

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Aug 31, 2012, 12:49 pm
BY RONALD R. CARPENTER
CLERK

No. 86924-3

RECEIVED BY E-MAIL

IN THE
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,

STATE OF WASHINGTON, Department of Transportation,

Petitioner.

BRIEF OF *AMICUS CURIAE*
WASHINGTON DEFENSE TRIAL LAWYERS

Stewart A. Estes
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
Attorney for Amicus
Washington Defense Trial Lawyers

FILED
SUPREME COURT
STATE OF WASHINGTON
2012 SEP 10 P 2:42
BY RONALD R. CARPENTER
CLERK

ORIGINAL

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS CURIAE 1

II. STATEMENT OF THE CASE..... 1

III. ANALYSIS 2

 A. Mary Carter Agreements Generally..... 2

 B. The Harm From Secret Agreements. 4

 1. **Secret Agreements Distort The True Nature of Litigation. 4**

 2. **All Divisions of the Washington Court of Appeals Have
 Condemned Secret Settlement Agreements and Covenants
 Not to Execute. 5**

 C. Because of the Harm Arising From Secret Agreements, Settling
 Parties Must Promptly Disclose Both the Existence and Terms of
 Such Agreements Before Trial. 6

 D. Some States Ban Such Back Room Deals Because They Corrupt the
 Integrity of the Trial Process. 10

 E. A Disclosure Obligation Exists Regardless of Actual Prejudice... 12

 F. A New Trial is the Only Proper Remedy for Nondisclosure of a
 Secret Settlement Agreement..... 14

IV. CONCLUSION 15

TABLE OF AUTHORITIES

Cases

<i>Adams v. Johnston</i> , 71 Wn. App. 599, 860 P.2d 423 (1993).....	10
<i>Bashor v. Northland Ins.</i> , 29 Colo.App. 81, 480 P.2d 864 (1970)	9
<i>Bedford School Dist. v. Caron Coast. Co.</i> , 367 A.2d 1051 (N.H. 1976)....	9
<i>Booth v. Mary Carter Paint Co.</i> , 202 So.2d 8 (Ct. App. Fla. 1967).....	2
<i>Breitkreutz v. Baker</i> , 514 P.2d 17 (Alaska 1973)	9
<i>Bristol-Myers Co. v. Gonzales</i> , 561 S.W.2d 801 (Tex. 1978).....	9
<i>Bunting v. State</i> , 87 Wn. App. 647, 654, 943 P.2d 347 (1997) (Div. III)..	6, 14
<i>City of Tucson v. Gallagher</i> , 108 Ariz. 140, 493 P.2d 1197 (1972).....	2
<i>Cox v. Kelsey-Hayes Co.</i> , 594 P.2d 354, 360 (Okl. 1978).....	10
<i>Daniel v. Penrod Drilling Co.</i> , 393 F.Supp. 1056, 1060-61 (E.D. La. 1975)	4, 7
<i>Dietz v. Gen. Elec. Co.</i> , 510, 821 P.2d 166, 171 (Ariz. 1991).....	12
<i>Dosdourian v. Carsten</i> , 624 So.2d 241, 246 (Fla.1993).....	10
<i>Elbaor v. Smith</i> , 845 S.W.2d 240, 250 (Tex.1992).....	10
<i>Firestone Tire & Rubber Co. v. Little</i> , 639 S.W.2d 726 (Ark. 1982).....	9
<i>Fullenkamp v. Newcomer</i> , 508 N.E.2d 37, 40 (Ind. Ct. App. 1987).....	9
<i>Furfaro v. City of Seattle</i> , 144 Wn.2d 363, 384, 27 P.3d 1160	14
<i>Gen. Motors Corp. v LaHocki</i> , 410 A.2d 1039, 1045-47 (Md. 1980).....	9
<i>General Motors Corp. v. Simmons</i> , 558 S.W.2d 855, 857-59 (Tex. 1977)	15
<i>Giambattista v. National Bank of Commerce of Seattle</i> , 21 Wn.App. 723, 735 n. 5, 586 P.2d 1180 (1978).....	6, 14
<i>Grillo v. Burke's Paint Co.</i> , 551 P.2d 449 (Or. 1976).....	9
<i>Hatfield v. Cont'l Imports, Inc.</i> , 610 A.2d 446, 452 (Pa. 1992)	9
<i>Hegarty v. Campbell Soup Co.</i> , 214 Neb. 716, 335 N.W.2d 758.....	15
<i>Hoops v. Watermelon City Trucking Inc.</i> , 846 F.2d 637, 640 (10 th Cir. 1988)	10
<i>In re: Exxon Valdez</i> , 1996 U.S. Dist. LEXIS 8173 (D. Alaska 1996).....	10
<i>Johnson v. Moberg</i> , 334 N.W.2d 411 (Minn. 1983).....	9
<i>L.J. Vontz Constr. Co. v Alliance Indus., Inc.</i> , 338 N.W.2d 60, 63 (Neb. 1983)	9
<i>Lum v. Stinnett</i> , 488 P.2d 347, 352 (Nev. 1971).....	11, 15
<i>Maule Indus., Inc. v. Rountree</i> , 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972)	3
<i>Maule Industries, Inc. v. Rountree</i> , 284 So. 2d 389, 390 (Fla. 1973).....	8
<i>McCluskey v. Handorff-Sherman</i> , 68 Wn. App. 96, 103-04, 841 P.2d 1300 (1992) (Div. II), <i>aff'd on other grounds</i> , 125 Wn.2d 1 (1994).....	6, 7, 14

