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NO. 65673-2

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

JARED K. BARTON, a single man,

Plaintiff-Respondent,

v.

STATE OF WASHINGTON, Department of Transportation,

Defendant-Appellant.

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

Co-Defendants-Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

The primary purpose of the Tort Reform Act of 1986 (TRA of 1986) was to negate joint liability and adopt a rule of proportionate liability between defendant tortfeasors. One of the few exceptions, where joint liability was preserved, is when judgment is entered against multiple defendants and the defendant is fault free. In that situation, joint liability exists between the defendants against whom judgment was entered for the sum of the total fault apportioned against them. This joint liability does not include any fault apportioned to defendants who have been released. A release negates joint and contribution liability. Any release agreement that limits the liability of a plaintiff to a defendant must be disclosed to the court and all parties. A covenant not to execute is one of the agreements that acts as a release and must be disclosed.

This appeal involves a covenant not to execute that limited the liability of two defendants to no more than \$100,000, their insurance policy limits. The existence of the agreement was hidden from the court and the State. The jury was misled and told in the opening statements of opposing counsel and in Jury Instruction 18 that the two defendants would be responsible to pay the entire verdict. Even though the liability of the two defendants was limited to \$100,000, a \$3.6 million judgment was entered against them and the State. The entry of the judgment against both

the State and the two defendants created joint liability for the State to pay their proportionate share of the judgment.

The problems with this scenario are that: 1) the covenant not to execute was kept secret, and 2) it negated joint and contribution liability between the State and the two defendants. Joint liability requires that each defendant must be responsible to pay the entire judgment amount. The two defendants whose liability was limited to \$100,000 did not have joint liability with the State to pay the plaintiff \$3.6 million. If there was no joint liability there could be no contribution liability. Indeed, RCW 4.22.060(2) specifically proves that a covenant not to execute or similar agreement discharges all liability for contribution.

The court of appeals failed to afford the covenant not to execute the operative legal effect mandated by RCW 4.22.060 and .070.¹ Instead, it held that the covenant not to execute didn't negate joint and contribution liability because the plaintiff and the two defendants didn't want it to. This decision undermines the TRA of 1986 by allowing joint liability to be imposed against a deep pocket defendant (the State), for the percentage of fault apportioned to shallow pocket defendants who do not actually have joint liability. This is directly contrary to the unequivocal legislative intent of the TRA of 1986 which was written specifically to limit the high

¹ Complete copies of RCW 4.22.060 and .070 are in the App. at 52 - 53.

liability exposure of deep pocket governmental defendants. *See* Laws of 1986, Reg. Sess., ch. 305, § 100. Preamble to the TRA of 1986.²

The integrity of the TRA of 1986 is a matter of substantial public interest. The court of appeals decision is in conflict with RCW 4.22.060 and .070 as well as numerous decisions of the court of appeals and this Court. Review is therefore warranted under RAP 13.4(b)(1)(2) and (4).

II. IDENTITY OF PETITIONER

The petitioner is the State of Washington, Department of Transportation, Appellant in the court of appeals.

III. COURT OF APPEALS DECISION

The State seeks review of the decision of the Court of Appeals, Division I in *Jared K. Barton v. State of Washington, Department of Transportation*, Cause No. 65673-2-I. The decision was filed on October 24, 2011. The State's Motion for Reconsideration was denied on December 5, 2011 (the slip opinion and the order denying the motion for reconsideration are in the Appendix (App.) at 1 -7).

IV. ISSUES PRESENTED FOR REVIEW

1. When there is a covenant not to execute that limits the liability of some defendants to pay to the plaintiff no more than \$100,000, are

² The preamble of the TRA of 1986 specifically states that comprehensive reform is necessary *inter alia* to address the escalating costs of insurance and increased exposure to lawsuits of governmental entities in order to improve the availability and affordability of quality governmental services. In other words, a purpose of this enactment was to protect "deep-pocket" government defendants. For ease of reference a copy of the preamble is attached in the App. at 54.

those defendants jointly liable with other defendants to pay the entire amount of a jury's \$3.6 million verdict?

2. RCW 4.22.060(2) mandates that a covenant not to execute negates contribution liability. Can a covenant not to execute be written in a way so that it does not negate contribution liability?

3. When the parties to a covenant not to execute hide its existence from the court and opposing counsel in willful violation of RCW 4.22.060(1) and in violation of specific interrogatory requests, is a new trial or the imposition of at least some significant sanction required to prevent subversion of the TRA of 1986?

V. STATEMENT OF THE CASE

This lawsuit arose from a collision that occurred on November 27, 2004, when 19 year old Korrine Linvog pulled away from a stop sign in front of a motorcycle that was being driven by the plaintiff, Jared Barton. The car Ms. Linvog was driving had been provided by her parents, Thomas and Madonna Linvog. As a result, the parents were potentially liable for their daughter's negligence under the family car doctrine. Before the lawsuit was filed, Korrine Linvog and her parents met with the plaintiff's lawyer and his highway design expert at the scene of the accident. CP at 484-85.

Mr. Barton filed this lawsuit on October 25, 2005, against the State of Washington, Korrine Linvog, and her parents. Mr. Barton claimed the Department of Transportation negligently placed the stop bar in a location where Korrine Linvog's view to her left, of Mr. Barton's approaching motorcycle, had been blocked by two trees. CP at 8.

Counsel for the Linvogs, William Spencer, tendered an offer of the Linvogs entire \$100,000 insurance policy limits to Mr. Barton's counsel, Ralph Brindley. CP at 555. Mr. Brindley rejected the offer because he wanted to maintain joint liability against the State for the entire judgment amount. Mr. Brindley indicated to Mr. Spencer his expectation that Mr. Barton would be found fault free and that the case was one of joint and several liability in which the plaintiff would collect against the State any judgment over and above the \$100,000 in insurance policy limits available to the Linvogs. CP at 560-61.

The State sent interrogatories to both the plaintiff and the Linvogs requesting disclosure of any agreements or covenants. As is standard practice in a tort lawsuit, the State also requested from the plaintiff the disclosure of any advance payments or compensation that had been paid in relation to the accident. CP at 831-41. At the time the interrogatories were initially answered in the negative, no covenant had been entered into and no payment had been made. CP at 831-41.

However, in March 2007 counsel for Mr. Barton and counsel for the Linvogs entered into an agreement that in exchange for payment of \$20,000, Mr. Barton would not execute on any judgment he obtained against the defendants Thomas and Madonna Linvog in excess of their \$100,000 insurance policy limits. CP at 924-26. Neither counsel advised the State or the court of their intent to enter into this covenant not to execute. RCW 4.22.060(1) requires that parties entering into releases, covenants not to execute, or similar agreements, provide all parties and the court with five days advance notice before entering into such agreements. The trial court found that both counsel were aware of this statutory requirement and failed to comply with it. CP at 9.

Nearly eight months passed between March 1, 2007, the date the covenant not to execute was entered into, and October 29, 2007, the date the trial began. Yet, neither counsel supplemented their interrogatory answers to disclose the existence of the covenant not to execute or the \$20,000 payment. The trial court concluded this mutual failure to supplement answers to the same interrogatories was a violation of the discovery rules. CP at 9.

Although Mr. Brindley and Mr. Spencer were each aware of the undisclosed agreement that limited the Linvog parents' liability to Mr. Barton at \$100,000, they each told the jury in their opening statements

that the Linvog parents were “on the hook” and “responsible for” all damages awarded against their daughter Korrine. CP at 785 (Brindley); CP at 791, 801-02 (Spencer). At Mr. Brindley’s request, the trial court also gave Jury Instruction 18 which told the jury that Thomas and Madonna Linvog were “responsible for the acts of” their daughter Korrine Linvog, because they provided a motor vehicle for her use. CP at 1235.

The jury returned a verdict of \$3.6 million and apportioned 5 percent of the fault for the accident to Ms. Linvog (\$180,000) and 95 percent of the fault to the State (\$3.42 million). CP at 224-26. Even though counsel for Mr. Barton knew there was a covenant not to execute that limited the Linvog parents’ liability to \$100,000, he entered a judgment against them for \$3.6 million. The Linvogs’ attorney did not object to the entry of this judgment against his clients. CP at 227-29.

Nor did the Linvogs’ attorney request the judgment reference the \$20,000 credit that the Linvogs were entitled for the sum they had paid plaintiff in consideration for the covenant not to execute payment. CP at 227-29. Since Mr. Barton was found to be fault free, the State was also entitled to that \$20,000 credit because the judgment was for joint liability. *See* RCW 4.56.050-.070. Failing to disclose the \$20,000 at the time when judgment was entered allowed the existence of the covenant not to execute to remain hidden.

Two-and-a-half years later, the State learned about the existence of the secret covenant not to execute and the \$20,000 advance payment. CP at 844. When no reason was offered to explain the non-disclosure (CP at 1283-85) the State filed a Motion to Vacate the Judgment and for Sanctions. CP at 635-87, 909-1297, 1304-23.

In the motion, the State argued that the hidden covenant not to execute had prejudiced the State in two ways. First, the State was denied the ability to challenge Korrine Linvog's credibility on cross examination about the fact that once she provided critical evidence against the State in her deposition the plaintiff eliminated the ruinous liability she had created for her parents by limiting their liability to their insurance policy limits of \$100,000. Her testimony that the State's trees blocked her view was critical to establishing liability against the State. In fact, Korrine provided the only evidence plaintiff had to prove the causation element of his claim against the State.

Second, the State argued that non-disclosure of the covenant not to execute allowed the Linvog parents to remain in the case as sham parties at trial. Had the covenant not to execute and advance payment been revealed, the State would have moved to have the parents dismissed. RP (1/15/10) at 7-8. Even if they had not been dismissed, the State would have known to object when the jury was told in opening statement by both

counsel and in Jury Instruction 18 that the Linvog parents were responsible to pay the entire verdict, when that was untrue. The Linvog parents appeared as extremely sympathetic defendants. They had done nothing wrong, other than let their daughter drive their car. Keeping them in the case and misrepresenting their liability created false sympathy and led the jury to believe that they would have to pay any verdict awarded against their daughter, Korrine.³ The jury's disproportionate allocation of 95 percent of the fault to the State (\$3.42 million) demonstrates the success of this sympathy strategy. By only awarding 5 percent of the fault, \$180,000, against Korrine Linvog, the jury limited her parents' liability. CP at 635-87, 909-1297, 1304-23.

The trial court denied the State's Motion to Vacate and for Sanctions, finding the State was not prejudice by the non-disclosure of the covenant not to execute. CP at 9-13. The trial court held that the covenant not to execute did not eliminate joint liability and contribution rights between the State and the Linvog parents because Mr. Brindley and Mr. Spencer said they didn't intend it to. CP at 9-15.

Despite the mandate of RCW 4.22.060(2) the court of appeals adopted the trial court's conclusion that the covenant not to execute did

³ Once the liability of the Linvog parents was limited to their insurance policy limits keeping them in the case served no legitimate purpose. Their liability was vicarious. Consequently, if they had been dismissed as parties to the case, a judgment against their daughter would result in recovery by the plaintiff of the entire \$100,000 available from their insurance.

not negate the Linvog parents' contribution liability. The court of appeals also held that even though the covenant not to execute limited the Linvog parents' liability to \$100,000, it did not eliminate the Linvog parents' joint liability with the State to pay the entire \$3.6 million verdict. Having agreed with the trial court's conclusion that the covenant not to execute did not negate joint and contribution liability, the court of appeals affirmed. *See* App. 1 - 6, *Barton v. State, Dep't of Trans.*, Cause No. 65673-2-I, slip op. (Wash. Oct. 24, 2011) (unpublished).⁴

VI. ARGUMENT

UNDER THE TORT REFORM ACT OF 1986 AN AGREEMENT THAT LIMITS A PARTY'S LIABILITY NEGATES JOINT AND CONTRIBUTION LIABILITY, AND MUST BE DISCLOSED

A. The Tort Reform Act Of 1986 Fundamentally Changed Tort Law In Washington By Rejecting The Rule Of Joint Liability And Adopting A Rule Of Proportionate Liability

In 1986 the Legislature changed the general rule of joint liability among tortfeasors to one of proportionate liability, which required the trier of fact to allocate liability based on each party's share of fault. One of the few exceptions where joint liability was maintained is when a plaintiff is

⁴ The court of appeals failed to decide the issue raised by the State that the \$146,000 sanction, that the trial court imposed upon Mr. Barton through the denial of his request for post judgment interest, was not a real sanction at all because the State had no obligation to pay interest after the judgment was satisfied and the judgment proceeds had been withdrawn by plaintiff from the court registry. The court of appeals also denied the State's request to address this issue in its Motion for Reconsideration. App. 8-32.

free from fault.⁵ Under this exception joint liability is invoked if: 1) the trier of fact concludes that the claimant or the party suffering bodily injury is fault free; and 2) judgment is entered against two or more defendants under RCW 4.22.070(1), *see Anderson v. City of Seattle*, 123 Wn.2d 847, 851, 873 P.2d 489 (1994). For purposes of creating joint liability under RCW 4.22.070(1), judgment is not entered against a defendant who has been released.⁶ The only parties that will be jointly and severally liable are “the defendants against whom judgment is entered.” *Id.* Settling parties, released parties, and immune parties are not parties against whom judgment is entered and will not be jointly and severally liable under RCW 4.22.070(1)(b). *Kottler v. State*, 136 Wn.2d 437, 447, 963 P.2d 834 (1998), citing *Washburn v. Beatty Equip. Co.*, 120 Wn.2d 246, 294-96, 840 P.2d 860 (1993); *Anderson*, 123 Wn.2d at 852 (a released party “can’t under any reasonable interpretation of RCW 4.22.070(1)(b) be a defendant against whom judgment is entered.”).

⁵ *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 a 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.)

⁶ *See* 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 the party’s proportionate share of the claimant’s total damages. The liability of each defendant shall be several only and shall not be joint except: (Emphasis added.)

RCW 4.22.060 delineates the types of pre-judgment agreements that constitute a “release” under RCW 4.22.070. RCW 4.22.060(2) specifically mandates that such release agreements “**discharge that person from all contribution liability. . .**”. (Emphasis added.)

A covenant not to execute operates as a release that negates joint and contribution liability. *Maguire v. Teuber*, 120 Wn. App. 393, 395, 885 P.2d 939 (2004). Only parties against whom judgment is entered under RCW 4.22.070 have joint liability under the TRA of 1986. *Kottler*, 136 Wn.2d at 443-44. And, only when one jointly liable defendant pays another defendant’s proportionate share of the judgment does contribution liability arise. *Id.*

B. The Court Of Appeals Decision That Defendants Who Are Only Obligated To Pay \$100,000 Have Joint Liability With Other Defendants To Pay \$3.6 Million Conflicts With Other Decisions Of This Court And The Court Of Appeals

The court of appeals’ decision below, that the covenant not to execute at issue in this case did not negate joint liability, conflicts with numerous cases. *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 395, 98 P.3d 96 (2004) (covenant not to execute constitutes a release under RCW 4.22.070); *Maguire v. Teuber*, 120 Wn. App. at 395 n.3 (holding that a covenant not to execute is a release under RCW 4.22.070 that negates joint liability); *Bunting v. State*, 87 Wn. App. 647, 651-52, 943 P.2d 347 (1997) (holding that a covenant not to execute negates joint

liability and contribution rights); and *Shelby v. Keck*, 85 Wn.2d 911, 918, 541 P.2d 365 (1975) (covenant not to execute to set the upper limits of a party's liability in exchange for \$25,000 must be viewed as a binding settlement and dismissal of that party by the court was proper).

