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NO. 65673-2-I

**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.

**STATE OF WASHINGTON'S REPLY TO BRIEF OF
RESPONDENTS LINVOG**

ROBERT M. MCKENNA
Attorney General

MICHAEL P. LYNCH
MICHAEL A. NICEFARO, Jr.
Assistant Attorneys General
WSBA No. 10913
WSBA No. 9537
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
(360) 586-6300

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I. INTRODUCTION

Under CR 60(b)(4), the standard for affording relief based on a discovery violation involving non-disclosure is whether the information that was withheld was material to a fair presentation of the case at the time of trial.¹ Any doubt that misconduct affected the verdict must be resolved against the verdict.² This is an objective inquiry into whether the extraneous evidence could have affected the jury's determination.³ A trial court decision whether to grant a new trial will be disturbed on appeal only for clear abuse of discretion or when it is predicated on an erroneous interpretation of the law. Greater deference is owed the decision to grant a new trial than the decision to deny one.⁴

In this case the trial court misinterpreted RCW 4.22.060 and .070 in concluding that the secret covenant not to execute did not negate contribution rights and joint liability between the Linvog parents and the State.⁵ The trial court erred in failing to determine the covenant not to

¹ *Roberson v. Perez*, 123 Wn. App. 320, 335, 96 P.3d 420 (2004), *review denied*, 155 Wn.2d 1002, 120 P.3d 578 (2005).

² *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

³ *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989).

⁴ *Kuhn v. Schnall*, 155 Wn. App. 560, 228 P.3d 828 (2010).

⁵ RCW 4.22.060(2) provides, in pertinent part: 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**. . . ." (Emphasis added.)

execute released the Linvog parents from the lawsuit.⁶ The trial court erred in giving the covenant not to execute the legal effect that Mr. Brindley (plaintiff's counsel) and Mr. Spencer (the Linvogs' counsel) claim that they thought it had—that it did not negate contribution rights and joint liability between the State and the Linvog parents. CP at 8-14. Analyzing statutory violations based on the subjective interpretation purportedly given to the statute by the parties and/or lawyers involved would render the law meaningless and result in legal oblivion.⁷

The agreement was material because the covenant not to execute and \$20,000 advance payment were kept hidden. The State did not know to ask the Linvogs in pre-trial discovery about the circumstances surrounding the agreement. Korrine Linvog was not cross examined 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. The Linvog parents were allowed to remain in the case as

⁶ See *Shelby v. Keck*, 85 Wn.2d 911, 918, 541 P.2d 365 (1975) (covenant not to execute that set the upper limits of a parties liability in exchange for \$25,000 must be viewed as a binding settlement and dismissal of that party by the court was proper); *Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, review denied, 152 Wn.2d 1026, 101 P.3d 421 (2004) (the fact that Maguire's agreement did not specifically "release" the defendants is irrelevant; what matters is the covenant's operative legal effect); *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004), review denied, 154 Wn.2d 1010, 113 P.3d 481 (2005) (covenant not to execute constitutes a release under RCW 4.22.060).

⁷ All of the Linvogs' arguments as to why the failure to disclose was non-prejudicial are premised on the trial court's faulty conclusion that the covenant not to execute did not have the operative legal effect of negating contribution and joint liability between the State and the Linvog parents. Brief of Respondents Linvog (Br. Resp'ts Linvog) at 1, 5-7, 15, 19, 24-45, 29, 33, 37, 39-44, 49-50.

sham parties who appeared vulnerable and sympathetic. No objection was made when the liability of the Linvog parents was misrepresented to the jury in the opening statements of both counsel and Jury Instruction 18. The objective success of this sympathy ploy is reflected in the jury's allocation of 95 percent of fault on the State.

The multimillion dollar judgment in this case is tainted by the non-disclosure of information that was directly material to a fair presentation of the State's case. Such hidden "wink-wink deals"⁸ must not be condoned. The order denying the State's Motion to Vacate and For Sanctions should be reversed.

II. COUNTER STATEMENT OF THE CASE

A. The Trial Court Did Not Enter Findings Of Fact

The hearing on the State's Motion to Vacate Judgment in this case was heard on January 15, 2010. Although dated March 14, 2010, the trial court's memorandum decision was not sent to the parties until May 3, 2010. The formal order denying the State's Motion to Vacate was entered on June 4, 2010. CP at 27-39. That order did not contain any findings of fact or conclusions of law.⁹ Pursuant to CR 52(a)(5)(B) findings and

⁸ RP(6/4/10) at 38.

⁹ The order did incorporate Judge Farris' Memorandum Decision, but the Memorandum Decision does not constitute findings and conclusions of law. It only sets forth the rationale for the courts decision. The State was not afforded any opportunity to contest findings of fact in the memorandum decision.

conclusion are not necessary when a court is ruling on a CR 60(b) motion to vacate a judgment. The Linvogs are incorrect in asserting that the trial court made formal findings of fact and that they are verities in this appeal because they are unchallenged. *See* Brief of Respondents Linvog (Br. Resp'ts Linvog) at 5, 19.

