint liability for the non-settling defendants).

III. CONCLUSION

This Court should adopt the rule advocated by the State, and now the Foundation, requiring the timely disclosure of pretrial agreements effecting partial settlements. The presumptive remedy for a violation of this rule should be a new trial. The Foundation and the State agree that the covenant not to execute in this case discharged the Linvog parents from all contribution liability. The court of appeals improperly held that the State was not prejudiced when the jury was told that the Linvog parents were "on the hook" to pay all damages awarded against their daughter because it erroneously concluded the State had a contribution claim against the

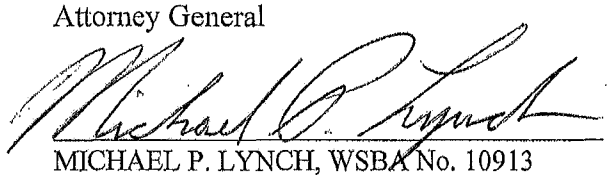
Linvog parents and therefore the statements were true. But the State had no contribution claim against the Linvog parents. The opening statements and Jury Instruction 18 were misrepresentations of fact and law. The decision of the court of appeals is wrong and should be reversed.

This Court should refuse to address the Foundation's request to overrule *Maguire, Romero, Washburn, Kottler* and *Mazon*. If the Court does address the issue, this Court should follow the well reasoned analysis in those decisions and hold that covenants not to execute which limit the liability of a party operate as a release negating joint liability under RCW 4.22.070(1) and contribution liability under RCW 4.22.060(2).

The State is entitled to the vacation of the judgment, an award of reasonable attorneys' fees and a new trial, or sanctions in the amount of the profit received by the attorneys who hid the covenant not to execute and an award of reasonable attorneys' fees.

RESPECTFULLY SUBMITTED this 21st day of September, 2012.

ROBERT M. McKENNA
Attorney General



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I certify that I served a copy of Brief of The State Of Washington Department of Transportation in Response to Brief of Amicus Curiae of Washington State Association For Justice Foundation on all parties or their counsel of record and the Court on the date below as follows:

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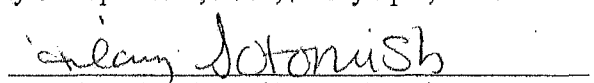
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of September, 2012, at Olympia, WA.



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Attached for filing in .pdf is Brief of the State of Washington Department of Transportation in Response to Brief of Amicus Curiae of Washington State Association for Justice Foundation in Barton v. State of Washington, Cause No. 86924-3. The attorney filing these documents is Michael P. Lynch, Assistant Attorney General, WSBA No. 9537, email address MikeL@atg.wa.gov.

<<State'sResponseToBriefofAmicusFoundation.pdf>>

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