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Supreme Court No. 86924-3

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SUPREME COURT
STATE OF WASHINGTON

JARED K. BARTON, a single man,

Respondent,

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

Respondents,

v.

STATE OF WASHINGTON, DEPT. OF TRANSPORTATION,

Petitioner.

SUPPLEMENTAL BRIEF

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I. The Linvogs' Statement of the Case

The highway on which Korrine Linvog was driving on the night of the accident came to a "T" with another. *Barton v. State, Dept. of Transp.*, Case No. 61015-5-I, 2008 WL 4838687 (Wn. App. Div. 1, 2008). Preparing to turn left, she stopped at the stop bar painted on the road by the State. Seeing no approaching traffic, she pulled forward across the lane of perpendicular traffic, and Jared Barton's motorcycle collided with the side of her car. *Id.* His injuries led to this lawsuit against Korrine, Thomas and Madonna Linvog (her vicariously liable parents), and the State Department of Transportation for negligent highway design. *Id.*

Korrine was steadfast in her testimony, both at her deposition and at trial, that she had not seen Mr. Barton coming. CP 928-941, 7-15. The defense to this case was, from the very beginning to the very end, that despite her careful observations, Korrine's view of Mr. Barton was blocked by something she could not see at night, and had no reason to suspect was there: a line of trees along the highway. CP 7-15. Although defendants commonly attempt to apportion blame to the plaintiff, in this case, the evidence to support such a defense was weak. CP 11. Korrine's joining in Mr. Barton's position that he was free of fault, and joining the State to argue for lower damages, was the most natural alignment of these parties based on the facts of the accident. *Id.*

Korrine gave her deposition in October 2006; her testimony was consistent with the testimony she would later give at trial. CP 928-941. The State sent discovery requests to both the Linvogs and Barton, which inquired into whether they had reached any settlement or any other agreements between themselves. Barton and the Linvogs, along with their attorneys, truthfully responded that there were no such deals.

In early 2007, Barton's attorney, Mr. Brindley approached Mr. Spencer, the Linvogs' attorney, because Barton was in need of funds for urgent medical expenses related to the accident. CP 555. Mr. Brindley and Mr. Spencer agreed that the Linvogs would advance Barton the sum of \$20,000, to be credited against any future judgment. *Id.* Mr. Spencer requested that Barton agree not to execute on any judgment against the Linvog Parents in excess of their \$100,000 policy limits¹. *Id.* Barton agreed, and the parties exchanged a stipulation to that effect. *Id.* The trial court would later enter findings of fact based on the testimony of the parties involved, unchallenged on appeal, that neither Mr. Brindley nor Mr. Spencer believed this agreement (the "Advance") would have any impact on the State's right to a contribution judgment against the Linvog Parents

¹ Mr. Spencer was aware that the State was trying to apportion fault to Barton, which could create separate liability for his clients. His primary objective was to limit Barton's ability to collect a separate judgment from the vicariously liable parents – an objective that had nothing to do with the State or its potential contribution rights. CP 555.

(CP 9)²; the Advance *specifically stated that it was not a release*. CP 849-850. In any event, the Advance did not even touch on Korrine, who was in the same position after it occurred as she had been beforehand. *Id.* The trial court later found, and *the State has now expressly acknowledged*³, that the Advance had *no impact* on the alignment of the parties at trial (CP 11).

The genesis of the State's complaint is that the Advance was not produced prior to trial⁴. The Linvogs do not deny that CR 26(e)(4) required them to supplement the State's discovery requests, previously truthfully answered negatively, to reflect the new fact of the Advance. The trial court later entered *unchallenged* findings of fact that this unfortunate failure to supplement was inadvertent, on the part of both Mr. Spencer and Mr. Brindley. CP 9. Without knowledge of the Advance, the State proceeded to present its defenses at trial. The Linvog Parents were present in the courtroom, but they never testified, and did not sit at counsel table. CP 14. Both Mr. Brindley and Mr. Spencer referred to them in passing during opening statements, simply explaining that the reason for their presence was that to the extent Korrine was liable, they were "on the hook"

² "Unchallenged findings are verities on appeal." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

³ *State's Reply to Linvogs' Appellate Response Brief* at 8.