<i>Mutual of Enumclaw Ins. Co. v. Wiscomb</i> , 95 Wn.2d 373, 622 P.2d 1234 (1980).....	11
<i>Nieves v. Snapp Indus., Inc.</i> , 929 So.2d 623, 624 (Fla. 2006)	5
<i>Packaging Corp. of America v. DeRycke</i> , 49 So. 3d 286, 291-92 (Fla. 2010)	9
<i>Pellet v. Sonotone Corp.</i> , 160 P.2d 783 (Cal. 1945).....	9
<i>Ratterree v. Bartlett</i> , 707 P.2d 1063 (Kan. 1985).....	8
<i>Sequoia Mfg. Co., Inc. v. Halec Const. Co., Inc.</i> , 570 P.2d 782, 795 (Ct. App. Ariz. 1977)	5, 12
<i>Soria v. Sierra Pac. Airlines, Inc.</i> , 726 P.2d 706, 716 (Idaho 1986)	9
<i>Thibodeaux v. Ferrellgas, Inc.</i> , 717 So. 2d 668, 672-73 (La. App. 1998)..	9
<i>Trampe v. Wisconsin Telephone Co.</i> , 214 Wis. 210, 252 N.W. 675, 678 (1934).....	2
<i>Ward v. Ochoa</i> , 284 So. 2d 385, 387 (Fla. 1973)	8, 9, 14
<i>Whitaker v. Spiegel Inc.</i> , 95 Wn.2d 661, 667, 623 P.2d 1147, 1150 (1981)	11

Statutes

RCW 4.22.060	10, 12
RCW 4.22.070	12

Publications

<i>Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility</i> , 19 Ariz. L. Rev. 863 (1977)	3
David Jonathan Grant, Note, <i>The Mary Carter Agreement-Solving the Problems of Collusive Settlements in Joint Tort Actions</i> , 47 S. Cal. L. Rev. 1393 (1974)	11
<i>Eight Olympic badminton players disqualified for 'throwing games'</i> , The Guardian, August 1, 2012, http://www.guardian.co.uk/sport/2012/aug/01/london-2012-badminton-disqualified-olympics	5
<i>FBI looking at Auburn guard</i> , March 9, 2012, ESPN.com news services, http://espn.go.com/mens-college-basketball/story/_/id/7662296/fbi-investigating-auburn-tigers-varez-ward-point-shaving-according-report5	5
<i>Gallagher Covenants, Mary Carter Agreements, and Loam Receipt Agreements: Unsettling Contributions to Conflict Resolution</i> , 1977 Ariz. St. L.J. 117	3
<i>It's a Mistake to Tolerate the Mary Carter Agreement</i> , 87 Colum.L.Rev. 368, 369-70 (1987).....	3
John Edward Herndon, Jr., " <i>Mary Carter</i> " <i>Limitation on Liability Agreements Between Adversary Parties: A Painted Lady Is Exposed</i> , 28 U. Miami L. Rev. 988 (1974)	11