As these other decisions properly recognized, in order for parties to be jointly liable, each defendant must be responsible to pay the entire judgment amount. *Maguire v. Teuber*, 120 Wn. App. at 395 n.3. In the case at bar, this is a matter of simple mathematics, \$100,000 \neq \$3.6 million. The Linvog parents, who had an agreement limiting their liability to Mr. Barton at \$100,000, were not jointly liable with the State to pay Mr. Barton the \$3.6 million verdict. *Id.*

The decision of the court of appeals is in direct conflict with each of cases cited above. The court of appeals erred by determining the operative legal effect of the covenant not to execute based on the intent of the parties and focusing on the fact that it was not a complete settlement and resolution of all liability. But, that was immaterial to the court's analysis. The court's focus should have been on the well established case law and unequivocal statutory language which only allow joint liability between defendants against whom judgment is entered. Judgment is only entered against defendants who have not been released. RCW

4.22.070(1). A covenant not to execute operates as a release. RCW 4.22.060(2); *Romero v. West Valley Sch. Dist.*; and *Bunting v. State*.

Joint liability requires that each party be responsible to pay the entire judgment amount. The covenant not to execute eliminates a party's obligation to pay the entire judgment amount. *Maguire v. Tueber*, 120 Wn. App. at 395, n.3. The Linvog parents weren't responsible to pay \$3.6 million, nor were they even responsible to pay \$180,000, their proportionate share of fault assigned to their daughter by the judgment. The State should not have been required to pay the proportionate share of fault assigned to the Linvog parents.⁷ These are the points of law that should have governed the court of appeals analysis.

Treating prejudgment covenants not to execute or enforce judgment as a release under RCW 4.22.070 is essential to foil schemes designed to keep released defendants in a lawsuit solely to achieve joint and several liability.⁸ The decision below does more than just misapply the law, it frustrates the central purpose of the TRA of 1986 by reinstating

⁷ The Linvogs only paid the plaintiff \$100,000, their insurance policy limits. The trial court granted plaintiff's motion to require the State to pay the unpaid portion of the Linvogs share of the judgment, \$80,000 plus interest accrued, which was a total of \$92,632.30. CP at 40-42.

⁸ See J. Michael Phillips, *Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255, 274 (1994). See App. at 33 - 53. See also *Maguire*, 120 Wn. App. at 398 n.21, 22 citing Cornelius J. Peck, *Reading Tea Leaves: The Future of Negotiations for Tort Claimants Free From Fault*, 15 U. Puget Sound L. Rev 335, 343-44 (1992) (Noting that an imaginative strategy of not treating a covenant not to execute as a release should fail.)

the joint liability that the Legislature abolished. Discretionary review is required to correct this serious departure from well settled law.

C. The Court Of Appeals' Decision That The Covenant Not To Execute Did Not Negate Contribution Liability Conflicts With Other Decisions Of The Court Of Appeals And The Unequivocal Directive Of RCW 4.22.060(2)

Building on its first erroneous conclusion, the court of appeals further erred in concluding that the covenant not to execute that limited the parents' liability to \$100,000 did not discharge their contribution liability to the State. This conclusion conflicts with precedent, statute, and the policy underlying the TRA of 1986.

As this Court stated in *Kottler*, 136 Wn.2d at 444, 448, a prerequisite to contribution liability is joint liability. And, as noted in previous argument, joint liability is negated by a covenant not to execute. *See Maguire v. Teuber; Romero v. West Valley Sch. Dist.; and Bunting v. State*. In order for joint liability to exist, defendants have to have judgment entered against them within the meaning of RCW 4.22.070(1) *see Kottler*, 136 Wn.2d at 442-43 (emphasizing language in RCW 4.22.070(1)). Settling and released defendants do not have judgment entered against them under RCW 4.22.070(1) and therefore do not have joint or contribution liability. *See Washburn*, 120 Wn.2d at 246.

But it is not case law alone that establishes the principle that a covenant not to execute discharges contribution liability. A covenant not

to execute or similar agreement eliminates contribution liability because that is what RCW 4.22.060(2) specifically provides:

A release, covenant not to sue, **covenant not to enforce judgment, or similar agreement** entered into by a claimant and a person liable **discharges that person from all liability for contribution**, but it does not discharge any other persons liable upon the same claim unless it so provides.

(Emphasis added.)

Finally, the decision of the court of appeals that a covenant not to execute does not eliminate joint and contribution liability seriously undermines the purpose and effect of the TRA of 1986. Under the TRA of 1986, contribution liability arises only between jointly liable judgment debtors, after one defendant has paid another defendant's proportionate share of the judgment. *Kottler*, 136 Wn.2d at 446, 448. For this reason, no contribution rights exist between a defendant whose liability on a judgment is limited by a covenant not to execute and defendants who are actually responsible to pay the entire judgment amount. The decision to the contrary allows parties in a lawsuit to impose joint liability on a deep pocket defendant for the percentage of fault apportioned to a shallow pocket defendant who is not actually responsible to pay even the percentage of fault apportioned by the jury.

The court of appeals conclusion is in conflict with RCW 4.22.060(2) and .070 and the decisions of this Court and the court of

appeals. It provides the means for a complete circumvention of the TRA of 1986 by reinstating the joint liability the Legislature abolished. This presents a matter of substantial public interest that should be corrected by this Court. Accordingly, the State requests review by this Court pursuant to RAP 13.4(b)(1)(2) and (4).

D. Hiding A Covenant Not To Execute Or Similar Type Of Release Agreement Should Be Discouraged In Order To Protect The Integrity And Operation Of The Tort Reform Act Of 1986

It is essential for the court and all of the parties in a tort lawsuit to be aware of who has been released in order to know who is responsible to pay the judgment, who should be a party at trial, and against whom judgment should be entered. If a party has been released, he/she is not a party against whom judgment should be entered under RCW 4.22.070(1). *See Kottler*, 136 Wn.2d at 442-44.⁹

In order to know who has been released under RCW 4.22.060(2) mandates, in pertinent part:

A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days written notice of such intent to all other parties and the court.

⁹ As outlined in the preceding argument the types of agreements that constitute a release under RCW 4.22.070(1) are set forth in RCW 4.22.060 and include a release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant. *See Washburn*, 120 Wn.2d at 294-96 (released defendants do not have judgment entered against them for purposes of joint liability under RCW 4.22.070(1)). *Anderson*, 123 Wn.2d at 852 (released party cannot be a party against when judgment is entered under RCW 4.22.070(1)(b)).

(Emphasis added.)

In the findings of fact, incorporated from its memorandum decision the trial court specifically found:

both counsel were aware of this statutory requirement and failed to comply with it. CP at 9.

(Emphasis added.)¹⁰

Disclosure of releases, covenants not to execute, and similar agreements is critical to the effective implementation of the TRA of 1986 because it prevents shallow pocket defendants who have been released from keeping that fact secret, remaining as sham defendants at trial, and subjecting a deep pocket defendant to joint liability for the shallow pocket defendants apportioned share of fault when the shallow pocket defendant actually owes the plaintiff far less. That's exactly what the parties tried to do in *Maguire, Romero, and Bunting*¹¹ they tried to avoid the loss of joint liability by artificially crafting an agreement that tried to keep the shallow pocket defendants in the case so that judgment could be entered against

¹⁰ Part of the legislative rationale for requiring five day's notice for a covenant not to execute and other types of settlement agreements was . . . "a legitimate concern that claimants will enter into 'sweetheart' releases with certain favored parties." 1 Senate Journal, 47th Leg. Reg., Sess. at 636 (Wash. 1981).

¹¹ See also *Estate of Bordon, ex rel. Anderson v. State, Dep't of Corrections*, 120 Wn. App. 227, 224, 95 P.3d 764 (2004), review denied, 154 Wn.2d 1003, 114 P.3d 1198 (2005) (stipulation for partial payment of damages and covenant not to execute eliminated joint liability of co-defendants with the State).

them achieving joint liability with deep pocket, government defendants.¹² However, the parties in those cases weren't able to get away with it because they had properly disclosed the existence of the covenant not to execute, which the courts correctly held operate as a release negating joint liability. By hiding the existence of the covenant not to execute in this case, the plaintiff and the Linvog co-defendants achieved the imposition of joint liability against the State that was disallowed in *Romero*, *Maguire*, *Bunting*, and *Estate of Bordon, ex rel. Anderson v. State, Dep't of Corrections*, 120 Wn. App. 227, 224, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003, 114 P.3d 1198 (2005). In so doing, they circumvented the abolition of joint liability that is at the core of the TRA of 1986.¹³

¹² For example in *Maguire* the covenant attempted to keep *Teuber and Hansel* in the lawsuit by referring to the possibility that judgment would be entered against them and expressly stated that it was not to be construed as benefitting the State in any way. In *Maguire* the court explicitly rejected this blatant attempt to circumvent the TRA of 1986 noting that in enacting Tort Reform Act the legislatures had acknowledged that government entities were faced with increased exposure to lawsuits and that comprehensive tort reform was necessary to create a more equitable distribution of the cost and risk of injury. 120 Wn. App. at 397 n.15 (quoting laws of 1986 Ch. 305, § 100).

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

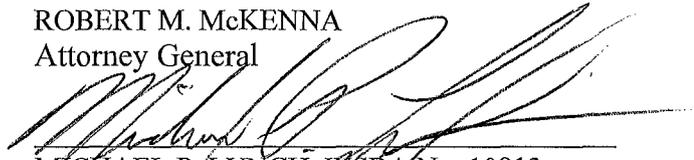
Despite the willful violation of the mandatory disclosure requirement in RCW 4.22.060(1), no actual sanction was imposed. Unless this Court emphasizes that such misconduct will not be tolerated, it will proliferate and undermine the effective operation of the TRA of 1986 in other cases, just as it did here. The integrity of the TRA of 1986 is a matter of substantial public importance warranting a review pursuant to RAP 13.4(b)(4).

VII. CONCLUSION

Review should be granted because the decision below misconstrues the TRA of 1986 to allow parties in a lawsuit to impose joint liability on a deep pocket defendant for the percentage of fault apportioned to shallow pocket defendants whose obligation to pay the plaintiff even their own percentage of fault has been released through a secret covenant not to execute. The decision of the court of appeals conflicts with decisions of this Court and the court of appeals and with unequivocal provisions in RCW 4.22.060 and .070. This is an issue of substantial public interest. Therefore, review is warranted under RAP 13.4(b)(1)(2)and(4).

RESPECTFULLY SUBMITTED this 29th day of December, 2011.

ROBERT M. McKENNA
Attorney General

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

MICHAEL P. LYNCH, WSBA No. 10913

MICHAEL A. NICEFARO Jr.,

WSBA No. 9537

Senior Counsel

Assistant Attorneys General

Counsel for Appellant

State of Washington, Department
of Transportation

PROOF OF SERVICE

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

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

DATED this 30th day of December, 2011, at Olympia, WA.



HILARY SOTOMISH, Legal Assistant

Appendix

Not Reported in P.3d, 2011 WL 5175599 (Wash.App. Div. 1)
(Cite as: 2011 WL 5175599 (Wash.App. Div. 1))

H

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 1.

Jared K. BARTON, a single man, Respondent

v.

STATE of Washington, DEPARTMENT OF
TRANSPORTATION, Appellant,
Skagit County, Department of Public Works, Defen-
dant,

Korrine Linvog, individually; and Thomas Linvog and
Madonna Linvog, husband and wife, Respondents.

No. 65673-2-I.

Oct. 24, 2011.

Appeal from Snohomish Superior Court; Honorable
Anita L. Farris, J.

Michael Augustin Nicefaro Jr., Office of The Attorney
General, Seattle, WA, Michael Patrick Lynch, Office
of the Attorney General, Olympia, WA, for Appellant.

Ralph James Brindley, Paul Nicholas Luvera Jr., Lu-
vera BarnettBrindley Beninger et al., Seattle, WA,
Howard Mark Goodfriend, Smith Goodfriend PS,
Seattle, WA, Brent William Beecher, Hackett Beecher
& Hart, Seattle, WA, for Respondents.

UNPUBLISHED OPINION

APPELWICK, J.

*1 The State appeals the denial of its motion to vacate the judgment and for a new trial, brought following its discovery of an undisclosed agreement between Barton and the Linvogs. The State also challenges the adequacy of the sanctions imposed for failing to disclose the agreement. The trial court found the agreement did not extinguish the State's right to obtain contribution from the Linvogs, did not realign the parties, and did not prejudice the State. The sanctions were within the discretion of the trial court. We affirm.

FACTS

Korrine Linvog was driving her parents' automobile when she stopped at a painted stop line, then

pulled out into an intersection and collided with Jared Barton, who was approaching on his motorcycle with the right of way. On the night of the crash, Linvog told officers that she looked to the left but did not see Barton's oncoming headlight. When she returned to the scene less than two weeks later during daylight hours, she became aware of an obstruction created by trees at the intersection. Barton sued Linvog and her parents, Thomas and Madonna Linvog, under the family car doctrine. He also sued the State of Washington under a theory of improper highway maintenance or design. He alleged the State painted the stop line at an improper location, such that when a driver was stopped there at night his or her view of any traffic approaching on the cross street would be obscured by the trunks of large trees.

The case proceeded to trial. The jury ultimately returned a \$3.6 million verdict for Barton, finding the State to be 95 percent liable and Linvog to be 5 percent liable. The judgment on the verdict reflected that Linvog, her parents, and the State were jointly and severally liable. The State appealed, and this court affirmed the judgment in November 2008. Barton v. State, 147 Wn.App. 1021, 2008 WL 4838687 (2008), rev. denied 166 Wn.2d 1012, 210 P.3d 1018 (2009).

In discussions about payment of the judgment, the State learned for the first time of an earlier agreement not to execute between Barton and the Linvogs. Ralph Brindley, Barton's attorney, reviewed his files and found the proposed, partially executed stipulation reflecting a \$20,000 advance payment. William Spencer, the Linvogs attorney, had not signed it. Brindley sent a copy of that partially executed stipulation to the State and stated that "[i]f the state wishes to pursue a contribution claim against the Linvogs, that is probably its option." As a result of this new information, in November 2009 the State moved to vacate the judgment under CR 60(b)(4), seeking a new trial and sanctions in the form of its reasonable attorney fees and costs for the trial and appeal. The State alleged its "interests were profoundly compromised by the hidden release agreement between the plaintiff and the Linvog parents."

The facts relevant to the nondisclosure are as follows. The Linvogs had \$100,000 of insurance liability coverage. Their counsel, Spencer, offered Barton that amount in settlement at the outset of litigation. Barton's counsel, Brindley, refused the offer, because

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Barton wanted to preserve joint and several liability between the State and the Linvogs, which would be destroyed if the Linvogs were dismissed under a settlement and release agreement. Brindley told Spencer that it was his general practice not to pursue a claim above the insurance policy limit against individual defendants like the Linvogs, when there was also an institutional defendant.

*2 In September 2005, the State sent interrogatories to Barton, asking in relevant part whether he had "received money from any source whatsoever as a result of the incident referred to in the Complaint" and whether Barton "or anyone acting on [his] behalf ha[d] entered into any agreement or covenant with any party or person regarding the incident." The Linvogs received similar interrogatory requests. Both Barton and the Linvogs answered in the negative, which was truthful at the time.

In 2007, Barton was uninsured and needed money to pay for his medical care. On his behalf, Brindley requested an advance of money from Spencer and the Linvogs, in anticipation that the Linvogs would bear some portion of fault for Barton's substantial damages. Brindley again refused to agree to anything that would release Linvog from liability and thereby prevent joint and several liability. The ultimate agreement was that if Linvog's parents paid \$20,000 to Barton, he would not execute on any judgment against Linvog's parents that exceeded the \$100,000 limit of their insurance coverage.