⁴ During the course of working out the payment to satisfy the judgment, both Mr. Brindley and Mr. Spencer voluntarily explained to the State that the Linvog Parents had advanced \$20,000, and shared a copy of the Advance Stipulation with the State. CP 848.

because of the family car doctrine – the trial court’s unchallenged findings recount that both (ultimately *correctly*) believed this to be true when they said it to the jury, because the Advance had no effect on the State’s contribution rights. CP 8-9. Thus *all parties* at the trial conducted it with the common understanding that Korrine and her parents were “on the hook, all the way” for the percent that her alleged negligence contributed to Mr. Barton’s injuries. *Id.* As noted in trial court’s unchallenged findings, after the State’s unfettered opportunity to challenge its own fault, the jury’s verdict allocating none of the blame to Barton, five percent to Korrine and 95 percent to the State, reflected the well-proven fact that Korrine could not see Barton because of the trees. CP 15.

The State’s argument before this Court is based on what it claims was the “actual legal effect” of the Advance – namely eliminating joint liability with the Linvog Parents, and with it, the State’s right to a contribution judgment. The extraordinary hole in the State’s narrative is that after it had seen a copy of the Advance, it moved for and was granted *exactly the contribution judgment it now complains was legally prohibited.* CP Sup. Design., sub no. 321. The State has an *un-appealed judgment* against the Linvog Parents for \$80,000 *in excess of* the covenant not to

execute⁵. The State now asks this Court to rule that it was not entitled to a judgment *it sought* and *obtained* from the trial court⁶.

As will be shown below, the unpublished court of appeals opinion in this case is consistent and in alignment with the TRA. The trial court specifically demurred with respect to whether the Advance was properly cognized as a full release of the Linvog Parents because there was no prejudice to the State either way; either the Advance legally left the Linvog Parents jointly liable, or alternatively, was void for mutual mistake, or impossibility. The court of appeals endorsed this approach in affirming.

II. Argument

1. *Aside from sanctions, the only issue in this case is whether the trial court abused its discretion in denying the State's Motion to Vacate under CR 60(b)(4).*

There is no question before the Court subject to *de novo* review. The court of appeals held that the trial court acted within its discretion in determining that the inadvertent non-disclosure of the Advance had not prejudiced the State. That is the proper analysis under CR 60(b)(4) – the court rule under which the State brought its Motion to Vacate. The State

⁵ This reflects a total liability of \$160,000 – five percent of the \$3.6 million total.

⁶ The State's Petition recites, "[T]he 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." *Petition at 15*. Whether the Advance discharged the Linvog Parents' contribution liability was not even an issue before the court of appeals; the State did not appeal its contribution judgment.

has consistently attempted to shift the focus of this case, from whether it was prejudiced in preparing for or conducting its defense by the inadvertent non-disclosure, to whether the “operative legal effect” of the Advance was to negate joint and contribution liability. There are two fundamental errors in the State’s approach. First, the State’s claim that the “operative legal effect” of the Advance was to protect the Linvog Parents from a contribution judgment is empirically false. The State moved for, and was granted, exactly the contribution judgment against the Linvog Parents that it now protests was “legally impossible.” The State’s second fundamental error is that for purposes of a CR 60(b) motion, the “operative legal effect” of the Advance is relevant only insofar as it bears on the issue of (no) prejudice to the moving party. Each of these arguments is addressed seriatim.

a. The State has the contribution judgment it claims is impossible.

In its appellate argument, the State has consistently claimed that the trial court committed legal error by ruling that the Linvog Parents were amenable to a contribution judgment. With similar consistency, the State has neglected to inform reviewing Courts that *it* moved for, and was granted, its full, uncompromised contribution judgment. For example, as recently as its Petition for Review, the State claimed:

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.

Petition at 14.

Whether the trial court "should" have granted such a judgment is no longer an issue; it did, it is final, and it is unappealed. It is simply, factually irreconcilable to simultaneously hold a final contribution judgment while claiming that the Linvog Parents "weren't responsible" for it⁷. This judgment is a present, fully enforceable encumbrance on the Linvogs' real property (which, as the State notes, is worth *well* in excess of the judgment). CP 291. The State's claim that it was "forced" to take this judgment to preserve the status quo because of the Statute of Limitations is baseless. *State's Appellate Reply to Linvogs* at 20, fn. 27, citing RCW 4.22.050(3). A *stay* preserves the status quo; a *judgment* judicially sanctions seizure of the Linvogs' property⁸. The State did not request a stay.

In the context of this case, where the State has its collectible contribution judgment and the jury determined the State was 95 percent

⁷ As the Linvogs argued on appeal, this presents a strong case for the application of judicial estoppel:

A party cannot invoke the jurisdiction and power of a court for the purpose of securing important rights from his adversary through its judgment and, after having obtained the relief desired, repudiate the action of the court. . . . Parties are barred from such conduct . . . for the reason that such a practice cannot be tolerated.