June F. Entman, <i>Mary Carter Agreements: An Assessment of Attempted Solutions</i> , 38 U. Fla. L. Rev. 521 (1986)	11
Katherine Gay, <i>Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems</i> , 36 Ark. L. Rev. 570 (1983).....	11
<i>Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation</i> , 69 Wash. L. Rev. 255, 257 (1994)	10
Meriwether D. Williams, <i>Blending Mary Carter's Colors: A Tainted Covenant</i> , 12 Gonz. L. Rev. 266 (1977)	11
<i>Other People's Money: and How The Bankers Use It</i> (Frederick A. Stokes Co., NY, 1914).....	7
Richard Casner, <i>Admission into Evidence of a Mary Carter Agreement from a Prior Trial is Harmful Error</i> , 18 Tex. Tech. L. Rev. 997 (1987)	11
Robin Renee Green, Comment, <i>Mary Carter Agreements: The Unsolved Evidentiary Problems in Texas</i> , 40 Baylor L. Rev. 449 (1988).....	11

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, is composed of more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients, which it does on a pro bono basis.

II. STATEMENT OF THE CASE

Amicus relies upon the statement of the case as set forth by Defendant/Appellant State of Washington's *Petition for Review* at 2-6; and, *Reply Brief* of at 3-12; and, *Supplemental Brief of Petitioner* at 3- 8.

The essential facts are 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. The agreeing parties then concealed that fact from the Trial Court and Defendant State -- despite a clear obligation to do so under the common law, the Tort Reform Act, and an

unambiguous discovery request for any such agreement. They then mislead the jury as to the true nature of the Defendants' liability¹. This stratagem (found by the trial court to be a knowing failure to disclose, CP 9) had its intended effect, sticking the State with 95% fault for several million dollars in damages. The covenanting parties did not reveal the agreement for over two years after trial and an appeal.

Amicus agrees with Petitioner that joint and several liability cannot exist in this situation (Issue No. 1), and on the contribution question (Issue No. 2), but will focus its analysis on the corrosive effect of the secret agreement (Issue No. 3).

III. ANALYSIS

A. Mary Carter Agreements Generally.

The name "*Mary Carter* agreement" derives from an old Florida case, *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Ct. App. Fla. 1967).²

¹ "At the beginning of the trial, William Spencer, in his opening statement, introduced his clients, Thomas and Madonna Linvog, to the jury and said they were going to be financially responsible for the acts of Korrine. CP at 801-02. Mr. Brindley, counsel for plaintiff Barton, also told the jury, in his opening statement, that the "parents are on the hook." CP at 785. Both counsel were well aware of their agreement that limited the liability of the Linvog parents to \$100,000. Mr. Brindley also proposed and the trial court gave jury instruction 18 that told the jury, as a matter of law, that the Linvog parents were "responsible for the acts of their daughter, Korrine. CP at 1232, 1235. See App. 2." *Supplemental Brief of State of Washington Department of Transportation*, at 5.

² Such agreements date back further than 1967. In *Trampe v. Wisconsin Telephone Co.*, 214 Wis. 210, 252 N.W. 675, 678 (1934), an agreement that would today be labeled a *Mary Carter* agreement was declared invalid more than 30 years earlier. In Arizona, such agreements are called "*Gallagher*" agreements, after *City of Tucson v. Gallagher*, 108 Ariz. 140, 493 P.2d 1197 (1972) (en bane).

However, that term “now appears to be used rather generally to apply to *any* agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants” *Lahocki v. Contee Sand & Gravel Co. Inc.*, 410 A.2d 1039, 1042 (1980) (emphasis added).

The potential variation in these agreements is “limited only by the ingenuity of counsel and the willingness of the parties to sign.” *Maule Indus., Inc. v. Rountree*, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972). “It is probably safe to say that no two agreements dubbed ‘Mary Carter Agreement’ have been alike.” *Lahocki v. Contee Sand & Gravel Co., Inc.*, 410 A.2d 1039, 1042 (1980). However, this family of agreements shares common features:

Mary Carter agreements may incorporate any variety of terms, but are generally characterized by three basic provisions. First, the settling defendant guarantees the plaintiff a minimum payment, regardless of the court's judgment. Second, the plaintiff agrees not to enforce the court's judgment against the settling defendant. Third, the settling defendant remains a party in the trial, but his exposure is reduced in proportion to any increase in the liability of his codefendants over an agreed amount. Some *Mary Carter* agreements include a fourth element: that the agreement be kept secret between the settling parties.

Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum.L.Rev. 368, 369-70 (1987).