The Linvogs' insurer issued a \$20,000 check to Barton in February 2007. Spencer prepared a stipulation reflecting the parties' agreement, which provided that the \$20,000 would be offset against any future judgment against the Linvogs. The stipulation also provided "that the advance payment does not represent a settlement of any claims [Barton] has brought in this matter." Spencer did not sign the stipulation. Brindley signed the stipulation on behalf of Barton, but did not return it to Spencer. Neither party filed the agreement with the court, nor did they give the State notice of the agreement. The trial court found that both Spencer and Brindley had a duty under court rules and under statute to supplement their earlier discovery answers and to give the State notice of the agreement, but failed to do so.

During opening statements, both Brindley and

Spencer explained to the jury that Linvog's parents would be responsible for any judgment entered against their daughter, based on the family car doctrine. Additionally, the court gave jury instruction 18, the Washington pattern jury instruction for the family car doctrine: "A person who maintains or provides a motor vehicle for the use of a member of his or her family is responsible for the acts of that individual in the operation of that motor vehicle." 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL § 72.05, at 530-31 (5th ed. 2005) (WPI). Linvog's parents were never called as witnesses, they were not present at counsel's table, and their names did not appear on the verdict form. The only time they were mentioned at trial was during opening statements, to explain why they were named in the case caption.

The trial court denied the State's motion to vacate on June 4, 2010, incorporating its memorandum decision filed May 3, 2010. The trial court found that it was the understanding and intent of both parties to the agreement that it would not affect or prevent Barton from executing on any judgment amount exceeding \$100,000 from Linvog. Additionally, the agreement would not prevent the State from seeking reimbursement from Linvog's parents for any percent of Linvog's ultimate liability, even if that exceeded \$100,000. Spencer told the Linvogs they would still face liability in contribution to the State, should the jury find that Linvog was liable in excess of her family's \$100,000 insurance limit. The trial court also denied Barton's motion for an award of interest from the State on the funds that were not released from trust until months after they had been deposited into the court registry, pending the court's decision on the State's motion. The trial court stated that the loss of interest was an appropriate sanction against Barton's law firm, based on the failure to disclose the agreement during the discovery process. The trial court did not sanction Spencer.

*3 On August 27, 2010, the State presented a judgment on its claim for contribution against the Linvogs. The State had earlier paid "in excess of its equitable share, a portion of the [Linvogs'] equitable share under the Judgment ... in the amount of \$92,632.30 (the principal amount of \$80,000 owed by [the Linvogs], plus interest at the rate of 6.151% in the amount of \$12,632.30)." The trial court entered judgment for the State for contribution against the

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Linvog's in that amount of \$92,632.30, plus interest of 2.208 percent until paid.

DISCUSSION

The State argues that the trial court erred by denying its motion to vacate judgment under CR 60(b)(4). It argues that the judgment should be vacated for two reasons. First, it argues Spencer, Brindley, and the trial court erroneously represented to the jury that Linvog's parents would be liable for any judgment against their daughter. The State contends that the agreement was a release that eliminated joint liability and contribution rights between the State and Linvog's parents, that the failure to disclose the release injected false sympathy into the trial, and that it misled the jury and the court into believing Linvog's parents would have to pay a large verdict. Second, the State argues it was prejudiced by its inability to cross-examine Linvog about the agreement. The State suggests this line of questioning was vital, because the agreement was essentially a "reward" from Barton, sparing Linvog's parents from liability beyond \$100,000 in return for her favorable testimony shifting blame onto the State. Additionally, the State argues the trial court erred by declining to impose sanctions against Brindley and Spencer under CR 26 and 37. It sought sanctions both in the form of a new trial and as an award of their reasonable attorney fees and costs.

It is not disputed that Spencer and Brindley had a duty to disclose the existence of the agreement between Barton and the Linvog's. The State's interrogatories requested identification of any such monetary payments or covenants. Under CR 26(e)(2), a party has a duty to seasonably amend a prior discovery response if "he knows that the response though correct when made is no longer true." The trial court concluded that both Spencer and Brindley had a duty under this court rule to supplement their discovery answers, but due to oversight failed to do so. In addition to the requirements of CR 26(e)(2), both attorneys were required by statute to give the State notice of the agreement and payment. RCW 4.22.060(1) provides:

A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court.

The trial court concluded that both Spencer and

Brindley "were aware of the statutory requirement and failed to comply with it." The State's motion to vacate judgment was raised under CR 60(b)(4), alleging that Spencer and Brindley's failure to amend the discovery responses constituted fraud, misrepresentation, or misconduct.

I. Standard of Review

*4 We review a trial court's denial of a CR 60(b) motion to vacate for an abuse of discretion. Stanley v. Cole, 157 Wn.App. 873, 879, 239 P.3d 611 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. Boguch v. Landover Corp., 153 Wn. App. 595, 619, 224 P.3d 795 (2009). We review a trial court's decision on sanctions for discovery violations under the abuse of discretion standard, giving wide latitude to the trial court in fashioning an appropriate sanction for discovery abuse. Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002).

In exercising its discretion to determine whether a discovery violation merits the imposition of an extremely harsh sanction such as a new trial, the court should consider whether the violation was "willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial." Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Similarly, for a trial court to vacate a judgment under CR 60(b)(4), "the fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case." Lindgren v. Lindgren, 58 Wn.App. 588, 596, 794 P.2d 526 (1990).

II. Prejudice.

The central question here is whether the State was prejudiced by the agreement and by Spencer and Brindley's failure to amend the discovery responses to disclose it. The State presents two main arguments for why it was prejudiced. Both are based on the State's foundational assertion that the agreement between Barton and the Linvog's had the operative legal effect of releasing Linvog's parents from liability. The State concedes that the language of the stipulation stated that it was not a settlement, but nevertheless insists that it was a release that negated joint and several liability of Linvog's parents. The State contends that because of this release it had no right to seek contribution from Linvog's parents.^{EN1} The State relies

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primarily on RCW 4.22.060(2) to support its assertion that the agreement discharged any claim for contribution. RCW 4.22.060(2) provides in relevant part:

FN1. This assertion is contradicted by the fact that the State successfully sought and obtained such contribution, in the amount of \$92,632.30, plus interest. Both the Linvog and the Barton respondents' briefs argue that the State should be estopped from arguing it was not entitled to a contribution judgment when it has already accepted the benefit of exactly such a judgment.

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution.

The State also relies on Maquire v. Tueber, 120 Wn.App. 393, 85 P.3d 939 (2004), for its assertion that the agreement not to execute operated as a full release of Linvog's parents, regardless of what the parties to the agreement may have actually intended. In Maquire, the court concluded that RCW 4.22.060's use of the word "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. Maquire, 120 Wn.App. at 396-97. But, as the trial court noted, the Maquire court was very careful to emphasize that such a release only arose due to the parties' intent to make a full settlement. *Id.* at 397-98. This case, by contrast, arose from an agreement not to execute, and that agreement plainly reflected both parties' intention that it did not constitute a settlement. The trial court stated:

*5 [Settlement] was not the intent in this case and this case is thus distinguishable. [Maquire] effectuated the true intent and effect of the parties' agreement. It does not stand for the proposition [that] a court can completely rewrite a contract in terms contrary to the intent of the parties. If the terms the parties agreed on truly are legally impossible, then the contract is rescinded due to mutual mistake. On the other hand, if the terms are legally possible the contract is interpreted and defined by what the parties intended. In judging whether this agreement had any prejudicial effect, it must be judged, if at all, according to its actual terms, not some version rewritten by the court or the

State.

The trial court declined to make a final determination on the validity of the agreement, finding that doing so was not necessary to resolve the motion to vacate. We agree with the trial court's analysis. If, as the State suggests, Maquire's holding invalidates the agreement and we treat it as unenforceable, the State is left in precisely the same position it is in now. FN2 If the agreement was a nullity from the outset, the State would have received exactly the same trial as it did in this case—the jury would have remained oblivious to any agreement, and would have been entitled to assign liability just as it did: 95 percent to the State and 5 percent to Linvog. Conversely, if the agreement is valid, then the relevant consideration is the parties' understanding of the agreement and its terms. As the trial court stated:

FN2. The trial court briefly contemplated other reasons why the agreement might be invalid: "It may be against public policy, violate RCW 4.22.060, [or] be legally impossible and based on mutual mistake. I make no final determination on the validity of the agreement as counsel have not addressed all of these issues and because it is not necessary for me to do so on this motion to vacate."

[F]or this motion what is important is not whether the agreement ultimately is found by a court to be valid and on what terms. What is relevant is whether the parties to the agreement believed it was valid at the time of trial and what terms they acted on believing them valid. I find that the parties to the agreement believed at the time of trial that the agreement was valid according to the terms they agreed on. That is why Plaintiff's attorney accepted the \$20,000 and Linvogs' attorney did not ask to have the money returned.

The evidence from Brindley and Spencer also indicated their mutual understanding from inception that the agreement would not excuse the Linvogs from joint and several liability or preclude the State from seeking contribution from Linvog's parents. The trial court rightly concluded that Linvog's parents "were still also liable through having to reimburse the State for any and all portions of their percentage on a joint and several judgment above \$100,000. They were still potentially on the hook all

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the way.” We reject the State’s assertion that the agreement somehow operated as a release and hold that it did not sever Linvog’s parents’ joint and several liability.

The State’s first argument for why it was prejudiced is factually based on three representations to the jury that Linvog’s parents would be responsible for any judgment against their daughter, when in fact they enjoyed the protection of a release. The State points first to the opening statements by Brindley and Spencer, where both attorneys stated that Linvog’s parents would be “on the hook” or responsible for any judgment against Linvog. The State also points to jury instruction 18, the family car doctrine instruction given by the trial court as improperly suggestive of Linvog’s parents’ liability. The State argues that “[t]hese statements and the court’s instruction deliberately created a false impression in the minds of the jury that the Linvog parents were responsible to pay the entire amount of any judgment awarded against their daughter.” The State’s suggestion is that the jury was affected by a false sense of sympathy, bias, or personal preference in favor of Linvog’s parents, which ultimately led it to return a disproportionate verdict against the State.^{FN3}

^{FN3}. The State also argues that the trial court never technically entered findings of fact. Indeed, the formal order denying the State’s motion to vacate did not contain any findings of fact or conclusions of law. But, it expressly incorporated the memorandum decision filed on May 3, 2010. And, the memorandum decision, in turn, stated: “I find the facts and make the conclusions of law set forth below.”

*6 This argument is undermined by the trial court’s conclusion below that Linvog’s parents were never released from joint and several liability. The opening statements by Brindley and Spencer were not a misrepresentation. Joint and several liability was retained and the State’s right to pursue contribution against Linvog’s parents was preserved. The same can be said of jury instruction 18. It was not an improper comment on the evidence, as the State alleges. An instruction that accurately states the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge under the Washington Constitution article 4, § 16. *Hamilton v.*

Dept. of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). An impermissible comment is one which conveys to the jury a judge’s personal attitudes towards the merits of the case. *Id.* Jury instruction 18 was an accurate statement of the law, which expressly adhered to the Washington pattern jury instruction and did not reflect any of the trial court judge’s personal attitudes. WPI § 72.05.

Moreover, the trial court considered the State’s argument that the jury may have been improperly sympathetic towards the Linvog parents, so as to avoid putting them into financial ruin. The trial court found that argument to be baseless and supported only by speculation: “No one made any statement or argument to the jury suggesting they do this. Such argument was forbidden by a motion in limine.” The record does not contradict this finding. The trial court also pointed out that the jury was given an instruction not to be swayed by sympathy, and there was no evidence to suggest that they ignored that instruction. Indeed, a jury is presumed to follow the court’s instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007). We hold that the State was not prejudiced by any undue juror sympathy.^{FN4}

^{FN4}. As the trial court noted, any risk of prejudice in this case did not result from any pretrial agreement, but was the same risk present in every trial with a deep pocket institutional defendant and individual defendants.

The State’s second argument suggests that Linvog tailored her testimony to “set up” the State and that it should have had the right to cross-examine her about Barton and Brindley having “rewarded her” with the agreement by limiting her parents’ liability to \$100,000. But, this argument also relies on its preliminary assertion that Linvog’s parents were actually released from joint and several liability, which was never the case. Based on the terms of the agreement which left the Linvogs “on the hook” for a contribution claim from the State, there was no factual basis to argue that Linvog’s testimony was biased. The trial court expressly considered the State’s argument, before concluding that Linvog’s testimony was not biased by the agreement, and that the agreement did not have any impact on her already established incentive to place blame on the State for the accident. The trial court noted that the parties’ alignment was plain before

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 (Cite as: 2011 WL 5175599 (Wash.App. Div. 1))

the agreement, based on the most plausible theory of the case for the Linvogs: "The agreement did not realign the parties in this case. Linvogs aligned with Plaintiff blaming the State because of the facts in the case. More importantly, ... the alignment was not secret so did not affect the fairness of the trial." Regardless of whether the State was aware of the agreement before trial, that agreement in no way biased Linvog's testimony at trial, nor did it change the Linvogs' incentive to blame the State for the accident. The trial court did not err in determining that the failure to supplement discovery did not prejudice the State or its ability to prepare for or try the case.

III. *Willful or Deliberate Failure to Disclose*

*7 The court rule governing the attorneys' duty to seasonably amend prior responses is CR 26(e)(2). And, the failure to seasonably supplement in accordance with this rule "will subject the party to such terms and conditions as the trial court may deem appropriate." CR 26(e)(4). These failures to supplement were unquestionably serious discovery violations. But, the trial court expressly concluded that Brindley and Spencer's discovery violations were not deliberate, but were inadvertent failures to supplement discovery answers, "due to oversight." Nothing in the record undercuts that conclusion.

IV. *Sanctions*

Based upon the findings that the failure to supplement was inadvertent and did not result in prejudice to the State, we find no abuse of discretion in the denial of the motion for new trial and for attorney fees and costs.

On appeal the State asserts that Brindley and Spencer should have been sanctioned and that it was an abuse of discretion not to do so. Brindley was sanctioned by the trial court. Its decision to deprive him of the use of the judgment funds and interest for almost a year while the trial court resolved the State's motion to vacate was a sanction. After the State had deposited its share of the judgment into the registry of the court in August 2009, it opposed Barton's October 2009 motion to allow distribution of the funds. The trial court ultimately denied Barton's motion for approximately \$146,000 in interest, holding that payment of interest should have been required, but stating that "sanctions are assessed against [Brindley's] law firm in the exact amount of said interest." (Capitalization omitted.) The trial court did not enter a sanction

against the Linvogs' counsel, Spencer. Based on the finding of inadvertence and based on the trial court's ultimate conclusion that the State was not prejudiced, we hold that the trial court did not abuse its discretion by administering sanctions as it did.

Since the State has not prevailed on appeal, we decline to award the State attorney fees and costs.

We affirm.

WE CONCUR: DWYER, C.J., and GROSSE, J.

Wash.App. Div. 1,2011.
 Barton v. State, Dept. of Transp.
 Not Reported in P.3d, 2011 WL 5175599 (Wash.App. Div. 1)

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JARED K. BARTON, a single man,)
)
 Respondent)
)
 v.)
)
 STATE OF WASHINGTON,)
 DEPARTMENT OF)
 TRANSPORTATION,)
)
 Appellant,)
)
 SKAGIT COUNTY, DEPARTMENT OF)
 PUBLIC WORKS,)
)
 Defendant,)
)
 KORRINE LINVOG, individually;)
 and THOMAS LINVOG and MADONNA)
 LINVOG, husband and wife,)
)
 Respondents.)