Where the trial court's decision is based on review of only documentary evidence, as in the case at bar, and there are no findings of fact, an appellate court can weigh all the evidence and draw its own inferences from it and all of the surrounding circumstances. *Auger v. Shideler*, 23 Wn.2d 505, 507, 161 P.2d 200 (1945); *In re Riley Estate*, 78 Wn.2d 623, 654, 479 P.2d 1 (1970) (trial court findings based on a written record, rather than live testimony, may be disregarded and an appellate court will determine what findings should have been made).

In order to be entitled to relief, the State does not have to establish that the existence of the covenant and \$20,000 payment were deliberately hidden by opposing counsel. Even if inadvertent, the failure to disclose prejudiced the fair presentation of the State's case entitling the State to relief under CR 60(b)(4).¹⁰ A lack of intent maybe considered in

¹⁰ Importantly, the standard for relief regarding the constitutional error in Jury Instruction 18 is significantly lower than the standard under CR 60(b)(4). Prejudice is presumed and the burden to rebut it was on the Linvogs. Const. art. IV, § 16, *see* Br. Appellant at 37-39, Reply to Brief of Respondent Barton at 18-19, incorporated herein to avoid duplication.

fashioning a discovery sanction. *Allied Fin. Servs. v. Magnum*, 72 Wn. App. 164, 168-69, 864 P.2d 1 (1993). Nevertheless, it is the State's position that the failure of Mr. Brindley's and Mr. Spencer's law firms to disclose the existence of the covenant not to execute and the \$20,000 payment was **not** inadvertent. See Brief of Appellant (Br. Appellant) at 19, 24, 29, 33-37, 40, 43, 47. Both law firms are extremely thorough and detailed in their litigation management. It strains credulity to believe that one, much less both would fail for eight months to supplement answers to the same interrogatories that specifically inquired about the existence of any covenants or advance payments. One would have to suppose Mr. Brindley was unaware of an interrogatory requesting disclosure of any advance payments, even though a request for such information is made in almost every multi-party personal injury lawsuit. CP at 1245. One would also have to believe that two highly skilled tort practitioners were both ignorant of the case law and statutory provision mandating that a covenant not to execute operates as a release of liability.¹¹ One would have to assume that Mr. Brindley was completely unaware of the article written by two of his partners that specifically criticized the holdings in the *Maguire* and *Romero* cases to that effect. See Br. Appellant, App. 6. David Beninger and Joel Cunningham, *Settlement Agreements: Are Lions Now*

¹¹ *Maguire*, 120 Wn. App. at 398; *Romero*, 123 Wn. App. at 385; and RCW 4.22.060(2).

Tigers and Bears (Oh My)?, Trial News at 5, 9 (January 2006). One would have to suppose that both Mr. Spencer and Mr. Brindley forgot that they had an agreement limiting the Linvogs parents' liability to \$100,000 when they both stated in their opening statements that the Linvog parents were responsible for, and on the hook for, the damages the jury awarded against their daughter Korrine. CP at 785, 801-02. One would have to assume that they suffered the same lapse in memory when Jury Instruction 18 was proposed to and given by the court again erroneously telling the jury that as a matter of law the Linvog parents were responsible for any damages awarded against their daughter. CP at 1232, 1235. One would have to believe that Mr. Spencer forgot that his clients were entitled to a \$20,000 credit, and the State to a \$20,000 offset when judgment was entered against both the State and the Linvogs without any reference to the \$20,000 the plaintiff had already received. *See* RCW 4.56.050-.075; Br. Appellant at 7 n.3. CP at 227-29. One would also have to explain how their memories returned a month later when the Linvogs paid plaintiff not \$100,000; but the \$80,000 balance due after the \$20,000 advance payment was credited, pursuant to the agreement. CP at 844.

Finally, to the extent the trial court did state in its memorandum opinion that Mr. Brindley's and Mr. Spencer's failure to supplement their discovery answers was due to oversight, the court then, in the next

sentence, inexplicably and paradoxically contradicts itself by concluding that both counsel were aware that RCW 4.22.060 required them to give the State notice of the agreement and payment five days before it was executed “and failed to comply with it.” CP at 9. Because the trial court did not make any formal findings of fact and its decision was based on a written record, this court is entitled to consider the evidence as a whole and make its own determination of the facts. *In re Riley Estate*, 78 Wn.2d at 654; *Federal Way Family Physicians Inc. v. Tacoma Stands up for Life*, 106 Wn.2d 261, 266, 721 P2d 946 (1986) (findings of fact based on affidavits deserve less deference on appeal).

B. The State Only Entered A Contribution Judgment After It Was Ordered To Pay The Remaining Portion Of The Linvogs Share Of The Judgment, Over Its Objection

After Judge Farris sent the parties the memorandum decision on May 3, 2010, Mr. Barton filed a motion for an order mandating the State’s payment of judgment balance. CP at 53-57, 217-61. The State opposed that motion.¹² CP at 80-182. Over the State’s opposition, the court granted plaintiff’s motion mandating the State pay the remaining judgment balance owed by the Linvogs. CP at 40-42. In compliance with the court’s order, the State paid the remaining \$80,000 share of the Linvogs’

¹² The Linvogs never explained why they did not pay the \$80,000 plus interest they argued that they owed on the judgment. The record reflects they own real property in Whatcom County that is valued at \$4,529,426. CP at 291.

portion of the judgment, plus interest accrued. Given the one year statute of limitations, under RCW 4.22.050(3), the State entered a contribution judgment against the Linvogs in order to protect its rights pending outcome of this appeal. CP at 1507-09. No payment has been made on that judgment into the registry of the court, and if such payment were made, the State would only disburse the funds if the State did not prevail on this appeal. The State has received no benefit from the contribution judgment other than to preserve the status quo until the real legal effect of the covenant is decided in this appeal. *See infra* at 22.