Bauer v. Bauer, 5 Wn.App. 781,793, 490 P.2d 1350 (1971)

⁸ "A court has the power to stay the trial of an action pending an appeal from a judgment in another action." *Lloyd v. Superior Court for Walla Walla County*, 42 Wn. 2d 908, 909, 259 P.2d 369 (1953).

responsible for Barton's injuries, the allocation itself, not the joint or several nature of the judgment, is the only thing that could have a financial impact on the State. The threat which the TRA was intended to eliminate for deep-pocket defendants⁹ is *entirely* absent in this case. The threat is that it is *the deep-pocket defendant* who is found *five percent* jointly liable for a large loss, together with a judgment proof co-defendant liable for 95 percent. In that case, there is a real public policy concern that the deep-pocket is unfairly paying far in excess of its fair share, and that joint liability in this situation is reserved for the specific circumstances enumerated in RCW 4.22.070 (eg, that the plaintiff be without fault). In the case at bar, however, the State is attempting to undo the jury's apportionment of fault – not because there is *any* risk that it will have to make a net payment of more than the jury apportioned to it – but because it is unhappy with the apportionment determined by the jury after a full and fair consideration of the State's defenses.

The Tort Reform cases cited by the State are excellent examples of the real harm the statutes seek to obviate. All are easily distinguishable.

⁹ For a discussion of the purpose of this aspect of Tort Reform, see Gregory C. Sisk, Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 U. Puget Sound L. Rev. 1 (1992). See also *Romero v. W. Valley Sch. Dist.*, 123 Wn. App. 385, 391, 98 P.3d 96 (2004) (“But the legislature [adopted a] legal policy that defendants should only be liable for that portion of the damages they caused.”)

For example, in the case of *Bunting v. State*, 87 Wn. App. 647, 943 P.2d 347 (1997), Timothy Bunting's wife and daughter were injured in a car accident where Timothy was driving. The wife and daughter settled with Timothy and his insurer for \$30,000, releasing all claims. The wife and daughter sued the State for negligent highway design two years later, and attempted to rescind the previous settlement agreement so as to establish joint liability with the State. *Id.* Of course, the *only reason* the plaintiffs had any interest in joint liability *at all* was because they wanted the State to ultimately be forced to pay for the share of fault allocated to Timothy by the jury. The court of appeals held that there was no rescission based on the facts of that case, and expressed its displeasure at the Buntings' attempted exploitation of the law:

Finally, neither equity nor public policy favors the Buntings' attempt to manipulate the system *in an effort to obtain payment from the State for Timothy's fault.*
Id. at 654 (*emphasis added*).

Thus the court of appeals ruled that, consistent with Tort Reform, the State would only be required to pay the share of fault that was attributed *to it* by the jury – as a several judgment. In the case at bar, the State is attempting to avoid exactly the result it championed in *Bunting* - that it be required to pay the amount allocated *to it* by the jury. And, in the case at bar, it is an established fact that neither Barton nor the Linvogs

thought the Advance would affect the State's right to contribution, negating the State's allegation of manipulation in the first place.

Similarly, in the case of *Romero v. W. Valley Sch. Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004), Aaron Romero was a kindergartener at Summit View Elementary who was killed by a passing truck while getting into his mother's car in the pick-up area in front of the school. His parents sued the School District, alleging that the drive-through was not reasonably safe. *Id.* The District alleged that the mother had comparative fault in the accident, so the father and Aaron's estate cross-claimed against her. The estate and the father settled with the mother, agreeing that she would remain as a defendant in the case, but that the plaintiffs would not execute on any judgment against her. *Id.* Additionally, she was entitled to collect a fifty percent share of any judgment that the Romeros successfully recovered from the District¹⁰.

The jury awarded \$1.3 million, assigning 75 percent to the district, and 25 percent to the mother. Despite the release, the trial court entered judgment against the District and the mother jointly. *Id.* The District appealed, claiming that the judgment should have been several only.

¹⁰ This kickback feature is the essential aspect that made the agreement a Mary Carter settlement, creating an insidious moral hazard not even remotely present in this case. For more on the features of Mary Carter settlements, *see eg. Wausau Bus. Ins. Co. v. Turner Const. Co.*, 2001 WL 604188 (S.D.N.Y. June 4, 2001).

