

Supreme Court No. 86924-3

SUPREME COURT
STATE OF WASHINGTON

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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.

**RESPONDENT LINVOGS' RESPONSE TO
WDTL'S AMICUS BRIEF**

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 ORIGINAL

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I. Restatement of the Case in Response to Amicus WDTL

Respondents Linvog, filing this brief, have little to add to their previous statements of the case in their appellate briefing, but take this opportunity to correct the WDTL's factual misconceptions. First, the WDTL claims that, "Defendants Linvog Parents entered into a secret side deal with Plaintiff eight (8) months before trial ostensibly shielding them from any personal liability in this catastrophic injury case in return for a nominal payment." *WDTL Amicus Brief at 1*. This is false. The agreement did not shield the Linvog parents, ostensibly or otherwise, from liability. CP 1482-3. It provided that Mr. Barton would not execute on any judgment against them over \$100,000, but it specifically did not release them. *Id.* While there has been argument during the course of this appeal that the "operative legal effect" of the agreement was to destroy contribution liability, the attorneys for both Barton and the Linvogs believed that the Linvog parents would have *unlimited personal liability* to the State for contribution, based on the jury's allocation of fault¹. CP 9.

¹ This was the trial court's unchallenged finding:

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'

According to the intent and belief of the parties that entered it, agreement shifted only *who* could collect a judgment against the parents, not whether a judgment could be collected. *Id.* The WDTL ignores the fact that the State holds an unappealed, final judgment against the Parents for exactly the liability “over \$100,000” that the WDTL claims everyone knew was impossible.

The WDTL then suggests that Barton and the Linvogs “concealed” the fact that the Linvog Parents were immune from liability. *WDTL Amicus Brief at 1.* As described, the Linvog Parents were *not* immune from liability, but the use of the word “concealed” is also misleading. The trial court specifically held, in unchallenged findings of fact, that the failure to disclose was inadvertent. CP 9. Everyone acknowledges that the agreement should have been disclosed. But where the WDTL sees a highly orchestrated conspiracy (“stratagem”, in its words), the reality was more akin to dropping a (small) ball; neither Barton nor the Linvogs thought the agreement was important enough to even follow through on

liability, even if that exceeded \$100,000. Plaintiff’s counsel and Linvogs’ counsel believed the agreement was valid and enforceable on these terms.

CP 9 (emphasis added).

getting an executed copy of it (there never was one). CP 1483. And their failure to supplement discovery responses was an oversight. CP 9.

Next, the WDTL claims that the attorneys for Barton and the Linvogs “then mislead the jury as to the true nature of the Defendants’ liability.” As a point of departure, Korinne Linvog – the only Linvog who was in the car at the time of the accident – was undeniably fully exposed to liability to Barton. Further, it is difficult to comprehend how the jury could have been “mislead” by a passing reference to the fact that the Parents were “on the hook” under the family car doctrine, since *they are on the hook* under the family car doctrine; there is nothing more to being “on the hook” than being the subject of an adverse judgment, and no one can argue that there is not a judgment obligating the Parents to pay a total well in excess of \$100,000.

Finally, the WDTL states, as a fact, that the “stratagem” “had its intended effect, sticking the State with 95% fault for several million dollars in damages.” *WDTL Amicus Brief at 2*. The WDTL ignores the trial court’s findings to the contrary. The State was stuck with 95% of the fault because of the well-proven fact that Korinne could not see Barton’s motorcycle through the trees, while stopped at the stop bar the State painted on the road. CP 11. The State’s opposing theory, namely that Barton’s headlight was not as bright as it should have been, was

characterized by the trial court as “weak and speculative.” 11. The WDTL does not hazard its own conjecture as to how the agreement allegedly caused the jury “stick” the State with a 95% apportionment. With these facts in mind, the Linvogs turn to the WDTL’s legal arguments.

II. Argument

The WDTL raises two substantive arguments: 1) that pre-trial agreements between a plaintiff and one of multiple defendants must be disclosed to all parties, and 2) that the Court should adopt a *per se* rule that if such agreements are not disclosed, the resulting judgment must be vacated. The Linvogs address each separately.

1. Disclosure

The WDTL’s brief could leave one with the impression that someone in this case is suggesting that there was no requirement to disclose the Advance agreement to the State. On the contrary, it has been thoroughly conceded that, even though both the Bartons and the Linvogs truthfully denied the existence of any such agreement when answering the State’s discovery requests, they had an obligation to supplement those responses once the Advance agreement had taken place. It is similarly freely admitted that the Advance agreement should have been disclosed under RCW 4.22.060. The WDTL commentary regarding whether

disclosure would be required under other circumstances is a theoretical question that does not pertain to the facts of this case.