III. ARGUMENT

A. **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**

Contrary to the Linvogs' argument, the State's primary argument is not that the secret agreement between the Linvogs and Mr. Barton was an alignment-changing event. *See Br. Resp'ts Linvog* at 9, 10, 14, 15, 17, 24, 35, and 38.¹³ While the limitation of liability strongly reduced plaintiff's incentive to recover from the Linvogs, the primary prejudice was from the agreement's non-disclosure. From the outset, Korrine Linvog had a strong

¹³ Throughout the brief of respondents Linvog they refer to the agreement as "the Advance." However, the \$20,000 advance payment is only relevant because it was not disclosed as required in discovery and was not referenced as an offset in the judgment entered against the Linvogs and the State. *See Br. Appellant* at 7. It was the undisclosed covenant not to execute that had the operative legal effect of releasing the Linvog parents.

incentive to do what the plaintiff wanted in order to eliminate the catastrophic liability she had created for her parents. She and her parents were facing a multimillion dollar judgment and had only a \$100,000 in insurance. So she met with Mr. Brindley, plaintiff's counsel, and his highway design expert, Ed Stevens, long before the lawsuit was ever filed and then provided the only evidence establishing that the State's trees, in conjunction with the location of the stop bar, had caused the accident.¹⁴ Her deposition (CP at 928-41) and trial (CP at 1007-08) testimony that she went back to the accident scene and concluded the trees must have blocked her view occurred long after her meeting with Mr. Brindley and Mr. Stevens. CP at 484-45.

After Korrine provided the key testimony in her deposition setting up the plaintiff's claim against the State, the plaintiff entered into an agreement limiting her parents' liability to \$100,000.¹⁵ The Linvogs' claim that Korrine "received nothing at all in the Advance" is inaccurate. *See* Br. Resp'ts Linvog at 6. The covenant not to execute eradicated the disastrous liability exposure she had created for her parents. This bargain was undoubtedly extremely important to Ms. Linvog.

¹⁴ At trial the evidence was undisputed that if Ms. Linvog had pulled forward to the edge of the road and looked again, she would have had a clear view of approaching west bound traffic on SR 536. CP at 780. *See* Br. Appellant Exhibit 51, App. 1.

¹⁵ The Br. Resp'ts Linvog at 4 incorrectly indicates Mr. Brindley approached Mr. Spencer to discuss the possibility of an agreement in April 2007. The agreement was executed on March 1, 2007. CP at 919.

If the agreement limiting the liability of Korrine's parents had not been hidden, the State could have cross examined her about the fact that after she provided the critical deposition testimony that established plaintiff's liability theory against the State (trees blocked her view), the plaintiff rewarded her by eliminating the potential destruction of her parents financial security through the consummation of the covenant not to execute above their insurance policy limits.¹⁶ Accordingly, the covenant not to execute was directly relevant to Korrine Linvog's motive, bias, and credibility, and material to the jury's finding and apportionment of fault against the State.¹⁷ Hiding the covenant not to execute prevented cross examination on this critical testimony.

In addition, the non-disclosure of the covenant not to execute allowed the Linvog parents to remain as sham parties and create false sympathy for them at trial. If the Linvogs had not kept the existence of the covenant not to execute and advance payment a secret, the State would have recognized that the covenant not to execute operated as a release (RCW 4.22.060(2)) and moved to have them dismissed. RP(1/15/10) at 7-8. *See Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, *review*

¹⁶ Of course, if the agreement had been disclosed before trial, the State could have deposed the Linvogs about the circumstances surrounding its creation.

¹⁷ *See State v. McDonald*, 122 Wn. App. 804, 95 P.3d 1248 (2004), *review denied*, 153 Wn.2d 1006, 103 P.3d 1247 (2005) (failure to disclose material evidence that could be used to impeach the credibility of a witness whose testimony was the only evidence supporting the jury's verdict is reversible error).

denied, 152 Wn.2d 1026, 101 P.3d 421 (2004).¹⁸ If they had not been dismissed, then the State would have known to object when the jury was told in opening statement by both counsel that the Linvog parents were “on the hook” for all damages allocated against their daughter Korrine. The State would have objected to Jury Instruction 18 which erroneously told the jury that the Linvog parents were responsible for paying all damages awarded against Korrine, because there was an agreement limiting the parents’ liability to \$100,000. These affirmative misrepresentations created false sympathy for the Linvog parents—that they would be financially ruined if the jury assigned a large percentage of fault in its \$3.6 million verdict against their daughter.¹⁹

B. Under Washington Law Jurors Should Be Advised Of Agreements That Change The Liability Of The Parties

Citing a couple cases from the state of Ohio,²⁰ the Linvogs argue that it was appropriate to allow the Linvog parents to remain defendants,

¹⁸ The Linvogs attempt to distinguish this court’s decision in *Maguire* on its facts. *See* Br. Resp’ts Linvog at 29-33. However, conspicuously absent from their argument is any mention or analysis of the express language in RCW 4.22.060(2) stating that, like a release, a covenant not to execute or similar agreement negates contribution rights and joint liability.