See Abigail Carson, Note, *Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility*, 19 Ariz. L. Rev. 863 (1977); and Charles W. Lowe, Comment, *Gallagher Covenants, Mary Carter Agreements, and Loam Receipt Agreements: Unsettling Contributions to Conflict Resolution*, 1977 Ariz. St. L.J. 117.

B. The Harm From Secret Agreements.

1. Secret Agreements Distort The True Nature of Litigation.

Even if disclosed, these agreements alter the true nature of the litigation. When they are kept secret, they deceive the trier-of-fact. One of the major dangers of such agreements lies in the distortion of the relationship between the settling defendant and the plaintiff, which allows the settling defendant to remain nominally a defendant to the action while secretly aiding the plaintiff's case, either directly or indirectly.

One federal court analogized such secret deals to point shaving, with the jury being the deceived spectator:

Courts are not merely arenas where games of counsel's skill are played. Even in football we do not tolerate point shaving. It is perhaps because the trial is adversary that each side is expected to give its best, without secret equivocation. Counsel have no duty to seek ultimate truth in a system where the lawyer's duty is primarily to represent his client. But even if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact, an obligation not to hide the real facts behind a façade.

Daniel v. Penrod Drilling Co., 393 F.Supp. 1056, 1060-61 (E.D. La. 1975)

("The first consideration of the court is the integrity of the trial process.")

Whether structured as a traditional *Mary Carter* agreement, a high-low agreement, a loan-receipt agreement, a *Snapp* agreement,³ a *Gallagher* agreement,⁴ or otherwise, side-deal settlements and covenants not to execute when kept secret deceive the trier of fact.

Side deals and hidden agendas are abhorrent to competition. Whether it be a basketball player deliberately missing shots⁵, or Olympic athletes throwing a badminton match to avoid playing a rival⁶, as a society condemn unfair play. Sitting silently through trial, while secretly holding an immunity card is just the type of conduct which we do not accept.

2. All Divisions of the Washington Court of Appeals Have Condemned Secret Settlement Agreements and Covenants Not to Execute.

All three divisions of the Washington Court of Appeal have

³ *Nieves v. Snapp Indus., Inc.*, 929 So.2d 623, 624 (Fla. 2006) (settlement agreement whereby one party would pay \$5,000 in exchange for another party's agreement not to oppose summary judgment motion "is barred as a matter of law.").

⁴ *See Sequoia Mfg. Co., Inc. v. Halec Const. Co., Inc.*, 570 P.2d 782, 795 (Ct. App. Ariz. 1977) (requiring disclosure of an "in between" agreement, even though it "did not encourage fraud or collusion," not did it alter the defendant's trial strategy).

⁵ *Report: FBI looking at Auburn guard*, March 9, 2012, ESPN.com news services, http://espn.go.com/mens-college-basketball/story/_/id/7662296/fbi-investigating-auburn-tigers-varez-ward-point-shaving-according-report

⁶ *Eight Olympic badminton players disqualified for 'throwing games'*, The Guardian, August 1, 2012, <http://www.guardian.co.uk/sport/2012/aug/01/london-2012-badminton-disqualified-olympics> ("Four pairs of women's doubles badminton players, including the Chinese top seeds, have been ejected from the Olympic tournament for trying to throw matches in an effort to secure a more favourable quarter-final draw.").

cataloged the problems that are created by *Mary Carter* agreements:

Division I has found the problems to include “*secrecy, foisting a fictitious controversy on the courts, failing to identify the true parties litigant or unfairly concealing from the trier of the fact the true battle lines and interests of the parties litigant...*” *Giambattista v. National Bank of Commerce of Seattle*, 21 Wn.App. 723, 735 n. 5, 586 P.2d 1180 (1978) (emphasis supplied).

Division II similarly recognized that “[t]he existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact.” *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103-04, 841 P.2d 1300 (1992) (Div. II), *aff’d on other grounds*, 125 Wn.2d 1 (1994).

Division III, in addressing circumstances similar to this case, recognized that “neither equity nor public policy favors [plaintiffs’] attempt to manipulate the system in an effort to obtain payment from the [co-defendant] State for [co-defendant] Timothy’s fault.” *Bunting v. State*, 87 Wn. App. 647, 654, 943 P.2d 347 (1997) (Div. III).

C. Because of the Harm Arising From Secret Agreements, Settling Parties Must Promptly Disclose Both the Existence and Terms of Such Agreements Before Trial.