2. *The Court should reject the WDTL's proposed "per se new trial" rule*

The WDTL's suggestion that the Court adopt a *per se* rule that a new trial is mandated whenever there has been a "secret settlement" is premised on equating the Advance agreement in this case with the worst kind of horse trading, manipulation, deception and embarrassment of the legal system. The Advance agreement is nothing of the sort. This abstract conception of "secret settlement agreements" – which the WDTL equates with Mary Carter agreements – is only helpful to the degree that agreements falling within that rubric share common features relevant to the resolution of a particular case. The Advance agreement in the case at bar does not share those features; it is not a Mary Carter. Courts have noted that the "Mary Carter" label can be more of a hindrance to good jurisprudence than a help: "One of the difficulties with such definitive proclamations is the condemnation by identification or by definition without regard to individual circumstance. Appellant would have us brand Mary Carter, like Hester Prynne, without regard to the hows or whys of her conduct or what good or harm resulted by what was done. *Lahocki v. Contee Sand & Gravel Co., Inc.*, 41 Md. App. 579, 608, 398 A.2d 490,

507 (1979) *rev'd sub nom. on other grounds Gen. Motors Corp. v. LaHocki*, 286 Md. 714, 410 A.2d 1039 (1980).

What the WDTL fails to appreciate in its "one size fits all" approach is that there are many kinds of pre-trial "agreements" that may take place between the parties during litigation; some are closer to insidious and some are closer to benign. On one side of this spectrum (the insidious side) is the classic Mary Carter:

Patient alleges medical malpractice against two surgeons that took place while patient was unconscious. Pre-trial, Plaintiff and Surgeon A secretly agree that Surgeon A will pay Plaintiff \$500,000, and the Plaintiff will release Surgeon A. Surgeon A agrees to remain a "defendant", and will be entitled to half of any judgment Plaintiff recovers from Surgeon B. At trial, instead of defending himself against Plaintiff's claims, Surgeon A suddenly admits malpractice during the surgery, implicates Surgeon B, and testifies that Plaintiff's immense damages claim is "conservative."

This type of corruption of the legal system is reprehensible, and results in the WDTL's bulleted maladies:

- "unfairly concealing from the trier of the fact the true battle lines and interests of the parties litigant...."
- "misleading the trier of fact"
- "foisting a fictitious controversy on the courts"
- "failing to identify the true parties litigant"
- "manipulat[ing] the system"

It would be hard to imagine a case further to the other side of the spectrum than the case at bar. Here, the plaintiff's attorney had communicated his unconditional intention – his “practice” – to collect joint judgments from the institutional defendant (the State, in this case) rather than private individuals. CP 8. When approached for help paying for immediate medical needs of the injured plaintiff, the Linvogs' insurer agreed to advance \$20,000. In exchange, the plaintiff agreed not to collect on anything over \$100,000 against the vicariously liable parents, thus providing them *even less* protection than might have been the plaintiff's attorney's “practice.” As an established, *uncontested* factual finding by the trial court, neither the Linvogs' attorney nor Barton's attorney thought the agreement would have any effect on this State's right to collect against the parents on an unlimited contribution judgment². And the agreement provided no protection whatsoever to Korrine. The State has conceded that the agreement did not alter the alignment of the parties. *State's Reply to Linvogs' Appellate Response Brief* at 8.

In another uncontested finding, the trial court correctly determined that the failure to disclose the agreement to the State was an inadvertent

² The WDTL claims, in Footnote 1 of its Amicus Brief, “Both counsel were well aware of their agreement that limited the liability of the Linvog parents to \$100,000.” **This is false.** It is an established, unchallenged fact that both counsel believed the Linvog parents had unlimited contribution liability to the State. CP 9.

mistake, not strategic secret keeping. CP 9. Finally, the net judgments, including the unappealed, final contribution judgment entered by the trial court exactly effectuate the precise result intended by the jury. On *this* fact pattern, the Linvogs invite the Court to return to the WDTL's bulleted maladies:

- “unfairly concealing from the trier of the fact the true battle lines and interests of the parties litigant....”

The State has properly conceded that the agreement did not alter the alignment of the parties. The battle lines were exactly where the jury understood them to be. The agreement had no effect on Korrine, the only Linvog to testify, and the unappealed contribution judgment is the most definitive proof possible that her parents were indeed “on the hook” for any amount apportioned by the jury.

- “misleading the trier of fact”

The trier of fact was not misled. The dispute the jury was exposed to was the authentic dispute in every way, as the trial court correctly found.

- “foisting a fictitious controversy on the courts”

There was nothing fictitious about this controversy. The judgment against the Linvog parents is genuine.

- “failing to identify the true parties litigant”

There was no re-alignment of the parties. There was no ringer in

the courtroom.