¹⁹ Here again, this kind of agreement conflicts with the Tort Reform Act of 1986, specifically RCW 4.22.070, which was enacted by the legislature with an intent to protect deep pocket defendants from bearing more than their fair share of liability. *See* J. Michael Phillips, *Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Ligation*, 69 Wash. L. Rev. 255, 257 (1994). *See* Br. Appellant at 25-27.

²⁰ *Hodesh v. Korelitz*, 123 Ohio St.3d 72, 76-77, 914 N.E.2d 186, 191 (2009); *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St.3d 10, 615 N.E.2d 1022 (1993). *See* Br. Resp’ts Linvog at 20-23.

and the jury should have heard nothing about the agreement they made with the plaintiff limiting their liability to \$100,000. Br. Resp'ts Linvog at 22. The Ohio cases are inapposite.²¹

First, they are in conflict with *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 in *McCluskey* 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 then noted that where 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 the jurors can consider the relationship in evaluating evidence and the credibility of witnesses. *McCluskey*, 68 Wn. App. at 104, citing *Daniels v. Penrod*, 339 F. Supp. 1056 (1975); *Ward v. Ochoa*, 284 So. 2d 385 (1973); *Maule v. Rountree*, 284 So. 2d 389 (1973); *Ratterree v. Bartlett*, 238 Kan. 11, 707 P.2d 1063 (1985). The Linvogs failed to cite or distinguish *McCluskey*, the only Washington case to address this issue.

²¹ Ohio represents the minority view. The majority of jurisdictions require that the agreements limiting a party's liability be disclosed and admitted into evidence. *General Motors Corp. v. Lahocki*, 286 Md. 714, 728, 410 A.2d 1039 (1989) (citing cases); *Packaging Corp. of America v. DeRycke*, 49 So. 3d 286, 291-92 (2010) (reversing trial court's failure to disclose to jury agreement where plaintiff accepted payment of insurance policy limits from defendant who remained a party at trial).

Second, in both of the Ohio cases the existence of the advance payment and agreement limiting liability was disclosed to the court and the opposing parties. In contrast, Mr. Barton and the Linvogs' violated RCW 4.22.060(1) in failing to disclose their agreement prior to its execution in March 2007. They violated their discovery obligations under CR 26 and 37 in failing to reveal the existence of the advance payment and covenant not to execute in discovery, despite specific interrogatories calling for disclosure. CP at 831-41. They hid the existence of the agreement and \$20,000 advance payment again by failing to include the payment as an offset in the judgment entered on the jury's verdict.²²

Third, there is no indication that a covenant not to execute operates under Ohio law as a release, eliminating contribution rights and joint liability, as it does under Washington law. *See* RCW 4.22.060(2), .070.

Fourth, neither of the Ohio cases involved a situation where counsel affirmatively misrepresented the liability of the party whose liability had been limited by the agreement. There is no reason to believe that if the Ohio courts had been faced with such fraudulent deception they

²² Even now the judgment entered on November 29, 2007, fails to reflect the State's entitlement to a \$20,000 offset credit against the judgment pursuant to RCW 4.56.050 - .075. The Linvogs assumed that credit when they paid only the \$80,000 balance due and obtained a partial satisfaction of judgment for \$100,000 on January 24, 2008. CP at 844.

would not have advised the jury of the truth by disclosing the existence of the agreement.

Finally, in *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St.3d 10, 615 N.E.2d 1022 (1993), the presence of the poultry company at trial actually served the purpose of determining the amount plaintiff could recover from them. In the case at bar, the presence of the Linvog parents served no purpose at all other than to evoke false sympathy from the jury.

Under the position advocated by the Linvogs and Mr. Barton, “wink-wink deals” can be kept hidden, in violation of statutory and discovery obligations, with impunity.²³ All agreements that affect the liability of parties in the litigation should be disclosed to the court, to opposing parties, and to the jury. That way the jury can consider the actual relationship of the parties and evaluating the evidence and the credibility of witnesses. *McCluskey*, 68 Wn. App. at 104.

If Respondents’ rule is accepted, then, hypothetically, the State and the Linvogs could enter into a partial indemnification agreement in which the State agreed to pay any damages awarded against the Linvogs above their insurance policy limits. Then, if Ms. Linvog testified that the reason she didn’t see Mr. Barton’s motorcycle was because of its dim headlight, and not that the State’s trees blocked her view, the jury wouldn’t be

²³ As Judge Farris noted, there is a concern about the number of “wink-wink deals” going on. RP(6/4/10) at 38.

entitled to know of the agreement.²⁴ If there was a defense verdict, there would be no reversible error even when the defendants **forgot** to disclose the agreement in violation of discovery rules. Such a rule does not promote candor and would be contrary to sound public policy.