No. 65673-2-1

ORDER DENYING MOTION
FOR RECONSIDERATION

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC -5 AM 9:06

The State of Washington Department of Transportation, having filed its motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 5th day of December, 2011.


Judge

NO. 65673-2

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

JARED K. BARTON, a single man,

Plaintiff-Respondent,

v.

STATE OF WASHINGTON, Department of Transportation,

Defendant-Appellant.

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

Co-Defendants-Respondents.

MOTION FOR RECONSIDERATION

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I. IDENTITY OF MOVING PARTY

The State of Washington Department of Transportation asks for the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT

The State requests this court to reconsider its unpublished decision dated October 24, 2011, and reverse the order of the Snohomish County Superior Court denying the State's Motion to Vacate and for Sanctions.

III. FACTS RELEVANT TO MOTION

In March 2007 Jared Barton agreed that in exchange for payment of \$20,000 that he would not execute on any judgment he obtained against defendants Thomas and Madonna Linvog in excess of \$100,000. CP at 924-26. RCW 4.22.060(1) requires that parties entering into releases, covenants not to execute, or other similar agreements provide all parties and the court with five days advance notice before entering into such agreements. The trial court found that Ralph Brindley, counsel for plaintiff Barton, and William Spencer, counsel for the Linvogs were both aware of the statutory requirement and failed to comply with it. CP at 9.

Although Mr. Brindley and Mr. Spencer were each aware of the undisclosed agreement that limited the Linvog parents' liability to Mr. Barton at \$100,000, they each told the jury in their opening statements that the Linvog parents were "on the hook" and "responsible for" all

damages awarded against their daughter Korrine. CP at 785 (Brindley); CP at 791, 801-02 (Spencer). At Mr. Brindley's request the trial court also gave the jury Instruction 18 which told the jury that Thomas and Madonna Linvog were "responsible for the acts of" their daughter Korrine Linvog, because they had provided a motor vehicle for her use. CP at 1235.

The jury returned a verdict of \$3.6 million and apportioned five percent of the fault for the accident to the Linvogs (\$180,000) and 95 percent of the fault to the State (\$3.42 million). CP at 224-26.

The State didn't learn about the existence of the secret covenant not to execute and \$20,000 advance payment until two and a half years later, on September 9, 2009. CP at 844. When neither Mr. Brindley nor Mr. Spencer offered any explanation as to why they had not disclosed the existence of the agreement and the payment (CP at 1283-85), as required by law and the State's outstanding discovery requests, the State filed a Motion to Vacate the Judgment and for Sanctions. CP at 635-87, 909-1297, 1304-23. Among other things, the State argued that the covenant not to execute negated contribution rights between the State and the Linvog parents based on RCW 4.22.060(2) which specifically provides:

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any

other persons liable upon the same claim unless it so provides.

(Emphasis added.)

The trial court concluded that the covenant not to execute did not eliminate joint liability and contribution rights between the State and the Linvog parents because Mr. Brindley and Mr. Spencer did not intend that their agreement operate as a settlement. CP at 278-80. Accordingly, the trial court denied the State's Motion to Vacate and for Sanctions.¹ CP at 40-42. This court affirmed the trial court's conclusion that the covenant not to execute limiting the Linvog parents' liability to \$100,000 did not negate their joint liability to pay the entire \$3.6 million verdict. See Appendix (App.) 1, *Barton v. State, Dep't of Trans.*, Cause No. 65673-2-I, slip op. (Wash. Oct. 24, 2011) (unpublished)

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. This Court's Decision Is In Direct Conflict With The Tort Reform Act Of 1986 And Controlling Precedent

This court's decision seriously undermines the purpose and effect of the Tort Reform Act of 1986 by allowing parties in a lawsuit to impose joint liability on a deep pocket defendant for the percentage of fault apportioned to a party who does not actually have joint liability.

¹ Although the trial court did sanction Mr. Brindley and his client \$146,000 through the denial of post judgment interest, as the State argued in this appeal, and in this motion *infra* p. 13 n.7, that was not a real sanction, because the State had no obligation to pay interest after the judgment was satisfied.

In order to be liable for contribution a party has to have joint liability. RCW 4.22.070(1)(b); *Washburn v. Beatty Equip. Co.*, 120 Wn.2d 246, 294-96, 840 P.2d 860 (1993). Joint liability requires that each party be obligated to pay the **entire** judgment. *Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, *review denied*, 152 Wn.2d 1026, 101 P.3d 421 (2004). Joint liability allows a plaintiff to proceed against one or all joint tortfeasors to obtain full recovery of the **entire verdict** amount. *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983).

A party who is not responsible to pay the entire judgment does not have joint liability. *Id.* For this reason, RCW 4.22.060(2) provides that a covenant not to execute or similar agreement discharges all contribution liability. A covenant not to execute limits liability. The one in this case limited the Linvog parents' liability exposure to \$100,000.² The plaintiff could not collect the entire \$3.6 million verdict from them. Because of the

² The court relies heavily on the fact that the State obtained contribution from the Linvogs. This "no harm/no foul" analysis ignores the plain language of RCW 4.22.060(2). Because of the secret agreement between Barton and the Linvogs, the State had no legal right to contribution. The fact that it was awarded by the trial court does not alter the statutory violation that should be central to this case. *See infra* pp. 15-19. The effect of the secret agreement entered into between the plaintiff and Linvogs, and now endorsed by this court, brought about a pre-1986 Tort Reform Act result, which was in violation of the law and frustrates the Legislature's intent behind the Act. Put simply, if this court's decision is allowed to exist, it will stand for the proposition that parties can unilaterally undermine the purpose and effect of the Tort Reform Act of 1986—and do so in secret to the prejudice of a third party. That result would be untenable.

undisclosed agreement, judgment should not have been entered against the Linvog parents to pay the plaintiff \$3.6 million when their actual liability was limited by the secret covenant to \$100,000. Allowing parties or their lawyers to draft an agreement and pretend that a covenant not to execute doesn't negate joint liability and contribution rights—when RCW 4.22.060 specifically mandates that it does—is a clear error that undermines the Tort Reform Act of 1986. As this court held in *Maguire v. Teuber* this is a matter of statutory interpretation – an issue of law.

In *Maguire* this court held that a covenant not to execute above \$100,000 was a release (for purposes of RCW 4.22.060(2)) that negated joint liability under RCW 4.22.070. The covenant in that case attempted to keep *Teuber* and *Hadsel* in the lawsuit by referring to the possibility that judgment would be entered against them and expressly stated that it was not to be construed as benefiting the State in any way. In *Maguire* this Court explicitly rejected this blatant attempt to circumvent the Tort Reform Act of 1986 noting that in enacting the Tort Reform Act the Legislature sought in part to “create a more equitable distribution of the cost and risk of injury.” It also noted that “government entities are faced with increased exposure to lawsuits and awards” and that comprehensive Tort Reform was necessary “[i]n order to improve the availability and affordability of quality government services” 120 Wn. App. at 397 n.15.

While the agreement at issue in this case is not a settlement, it does negate joint liability by capping the Linvogs' liability at \$100,000. The types of agreements specified in RCW 4.22.060(2)—agreements that limit the liability of a party in a lawsuit—have the operative effect of negating joint liability for purposes of RCW 4.22.070. In other words, a party who has entered into a covenant not to execute with the plaintiff is not a party against whom judgment can be entered for purposes of joint liability under RCW 4.22.070(1)(b). See *Kottler v. State*, 136 Wn.2d 437, 447, 963 P.2d 834 (1998); and see *Maguire*, 120 Wn. App. at 395. If a plaintiff has released a defendant (by a covenant not to execute), that defendant is not jointly and severally liable with his co-defendants and he has no liability for contribution. *Id.*

In *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004), *review denied*, 154 Wn.2d 110 (2004), the court of appeals held that the practical effect of a covenant not to execute was to release the mother from any further liability. The court specifically held that the school district was not jointly liable for the percentage of fault apportioned to the mother. The portion of the agreement that tried to keep the mother in the suit as a defendant and have judgment entered against her was declared to be invalid.

This is a matter of simple mathematics, \$100,000 ≠ \$3.6 million. Defendants who have an agreement limiting their liability to a plaintiff at \$100,000 are not liable to pay the plaintiff a \$3.6 million verdict. If they are not liable to pay the entire verdict then they don't have joint liability. If they don't have joint liability, there is no right of contribution. See RCW 4.22.060(2) and .070(1). *Maguire*, 120 Wn. App. at 395-98; *Romero*, 123 Wn. App. at 391-92; *Kottler*, 136 Wn.2d at 447.

This court's conclusion that a covenant not to execute does not eliminate joint liability, if the parties say they didn't *intend* it to, substantially undermines the Tort Reform Act of 1986. Under this court's ruling, in large liability cases with deep pocket defendants a fault free plaintiff won't settle with the shallow pocket defendants. Instead, a plaintiff can now simply take most of the available insurance in exchange for a covenant not to execute above policy limits, yet retain joint liability. They can have their cake and eat it too. The deep pocket defendants will have joint liability to pay the entire verdict, even though the shallow pocket defendants won't even be liable to pay their own apportioned share of liability, above the amount plaintiff covenanted not to collect. In other words, deep pocket defendants will be required to pay the shallow pocket defendant's share of liability even though a covenant not to execute

precluded plaintiff from ever collecting the judgment against the shallow-pocket defendants.

This type of subversion of justice is exactly what the Tort Reform Act of 1986 was designed to prevent.³ Every case that has looked at a covenant not to execute, prior to this court's decision, has correctly held that it operates as a release under RCW 4.22.060 to negate joint liability under RCW 4.22.070. *See Maguire*, 120 Wn. App. at 395; *Romero*, 123 Wn. App. at 392; *Bunting v. State of Washington*, 87 Wn. App. 647, 943 P.2d 347 (1997); *see also Estate of Bordon, ex rel. Anderson v. State, Dep't of Corrections*, 122 Wn. App. 227, 234, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003, 114 P.3d 1198 (2005) (stipulation for partial payment of damages and covenant not to execute eliminated joint liability of co-defendants with the State).

For purposes of RCW 4.22.060(2) a "release" is any legal agreement that has the effect of releasing the defendant and the statute specifically lists a covenant not to execute as one of the legal agreements that constitute a release. Pursuant to RCW 4.22.070(1), judgment is not entered against defendants "... who have been **released** by the claimant or are immune from liability to the claimant". Joint liability only exists between parties against whom judgment is entered under

³ *Maguire*, 120 Wn. App. at 397 n.15, quoting the legislative intent section of the Tort Reform Act of 1986. Laws of 1986, Ch. 305, § 100.

RCW 4.22.070(1). *Kottler*, 136 Wn.2d at 446-47. Parties who have been “released” under RCW 4.22.060 are not parties against whom judgment is entered and thus will not be jointly and severally liable with other tortfeasors even when the tort victim is fault free. *Id.*

RCW 4.22.070 limits joint liability to defendants who are actually obligated to pay the plaintiff the entire amount of the verdict. For purposes of joint liability under RCW 4.22.070(1) parties are released by any agreement that limits their liability to pay the plaintiff the entire judgment amount. This court’s decision creates the exception that swallows that rule. There can be no doubt that if this type of an agreement is held not to negate joint liability it will quickly become the norm. The mandate of RCW 4.22.060(2) should be enforced and covenants not to execute or similar agreements should be treated as releases that negate joint liability and contribution rights under the Tort Reform Act of 1986. *See Kottler v. State; Washburn v. Beatty Equip. Co.; Maguire v. Teuber; Romero v. West Valley Sch. Dist.*⁴

⁴ As one of the leading commentators on the Tort Reform Act has noted, this interpretation is consistent with the intent of the legislature “. . . that when one of the listed types of settlements [in RCW 4.22.060] is entered into before judgment, that settlement would prevent judgment against the settling party, and thereby exclude the 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 settling defendants in the lawsuit.” *See J. Michael Phillips, Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255, 274 (1994).

This court should reconsider its decision, hold that a covenant not to execute negates joint liability and contribution rights, and analyze the prejudice to the State from the non-disclosure of the agreement in the light of the operative effect that it actually had; i.e., that it discharged the Linvog parents from any liability from contribution under RCW 4.22.060(2) and took the parents off the hook for any liability to the plaintiff above \$100,000.

B. The Knowing Concealment Of A Covenant Not To Execute In Violation Of RCW 4.22.060(2) Warrants A Significant Sanction

This court found that the trial court did not abuse its discretion in denying the State's Motion to Vacate and for Sanctions based upon the trial court's finding that the failure to supplement interrogatory responses by Mr. Brindley and Mr. Spencer was inadvertent. *See App. 1, Barton*, slip op. at 13. However, in analyzing the sanctions issue this court overlooked the trial court's finding that Mr. Brindley and Mr. Spencer intentionally violated RCW 4.22.060(1) which provides:

A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days written notice of such intent to all other parties and the court.

(Emphasis added).

The trial court specifically concluded that both Spencer and Brindley “. . . were aware of the statutory requirement and failed to comply with it”. CP at 9.⁵ While the State’s Motion to Vacate and for Sanctions was based in part on the failure to disclose the covenant not to execute and advance payment in response to specific interrogatory requests, the State’s Motion was **also** based on the intentional violation of RCW 4.22.060(1). Disclosure of releases, covenants not to execute, and similar agreements is critical to the effective implementation of the Tort Reform Act of 1986 because it prevents parties who have been released from keeping that fact secret and remaining in a lawsuit in order to improperly force joint liability on a deep pocket defendant by maintaining the illusion that the shallow pocket defendant is still jointly liable. That’s exactly what the parties tried to do in *Maguire*, *Romero*, *Bunting*, and *Estate of Bordon*. However the parties in these cases weren’t able to get away with it because they had properly disclosed the existence of the covenant not to execute, which the courts correctly held operated as a release, negating joint liability. In those cases, the plaintiff tried to avoid the loss of joint liability by artfully crafting an agreement that tried to keep

⁵ The court’s opinion states that nothing in the record undercuts the conclusion that the non-disclosure was inadvertent. See App. 1, *Barton*, slip op. at 13. However, this finding of fact is a verity for purpose of this appeal and is supported by the statement that both Mr. Brindley and Mr. Spencer were well versed with the requirements of RCW 4.22.060(1). CP at 563.

the non-governmental co-defendants in the case for the purpose of achieving joint liability against the State. *Id.* Here, they simply hid the agreement in violation of statute and court rules.

In *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 104, 841 P.2d 1300 (1992), *aff'd*, 125 Wn.2d 1, 882 P.2d 157 (1994), the court noted that the existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact. The court noted that when appellate courts have permitted such agreements, they have required pre-trial disclosure to the trial court. The trial court can then advise the jury of the agreement so jurors can consider the true relationship between the parties in evaluating the credibility of witnesses.⁶ *McCluskey*, 68 Wn. App. at 104, citing *Daniel v. Penrod Drilling Co.*, 393 F. Supp. 1056 (E.D. La. 1975); *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973); *Maule Indus. v. Rountree*, 284 So.2d 389 (Fla. 1973); *Ratterree v. Bartlett*, 238 Kan. 11, 707 P.2d 1063 (1985).

No court should condone this type of serious statutory violation. Yet, the failure to impose any type of meaningful sanction does just that.