Secrecy corrupts. “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Louis D. Brandeis, *Other*

People's Money: and How The Bankers Use It (Frederick A. Stokes Co., NY, 1914), at 92.

A common law obligation to disclose such agreements exists, independent of the operation of the Tort Reform Act or any discovery request. In *McCluskey v. Handorff-Sherman* the court stated:

Where appellate courts have permitted such agreements, they also have required pretrial disclosure to the trial court. The trial court can then advise the jury of the agreement so that jurors can consider the relationship in evaluating evidence and the credibility of witnesses.

68 Wn. App. at 104 (citing cases). The court's opinion in *McCluskey* is clear and unequivocal: settling parties must disclose settlement agreements or covenants not to execute so that the trial court can properly adjudicate the case, the jury can properly decide the case, and the parties can properly litigate the case.

The *McCluskey* court cited four opinions in support of that holding, each of which strongly supports a disclosure requirement. In the first case – *Daniel v. Penrod Drilling Co.*, 393 F. Supp. 1056 (E.D. La. 1975) – the settling parties disclosed their settlement agreement to the court and non-settling parties during trial, but the jury was never informed of the agreement. *Id.* at 1058-59. On this basis, the district court granted the non-settling party's post-trial motion for a new trial. *Id.* at 1061. The court did so without regard to any alleged prejudice, stating that "the jury was not informed of the true posture of the parties." *Id.* at 1059.

In the second case cited in *McCluskey* the Florida Supreme Court similarly mandated pre-trial disclosure. The court reasoned:

The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. ***Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion.*** To prevent such deception, we are compelled to hold that such agreements must be produced for examination before trial, when sought to be discovered under appropriate rules of procedure.

Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973) (emphasis supplied).

In the third case cited in *McCluskey* the court reached the same result, for similar reasons. The trial court refused to require pretrial production of a settlement agreement that required some of the defendants to “continue in active defense of the litigation,” even though under the agreement “their financial responsibility would be limited” and the “plaintiffs would look solely to the other defendants for satisfaction of the judgment.” *Maule Industries, Inc. v. Rountree*, 284 So. 2d 389, 390 (Fla. 1973). The Florida Supreme Court reversed and remanded for a new trial based *solely* on the failure to disclose that agreement prior to trial. *Id.* at 390-91.

In the fourth case cited, *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985), the Kansas Supreme Court likewise mandated “prompt” disclosure of settlement agreements. Surveying applicable case law, the court noted:

Due to the possibility of prejudice arising from such secret “*Mary Carter*” agreements, the overwhelming majority of courts, though approving such agreements, have required disclosure of the settlement terms to the parties and the court and, under certain circumstances, to the jury.

Id. at 1074-75 (citing cases).⁷ Because such disclosure was not given in that case, the court remanded the case for a new trial. *Id.* at 1076.

Numerous other courts have similarly held.⁸ In fact, the majority of jurisdictions across the United States require that agreements limiting a party's liability be disclosed and admitted into evidence. *General Motors Corp. v. Lahocki*, 410 A.2d 1039 (Md. 1989) (citing cases); *Packaging Corp. of America v. DeRycke*, 49 So. 3d 286, 291-92 (Fla. 2010) (reversing trial court's failure to disclose to jury agreement where plaintiff

⁷ Citing *Breitkreutz v. Baker*, 514 P.2d 17 (Alaska 1973); *Taylor v. DiRico*, 606 P.2d 3 (Ariz. 1980); *Firestone Tire & Rubber Co. v. Little*, 639 S.W.2d 726 (Ark. 1982); *Pellet v. Sonotone Corp.*, 160 P.2d 783 (Cal. 1945); *Bashor v. Northland Ins.*, 29 Colo.App. 81, 480 P.2d 864 (1970), *aff'd* 177 Colo. 463, 494 P.2d 1292 (1972); *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973); *General Motors Corp. v. Lahocki*, 410 A.2d 1039 (Md. 1980); *Johnson v. Moberg*, 334 N.W.2d 411 (Minn. 1983); *Hegarty v. Campbell Soup Co.*, 335 N.W.2d 758 (Neb. 1983); *Bedford School Dist. v. Caron Coast. Co.*, 367 A.2d 1051 (N.H. 1976); *Grillo v. Burke's Paint Co.*, 551 P.2d 449 (Or. 1976); *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex. 1978).