C. RCW 4.22.060 Requires Notice To The Court And All Parties To Prevent Sham Defendants From Remaining In A Lawsuit

The pre-settlement notice requirement of RCW 4.22.060 is designed to prevent sham defendants from remaining in a lawsuit, not as the Linvogs argue because of a need for a reasonableness hearing. *See* Br. Resp'ts Linvog at 44-46. The reasonableness hearing aspect of RCW 4.22.060 does not apply in this case. It is applicable in cases involving multiple tortfeasors who are exempt from RCW 4.22.070 (Tort Reform Act of 1986) or when a plaintiff is contemplating a bad faith claim against a defendants' insurer. 16 David K. DeWolf and Keller W. Allen, *Washington Practice: Tort Law and Practice* § 12.43 (3d ed. 2011).

The reasonableness hearing requirement was part of the Tort Reform Act of 1981 that implemented contributory fault but retained joint and several liability in all cases. In 1986 the Legislature further revised Washington's tort law by establishing proportionate liability, making joint liability the exception rather than the rule. Under RCW 4.22.070(2),

²⁴ Two eye witnesses to the accident stated that the headlight on Mr. Barton's motorcycle was very dim, fading in and out as it approached the intersection where the accident occurred. CP at 1147-54.

RCW 4.22.060 comes into play in determining contribution rights against other jointly and severely liable defendants. *See Bunting v. State*, 87 Wn. App. 647, 651-52, 943 P.2d 347 (1997). However, because under RCW 4.22.060(2) a covenant not to execute negates contribution rights, it also negates joint liability. *Id.*

It would be a “procedural sham” to allow a party to settle with one tortfeasor, keep the settlement proceeds, and then retain that tortfeasor as a party in order to maintain joint liability for non-settling defendants. *Bunting*, 87 Wn. App. at 653. The Linvogs are correct that RCW 4.22.060 does provide a settling defendant *protection* from contribution claims. *See Br. Resp’ts Linvog* at 45. The fact that the Linvogs’ attorney has never argued that RCW 4.22.060 protected the Linvog parents from the State’s contribution rights highlights the conflict of interest they face. If they invoke the mandate of RCW 4.22.060(2) and assert they are “off the hook” because the covenant not to execute negated the State’s contribution rights, then they would be conceding the prejudice of the opening statements and jury instruction that mislead the jury into believing they were on the hook. If they continue to argue that RCW 4.22.060(2) does not mean what it says, and did not negate contribution rights, then Thomas and Madonna Linvog could end up having to pay \$92,632.30 that they don’t owe. CP at 1570; *see infra* at 22.

D. The Linvog Parents Were Not Subject To An Involuntary Adverse Judgment

It is undisputed that from the very beginning of this case the Linvogs offered Mr. Barton their entire \$100,000 in insurance policy limits to try to settle the case. CP at 555; Br. Resp'ts Linvog at 3. This offer was refused because the plaintiff wanted to maintain joint liability between the Linvogs and the State so that he could collect the entire judgment (minus the \$100,000 in insurance) from the deep pocket governmental defendant. CP at 560-61. The covenant not to execute limited the Linvog parents' liability to \$100,000. Therefore, the entire amount of money that the Linvog parents would ever have to pay Mr. Barton was the same amount they had already offered and never withdrew. The reason Korrine Linvog was not included in the covenant not to execute was expressly because Mr. Barton didn't want to do anything that would affect joint liability. CP at 561. Ms. Linvog's exclusion from the covenant not to execute demonstrates that the Linvog parents and Mr. Barton knew that the covenant not to execute negated joint liability of the Linvog parents notwithstanding what they contend now.

As noted previously, the Linvog parents' presence in this lawsuit served no purpose other than to evoke false sympathy from the jury.

Supra at 14. Because their liability was purely vicarious under the family car doctrine, payment of the remaining \$80,000 in available insurance proceeds would occur upon the jury's inevitable verdict against Korrine Linvog, whether her parents continued as parties or not.

The Linvogs have never offered any explanation as to why the Linvog parents were not simply dismissed in exchange for the \$20,000 advance payment. RP(1/15/10) at 10-11. The only logical explanation is they were kept in the case as a sympathy ploy—hoping the jury would feel sorry for them and thereby impose a lower verdict against their daughter.

To follow the metaphor that the Linvogs borrow from Professor Sisk, the Linvog parents no longer remained in the boat—truly subject to an involuntary adverse judgment—after their liability to the plaintiff was limited to an amount they had already voluntarily offered to pay in settlement. Only Korrine and the State were in the boat together when the lawsuit came ashore for entry of judgment. Only Korrine and the State were liable for the \$3.6 million judgment entered on the jury's verdict. *See* Br. Resp'ts Linvog at 36, quoting *Maguire*, 120 Wn. App. at 399; citing Gregory Sisk, *Interpretation of the Statutory Modification of Joint*

and Several Liability: Resisting the Deconstruction of Tort Reform, 16 U. Puget Sound L. Rev. 1, 50-51 (1992).²⁵

The most pertinent part of Professor Sisk's discussion of covenants not to execute is where he notes that a:

[C]ourt should decline to permit such circumvention of the statute. The court should insist that any such covenant not to execute a judgment be revealed prior to the entry of the judgment, and then it should refuse to enter judgment against a party that is not truly subject to its consequences. The court retains the power of judgment and may refuse to exercise that power when the parties seeking such a judgment are attempting to manipulate the judicial process to an improper end.