⁶ Since the agreement limiting the Linvog parents' liability was hidden from the State and the court in violation of statutory and discovery obligations, the jury never knew of the huge financial reward the plaintiff had given Korrine Linvog through a covenant not to execute that reduced her parents' liability from \$3.6 million to \$100,000. In addition, the jury was affirmatively misled by counsel and the court into believing that the Linvog parents would be "on the hook" and responsible to pay whatever percentage of fault apportioned to Korrine in the verdict, when that was untrue. CP at 785, 791, 801-02, and 1235. These are not trifling errors, as this court's opinion makes them out to be.

The State respectfully requests this court to vacate the judgment, or as an alternative, require counsel to pay the State all funds they received in profit, plus reasonable attorneys' fees. At a minimum, some type of significant sanction should be imposed.⁷

C. The State's Argument Is That The Covenant Not To Execute Negated Joint And Contribution Liability, Not That It Was Invalid Or Unenforceable

On page 9 of this court's decision this court states:

If, as the State suggests, *Maguire's* holding invalidates the agreement and we treat it as unenforceable, the State is left precisely in the same position it is in now.

See App. 1. To be clear, the State has **never** argued that the covenant not to execute was invalid. Rather, the State has consistently asserted that the covenant not to execute is valid and must be accorded the operative legal effect it has under RCW 4.22.060(2)—that it operates as a release negating joint and contribution liability. In both *Maguire* and *Romero* the agreements contained covenants not to execute that also included specific attempts to keep the released defendants in the case and on the verdict form in order to impose joint liability on the deep pocket

⁷ Although the trial court did deny Mr. Brindley's motion for \$146,000 in post judgment interest because he kept the judgment proceeds in his law firms trust account during the pendency of the State's Motion to Vacate, that was no sanction at all because the State had no obligation to pay post judgment interest once it had paid the judgment into the registry of the court and Mr. Barton had withdrawn those funds. Pursuant to RCW 4.92.160(2), the judgment was satisfied. CP at 67-182. See Brief of Appellant (Br. Appellant) at 45 n.27, State's Reply to Brief of Respondent Barton at 23-24.

defendant to pay the entire judgment. In neither case did the court invalidate the agreement. Instead, the court held that the covenant not to execute operated as a release negating joint and contribution liability. In both cases the court refused to allow the released defendants to have judgment entered against them, under RCW 4.22.070(1), for purposes of creating joint and contribution liability. That is exactly what the State is arguing this court should do here, treat covenant not to execute as an agreement that limited the Linvog parents' liability at \$100,000.

Even if the agreement at issue in this case did not constitute a settlement of all claims between Mr. Barton and Linvog parents, it did operate as a release under the unambiguous mandate of RCW 4.22.060(2) so as to negate joint liability under RCW 4.22.070(1).

The covenant not to execute is not invalid. Nor, as the court held in *Bunting v. State*, is it subject to rescission. It is what it is, an agreement releasing the Linvog parents from all liability above \$100,000. That is the operative legal effect that the Legislature mandated that a covenant not to execute have under RCW 4.22.060(2) and that is the operative legal effect this court should afford it.

Because the covenant not to execute released the Linvog parents from joint and contribution liability they were not obligated to pay the plaintiff more than \$100,000. The opening statements of Mr. Brindley and

Mr. Spencer, and Jury Instruction 18, which told the jury that the Linvog parents were responsible to pay all damages awarded against their daughter where untrue, misleading, and prejudicial. The order denying the State Motion to Vacate and for Sanctions should be reversed.

D. The Real Issue In This Appeal Is The Operative Legal Effect Of The Undisclosed Covenant Not To Execute And Not The Fact That The State Entered A Contribution Judgment Against The Linvog Parents, Which Is Irrelevant

Footnote one should be deleted from this courts decision because the fact that the State entered a contribution judgment against the Linvog parents has nothing to do with the real issue in this appeal. In response to the State's contention that the covenant not to execute constituted a release that negated joint liability, this court set forth the following footnote:

This assertion is contradicted by the fact that the State successfully sought and obtained such contribution, in the amount of \$92,632.30, plus interest. Both the Linvog and respondent's brief argue that the State should be estopped from arguing that it was not entitled to a contribution judgment when it as already accepted the benefit of exactly such a judgment.

Barton, slip op. at 8, n.1, *see* App. 1.

This footnote should be removed from the court's decision because it gives credence to a hollow argument on an irrelevant issue. Once the State learned of the secret covenant not to execute, the State has never waived in its position that the covenant discharged the Linvog parents

from all contribution liability pursuant to the express and unequivocal mandate of RCW 4.22.060(2). The State only entered the contribution judgment after the trial court ordered it to pay the unpaid portion of the Linvogs' share of liability.⁸ Entry of the contribution judgment was necessary to preserve the status quo because of the one year statute of limitations that expired before this case ever went to oral argument. *See* RCW 4.22.050(3).⁹

The fact that the respondents made an estoppel argument is irrelevant because, as the State's reply brief clearly points out, none of the elements of judicial estoppel were met. *See* Reply to Brief of Respondents Linvog at 20-22.

Moreover, getting a \$92,632.30 contribution judgment doesn't change the fact that the judgment against the Linvog parents for \$3.6 million dollars was a sham because they only owed \$100,000. Pretending contribution rights actually existed because the court entered a judgment for \$3.6 million dollars doesn't change the fact that the covenant not to execute discharged the Linvog parents from all contribution liability pursuant to RCW 4.22.060 as a matter of law.¹⁰

⁸ The State actually opposed being ordered to pay the proportionate share of the Linvog parents' liability. CP at 80-85. VRP (6/4/10) at 25-28, 37.

⁹ *See* State's Reply to Brief of Respondents Linvog at 7-8.

¹⁰ Just to be clear, the Linvog parents have not paid the contribution judgment. Like the State, they are probably waiting the final appellate resolution of whether they

The covenant not to execute took the Linvog parents “off the hook” for any liability above \$100,000. The trial court was able to enter the \$3.6 million judgment against the Linvog parents because the covenant not to execute had been hidden. The State didn’t know to object. But Mr. Brindley and Mr. Spencer knew the Linvog parents would never have to pay \$3.6 million. They knew there was an agreement limiting the parents’ liability to \$100,000. Yet, in their opening statements and more importantly Jury Instruction 18, they told the jury that the Linvog parents were liable to pay all damages awarded against their daughter Korrine, when their liability was limited to \$100,000.00. These were lies. *See In re Doyle*, 93 Wn. App. 120, 966 P.2d 1279, *review denied*, 139 Wn.2d 122 (1998) (released defendants are not jointly and severally liable since judgment against them is improper).

The real issue in this appeal is whether the Linvog parents had joint liability with the state to pay a \$3.6 million dollar judgment. They didn’t. Their liability was limited to \$100,000. Without joint liability there was no contribution liability. *Washburn*, 120 Wn.2d at 294-96. Without contribution liability they weren’t “on the hook” to pay any more than \$100,000. *Kottler*, 136 Wn.2d at 447. The \$3.6 million dollar

had joint/contribution liability and owe the money, or whether the covenant not to execute limited their liability to \$100,000. Paradoxically, instead of arguing based on RCW 4.22.060(2) that they don’t owe the \$92,632.30, the lawyer for the Linvog parents is conceding that they do.

judgment against the Linvog parents was the result of a deception facilitated through the non-disclosure of the advance payment and covenant not to execute.¹¹

Because of the covenant not to execute, the Linvog parents only owed Mr. Barton \$100,000, not \$3.6 million. But instead of reducing the \$3.6 million judgment against the Linvog parents to what they actually owed, the trial court compounded its error by enforcing the fraudulent judgment and requiring the State to pay \$92,632.30 that the Linvog parents didn't owe.¹² Again, this was based on the trial court's mistaken conclusion that the State and the Linvog parents had joint and contribution liability when that liability simply did not exist under RCW 4.22.060 and .070.

The absence of joint and contribution liability in this case is the issue that should be decided on reconsideration. The fact that the State entered a contribution judgment after it was improperly forced to pay a legal obligation on behalf of the Linvog parents that they did not owe is

¹¹ This court's discussion of whether the covenant not to execute realigned the parties also misses the mark. The crux of the State's argument was that: The State Was Prejudiced By The Fact That The Covenant Not To Execute Was Kept Secret, Not By Some Realignment Of The Parties Through The Execution Of The Covenant Itself. See State of Washington's Reply to Brief of Respondents Linvog at 8-11.

¹² The Linvog parents had paid Mr. Barton the entire \$100,000 long before the existence of the secret agreement was discovered. CP at 1240-42.

immaterial to that analysis, and should not be the focus of this court's inquiry.

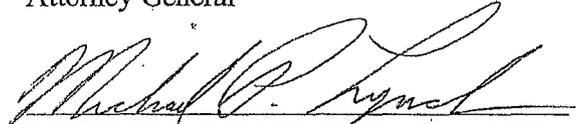
V. CONCLUSION

A covenant not to execute eliminates responsibility to pay the entire amount of the judgment entered by the court. A party who is not obligated to pay the entire judgment does not have joint liability. The absence of joint liability negates contribution liability. These are undisputed points of law based on statute and controlling precedent. This court's conclusion that the Linvog parents had joint liability and were obligated to pay the entire \$3.6 million judgment when they had a covenant not to execute with the plaintiff that limited their liability to \$100,000 is clearly erroneous. It guts the Tort Reform Act of 1986 and should be reconsidered.

The express and unequivocal mandate of RCW 4.22.060(2) that a covenant not to execute operates the same as a release for purposes of the entry of judgment under RCW 4.22.070(1) should be enforced. The intentional violation of the disclosure requirement for covenants not to execute under RCW 4.22.060(1) should be punished, or it will proliferate. The order denying the State's Motion to Vacate and For Sanctions should be reversed.

RESPECTFULLY SUBMITTED this 9th day of November, 2011.

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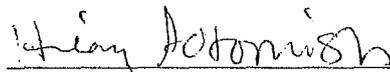
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Comment

***255 LOOKING OUT FOR MARY CARTER: COLLUSIVE SETTLEMENT AGREEMENTS IN WASHINGTON TORT LITIGATION**J. Michael Phillips

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

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

Alice was thus able to buy an ally at trial, as both she and Bill would benefit from a large judgment against the city. Bill viewed the agreement as an opportunity to escape as much blame and consequent liability as possible, and enthusiastically developed a story to the effect that it was faulty highway design that caused him to lose control of his car. The result was that the two exploited the trial process, improperly influenced the jury, and secured an enhanced finding of fault against the "deep-pocket" city. And the device making it all possible was the Mary *256 Carter agreement, [FN1] a controversial pseudo-settlement tool that in many cases has become a powerful plaintiff's weapon. [FN2]

Debate has raged for years over the validity of such agreements. The potential variations on the basic agreement are infinite, [FN3] and jurisdictions have adopted individual approaches in response to various forms. The important features, however, embodied in most Mary Carters are: 1) that the settling defendant retains a financial stake in the plaintiff's recovery, and 2) that the settling defendant remains a nominal defendant at trial. [FN4]

Because of their tendency to alter traditional aspects of the trial process, Mary Carter agreements have received mixed reviews from courts and commentators. Much of the debate focuses on whether adopting procedures to prevent them from remaining secret is sufficient to ensure trial fairness. The majority of courts argue that while these agreements might threaten trial fairness, they are tolerable if completely disclosed to the court and non-agreeing parties. [FN5]

Although Washington courts have yet to definitively establish a position, the recent case of *McCluskey v. Handorff-Sherman* [FN6] suggests that they lean toward the majority view. If Washington courts fully adopt this position in the future, the implications will be critical, particularly for deep-pocket defendants who often become targets of *257 personal injury litigation. [FN7] Because Mary Carter agreements can influence determinations of proportionate fault, [FN8] their use in Washington courts--which determine liability on a "pure" comparative basis [FN9]--could inflate the liability of non-agreeing defendants. As a result, Mary Carters conflict with Tort Reform laws enacted in Washington that were designed at least in part to protect deep-pocket defendants from bearing more than their fair share of liability.

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

I. OVERVIEW OF MARY CARTER AGREEMENTS

A. *Details of a Mary Carter Agreement*

The key elements of a Mary Carter agreement are a limitation of the settling defendant's liability, a requirement that that defendant remain in the trial, and a guarantee of a certain sum of money to the plaintiff. [FN10] A typical Mary Carter agreement might contain several additional provisions. For example, the plaintiff might be prohibited from settling with non-agreeing defendants for an amount less than the guaranteed amount without the agreeing defendant's consent. [FN11] The agreement *258 might even explicitly urge a verdict exceeding the guaranteed amount. [FN12] Further, it might require that the parties conceal the agreement not only from the jury, but also from the court and other parties. [FN13] This secrecy has been a focus of controversy, with most, if not all, courts requiring disclosure of the agreement. [FN14]

Specific provisions regarding the guaranteed payment might also vary. For example, rather than guarantee a payment, the defendant might loan the funds to the plaintiff under a variation known as a "loan receipt" agreement. [FN15] While the terminology differs, the essential premise is the same: the settling defendant guarantees recovery to the plaintiff of a specified amount. Whether funds actually change hands prior to trial and judgment or whether the transfer is purely on paper makes little difference. [FN16]

Such an arrangement has significant effects on the parties' conduct at trial. In its recent decision to ban Mary Carters, the Texas Supreme Court remarked that these agreements create a substantial interest for the defendant in a sizable plaintiff's recovery, and therefore encourage that defendant to assist the plaintiff at trial in any manner possible. [FN17] Settling defendants are thus pressured to cooperate with the plaintiff in discovery, peremptory challenges, trial tactics, witness examination, and influencing the jury. [FN18]

B. *Judicial Treatment of Mary Carters: Generally*

While debate continues over whether trial processes will be unfairly distorted, most authorities accept that Mary

Carters skew the parties' interests. A key problem acknowledged by courts and commentators on both sides of the issue is how to overcome secrecy. [FN19] Even those courts *259 that tolerate Mary Carters recognize the potential for trial misconduct when the agreeing parties assist each other to the complete bewilderment of the court, other defendants, and the jury. This problem may or may not be controllable through various disclosure and instructional devices, and the sufficiency of such measures is a major issue dividing those courts that tolerate Mary Carters from those that prohibit them.