⁸ See, e.g., *Johnson v. Moberg*, 334 N.W.2d 411, 415 (Minn. 1983) ("The overwhelming majority of courts that have considered the issue have required that the trier of fact be apprised promptly of any such agreements;" citing cases); *Thibodeaux v. Ferrellgas, Inc.*, 717 So. 2d 668, 672-73 (La. App. 1998) ("secrecy makes the typical 'Mary Carter' agreement abhorrent," which can be remedied by disclosure to the trier of fact); *Hatfield v. Cont'l Imports, Inc.*, 610 A.2d 446, 452 (Pa. 1992) (requiring disclosure because of "the effect of distorting the adversarial process assumed by the trier of fact to exist"); *Fullenkamp v. Newcomer*, 508 N.E.2d 37, 40 (Ind. Ct. App. 1987) ("without knowledge of the agreement, the fact finder is hampered in its ability to judge witness credibility based upon bias or prejudice"); *Soria v. Sierra Pac. Airlines, Inc.*, 726 P.2d 706, 716 (Idaho 1986) (requiring disclosure because of "the distinct potential for misleading jurors in reviewing evidence and judging witness credibility"); *Gen. Motors Corp. v. LaHocki*, 410 A.2d 1039, 1045-47 (Md. 1980) (non-disclosure of settlement agreement had a prejudicial effect on non-settling party; citing cases); *L.J. Vontz Constr. Co. v. Alliance Indus., Inc.*, 338 N.W.2d 60, 63 (Neb. 1983) (requiring disclosure as it "bore directly upon the bias and credibility of the witnesses").

accepted payment of insurance policy limits from defendant who remained a party at trial).

There are, of course, significant policy reasons supporting such disclosure requirements. A leading commentator described those reasons as follows:

Because *Mary Carter* agreements can influence determinations of proportionate fault, their use in Washington courts – which determine liability on a “pure” comparative basis – 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.

J. Michael Phillips, Note & Comment, *Looking Out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255, 257 (1994) (footnote and citations omitted). In *Adams v. Johnston*, 71 Wn. App. 599, 860 P.2d 423 (1993), the court likewise explained that the disclosure requirement in RCW 4.22.060 is meant “to protect the non-settling defendant.” 71 Wn. App. at 604.

D. Some States Ban Such Back Room Deals Because They Corrupt the Integrity of the Trial Process.

Some jurisdictions ban *Mary Carter* agreements completely.⁹ Even their disclosure (to the court and the non-settling defendant) cannot cure

⁹ See, e.g., *In re: Exxon Valdez*, 1996 U.S. Dist. LEXIS 8173 (D. Alaska 1996); *Dosdourian v. Carsten*, 624 So.2d 241, 246 (Fla.1993); *Cox v. Kelsey-Hayes Co.*, 594 P.2d 354, 360 (Okla. 1978); *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex.1992); and, *Hoops v. Watermelon City Trucking Inc.*, 846 F.2d 637, 640 (10th Cir. 1988).

the problems inherent in the deal. *Lum v. Stinnett*, 488 P.2d 347, 352 (Nev. 1971). The court there refused to accept the plaintiff's claim that merely disclosing the deal to the targeted defendant would cure the taint: "It is no answer to say [the non-agreeing defendant] was not stabbed in the back. If his hands were tied, it matters little that he could see the blow coming." *Id.*

The question in Washington is open as to whether such agreements violate public policy *ab initio*. The parties to an agreement may determine the specific terms, "but the contract provisions are subject to limitation and invalidation if they contravene public policy." *Whitaker v. Spiegel Inc.*, 95 Wn.2d 661, 667, 623 P.2d 1147, 1150 (1981) (citing *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 95 Wn.2d 373, 622 P.2d 1234 (1980)).¹⁰

¹⁰ A substantial number of commentators have criticized *Mary Carter* agreements on these and other grounds. See, e.g., Robin Renee Green, Comment, *Mary Carter Agreements: The Unsolved Evidentiary Problems in Texas*, 40 Baylor L. Rev. 449 (1988); John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum. L. Rev. 368 (1987); Richard Casner, Note, *Admission into Evidence of a Mary Carter Agreement from a Prior Trial is Harmful Error*, 18 Tex. Tech. L. Rev. 997 (1987); June F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 U. Fla. L. Rev. 521 (1986); Katherine Gay, Note, *Mary Carter in Arkansas Settlements, Secret Agreements, and Some Serious Problems*, 36 Ark. L. Rev. 570 (1983); David R. Miller, Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 Sw. L.J. 779 (1978); Meriwether D. Williams, Comment, *Blending Mary Carter's Colors: A Tainted Covenant*, 12 Gonz. L. Rev. 266 (1977); John Edward Herndon, Jr., Note, *"Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady Is Exposed*, 28 U. Miami L. Rev. 988 (1974); and, David Jonathan Grant, Note, *The Mary Carter Agreement-Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. Cal. L. Rev. 1393 (1974).