16 U. Puget Sound L. Rev. at 51; *see Maguire*, 120 Wn. App. at 399 nn.24, 25.

Since the liability of the Linvog parents to Mr. Barton was limited to \$100,000, judgment should not have been entered against them above the amount that they owed to the plaintiff. CP at 1237-39. Contribution rights and joint liability between the State and the Linvogs parents were eliminated by the covenant not to execute. RCW 4.22.060(2). Thanks to the covenant not to execute, the Linvog parents were already safely on shore when the jury rendered a \$3.6 million verdict, in favor of Mr. Barton.

²⁵ The Linvogs assertion that the State convinced the trial court to enter a judgment in its favor against the Linvog parents is misleading at best. Br. Resp'ts Linvog at 37. The State opposed Mr. Barton's motion to compel the State to satisfy the remaining unpaid portion of the judgment against the Linvogs. *See supra*, pp. 7-8.

E. Judicial Estoppel Does Not Bar The State From Arguing That The Covenant Not To Execute Released The Linvog Parents From Liability

As the basis for their judicial estoppel argument, the Linvogs' claim that the State is asserting inconsistent positions by taking the position that the covenant not to execute negated its contribution rights against the Linvog parents, but then taking a contribution judgment against the Linvog parents.²⁶ See Br. of Resp'ts Linvog at 26-28. What the Linvogs fail to note is that the State only took the contribution judgment after it was ordered, over its objection, to pay the Linvogs unpaid portion of the judgment, \$92,632.30.²⁷

Judicial estoppel requires the court to analyze three questions: (1) whether a party's current position is inconsistent with an earlier position; (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception that the party misled either the first or second court; and (3) whether the party asserting the inconsistent position will obtain an unfair advantage or impose an unfair detriment on the opposing party if not stopped. *Miller v. Campbell*, 164 Wn.2d 529,

²⁶ There is no dispute that the contribution judgment against Korrine Linvog is proper.

²⁷ Because the final resolution of this appeal will not occur until after the one year statute of limitations for obtaining a contribution judgment expires, the State needed to enter that judgment in order to protect its financial interests. See RCW 4.22.050(3).

539, 192 P.3d 352 (2008). The Linvogs fail to satisfy any of these three elements.

First, the State's position is not inconsistent with an earlier position. Since learning of the secret covenant not to execute, the State had steadfastly asserted that the covenant negated joint liability between the State and the Linvog parents and any contribution rights between them. That was the State's argument to the trial court and in this appeal.

Second, there is no chance that the State misled the first or second court with inconsistent positions because, its positions are not inconsistent, and all rulings have been in the same case and before the same judge. Judge Farris ruled **against** the State by rejecting its argument that the covenant not to execute negated contribution rights and then by ordering the State to pay the Linvogs' unpaid portion of the judgment. Judicial estoppel only applies if the litigant benefitted from its prior inconsistent position benefitted the litigant or it was accepted by the court. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001); *see also Miles v. State Child Protective Servs. Dep't 6*, 102 Wn. App. 42, 6 P.3d 112 (2000), *review denied*, 142 Wn.2d 1021, 16 P.3d 1266 (2001) (judicial estoppel prevents a party from taking a factual position that is inconsistent with the factual position asserted in previous litigation).

Finally, the State will not obtain any advantage or impose any detriment on Thomas and Madonna Linvog. If this court ultimately adopts the State's position that the covenant not to execute negated contribution rights and joint liability between the State and the Linvog parents then the contribution judgment can be vacated. If the court agrees with the position asserted by the Linvogs' counsel that the covenant not to execute did not negate contribution rights or joint liability and they owe the State the \$92,632.30, then the status quo before Judge Farris's ruling **against** the State has been maintained. In short, the State is not trying to "have it both ways." To the contrary the State is simply asking this court to give the covenant not to execute its actual, operative legal effect under RCW 4.22.060(2) and then properly analyze the prejudicial effect that its non-disclosure had on the trial.

F. The Trial Court Abused Its Discretion By Misinterpreting And Misapplying RCW 4.22.060 and .070

When the trial court erroneously concluded that the covenant not to execute did not operate as a release of the Linvog parents, at least above \$100,000, this skewed the trial court's analysis of the prejudicial impact of the failure to disclose. The proper interpretation of RCW 4.22.060 and .070 is an issue of law subject to de novo review. A court abuses its discretion when it applies the law to the fact on untenable grounds. *Mayer*

v. *STO Industry*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). See Br. Appellant at 23-33.