Because the Mary Carter agreement had entirely released the mother from any risk of an adverse judgment, the court of appeals held that she was a “released party” under RCW 4.22.070, and the judgment should not have been joint. *Id. at 392.*

Here, whether the judgment is “properly” categorized as a “contribution” judgment is of no moment – it represents a financial rebalancing, the actualization of the result intended by the jury, the precise outcome achieved by the court in *Romero*, and harmony with the principles of Tort Reform. Supposing, without conceding, that the TRA prohibited joint liability between the State and the Linvog Parents, the result accomplished by the trial court already negated the State’s professed joint liability concerns. The issue in this case has never been whether the State might have to pay more than its fair share of the judgment, and this Court should reject the State’s attempt to clothe its complaint about the jury’s apportionment in the robes of the Tort Reform Act.

b. The real issue, whether the State was prejudiced by the non-disclosure, was resolved as a factual matter within the trial court’s broad discretion.

There is no dispute that both the Linvogs and Barton should have disclosed the Advance to the State. But the evidence before the trial court demonstrated that neither Mr. Spencer nor Mr. Brindley thought the Advance had any effect on the State’s right to contribution from the

Linvog Parents, and inadvertently failed to do so. CP 9.

When both Spencer and Brindley freely shared this information with the State after trial, the motion the Attorney General brought was not to re-cast the judgment as several rather than joint; it was to vacate the jury's apportionment of fault. The State brought its Motion under CR 60(b)(4), alleging that Barton and the Linvog Parents had engaged in "fraud, misrepresentation or other misconduct" by not disclosing the Advance. The Linvogs hotly dispute the State's accusations of "fraud" as a component of its effort to leverage an inadvertent error into a new trial to obtain a new apportionment¹¹. But regardless of whether the Linvogs' accidental silence in the face of an obligation to speak counts as "misrepresentation" or "misconduct", such a violation does not lead automatically to discarding the result of a multi-week jury trial. A determination that there has been "misconduct" is only the first of the two-stage process in which a trial court must engage before vacating a judgment under CR 60(b).

The second step is a determination of whether the alleged misconduct caused meaningful interference in the moving party's defense. For example, in the case of *Peoples State Bank v. Hickey*, 55 Wn. App.

¹¹ "A Rule 60 motion will be denied if it is merely an attempt to relitigate the case." *Platner v. Strick Corp.*, 102 F.R.D. 612, 614 (N.D. Ill. 1984).

367, 371-72, 777 P.2d 1056 (1989), the court held: “[T]he conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense.” *See also, Lindgren v. Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990). *Peoples Bank* noted that FRCP 60(b)(3) is the federal counterpart to CR 60(b)(4), and relied on federal law in deriving this standard. Other federal cases have explored this issue in more detail:

Misconduct alone, however, is not sufficient to justify the setting aside of a final judgment. Under Rule 60(b), a court must balance the interest in justice with the interest in protecting the finality of judgments. That balance is effectuated in part by the requirement that the victim of misconduct (or of fraud or misrepresentation) demonstrate actual prejudice. This is often worded as a requirement that the movant show that the misconduct “foreclosed full and fair preparation or presentation of its case.”

Summers v. Howard Univ., 374 F.3d 1188, 1193-95 (D.C. Cir. 2004) (*Citations omitted*).

The determination of whether the moving party has been prejudiced – or deprived of a full and fair preparation and presentation of the case – is vested in the broad discretion of the trial court, and will not be overturned on appeal absent a manifest abuse of that discretion¹². *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 590, 220 P.3d 191 (2009).

¹² The trial court in the case at bar analyzed the State’s allegations in terms of “no prejudice.” As noted in the case of *Wilson v. Montague*, 2011 WL 1661561 (Del. May 3, 2011), some courts have conflated a deprivation of the right to “full and fair presentation” with “prejudice to the moving party,” but there is no additional content to be parsed by dwelling on these semantics: “[T]he distinction between the ‘full and fair presentation’ test and the ‘prejudice’ test is subtle, if a distinction at all.” *Id.*

It is inconsistent with the abuse of discretion standard for an appellate court to substitute its own discretion for that of the trial court when deciding whether a party's ability to prepare for trial was compromised. *Id.*

Here, the issue of whether the State was prejudiced in its preparation or presentation of its defenses was the subject of an exhaustive fifteen-page memorandum opinion from the trial court with findings of fact and conclusions of law. The trial court correctly determined that the State should have known about the Advance agreement, and then considered the possible uses that the State could have made of that information. There are only two ways the State could have used it: by moving to dismiss the Linvog Parents as defendants, or by using the fact of the Advance to attempt to show bias on cross examination at trial. After having witnessed the two week trial, the judge, appropriately acting within her discretion, correctly determined as a factual matter that the State had not been prejudiced in the preparation or presentation of its defenses.

i. The State was not prejudiced by having the Linvog Parents as "defendants" at trial.