1. The Majority View

The vast majority of states allow Mary Carter agreements if trial courts implement procedural safeguards to overcome secrecy. [FN20] As long as a Mary Carter is disclosed to the court and opposing parties prior to trial, these courts are satisfied that the nonsettling parties will not be surprised or unfairly disadvantaged. Additionally, when the court is aware of the agreement, it may consult the parties on how best to instruct the jury concerning the arrangement and the true interests of the parties. Once instructed, the jury is said to be able to properly judge the credibility of witnesses. [FN21]

Some courts have developed specific procedures to eliminate bias that may result from collusive or abnormal conduct of the agreeing defendants. In *Elbaor v. Smith*, [FN22] for example, the trial court gave the non-agreeing defendant the same number of peremptory challenges as the plaintiff and settling defendants combined, denied the settling parties the customary right of an opponent to lead opposing witnesses, and changed the order of presentation to guarantee that the non-agreeing defendant always had the final opportunity to present evidence and examine witnesses. By balancing procedural advantages, these courts hope to overcome the shifting alliances created by a Mary Carter agreement that might unfairly skew the trial process. [FN23]

**260 2. Minority Position*

A clear minority of jurisdictions have elected to ban Mary Carter agreements or to render them entirely ineffective. [FN24] In a major recent case, the Texas Supreme Court determined that these arrangements skew the trial process, mislead the jury, promote unethical collusion between nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full amount of any judgment. [FN25] The court concluded that the agreements and their effects are therefore inimical to the adversary system. [FN26] The court further noted that such agreements do not promote settlement, but rather provide only partial settlement, ensuring that the plaintiff will go to trial against the remaining defendant to obtain high damages. [FN27]

Based on these concerns, the Texas court denounced Mary Carters as completely incompatible with a system of fair trials, despite measures designed to mitigate harmful effects. [FN28] The court found such remedial measures insufficient to overcome the harm caused by collusion between the settling parties when the defendant retained a substantial financial interest in the plaintiff's recovery. [FN29] The court reasoned that its policy of *261 favoring fair trials far outweighed any policy favoring partial settlements. [FN30]

Texas is not alone in its rejection of Mary Carters. In a much earlier decision, the Nevada Supreme Court, in *Lum v. Stinnett*, [FN31] declared Mary Carter agreements void as against public policy. The court determined that remedial measures such as disclosure to the jury are not only inadequate, but might present additional problems such as unwarranted jury bias. [FN32] While it confessed to being unsure of the effects such an agreement might actually have on the jury, the court argued that defendants have the right to litigate without the risk that a Mary Carter might affect a jury's verdict. [FN33]

As an alternative to outright banning, Oklahoma adopted a somewhat novel approach to Mary Carter agreements. In *Cox v. Kelsey-Hayes Co.*, [FN34] the Oklahoma Supreme Court recognized that Mary Carters deprive a trial of its adversarial nature, and that the more culpable defendant usually avoids liability through

them. [FN35] The court therefore required trial courts to adopt one of two alternative approaches: either dismiss the agreeing defendant prior to trial or prohibit the portion of the agreement granting the defendant an interest in a large plaintiff's recovery. [FN36] The court reasoned that if the settling defendant is dismissed and subsequently appears as a witness, cross-examination regarding the defendant's interests and credibility will sufficiently protect the non-settling defendant's interests. [FN37] Alternatively, allowing the settling defendant to remain in the suit but voiding the reimbursement provision *262 will preserve the adversarial nature of the proceedings and make the agreement irrelevant. [FN38]

Although the *Cox* court required the defendant's dismissal, it did not elect to view Mary Carters in general as settlements. In fact, the court commented that Mary Carter-type agreements cannot be classified as settlements because the controversy is only contingently settled. [FN39] The agreeing defendant remains a party, and the jury still determines the extent of his or her liability. [FN40]

In contrast to Oklahoma's conclusion that Mary Carters are not settlements, the Maryland Supreme Court, in *General Motors Corp. v. Lahocki*, [FN41] did view a Mary Carter-type arrangement as a settlement. Citing nineteenth century precedent, the court stressed that the very essence of compromise involves the waiver of preexisting claims in favor of a right or claim fixed by a new agreement. [FN42] The court reasoned that because the defendant limits the extent of its liability and guarantees a sum to the plaintiff through a Mary Carter, such arrangements are essentially settlements. [FN43] The court therefore determined that disclosure to the trial court was necessary. [FN44] It did not, however, consider the propriety of dismissing the defendant, apparently because the non-agreeing defendant in the case had not requested dismissal. [FN45] This treatment suggests that the court considered Mary Carters acceptable if disclosed, indicating compliance with the majority view.

C. Mary Carters Under Washington Law

1. Judicial Treatment of Mary Carters

Consideration of Mary Carter arrangements by Washington courts has been extremely limited. A few cases, while not specifically referring to "Mary Carters," have dealt with similar arrangements. Only two cases have actually used the term "Mary Carter," and only one of these was decided since 1986, when the legislature amended laws governing *263 determinations of fault. [FN46] Indications are that Washington courts lean toward allowing these arrangements if fully disclosed.

In *Monjay v. Evergreen School District*, [FN47] an appellate court confronted a Mary Carter-like arrangement that it called a "loan agreement." The contract guaranteed a recovery amount to the plaintiff, who agreed to reimburse the settling defendant in the event of judgment against the non-settling party. [FN48] The settling party did not, however, remain at trial as a defendant; instead, the plaintiff agreed not to sue that party. [FN49] Troubled primarily by the guarantee clause of the arrangement, the court declared only that portion void. It held that such a provision was repugnant to the principle of pro tanto reduction attendant to the covenant not to sue, [FN50] and was potentially coercive because it forced the non-settling defendant, whose responsibility for injury might be questionable or unclear, to either litigate or settle, thereby compelling contribution from that defendant. [FN51]

Ten years later, the same court overruled this holding in *Jensen v. Beaird*. [FN52] Attacking the reasoning in *Monjay*, the court joined the majority of states by lending its approval to Mary Carter-type settlements. [FN53] The court specifically rejected the lower court's reliance *264 on *Monjay*, [FN54] concluding that loan agreements violate neither the pro tanto reduction principle nor any other public policy. [FN55]

The *Jensen* court concluded that a loan agreement did not involve an actual payment in settlement of the plaintiff's claim. [FN56] While a loan might deprive the remaining tortfeasor of a reduction in any judgment against it, this would not violate pro tanto reduction principles. The court suggested that *Monjay* confused the pro tanto principle

with prohibitions against contribution. [FN57] In any event, it held that rules barring contribution were not violated, even though the settling defendant might therefore obtain indemnification to which it otherwise would not be entitled. The court reasoned that the principle objection behind the no-contribution doctrine--that the courts should not be used for the relief of wrongdoers--was absent in this case because the agreement was indirect, private, and "out of court." [FN58]

The *Jensen* court also noted certain salutary effects of a loan agreement, including that such agreements encourage private settlement, make funds immediately available to injured persons, and simplify complex multiparty litigation. [FN59] The court further dismissed the *Monjay* arguments that loan agreements were coercive, reasoning that disclosure and limiting instructions can alleviate any collusive or abnormal effects. [FN60] In rejecting any argument that such agreements undermine the adversarial nature of trial or produce coercive effects, the court rather summarily cited "the great weight of authority." It relied on the notion that the law does not require that codefendants be friendly. [FN61]

However, while *Jensen* thus dismissed *Monjay* and suggested that Mary Carters might be acceptable in Washington, it was decided prior to tort reform. While its analysis indicates how Washington courts may act, *265 the changes wrought by tort reform call its continuing validity into question.

In the one case discussing Mary Carters after tort reform, *McCluskey v. Handorff-Sherman*, the Washington Court of Appeals did not reach the issue of the validity of Mary Carters, due to a lack of evidence that such an agreement actually existed. [FN62] In dictum, however, the court cited cases from other states for the proposition that secret agreements might prejudice a trier of fact and that pretrial disclosure is therefore necessary. [FN63] Those cases suggest that through disclosure, the jury will be able to sufficiently consider the parties' relationships in evaluating evidence and the credibility of witnesses. [FN64] The implication is therefore that Washington courts might uphold disclosed Mary Carter agreements even under modern tort law.

On the other hand, Washington courts have given no indication as to whether Mary Carter agreements will be viewed as settlements. However, they have concluded that a similar device--a straight "covenant not to execute" [FN65]--will be. In *Shelby v. Keck*, the Washington Supreme Court held that such a covenant made dismissal of the agreeing defendant appropriate. [FN66] The arrangement set the upper limit of the defendant's liability. The court reasoned that once the plaintiff accepted the funds, the plaintiff was protected in the event that the jury held against that defendant for a lower amount. [FN67] The court held that the covenant was a settlement because it left no justiciable issue between the parties; dismissal was proper despite the plaintiff's objection that the agreement did not call for it. [FN68]

*266 2. Background on 1986 Tort Reform

Washington began moving away from traditional common law principles of fault determination in its 1973 legislation adopting a system of "pure" comparative negligence, with the purpose of facilitating recovery by injured persons and thereby serving the compensatory function of tort law. [FN69] The Washington Supreme Court later rejected pleas to abandon joint and several liability, holding that comparative negligence did not necessitate such an action, and that abandoning joint and several liability would only frustrate the goal of compensation. [FN70] Fairness among tortfeasors was deemed subordinate to the goal of fairness to the injured party. [FN71] In 1981, the legislature established contribution among joint or concurrent tortfeasors to mitigate any "unfairness" to defendants who may have been compelled to pay more than their proportionate share of damages. [FN72]

In 1986, the Washington Legislature modified the state's tort system and, in particular, substantively changed rules regulating joint and several liability. The legislature adopted a general rule of several liability based on proportionate fault, with joint and several liability restricted to a few specific situations. An example is when a plaintiff is free from fault. [FN73]

*267 The 1986 law requires a trier of fact to allocate liability comparatively among all entities causing damage, including the plaintiff, [FN74] based on each party's share of fault. The liability of each is to be several only, except when the plaintiff is free of fault; in that case, the defendants are jointly and severally liable for the sum of the shares of all parties against whom judgment is entered. [FN75] Thus, when a faultless plaintiff settles with one defendant prior to judgment, the amount of joint and several liability is reduced by whatever amount of fault the trier of fact later allocates to that settling defendant. [FN76] One effect of this provision is to require faultless plaintiffs to exercise extreme caution in entering into any pre-judgment settlement agreement. [FN77]

In cases in which a faultless plaintiff enters into a post-judgment settlement with one of the joint tortfeasors, the effects of that settlement are governed by section 4.22.060. [FN78] That provision specifically lists any release, covenant not to sue, covenant not to enforce judgment, or similar agreement as a settlement within its scope. [FN79] On the other hand, when liability is several only, settlement appears to have no effect on the liabilities of remaining tortfeasors. [FN80]

II. ANALYZING MARY CARTER AGREEMENTS IN WASHINGTON

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

*268 A. Application of a Mary Carter Agreement

The use of Mary Carter agreements in Washington will have a distinctly negative impact on deep-pocket defendants. This is demonstrated by the simple automobile collision suit discussed at the beginning of this Comment. [FN81]

Where the plaintiff (*A*) is faultless, its advantages from a Mary Carter agreement are clear. Washington law holds the defendants against whom judgment is entered jointly and severally liable for the sum of their proportionate shares of the claimant's total damages. [FN82] Because the settling defendant (*B*) is financially limited to its insurance coverage, any judgment against *B* will be limited for purposes of actual recovery. By making the city (*C*)--a typical "deep-pocket defendant"--a defendant, and by agreeing with *B* to encourage the jury to allocate fault to the city, *A* greatly increases chances for recovery of full damages, [FN83] with *C* jointly and severally liable for all damages.

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

Nor does the defendant's right of contribution [FN84] offer any consolation to a deep-pocket defendant on the short end of an agreement. The distortive effects of supposedly opposing parties' cooperative conduct on a jury's fault determinations are well-chronicled. [FN85] A jury might allocate *269 substantial fault to a city that is charged, for example, with negligence in failing to construct a median barrier. [FN86] The agreeing defendant's liability will thus likely be lower, which means that contribution to the extent of that liability will be substantially lower than in the absence of such an agreement. [FN87] Further, because the state bears the risk that other tortfeasors will be unable to pay damages, it lacks recourse when the agreeing defendant is insolvent. [FN88]

The potential for abuse of the trial process is substantial even when the plaintiff is partially at fault, and the defendants' liabilities are therefore several only. As discussed, the impact on the jury of cooperative conduct between the settling parties may increase a non-settling party's liability far beyond what it might have been absent the agreement. *A* and *B* will work to decrease *B*'s fault while attempting to increase both the total damages and the outside defendant's responsibility for them. [FN89] All defendants, deep-pocket or otherwise, are thus exposed to unjustifiably high fault determinations when the plaintiff and settling defendant coordinate their efforts against them. As *270 contribution is not allowed when liability is several only, [FN90] the agreeing parties need not concern themselves with the possibility of the outside defendant seeking reimbursement from *B*.

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

Because Mary Carter agreements have the potential to unduly influence the jury and thereby to thrust excessive liability onto a deep-pocket defendant, such agreements frustrate the purposes of the Washington Legislature's modification of joint and several liability under the 1986 Tort Reform Act. [FN91] The preamble to the 1986 modification states that the reforms were enacted to create a more equitable distribution of the cost and risk of injury and to increase the availability and affordability of insurance. [FN92] The aim is to reduce costs associated with the tort system while providing "adequate and appropriate" compensation to injured parties. [FN93] Because of their capacity to greatly inflate or even create the non-settling defendant's share of responsibility for injury, Mary Carter agreements defeat these purposes.

The possibility of inflated allocations of fault based on the cooperative and manipulative conduct of the agreeing parties, rather than on the true facts of the case, frustrates the legislative goal of an equitable allocation of the cost and risk of injury. Whether liability is joint or several, deep-pocket defendants face drastically increased liability. Allocations of fault in these cases are not "equitable," because they are the products of jury influencing and strategic gamesmanship rather than legitimate fact-finding. [FN94] Recovery from the deep-pocket defendant is therefore not an appropriate compensation, because it is not based on the true facts of the case and does not accurately reflect the actual responsibilities for injury.

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

The use of Mary Carter agreements is inconsistent with modern Washington tort law. While the position of Washington courts is unclear, the *Jensen* and *McCluskey* holdings have suggested that Mary Carters are acceptable when tempered by prophylactic measures. [FN95] A better rule, however, would be to eliminate Mary Carters entirely.

First, the *Jensen* view is outdated and incorrect. Not only is its reasoning inconsistent with the legislature's subsequent effort to curb inflated deep-pocket liability, but the court also appears to have relied on the reasoning of the majority of other jurisdictions without a thorough, independent assessment of the true effects of a Mary Carter-type agreement under Washington law. The court merely commented that the majority of states' courts reject arguments that these arrangements undermine the adversarial process or produce collusion, apparently because there is no requirement that codefendants be friendly. [FN96] The evidence of the impact of cooperative conduct, [FN97] however, demonstrates that the problem goes beyond unfriendly codefendants. Washington courts should therefore abandon *Jensen's* short-sighted approach.

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

A. Mary Carter Agreements Resolve the Plaintiff's Claim

The logistics of the parties' new relationship under a Mary Carter agreement demonstrate that the agreements resolve the plaintiff's claim against the agreeing defendant; therefore, courts should view the agreements as settlements and dismiss the agreeing defendant. This *272 conclusion is supported by the Washington Supreme Court's reasoning in *Shelby v. Keck*. There, the court dismissed the agreeing defendant in a covenant not to execute, due to the absence of a justiciable issue. [FN98] A covenant not to execute is virtually identical to a Mary Carter agreement. [FN99] Under a Mary Carter agreement, the plaintiff and defendant have also resolved the plaintiff's claim, completely replacing it with a separate contractual relationship in which the defendant pays the agreed sum and the plaintiff reimburses the defendant to the extent warranted by the final judgment. [FN100] The trial serves only as the engine for the contract's execution.

The Mary Carter agreement thereby eliminates any justiciable issue between the plaintiff and the agreeing defendant. Although the agreeing defendant retains an interest in the outcome of the litigation, this interest is now tied to the jury's allocation of fault to the non-agreeing party; this interest has no relationship to the plaintiff's original claim against the agreeing defendant. Most importantly, the proceedings between the plaintiff and settling defendant are no longer adversarial. Having settled their differences, they are now working together to achieve a maximum verdict against the non-agreeing party. There is a complete lack of dispute over a now non-existent claim, between parties who are nevertheless nominally opposed and treated as adversaries in the formal trial structure. [FN101]

*273 Allowing the settling party to remain a defendant therefore presents the court with a sham controversy. [FN102] The settling defendant effectively circumvents Washington law forbidding contribution from remaining defendants, [FN103] under the guise of adversity and within the auspices of a formal trial designed to resolve adversarial disputes. Allowing a defendant to remain nominally opposed to the plaintiff, while its only interest concerns the non-settling defendant and the "contribution" it may effectively receive from that defendant, is therefore utterly incompatible with the traditional trial system. [FN104]

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

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

The language of the 1986 Tort Reform Act and its interrelationship with the "effects of settlement" statute [FN105] suggest that the legislature intended Mary Carter-type agreements to be treated as settlements. *274 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. [FN106] While this section is intended only to come into effect in the case of joint and several liability, [FN107] which itself only applies when there is judgment against the defendants, [FN108] 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. [FN109]

In cases when liability is several only, the effects of settlement statute [FN110] does not apply; the language of the general fault determination statute [FN111] nevertheless indicates the same legislative intent to treat Mary Carter-type agreements as settlements. The statute specifically directs that judgment shall be entered against all parties, except those released by the claimant, or immune from liability, or prevailing on any other defense. [FN112] While this section does not specifically list the types of settlements considered releases, it can be inferred that a release is intended to include those arrangements listed in the effects of settlement statute. [FN113] Further, at least one com-

mentator argues that the fact that the fault determination statute was amended in 1987 gives rise to an inference that the two statutes cover the same general types of agreements. [FN114] This suggests that a Mary Carter-type agreement would *275 be considered by the legislature to be a release; the released defendant should therefore be dismissed.