The failure of counsel for the Linvogs and Mr. Barton to disclose the covenant not to execute and the \$20,000 payment in response to specific interrogatory requests, and as required by statute and case law constitutes fraud.²⁸ See *Crisman v. Crisman*, 85 Wn. App. 15, 21-23, 931 P.2d 163, review denied, 132 Wn.2d 1008, 940 P.2d 653 (1997) (when a duty to disclose exists, suppression of a material fact is tantamount to an affirmative misrepresentation). See Br. Appellant at 21-23. In addition, the misrepresentations made by counsel for the Linvogs and Mr. Barton in their opening statements that the Linvogs were “on the hook” when their liability was limited to \$100,000 also constitutes fraud. The misstatement in Jury Instruction 18 regarding the parents’ liability is a grossly misleading comment on the evidence, the prejudice of which has not been rebutted.

Accordingly, the order denying the State’s Motion to Vacate the Judgment should be reversed. The court should either order a new trial or, as an alternative, require Mr. Brindley and Mr. Spencer to pay the State’s costs and attorneys fees and disgorge all funds that their law firms received in profit and pay that amount to the State as a sanction for their

²⁸ RCW 4.22.060(1); *McClusky*, 68 Wn. App. at 104.

discovery violations and in restitution. *See* RAP 12.8; Br. Appellant at 48-49.

At a minimum, substantial sanctions are warranted under CR 26 and 37. Whether analyzed under CR 26(g) or 37(a), the failure to disclose the covenant not to execute and \$20,000 payment were not trifling errors especially when compounded by misrepresentations as to the Linvog parents' liability that were perpetuated at trial. The discovery rules are intended to "make a trial less a game of blind mans bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Gamon v. Clark Equip. Co.*, 38 Wn. App. 274, 279-80, 686 P.2d 1102 (quoting *United States v. Proctor & Gamble Company*, 356 U.S. 677, 683, 78 S. Ct. 983, 986, 2 L. Ed. 2d 1077 (1958)), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985)). A violation of the discovery rules is willful if done without a reasonable excuse. *Id.*

The Linvogs cite *Panorama Village Homeowners Ass'n v. Golden Rule Roofing Inc.*, 102 Wn. App. 422, 10 P.3d 417 (2000), for the proposition that the trial court does not abuse its discretion in failing to impose a sanction when there is no potential prejudice from the discovery violation. As a general proposition, that is correct. But once again, by misinterpreting RCW 4.22.060 and .070 the court improperly assessed the prejudice to the State and therefore the propriety and level of sanction to

be imposed. In the *Panorama Village* case, the draft letter at issue was disclosed prior to trial and the court observed that late disclosure could have been cured because Panorama's expert Mr. Hill was available to testify at trial.²⁹

The sanctions the State requests are consistent with the overarching standard to be applied to redress discovery violations—to ensure that the wrongdoer does not profit from the wrong. *See Magana v. Hyundai Motor America, Inc.*, 167 Wn.2d 570, 590, 220 P.3d 191 (2009), quoting *Wash. State Physician Ins. Exchange & Ass'n v. Fisons Corp.*, 122 P.2d 299, 355-56, 858 P.2d 1154 (1993).

IV. CONCLUSION

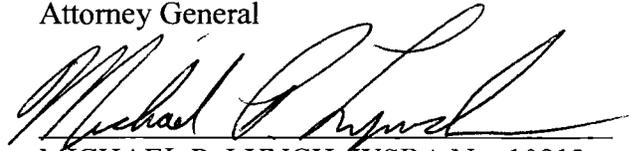
The agreement in this case is just one manifestation of the type of “wink-wink deals” that are done to subvert RCW 4.22.070 and the policies underlying the Tort Reform Act of 1986. Non-disclosure of such agreement should be condemned, not rewarded. The State of Washington respectfully requests that this court reverse the trial court's order denying its Motion to Vacate Judgment and impose sanctions, and award the State its reasonable attorneys' fees pursuant to CR 26 and 37. *See* RAP 18.1.

²⁹ In *Panorama Village* the court specifically noted that Golden Rule was not contending that the trial court failed to apply the proper standard in making its ruling and therefore de novo review of its decision was not warranted. *See Panorama Village*, 102 Wn. App. at 431 n.2. In the case at bar, disclosure happened years after the covenant was executed and the check was cashed—long after the prejudice to the State had occurred at trial.

RESPECTFULLY SUBMITTED this 10th day of February,

2011.

ROBERT M. McKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Michael P. Lynch", 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:

US Mail Postage Prepaid via Consolidated Mail Service

Ralph Brindley
Luvera Barnett Brindley, et al
6700 Bank of America Tower
701 Fifth Ave.
Seattle, WA 98104

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

Howard Goodfriend
1109 First Avenue, Suite 500
Seattle, WA 98101

ABC/Legal Messenger

State Campus Delivery

Hand delivered by _____

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

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HILARY GALLIGAN, Legal Assistant

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NO. 65673-2-I

**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.

**STATE OF WASHINGTON'S REPLY TO BRIEF OF
RESPONDENTS LINVOG**

ROBERT M. MCKENNA
Attorney General

MICHAEL P. LYNCH
MICHAEL A. NICEFARO, Jr.
Assistant Attorneys General
WSBA No. 10913
WSBA No. 9537
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504-0126
(360) 586-6300