The State has argued that, because of the Advance, the Linvog Parents were "released", no longer subject to an adverse judgment, and that it would have had a right to have them dismissed had it known of the Advance. The State claims that the jury was so overwhelmed by its

concern for Thomas and Madonna that it ignored its instruction to base its verdict on the evidence rather than on sympathy, and apportioned only five percent of the fault to Korrine in order to protect *her parents*. The State contends it was prejudiced by simply having them “in the case.”

To support its proposition that it was entitled to a dismissal, the State cites *Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, *rev. denied*, 152 Wn.2d 1026, 101 P.3d 421 (2004). In that case, the injured party, Maguire, sued the at-fault driver and the owner of the at-fault car along with the State for negligent highway design. Maguire settled with the two personal defendants; in exchange for a \$100,000 payment, Maguire covenanted not to execute on any judgment against them, and the two personal defendants agreed to stay in the case as nominal defendants. *Id.* The State moved to dismiss them, arguing that the “operative legal effect” of the covenant not to execute was a complete release, and they were no longer liable for a contribution judgment under RCW 4.22.070. “The State argued their continued presence in the case was designed to create joint and several liability among the three defendants.” *Id.* The court of appeals agreed with the State, and remanded for a dismissal of the personal defendants prior to trial. *Id.* The State posits it was entitled to the same relief in the case at bar.

There are several important distinctions the Court should bear in

mind with respect to the application of *Maguire* to the facts of this case, addressed here in ascending importance. First, unlike in *Maguire*, the trial court's unchallenged findings of fact confirmed that the parties here did not intend for the Advance to affect the State's right to contribution, and did not believe it did so. The State characterizes the trial court's position on this issue as follows:

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.

Pet. for Rev. at 9.

No one is suggesting that a litigant can "will" her way out of Tort Reform. The intent of the parties to the Advance is *not* relevant insofar as it could eliminate the possibility of joint liability and a contribution judgment (although it is worth mentioning again that this "impossibility" is actual in this case). But the understanding of Barton and the Linvogs *is* relevant to the question that matters the most; was the State prejudiced in preparing or presenting its defenses at trial. That was not the issue in *Maguire*. The trial court, and the court of appeals, made no conclusion about whether the State would have had the right to have the Linvog Parents dismissed, instead evaluating the logically primary question of whether the Advance had created a bias unknown to the State.

[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 term 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.

CP 10.

This unchallenged finding by the trial court confirms that the Linvogs conducted their defense exactly as they would have absent the Advance, because it had no effect on their perceived financial exposure - simply on whether it would be the State or Barton collecting. And, importantly, the only Linvog to testify was Korrine, who had no protection from a judgment at all. With or without the Advance, her only financial bias would have been identical – to vigorously emphasize that Barton’s injuries were the fault of the State. The trial court found this bias was well known to the State and available for exploration on cross-examination¹³.

Second, in dramatic distinction from *Maguire*, the trial court found that the presence of the Linvog Parents was a non-issue at trial. The dismissal of the personal defendants in *Maguire* did not change the fact that they were entitled to vigorously participate in trial as fact witnesses. Here, in contrast, the relevant question was whether the Linvog Parents’ “involvement” in the trial had prejudiced the State. The trial court’s

¹³ This is not the first time the State has mistakenly interpreted coordination of its tort adversaries as “collusion” when in fact it is simply the natural alignment of the parties. See *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 103, 841 P.2d 1300, 1304 (1992) *aff’d*, 125 Wn. 2d 1, 882 P.2d 157 (1994).

findings of fact on this issue were compelling:

Finally, the State argues that it was prejudiced because the jury might have felt sorry for the Linvog parents. . .

There is nothing to support this argument except 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 jury was given an instruction to not be swayed by sympathy and there is no evidence they ignored that. **The only time the Linvog parents were even mentioned at trial was in passing in opening statement to explain why they were on the case caption. *The parents did not sit at counsel table. They were such a non-presence at trial that they were not on the verdict form and no one noticed.*** If mere speculation a jury based its decision on a desire to not financially ruin defendants were enough to vacate a verdict, no verdict could ever stand.

CP 14 (emphasis added).