2. Treating Mary Carters as Settlements Comports with Legislative Intent

In limiting the application of joint and several liability to situations in which there is an actual judgment against the defendants, [FN115] the legislature sought to hold an entity responsible only for its proportionate share of fault. [FN116] Joint and several liability is clearly the exception, not the rule. Further, in excluding the fault of settling parties from the amount considered joint, the legislature was apparently putting the burden of inadequate settlement on the plaintiff, rather than on the remaining parties against whom judgment is entered. [FN117]

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

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

Recitals within a Mary Carter that it is not to be construed as a settlement, that the defendant is not to be released, or that it is not *276 intended as a covenant not to execute should not prevent a court from identifying the agreement for what it is: a settlement of the plaintiff's claim. Washington courts, in similarly attempting to distinguish between releases and covenants not to sue, have consistently held that the court will look to the true nature of the agreement rather than to the language of the contract itself. [FN118] Courts should similarly treat a Mary Carter agreement as a settlement or release despite any recitals within the agreement to the contrary. [FN119]

Finally, courts should treat Mary Carter agreements as settlements whether or not money has actually changed hands between the plaintiff and settling defendant. The issue arises under an agreement such as a loan receipt, [FN120] in which the defendant turns money over to the plaintiff prior to judgment instead of merely guaranteeing the sum. [FN121] The defendant will receive reimbursement in the event of sufficient recovery against the non-settling defendant. The crucial point is that, whether or not money has actually changed hands, the settling defendant has made an unconditional promise to provide the sum, and the plaintiff is guaranteed at least that amount regardless of the outcome of trial. [FN122] While the fact that money has changed hands may provide direct evidence that the agreement is in fact unconditional, [FN123] a true Mary Carter will always involve the unconditional promise. Courts in Washington should therefore not hesitate to identify them as settlements, whether or not the plaintiff has received funds prior to trial.

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

The benefits of dismissing the defendant are many. The plaintiff may no longer obtain the underhanded assistance at trial that it initially sought to purchase through the Mary Carter agreement. This eliminates the *277 potential for skewing the adversarial process. While most courts recognize this problem, the majority have attempted to deal with it by providing limiting instructions, balancing procedural advantages, and disclosing the agreement. [FN124] The success of such measures is debatable, as argued by some courts and commentators. [FN125] Removing the defendant achieves the purpose of ensuring trial fairness [FN126] while avoiding debates as to the propriety of disclosing the agreement and sufficiency of balancing measures. While the *Cox* court adopted this measure based primarily on public policy grounds, [FN127] Washington courts may effectively do so by viewing Mary Carters as final settlements. [FN128]

Once the agreeing defendant is removed, the trial may produce a judgment free from collusive influence. The settling defendant's fault will still be determined by the trier of fact, but without the bias of that party's tainted input. Because the settling defendant's real interest is against the interest of the non-settling party, some courts have apparently allowed the agreeing defendant to remain at trial as a plaintiff. [FN129] This approach should be precluded in Washington, however, as a settling defendant is not permitted to maintain an action against other tortfeasors for contribution or indemnity. [FN130] Taking the next logical step, courts should similarly hold void that element of the agreement guaranteeing reimbursement to the settling defendant.

To best serve future litigants, Washington courts should unequivocally assert that all Mary Carter agreements requiring the settling defendant to remain at trial will be void. A firm policy will prevent piecemeal assessment of each agreement as it might become relevant at trial, *278 thereby avoiding wasted time and energy. Ideally, parties will abandon this particular device in favor of traditional, acceptable settlements. [FN131]

IV. CONCLUSION

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

[FN1]. The name comes from Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). The agreements are occasionally known by different names. See June F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 U. Fla. L. Rev. 521, 522 n.1 (1986).

[FN2]. This hypothetical is based loosely on the case of McCluskey v. Handorff-Sherman, 68 Wash. App. 96, 841 P.2d 1300 (1992), review granted, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993). In *McCluskey*, the existence of an agreement was never established. Nevertheless, the case presented an ideal opportunity for the use of a Mary Carter agreement. *McCluskey* was different in that the defendant was insolvent and lacked insurance altogether. In such a situation, the Mary Carter agreement would be equally effective. While it would not guarantee any amount from Bill (B) to Alice (A), A and B would still contract to work together at trial to foist maximum liability on the city (C). The incentives for A, as in the hypothetical, are obvious. B, although insolvent, might still be encouraged to cooperate if A promises to place all blame upon C and not to enforce judgment; thus, B has a chance to escape much, if not all, responsibility for the accident.

[FN3]. Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972), rev'd on other grounds, 284 So. 2d 389 (Fla. 1973).

[FN4]. Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992). As discussed, Mary Carters may vary. This Comment discusses only those agreements containing these two major elements.

[FN5]. See Entman, *supra* note 1, at 530.

[FN6]. 68 Wash. App. 96, 841 P.2d 1300 (1992), review granted, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993). Washington courts have previously confronted agreements that may be classified under the general definition of Mary Carter agreements. See *infra* note 47 and accompanying text.

[FN7]. See Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 Wash. L. Rev. 233, 238 (1987) [hereinafter Peck, *Rejection and Modification*].

[FN8]. See, e.g., John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Colum. L. Rev.

368, 374-75 (1987); Entman, *supra* note 1, at 574.

[FN9]. See *infra* note 73 and accompanying text. A “pure” comparative negligence system is one in which a plaintiff’s contributory negligence serves to reduce his or her damages in proportion to his or her fault; all defendants are liable to the plaintiff for their respective shares of the loss, even though they may be less negligent than the plaintiff. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 67, at 471-72 (5th ed. 1984); see Wash. Rev. Code § 4.22.070 (1993).

[FN10]. Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992).

[FN11]. See Entman, *supra* note 1, at 524-25.

[FN12]. See, e.g., Lum v. Stinnet, 488 P.2d 347, 348 (Nev. 1971).

[FN13]. See, e.g., Booth v. Mary Carter Paint Co., 202 So. 2d 8, 10 (Fla. Dist. Ct. App. 1967).

[FN14]. See Benedict, *supra* note 8, at 370.

[FN15]. See, e.g., Meriwether D. Williams, Comment, *Blending Mary Carter's Colors: A Tainted Covenant*, 12 Gonz. L. Rev. 266, 268 (1977). A “loan receipt” agreement provides for payment prior to judgment, with reimbursement made later, rather than a mere guarantee of payment with later reduction.

[FN16]. However, whether there is actual payment might be important to a court attempting to determine the true nature of the agreement. See *infra* note 123.

[FN17]. Elbaor v. Smith, 845 S.W.2d 240, 247 (Tex. 1992).

[FN18]. *Id.* at 249 (citing Benedict, *supra* note 8, at 372-73).

[FN19]. “The chief problem associated with a Mary Carter agreement is that a hidden alteration of the relationship of some of the parties will give the jury a misleading and incomplete basis for evaluating the evidence.” *Id.* at 254 (Doggett, J., dissenting).

[FN20]. *Id.* at 256 (Doggett, J., dissenting).

[FN21]. See, e.g., General Motors Corp. v. Lahocki, 410 A.2d 1039, 1046 (Md. 1980).

[FN22]. Elbaor, 845 S.W.2d at 255 (Doggett, J., dissenting).

[FN23]. *Id.* at 254-55 (Doggett, J., dissenting). The maintenance of Mary Carters in the face of various challenges is attributable to what some courts refer to as the “salutary effects” of these agreements. See Reese v. Chicago, B. & Q. R.R., 303 N.E.2d 382, 386 (Ill. 1973) (holding that a loan receipt agreement was beneficial in that it meant funds would be more readily available to an injured plaintiff, and that private settlement would be facilitated). While the justification of encouraging settlement has been adopted by several courts, this line of reasoning has recently been attacked as short-sighted because these agreements encourage only partial settlements. See *infra* note 27.

[FN24]. Only Texas, Nevada, Oklahoma, and Wisconsin have banned the use of Mary Carter agreements. See Elbaor, 845 S.W.2d at 250 n.21. Some argue that Wisconsin, in Trampe v. Wisconsin Tel. Co., 252 N.W. 675 (Wis. 1934), banned only *secret* Mary Carter agreements. See Elbaor, 845 S.W.2d at 256 (Doggett, J., dissenting).

[FN25]. Elbaor, 845 S.W.2d at 250.

[FN26]. Id. at 248 (citing Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 8 (Tex. 1986) (Spears, J., concurring)).

[FN27]. Id. at 248-49. The existence of a settlement “veto” power in the hands of the settling defendant makes settlement with the remaining defendant even less likely, as the settling defendant is unlikely to approve of any settlement which defeats reimbursement of the guaranteed amount.

[FN28]. The trial judge, aware of the potential bias against the non-settling doctor, undertook various remedial measures to mitigate any harmful effects. *See supra* note 22 and accompanying text. Despite these provisions, the court noted an extremely abnormal effect on the parties' conduct. Elbaor, 845 S.W.2d at 246-47. The court discussed the ways in which a settling defendant might assist the plaintiff, including cooperating in discovery, peremptory challenges, trial tactics, supportive witness examination, and influencing the jury. Id. at 249 (citing Benedict, *supra* note 8, at 372-73 (detailing the tactical and procedural advantages that cooperating parties enjoy)).

[FN29]. Elbaor, 845 S.W.2d at 250. Earlier, in Scurlock Oil v. Smithwick, 724 S.W.2d 1 (Tex. 1986) (Spears, J., concurring), Justice Spears argued that disclosure provisions are insufficient to overcome unfairness, because it would be difficult for jurors, already unfamiliar with trial procedure and practice, to fully grasp the implications of the relationship between the settling parties created by the Mary Carter agreement. Id. at 11. To illustrate the problem, Spears referred to a companion case arising from the same accident as Scurlock Oil and containing identical facts, Missouri Pacific v. Huebner, 704 S.W.2d 353 (Tex. Ct. App. 1985). The outcome in Missouri Pacific was virtually opposite from the jury findings in Scurlock Oil. Scurlock Oil, 724 S.W.2d at 11. In Scurlock Oil, the jury found the Mary Carter defendant (Mo-Pac) not negligent and the non-settling defendant (Scurlock) 100 percent negligent; in Huebner, where Mo-Pac did not enter a settlement agreement, it was found 90 percent negligent and Scurlock only 10 percent negligent. Id. The concurring justice reasoned that “[o]nly the Mary Carter agreement can account for these variations in the juries' findings.” Id.

[FN30]. Elbaor, 845 S.W.2d at 250.

[FN31]. Lum v. Stinnett, 488 P.2d 347 (Nev. 1971) (banning Mary Carters because they violate policies against champerty and maintenance, violate rules of professional ethics, and are “inimical to true adversary process,” thus preventing fair trial). For a detailed examination of this case, see Entman, *supra* note 1, at 531-40.

[FN32]. Lum, 488 P.2d at 352-53.

[FN33]. Id.

[FN34]. 594 P.2d 354 (Okla. 1978).

[FN35]. Id. at 359.

[FN36]. Id. (“In no circumstances should a defendant who will profit from a large plaintiff's verdict be allowed to remain in the suit as an ostensible defendant.”).

[FN37]. Id.

[FN38]. Id. at 359-60.

[FN39]. *Id.* at 358.

[FN40]. *Id.*

[FN41]. 410 A.2d 1039 (Md. 1980).

[FN42]. *Id.* at 1044 (citing St. John's College v. Purnell, 23 Md. 629, 640-41 (1865)).

[FN43]. *See id.*

[FN44]. The court held that disclosure was necessary because “in judging the credibility of a witness, the jury is entitled to know of his interest in the outcome” of the trial. *Id.* at 1046.

[FN45]. *See id.*

[FN46]. These cases are McCluskey v. Handorff-Sherman, 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted*, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993), and Giambattista v. National Bank of Commerce, 21 Wash. App. 723, 586 P.2d 1180 (1978). The *Giambattista* court referred to Mary Carters only in passing, holding that the agreement in question did not fall within such a category. *Id.* at 735 n.5, 586 P.2d at 1187 n.5; *see supra* note 9.

[FN47]. 13 Wash. App. 654, 537 P.2d 825 (1975), *review denied*, 85 Wash. 2d 1017 (1975).

[FN48]. *Id.* at 658.

[FN49]. *Id.* at 655. *See Williams, supra* note 15, at 273-74.

[FN50]. Pro tanto reduction, whereby the plaintiff's total recovery against remaining defendants is reduced by the amount of settlement, was in use in Washington at the time of *Monjay*. The 1986 Tort Reform Act has rejected this principle in favor of a comparative reduction system in the case of joint tortfeasors. *See infra* notes 74-80 and accompanying text.

[FN51]. *Monjay*, 13 Wash. App. at 660-61, 537 P.2d at 829. The court also expressed concern that the agreement was champertous. *Id.* at 661, 537 P.2d at 830. *Cf. Lum v. Stinnet*, 488 P.2d 347 (Nev. 1971). Champerty is a disfavored practice in which a stranger to a suit agrees with a party to carry on the litigation at his or her own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered. *Black's Law Dictionary* 231 (6th ed. 1990).

[FN52]. 40 Wash. App. 1, 696 P.2d 612 (1985), *review denied*, 103 Wash. 2d 1038 (1985). The agreement at issue in *Jensen* consisted of a covenant by the plaintiff not to execute any judgment against the settling defendant in exchange for \$110,000. Note a critical difference from *Monjay*--the agreeing defendant in *Jensen* remained a party at trial.

[FN53]. *Id.* at 10, 696 P.2d at 618.

[FN54]. The trial court found that the agreement violated pro tanto reduction in that it resulted in indemnity or contribution for the settling defendant to which it otherwise would not have been entitled. *Id.* at 6-7, 696 P.2d at 616.

[FN55]. *Id.* at 7, 696 P.2d at 617.

[FN56]. *Id.* at 9, 696 P.2d at 618.

[FN57]. *Id.* at 10, 696 P.2d at 618.

[FN58]. *Id.* (citing Reese v. Chicago, B. & O. R.R., 303 N.E.2d 382, 386 (Ill. 1973)).

[FN59]. *Id.* citing Reese, 303 N.E.2d at 386.

[FN60]. *Id.* at 11-12, 696 P.2d at 619. This dismissal of the *Monjay* argument appears to have missed the point. In *Monjay*, the agreeing defendant clearly was not required to remain at trial. The *Monjay* court discussed the coercive potential of the agreement as forcing a non-agreeing defendant to either litigate or settle; it did not deal with the collusive effects of a plaintiff and cooperative defendant aligned at trial. See Monjay, 13 Wash. App. at 661, 537 P.2d at 829.