- “manipulat[ing] the system”

There was no manipulation. What was presented to the jury was the real case, and the verdict it rendered was translated into the collectable judgments the jury intended.

Thus, instead of presenting *all* of the threats identified by the WDTL, the Advance agreement in this case presented *none* of them. The total net effect of the agreement in this case was that a faultless plaintiff in dire need of money received an early \$20,000 for medical care. As the Linvogs and Barton correctly predicted, the Advance agreement did nothing to inhibit the State’s right to a contribution judgment against the Linvog Parents – a judgment the State voluntarily elected to take and has not appealed. The Advance agreement fundamentally presents a strongly distinguishable fact pattern from each case in the legions of Mary Carter authority cited by the WDTL in favor of its “one-size-fits-all” “*per se* new trial” approach.

The Linvogs certainly agree with the abstract proposition that there are many types of “secret settlement agreements” that corrupt a lawsuit to the point that the resulting verdict is beyond salvage. But, without endorsing even inadvertent non-disclosure, there are some that do not. The WDTL’s “automatic vacation of judgment” approach, which treats the

most and least egregious agreements identically, is antithetical to both Washington jurisprudence and Washington statutory law. As discussed below, a motion to vacate a judgment is vested in the trial court's discretion under CR 60(b), and RCW 4.36.240 expressly prohibits the WDTL's rigid "*per se*" proposed rule.

a. Washington Jurisprudence vests the trial court with discretion in ruling on a CR 60(b) Motion.

Washington embraces decades of existing law that has addressed the subject of whether to grant a new trial in the face of alleged irregularity, fraud, misrepresentation, or misconduct of an adverse party. CR 60(b). CR 60 is specifically equipped to address the situation where a party alleges, post-judgment, that the trial was unfair for those reasons. The obvious fit between CR 60 and the State's claims in this case is reflected in the fact that the State made its Motion for New Trial under that court rule.

Uniformly in the application of CR 60 motions for a new trial, this Court has confirmed that the trial court's ruling on such a motion is discretionary. "Vacation of a judgment under CR 60(b) is within the trial court's discretion. We will overturn the trial court only if it plainly appears that its discretion has been abused." *State v. Santos*, 104 Wn. 2d 142, 145, 702 P.2d 1179 (1985), *see also Olpinski v. Clement*, 73 Wn. 2d 944, 950,

442 P.2d 260 (1968). Because the WDTL advocates a “*per se*” reversal regime, its brief does not reach the issue of whether the trial court was within the broad scope of its discretion in its ruling that the State was not prejudiced, and accordingly denying the State’s CR 60(b) motion. The parties to this litigation have addressed that issue in considerable detail elsewhere, and that analysis is not repeated here.

b. Washington statutory law prohibits courts from applying the type of “per se reversal” rule advocated by the WDTL.

Another reason the Court should reject the WDTL’s proposed new *per se* reversal rule is that it would violate Washington statutory law. RCW 4.36.240 provides:

The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

This statute describes perfectly the situation that was faced by the trial court in this case, and is now before this Court for resolution. There was, undeniably, a defect in the proceedings: the non-disclosure of the Advance agreement. The trial court was thus obligated to, and properly did, consider whether any substantial rights of the adverse party (the State) had been affected by the defect. In its well reasoned, fifteen page memorandum opinion, the trial court determined that no substantial rights

had been affected. The WDTL's *per se* proposed reversal rule would short-circuit RCW 4.36.240 in that it would require judgments to be vacated even though, as was true in the case at bar, the defect did not prejudice any party's substantial rights. Vacating judgments under these circumstances, where there has been no prejudice, would be wasteful of resources, bad policy, and in violation of the statute. The Court should reject the WDTL's *per se* proposal, and re-affirm the traditional rule that the trial court has discretion in granting or denying CR 60(b) motions.

Respectfully submitted this 21st day of September 2012.

HACKETT, BEECHER & HART
/s/*
Brent W. Beecher, WSBA #31095
Attorneys for Respondents Linvog
*Original Signature on File

CERTIFICATE OF SERVICE

I, Nancy Boyd, declare that on the date noted below, I caused to be delivered via ABC legal messengers, *RESPONDENT LINVOGS' RESPONSE TO WDTL'S AMICUS BRIEF* to:

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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.

Signed in Seattle, Washington this 21st day of September 2012.

/s/*
Nancy Boyd
*Original Signature on File

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Attached for filing by attorney Brent W. Beecher (WSBA #31095) are the following responses:

Respondent Linvogs' Response to WA State Association for Justice Foundation's Amicus Brief;
and Respondent Linvogs' Response to WDTL's Amicus Brief.

Mr. Beecher's email is: bbeecher@hackettbeecher.com

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