As the issue is not addressed by the parties, Amicus WDTL urges the court to *assume* for purposes of this appeal that such agreements are allowed to begin with, while expressly reserving this issue for another day.

E. A Disclosure Obligation Exists Regardless of Actual Prejudice.

The Arizona Court of Appeals required disclosure of an “in between” agreement even though the agreement “did not encourage fraud or collusion” and did not alter the defendant’s trial strategy:

The clear intention of the Arizona Supreme Court ... is to include in the "*Gallagher*" category all covenants, assuming the requisite elements of consent and consideration are present, involving plaintiffs and settling codefendants, *even if there is no agreement or incentive to sabotage the non-agreeing defendants or to enhance the plaintiff's total verdict or verdict against the non-agreeing defendants.*

Sequoia Mfg. Co., Inc. v. Halec Const. Co., Inc., 570 P.2d 782, 795 (Ct. App. Ariz. 1977) (emphasis added).¹¹

The primary concern is the integrity of the civil trial system in general (including public confidence therein). Equally weighty concerns are the potential for mischief that such secret deals create which, due to the numerous forms the take is difficult to anticipate. It is the secrecy in

¹¹ Arizona cases are particularly instructive here as that state’s tort law is similar to Washington’s especially as to comparative fault and joint and several liability. Arizona has abolished joint and several liability in most circumstances and established a system of comparative fault, making “each tortfeasor responsible for paying his or her percentage of fault and no more.” *Dietz v. Gen. Elec. Co.*, 510, 821 P.2d 166, 171 (Ariz. 1991) (citing A.R.S. §12-2506(A)). Compare, RCW 4.22.060 and .070.

and of itself that raises the red flag. The trial judge acting as referee is in the best position to determine what if any remedies to impose to assure the jury is not misled. Otherwise, it is left to the covenanting parties to decide who should know what and whether their deal would create fraud or collusion. But in that situation, very few people would admit that their testimony was shaded to favor the deciding party.

Thus, not to impose a disclosure requirement is to allow parties carte blanche to decide what agreements (in their opinion and subject to future rulings) should be disclosed and to eliminate fertile territory for cross examination for financial or other bias.

But while non-disclosure *by itself* is sufficient to require that the trial court's judgment be vacated, the record here appears replete with prejudice, from jury instructions, to opening statements, to the State's inability to cross examine the parties on how they had altered their legal statuses.

In *Daniel*, the district court required a new trial in such circumstances because "the jury was not informed of the true posture of the parties." 393 F. Supp. 1059. Similarly, in *Ratteree*, the Kansas Supreme Court expressly held that such misstatements require that the trial court's judgment be vacated. 707 P.2d at 1076 (vacating judgment where parties to settlement agreement failed to disclose agreement and made erroneous statements to the jury). That, too, requires that the trial court's judgment be vacated. See *Furfaro v. City of Seattle*, 144 Wn.2d 363, 384,

27 P.3d 1160 (reversing judgment because jury instruction was erroneous and misleading), *amended by* 36 P.3d 1005 (2001).

F. A New Trial is the Only Proper Remedy for Nondisclosure of a Secret Settlement Agreement.

Respondents attempt to narrowly cabin the issue of harm, restricting it to the ability of the State to seek contribution (for the remaining 5% of damages awarded). But this argument misses the mark. It presumes that the disclosure of the secret agreement would have had no impact on the jury's underlying decision-making process and credibility determinations. These problems are the most basic concerns of trial practice and underlie all jurisdictions' condemnation of the agreements.