[FN61]. Jensen, 40 Wash. App. at 12, 696 P.2d at 619.

[FN62]. 68 Wash. App. 96, 841 P.2d 1300 (1992), *review granted*, 121 Wash. 2d 1021, 854 P.2d 1084 (June 9, 1993).

[FN63]. *Id.* at 103-04, 841 P.2d at 1304-05.

[FN64]. *Id.* (citing Daniel v. Penrod, 393 F. Supp. 1056 (E.D. La. 1975); Ward v. Ochoa, 284 So. 2d 385 (Fla. 1973); Maule v. Rountree, 284 So. 2d 389 (Fla. 1973); Ratterree v. Bartlett, 707 P.2d 1063 (Kan. 1985)).

[FN65]. "In a covenant not to execute, the defendant's liability is limited to an agreed sum regardless of the judgment amount." Sara Connelly, Note, *Loan Agreements as Settlement Devices*, 25 DePaul L. Rev. 792, 795 (1976).

[FN66]. 85 Wash. 2d 911, 918, 541 P.2d 365, 370 (1975).

[FN67]. *Id.*

[FN68]. *Id.*

[FN69]. See Peck, *Rejection and Modification*, *supra* note 7, at 235-39, for a detailed history of the common law principles and their modification in Washington.

[FN70]. Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 236, 588 P.2d 1308, 1313 (1978); see also Peck, *Rejection and Modification*, *supra* note 7, at 237.

[FN71]. *Id.*

[FN72]. See Cornelius J. Peck, *Reading Tea Leaves: The Future of Negotiations for Tort Claimants Free From Fault*, 15 U. Puget Sound L. Rev. 335, 337 (1992) [hereinafter Peck, *Tea Leaves*].

[FN73]. The Washington statute provides, in pertinent part:

(1) In all actions involving fault of more than one entity, [the trier of fact shall determine the fault of each entity, with judgment entered against each defendant except those released by the claimant,] in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW [§§] 4.22.040, 4.22.050, and 4.22.060.

Wash. Rev. Code § 4.22.070 (1993). Note that joint and several liability is traditionally reserved for cases involving hazardous wastes, tortious interference with contracts or business relations, and generic products. *See, e.g., Peck, Tea Leaves, supra* note 72, at 341 n.24.

[FN74]. Wash. Rev. Code § 4.22.070(1).

[FN75]. Note that joint and several liability is also available in the separate context of concurrent tortfeasors. *See supra* note 73.

[FN76]. For a detailed discussion of the intricacies of this system and criticism of its effects on negotiation and claim settlement, see generally Peck, *Rejection and Modification, supra* note 7; Peck, *Tea Leaves, supra* note 72.

[FN77]. *See Peck, Tea Leaves, supra* note 72, at 351.

[FN78]. Wash. Rev. Code § 4.22.070(2).

[FN79]. Wash. Rev. Code § 4.22.060.

[FN80]. *See Peck, Tea Leaves, supra* note 72, at 340 n.21.

[FN81]. *See supra* note 1 and accompanying text.

[FN82]. Wash. Rev. Code § 4.22.070(1)(b); *see supra* note 76 and accompanying text.

[FN83]. *See Wash. Rev. Code § 4.22.070(1)(b).*

[FN84]. *See Wash. Rev. Code § 4.22.070(2)* (indicating that right to contribution is to be determined according to sections 4.22.040-.060).

[FN85]. *See supra* note 25 and accompanying text. One commentator notes that the very nature of a Mary Carter is deceit and fraud practiced by the contracting parties against the outside defendant. Warren Freedman, *The Expected Demise of "Mary Carter": She Never Was Well*, 633 Ins. L.J. 602, 604 (1975). The *Scurlock* concurrence describes the anomalous results reached in companion cases based on the same accident and identical facts. *See supra* note 29.

[FN86]. In fact, the jury in *McCluskey* allocated 50 percent of the fault to the state and 50 percent of the fault to the defendant driver who had been smoking marijuana and speeding at the time of the accident. On appeal, the state noted

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

[FN87]. See Benedict, *supra* note 8, at 375 (arguing that as the focus of the parties is to try to increase the non-settling defendant's liability, while decreasing that of the settling defendant, the non-settling defendant is naturally likely to pay more than if there is no Mary Carter arrangement).

[FN88]. See Peck, *Rejection and Modification*, *supra* note 7, at 239. Another possibility might be that the settling parties, nearing conclusion of the trial and confident of a high negligence finding against the deep pocket, agree to drop the settling party from the suit. This will cost the plaintiff the chance of joint and several liability, but will save the settling defendant any risk of contribution. When the settling party's negligence is found to be low anyway, this may be a viable part of a creative agreement. See generally Entman, *supra* note 1, at 545-46.

[FN89]. For a discussion of the attractiveness of Mary Carters in comparative contribution jurisdictions, see Benedict, *supra* note 8, at 375-76 (“[T]he settling defendant's negligence only reduces the plaintiff's recovery by the percentage of fault attributable to him. The settling parties attempt to decrease the settling defendant's percentage of liability, while increasing both the total judgment and the nonsettling defendant's percentage of fault.”).

[FN90]. See *supra* note 73.

[FN91]. See *id.*

[FN92]. 1986 Wash. Laws 1354-55.

[FN93]. *Id.*

[FN94]. See Entman, *supra* note 1, at 574-75.

[FN95]. See *supra* notes 52-64 and accompanying text.

[FN96]. Jensen v. Beard, 40 Wash. App. 1, 12, 696 P.2d 612, 619 (1985), *review denied*, 103 Wash. 2d 1038 (1985).

[FN97]. See *supra* note 25.

[FN98]. See *supra* note 66 and accompanying text.

[FN99]. The only real differences between *Shelby*'s covenant not to execute and a Mary Carter are the contractual ramifications for final payment or reimbursement amounts. Under a Mary Carter, agreeing defendants effectively limit their liability to the agreed upon sum, just as in a covenant not to execute. Mary Carters only differ to the extent that the defendant may or may not recover some or all of its commitment, depending on the non-settling party's allocation of fault; the plaintiff receives the same security as in a covenant not to execute. More importantly, the defendant is effectively receiving an unspoken covenant not to execute, because any judgment against it will be deemed ineffective due to its contractual right. See generally Connelly, *supra* note 65, at 792; Benedict, *supra* note 8, at 371 n.12 (labeling all Mary Carters covenants not to execute, as the plaintiff promises not to enforce a court's judgment against the set-

ling defendant). Note that many Mary Carters contain an explicit covenant not to execute. *See, e.g., Williams, supra* note 15, at 268.

[FN100]. *See General Motors Corp. v. Lahocki*, 410 A.2d 1039, 1043-44 (Md. 1980); *see also supra* note 1.

[FN101]. *Cf. Gatto v. Walgreen Drug Co.*, 337 N.E.2d 23, 29 (Ill. 1975), *cert. denied*, 425 U.S. 936 (1976) (“No ‘justiciable matter’ exists where two former adversary parties have settled their differences as to all the issues they are *purportedly* litigating before the trial court.” (emphasis added)). *See also* Connelly, *supra* note 65, at 798-99 (arguing that the *Gatto* holding “indicates that once a loan agreement is executed, the signing defendant must be dismissed from the action”); David R. Miller, Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 SW. L.J. 779, 800 (1978) (“Since no justiciable issue exists between the parties entering the Mary Carter agreement, dismissing the settling defendant is appropriate.”); Entman, *supra* note 1, at 563, 564 n.241 (arguing that if a Mary Carter is treated as valid and given full effect, there are no issues left to be tried on the claim against the agreeing defendant, thus “demonstrat[ing] the absurdity of upholding the validity of a Mary Carter agreement while still allowing the settling defendant to remain as a party defendant”).

[FN102]. *Cf. Gatto*, 337 N.E.2d at 29 (“While [the Illinois Constitution] provides that ‘Circuit Courts shall have original jurisdiction of all justiciable matters’ . . . it does not confer jurisdiction to decide sham controversies.”).

[FN103]. A right to contribution among defendants is available only to defendants against whom judgment has been entered. *See supra* note 77. Here, however, the settling defendant is clearly seeking contribution towards its payment (or promise to pay) of the guaranteed amount. The *Jensen* court remarked that it was not concerned with the potential for contribution between parties despite prohibition of such a result, as the real objection to contribution--“use of the courts for relief of wrongdoers”--was absent from what it called an “indirect, private out-of-court arrangement.” *Jensen v. Beaird*, 40 Wash. App. 1, 10, 696 P.2d 612, 618 (1985). In the hypothetical at hand, however, where the only interest of the settling defendant involves what it will in fact receive from the non-settling defendant as contribution, the court is being used for the relief of wrongdoers, and in an underhanded manner at that. This result weighs in favor of banning Mary Carters, at least insofar as they maintain the settling defendant's presence at trial. For a discussion of how Mary Carters violate no contribution rules, see Entman, *supra* note 1, at 540-49.

[FN104]. Compare the *Shelby* court's reasoning for approving the lower court's dismissal of the agreeing defendant: The plaintiff hoped to use certain pre-trial statements of the settling defendant, and could do so only under the hearsay exception for party admissions. This was apparently the sole purpose of maintaining the defendant's presence, and the lower court was deemed to be acting within its discretion in dismissing the defendant “to avoid a possible misuse of the evidence by the jury.” *Shelby v. Keck*, 85 Wash. 2d 911, 918, 541 P.2d 365, 370 (1975).

[FN105]. Wash. Rev. Code § 4.22.070, .060; *see supra* notes 74-81 and accompanying text.

[FN106]. *See supra* note 79 and accompanying text.

[FN107]. *See, e.g., Washburn v. Beatt Equip. Co.*, 120 Wash. 2d 246, 840 P.2d 860 (1992) (when there is no joint and several liability, § 4.22.070(2) does not apply, and thus does not direct that .040, .050, or .060 is to be applied).

[FN108]. *See supra* note 75 and accompanying text. *See also* Peck, *Tea Leaves, supra* note 72, at 340.

[FN109]. *See* Peck, *Tea Leaves, supra* note 72, at 343-44.

[FN110]. Wash. Rev. Code § 4.22.060; *see supra* notes 73-80 and accompanying text.

[FN111]. Wash. Rev. Code § 4.22.070; see *supra* notes 73-80 and accompanying text.

[FN112]. Wash. Rev. Code § 4.22.070(1).

[FN113]. See Peck, *Tea Leaves*, *supra* note 72, at 344 (section .060 refers to “a release, covenant not to sue, covenant not to enforce judgment, or similar agreement” as being “interchangeable” for the purpose of determining the effect of settlement).

[FN114]. *Id.*

[FN115]. See *supra* note 76 and accompanying text; Washburn v. Beatt Equip. Co., 120 Wash. 2d 246, 293-96, 840 P.2d 860, 885-89 (1992). When parties were acting in concert or when a person was acting as an agent or servant of the other party, there is no judgment requirement. Wash. Rev. Code § 4.22.070(1)(a).

[FN116]. Washburn, 120 Wash. 2d at 294, 840 P.2d at 886.

[FN117]. *Id.* at 299, 840 P.2d at 888-89. The Washington Supreme Court has argued that the plaintiff bears the risk of an adverse settlement when liability is several only because of uncertainty about the ultimate recovery following trial. The uncertainty built into the general rule of several liability, combined with the fact that the plaintiff often will not know whether it will be at fault until the end of the trial, indicated to the court that the legislature did not intend to burden non-settling parties with the effects of a plaintiff's settlement. *Id.* (citing Thomas Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 Gonz. L. Rev. 67, 82 (1986-87)).

[FN118]. See Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003 (1941); Hargreaves v. American Flyers Airline Corp., 6 Wash. App. 508, 511, 494 P.2d 229, 231 (1972) (“Appellate courts have ignored the stated intent of the parties . . . if it is clear from the surrounding circumstances that the actual intent was other than as stated.”).

[FN119]. Peck, *Tea Leaves*, *supra* note 72, at 344.

[FN120]. See, e.g., Jensen v. Beaird, 40 Wash. App. 1, 696 P.2d 612 (1985).

[FN121]. See Entman, *supra* note 1, at 522-23.

[FN122]. *Id.* at 544-45.

[FN123]. See Cullen v. Atchison, Topeka & Santa Fe Ry., 507 P.2d 353 (Kan. 1973) (where parties had entered a loan receipt-type agreement, court held the agreement to be a conventional, unconditional settlement; money paid was treated as a credit to subsequent judgment against non-settling defendant). See also Entman, *supra* note 1, at 544.

[FN124]. See *supra* notes 21-23 and accompanying text.

[FN125]. See Elboar v. Smith, 845 S.W.2d 240, 249 (Tex. 1992); Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 9-11 (Tex. 1986); *supra* note 28; see also Entman, *supra* note 1, at 563 (“The disclosure and admission approach to controlling Mary Carter agreements has been criticized as being insufficient to cure the prejudice to the nonsettling defendant.”).

[FN126]. Entman argues that dismissing the settling defendant eliminates trial prejudice by removing an attorney from trial who may use jury selection, examination of witnesses and jury arguments to the plaintiff's advantage. Entman,

supra note 1, at 564; *see also* Miller, *supra* note 101, at 800 (“dismissing the settling defendant will frustrate the collusive intentions of the agreeing parties”).

[FN127]. *See supra* note 38 and accompanying text.

[FN128]. Dismissing the defendant under such conditions involves reasoning similar to that used in the *Shelby* case, in which the court held that dismissal of the settling defendant, who no longer was party to a justiciable issue, was proper to avoid a misuse of evidence by the jury. *See supra* note 104.

[FN129]. *See* Entman, *supra* note 1, at 563 n.235.

[FN130]. *See supra* note 76 and accompanying text.

[FN131]. There is a clear potential for collusion in litigation that may escape the court's eye. It is conceivable that Mary Carter-type agreements may be made tacitly, with nothing more than oral confirmation. Such a possibility suggests that the current provision for joint and several liability should be reworked, perhaps by requiring that a defendant be at least 30 to 40 percent at fault before joint and several liability will apply.

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RCW 4.22.060

Effect of settlement agreement.

(1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.

(2) A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

(3) A determination that the amount paid for a release, covenant not to sue, covenant not to enforce judgment, or similar agreement was unreasonable shall not affect the validity of the agreement between the released and releasing persons nor shall any adjustment be made in the amount paid between the parties to the agreement.

[1987 c 212 § 1901; 1981 c 27 § 14.]

RCW 4.22.070

Percentage of fault — Determination — Exception — Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. 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 except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(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 claimant's total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

[1993 c 496 § 1; 1986 c 305 § 401.]

Notes:

Effective date -- 1993 c 496: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 496 § 3.]

Application -- 1993 c 496: "This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993." [1993 c 496 § 4.]

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

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

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

Passed the Senate February 16, 1986.

Passed the House March 6, 1986.

Approved by the Governor April 4, 1986.

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

CHAPTER 305

[Engrossed Substitute Senate Bill No. 4630]

TORT LAW REVISIONS

AN ACT Relating to civil actions; amending RCW 5.60.060, 4.22.030, 51.24.060, 4.16.350, 4.24.115, 4.16.160, 4.16.310, and 4.16.300; adding a new section to chapter 4.22 RCW; adding new sections to chapter 4.24 RCW; adding new sections to chapter 4.56 RCW; adding new sections to chapter 5.40 RCW; adding a new section to chapter 7.70 RCW; adding a new section to chapter 48.19 RCW; adding a new section to chapter 48.22 RCW; creating new sections; repealing RCW 4.56.240; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 100. PREAMBLE. Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage

physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.

PART I

ACCELERATED PHYSICIAN-PATIENT PRIVILEGE

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

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

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

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

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