This determination was both correct, and well within the trial court's discretion. This Court should not disturb this discretionary ruling.

ii. The alternative basis for the holding – that the Advance agreement's covenant was void – is an equally compelling basis to affirm.

A second reason for which the understanding of Barton and the Linvogs with respect to whether the Advance eliminated contribution liability was relevant is that, if they were wrong *that*, then the terms of the Advance would not have been enforceable at all. As the trial court noted, the Advance agreement was like any other contract¹⁴, and could be void if its terms were legally impossible (as the State argues), or void because of

¹⁴ "A release is a contract." *Bunting v. State*, 87 Wn. App. at 653.

mutual mistake. In every case cited by the State on the Tort Reform issue, it was abundantly clear that the intent of the covenant not to execute was to protect the released party not just from execution by the plaintiff, but from a contribution judgment as well. As the court in *Bunting* recognized, however, the destruction of joint liability that accompanies a true covenant not to execute is contingent upon the enforceability of that agreement. In *Bunting*, the issue was whether the release had been rescinded. In this case, it is whether treating the covenant aspect of the Advance as void *ab initio* negates the State's claim of prejudice under CR 60(b).

This exercise of the trial court's discretion also honors the result reached by the jury after the two-week trial and its deliberations, as well as ensuring the State got the trial it would have had if there had been no Advance in the first place: the Linvogs correctly believed that they were exposed to an unlimited contribution judgment, negating any allegation of bias; the Linvog Parents' (non) presence at trial was identical; the vanishingly brief comments in opening statements that the Parents were on the caption because they were "on the hook" for Korinne's liability was literally (and empirically) true; and the State ended up with the (collectible) contribution judgment it claims should have been impossible if the Advance were valid. This alternative basis for its finding that the State was not prejudiced was also well within the trial court's ample

discretion in ruling on a CR 60(b) Motion to Vacate, and provides one more reason for this Court to affirm.

2. *Sanctions against the Linvogs' attorney.*

The State did not challenge the trial court's correct conclusion that the Linvogs' attorney, Mr. Spencer, made an honest mistake in failing to produce a copy of the Advance to the State. "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993). The trial court was well within its discretion to determine that Mr. Spencer has been educated, punished and deterred with respect to his inadvertence by the fact that the result he obtained for his clients was subject to the Motion to Vacate and now years of appeals. There is no basis for a sanction to compensate the State, however, because the State suffered no prejudice.

III. Conclusion

The Linvogs respectfully request that the Court affirm the court of appeals decision in this case.

Respectfully submitted this 9th day of July 2012.

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

CERTIFICATE OF SERVICE

I, Nancy Boyd, declare that on the date noted below, I caused to be delivered via ABC legal messengers, Respondent Linvogs' *SUPPLEMENTAL BRIEF* to:

Michael Nicefaro
Office of the Attorney General of WA Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

With copy *via U.S. Post* to:

Michael P. Lynch
Assistant Attorney General
7141 Cleanwater Drive SW
Olympia, WA 98504

David Benninger and Ralph J. Brindley
Luvera, Barnett, Brindley, Beninger & Cunningham
701 Fifth Avenue, Suite 6700
Seattle, WA 98104-7106

Howard M. Goodfriend
Edwards Sieh Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101-2988

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

Signed in Seattle, Washington this 9th day of July 2012.

/s/*

Nancy Boyd

*Original Signature on File

OFFICE RECEPTIONIST, CLERK

To: Brent Beecher
Cc: miken@atg.wa.gov; MikeL@ATG.WA.GOV; Deborah Martin; Ralph Brindley; David Beninger; Tara Friesen; Howard Goodfriend
Subject: RE: No. 86924-3 - Jared K. Barton, v. State of Washington, Department of Transportation, et al.

Rec. 7-9-12

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

From: Brent Beecher [<mailto:bbeecher@hackettbeecher.com>]
Sent: Monday, July 09, 2012 4:58 PM
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Subject: Re: No. 86924-3 - Jared K. Barton, v. State of Washington, Department of Transportation, et al.

Attached for filing is the Supplemental Brief of Respondents Linvog. The attorney filing this document is Brent W. Beecher, WSBA 31095.

Thank you.

Brent Beecher

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On Jul 9, 2012, at 4:39 PM, Tara Friesen wrote:

Attached for filing in .pdf format is the Supplemental Brief of Respondent Barton, in *Barton, v. State of Washington, Department of Transportation*, Cause No. 86924-3. The attorney filing this document is Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com.

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<Supplemental Brief of Respondent Barton.pdf>