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STATE OF WASHINGTON
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Supreme Court No. 86924-3

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SUPREME COURT
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.

RESPONDENT LINVOGS' RESPONSE TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'S AMICUS BRIEF

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ORIGINAL

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I. Argument

Respondents Linvog address the two arguments made by Amicus Washington State Association for Justice Foundation ("Foundation") in this case. First, the argument that "pretrial agreements bearing on liability and/or damages between some but not all parties to a tort action must be disclosed to the court and nonparticipating parties, regardless of whether a formal discovery request about any such agreement has been made." Second, the argument that if a plaintiff and one of multiple defendants enter into a covenant not to execute, that defendant should be free to remain in the case and be subject to "modified joint and several liability." The Linvogs address each of these arguments below

1. Disclosure of pre-trial agreements

In this case, it is uncontested that both the Linvogs and Barton had an obligation to disclose the Advance agreement to the State, both in response to the State's discovery requests and pursuant to RCW 4.22.060. The Foundation hypothesizes a situation where there was no discovery request and RCW 4.22.060 does not apply, and requests that the Court purposefully incorporate dicta into its Opinion to address that counterfactual circumstance. The Foundation advocates this approach as a

creation of "dicta in the best sense of the word." *Foundation's Amicus Brief at 9.*

Because it is irrelevant to any of the questions before the Court in *this* case, the Linvogs take no position as to the Foundation's request. One might, however, respectfully agree with Justice Frankfurter's observation: "deliberate dicta . . . should be deliberately avoided." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 411, 68 S. Ct. 525, 548, 92 L. Ed. 746 (1948).

2. *Covenants not to execute and "modified joint and several liability."*

The Foundation also argues that under the plain language of the Tort Reform Act, it is possible for a plaintiff to enter into a covenant not to execute with one of several defendants, without destroying joint and several liability with that defendant. The issue before the Court, however, does not require, nor would it benefit from, a resolution of this Tort Reform issue; the State's complaint is not with the *character of the judgment*. It is with the *fairness of the trial* under CR 60(b). There are many good reasons to agree with the trial court's rejection of the State's prejudice arguments in that regard, but the joint or several character of the judgment, which was of course entered after the verdict, could not logically bear on the whether the State was substantially inhibited in presenting its defenses.

Because a full-bore analysis of the issue is unnecessary to decide this case, the Linvogs respectfully point out that nothing should turn on it, dicta or otherwise. The Linvogs do posit, however, that there is more than one kind of covenant not to execute. There are covenants not to execute *at all*, usually provided as consideration for a full settlement payment, and there are covenants not to execute *in excess of a certain amount*, which specifically contemplate that the agreeing defendant remains liable for some amount – and subject to some judgment – in the future. As a subject apart and aside from disclosure and how trial courts ought to incorporate evidence of such "not in excess of" covenants into a fair trial, it would seem to torture law and logic to suggest that a defendant, who remains liable for hundreds of thousands or millions of dollars before a protective covenant takes effect, has been "released" by the plaintiff. Indeed, a holding to the contrary would automatically eject any litigant that managed to negotiate a high-low agreement with the plaintiff; the high-low necessarily includes a covenant not to execute in excess of the high. There is no benefit to be gleaned from forcing litigants to use special, magic words in their agreements to avoid accidentally "releasing" a defendant. It was with these considerations in mind that the court in *Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, *rev. denied*, 152 Wn.2d 1026, 101 P.3d 421 (2004) was so careful to rely on the operative

effect of the agreement, rather than the characterizations attached to it by the parties:

> 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.
>
> *Id.* at 396-97 (emphasis added)

In *Maguire*, the covenant not to execute left the agreeing defendants with no further liability. As the court noted:

> This is release language. It cannot be construed any other way. The fact that Maguire did not specifically "release" the defendants is irrelevant; what matters is the covenant's operative effect.
>
> *Id. at* 398.

Either the agreement effectively releases the defendant or it does not. A full covenant not to execute *is* the functional equivalent of a release and should be treated accordingly; a covenant not to execute above an agreed "high" is not, and should also be treated accordingly.

As a policy matter, a litigant who remains in the case defending itself to protect its own substantial financial interests is not the kind of defendant who will "throw" a case to the plaintiff and thus tamper with the integrity of the trial. That defendant does not threaten the judicial process or mislead a jury. Such was the situation in the case at bar, where the

Linvog parents had $80,000 exposure directly to Barton in the event of an adverse judgment. The "incentive to defend" issue is also a nonstarter in the case at bar, because in addition to that $80,000, counsel for both the Linvogs and Barton conducted the trial with the good faith belief that the State's contribution rights against the Linvog parents would be unlimited[1]. CP 9.

What the Foundation's argument *does* show is that reasonable attorneys, even with the benefit of the months of analysis and legal research that the Foundation has brought to bear on this case, can responsibly differ on their interpretation of how a covenant not to execute will effect the exposure of the agreeing defendant. In this context it is hardly surprising that the trial court found the following:

> 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**

[1] The Foundation suggests in its Footnote 21 on page 24 of its Amicus Brief that the trial court erred in concluding that the Linvog Parents were subject to such a contribution judgment. As the Linvogs have argued elsewhere, this contribution judgment was requested by the State. It is final and unappealed. It is the law of this case. While amici understandably view cases on which they contribute through the lens of the policy and future decisions to benefit their constituents, the case being decided by the Court, respectfully, is *this* case.

> **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.
>
> CP 9 (emphasis added).

While it is conceivable that this Court might ultimately come to a different conclusion - that the Advance agreement *should* have entirely insulated the Linvog Parents from a contribution judgment – that does not change the fact that the trial was conducted based on counsels' understanding, nor the fact that the contribution judgment against the Linvog Parents is real, enforceable, and unappealed. Whatever might be the proper characterization of the judgment, joint or several, allowing or prohibiting contribution, it is irrelevant to whether the State received a fair trial. It did. The Linvogs respectfully request that Court affirm the court of appeals and the trial court.

Respectfully submitted this 21st day of September 2012.

HACKETT, BEECHER & HART
/s/*
Brent W. Beecher, WSBA #31095
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*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, *RESPONDENTS LINVOGS' RESPONSE TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'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.

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