The Washington courts (*Giambattista*, *Bunting*, and *McCluskey*, *supra*) all recognize that the jury is misled by such pacts. As set forth above, these agreements:

- “unfairly conceal[] from the trier of the fact the true battle lines and interests of the parties litigant...”
- “mislead[] the trier of fact”
- “foist[] a fictitious controversy on the courts”
- “fail[] to identify the true parties litigant”
- “manipulate the system”

In *Ward v. Ochoa*, 284 So. 2d 385, 387-88 (Fla. 1973), the Florida Supreme Court likewise required disclosure because of “possible injustice” and the potential to mislead judges and juries.

In *Daniel, supra*, the court explained that even if a court cannot surmise exactly how a jury would respond to an undisclosed settlement agreement, “we know only that appellant had the right to litigate his case without hazarding the prospect that such considerations might affect the jury’s verdict.” 393 F. Supp. at 1060 (quoting *Lum v. Stinnett*, 488 P.2d 347, 353 (Nev. 1971)).

The Kansas Supreme Court held that because the settling parties failed to disclose their settlement agreement as required, the only proper remedy was to vacate a trial court’s judgment and remand the matter for a new trial. *Id.* (citing *General Motors Corp. v. Lahocki*, 286 Md. at 728, 410 A.2d 1039; *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758; *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857–59 (Tex. 1977)).

IV. CONCLUSION

In summary, the disclosure issue in this case is not only an important issue on appeal, it is an exceptionally important issue in Washington courts generally. Whether as a matter of common law, based on the ethical duty of candor, or under the Tort Reform Act, such agreements *must* be disclosed before trial. The Court should confirm this point in its decision so that such gamesmanship does not occur in subsequent cases. Because such disclosure admittedly did not occur here, the trial court’s judgment should be vacated.

Respectfully submitted this 31st day of August 2012.

KEATING, BUCKLIN & MCCORMACK,
INC., P.S.

Stewart A. Estes

Stewart A. Estes, WSBA No. 15535

CARNEY BADLEY SPELLMAN, P.S.

Michael B. King

Michael B. King, WSBA No. 14405

Attorneys for *Amicus Curiae*
Washington Defense Trial Lawyers

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on August 31, 2012, I caused the foregoing *Brief of Amicus Curiae* Washington Defense Trial Lawyers to be served via Email on the parties identified below:

Mr. Brent Beecher
Hackett Beecher & Hart
1601 5th Ave. Ste. 2200
Seattle, WA 98101-1651
bbeecher@hackettbeecher.com

Howard Goodfriend
1109 First Avenue, Suite 500
Seattle, WA 98101
howard@washingtonappeals.com

Michael P. Lynch
Michael A. Nicefaro, Jr.
Assistant Attorneys General
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
mikel@atg.wa.gov
miken@atg.wa.gov

Dated this 31st day of August 2012 at Seattle, Washington.

KEATING, BUCKLIN & MCCORMACK,
INC., P.S.

Stewart A. Estes

Stewart A. Estes, WSBA No. 15535

OFFICE RECEPTIONIST, CLERK

To: Stewart A. Estes
Cc: 'Bryan P. Harnetiaux'; 'Mike Nicefaro'; 'Mike Lynch'; 'Howard Goodfriend';
'bbeecher@hackettbeecher.com'; 'Michael B. King'
Subject: RE: Barton v. Linvog, et al. Supreme Court No. 86924-3

Rec. 8-31-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Stewart A. Estes [<mailto:sestes@kbmlawyers.com>]
Sent: Friday, August 31, 2012 12:46 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Bryan P. Harnetiaux'; 'Mike Nicefaro'; 'Mike Lynch'; 'Howard Goodfriend'; 'bbeecher@hackettbeecher.com'; 'Michael B. King'
Subject: Barton v. Linvog, et al. Supreme Court No. 86924-3

Dear Mr. Carpenter:

Pursuant to the Court's prior permission, please find attached WDTL's proposed Brief of Amicus Curiae in the above matter. (Our application was submitted yesterday and remains pending.)

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties, and the Washington State Association for Justice Foundation, who by agreement have accepted this method of service.

Thank you,

Stew Estes
Chair, WDTL Amicus Committee

STEWART A. ESTES
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

(206) 623-8861
(206) 223-9423 (fax)
(206) 719-6831 (cell)

Firm Website: www.kbmlawyers.com
Bio: www.kbmlawyers.com/attorneys.estes.htm

This message is confidential, and is intended only for the named recipient. It may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. If you are not the intended recipient, you are notified that the dissemination, distribution or copying of this message is strictly prohibited. If you receive the message in error, or are not the named recipient, please notify the sender immediately. Thank you.