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I. INTRODUCTION

Under CR 60(b)(4), the standard for affording relief based on a discovery violation involving non-disclosure is whether the information that was withheld was material to a fair presentation of the case at the time of trial.¹ Any doubt that misconduct affected the verdict must be resolved against the verdict.² This is an objective inquiry into whether the extraneous evidence could have affected the jury's determination.³ A trial court decision whether to grant a new trial will be disturbed on appeal only for clear abuse of discretion or when it is predicated on an erroneous interpretation of the law. Greater deference is owed the decision to grant a new trial than the decision to deny one.⁴

In this case the trial court misinterpreted RCW 4.22.060 and .070 in concluding that the secret covenant not to execute did not negate contribution rights and joint liability between the Linvog parents and the State.⁵ The trial court erred in failing to determine the covenant not to

¹ *Roberson v. Perez*, 123 Wn. App. 320, 335, 96 P.3d 420 (2004), *review denied*, 155 Wn.2d 1002, 120 P.3d 578 (2005).

² *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

³ *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989).

⁴ *Kuhn v. Schnall*, 155 Wn. App. 560, 228 P.3d 828 (2010).

⁵ RCW 4.22.060(2) provides, in pertinent part: 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**. . . ." (Emphasis added.)

execute released the Linvog parents from the lawsuit.⁶ The trial court erred in giving the covenant not to execute the legal effect that Mr. Brindley (plaintiff's counsel) and Mr. Spencer (the Linvogs' counsel) claim that they thought it had—that it did not negate contribution rights and joint liability between the State and the Linvog parents. CP at 8-14. Analyzing statutory violations based on the subjective interpretation purportedly given to the statute by the parties and/or lawyers involved would render the law meaningless and result in legal oblivion.⁷

The agreement was material because the covenant not to execute and \$20,000 advance payment were kept hidden. The State did not know to ask the Linvogs in pre-trial discovery about the circumstances surrounding the agreement. Korrine Linvog was not cross examined 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. The Linvog parents were allowed to remain in the case as

⁶ See *Shelby v. Keck*, 85 Wn.2d 911, 918, 541 P.2d 365 (1975) (covenant not to execute that set the upper limits of a parties liability in exchange for \$25,000 must be viewed as a binding settlement and dismissal of that party by the court was proper); *Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, review denied, 152 Wn.2d 1026, 101 P.3d 421 (2004) (the fact that Maguire's agreement did not specifically "release" the defendants is irrelevant; what matters is the covenant's operative legal effect); *Romero v. West Valley Sch. Dist.*, 123 Wn. App. 385, 98 P.3d 96 (2004), review denied, 154 Wn.2d 1010, 113 P.3d 481 (2005) (covenant not to execute constitutes a release under RCW 4.22.060).

⁷ All of the Linvogs' arguments as to why the failure to disclose was non-prejudicial are premised on the trial court's faulty conclusion that the covenant not to execute did not have the operative legal effect of negating contribution and joint liability between the State and the Linvog parents. Brief of Respondents Linvog (Br. Resp'ts Linvog) at 1, 5-7, 15, 19, 24-45, 29, 33, 37, 39-44, 49-50.

sham parties who appeared vulnerable and sympathetic. No objection was made when the liability of the Linvog parents was misrepresented to the jury in the opening statements of both counsel and Jury Instruction 18. The objective success of this sympathy ploy is reflected in the jury's allocation of 95 percent of fault on the State.

The multimillion dollar judgment in this case is tainted by the non-disclosure of information that was directly material to a fair presentation of the State's case. Such hidden "wink-wink deals"⁸ must not be condoned. The order denying the State's Motion to Vacate and For Sanctions should be reversed.

II. COUNTER STATEMENT OF THE CASE

A. The Trial Court Did Not Enter Findings Of Fact

The hearing on the State's Motion to Vacate Judgment in this case was heard on January 15, 2010. Although dated March 14, 2010, the trial court's memorandum decision was not sent to the parties until May 3, 2010. The formal order denying the State's Motion to Vacate was entered on June 4, 2010. CP at 27-39. That order did not contain any findings of fact or conclusions of law.⁹ Pursuant to CR 52(a)(5)(B) findings and

⁸ RP(6/4/10) at 38.

⁹ The order did incorporate Judge Farris' Memorandum Decision, but the Memorandum Decision does not constitute findings and conclusions of law. It only sets forth the rationale for the courts decision. The State was not afforded any opportunity to contest findings of fact in the memorandum decision.

conclusion are not necessary when a court is ruling on a CR 60(b) motion to vacate a judgment. The Linvogs are incorrect in asserting that the trial court made formal findings of fact and that they are verities in this appeal because they are unchallenged. *See* Brief of Respondents Linvog (Br. Resp'ts Linvog) at 5, 19.

Where the trial court's decision is based on review of only documentary evidence, as in the case at bar, and there are no findings of fact, an appellate court can weigh all the evidence and draw its own inferences from it and all of the surrounding circumstances. *Auger v. Shideler*, 23 Wn.2d 505, 507, 161 P.2d 200 (1945); *In re Riley Estate*, 78 Wn.2d 623, 654, 479 P.2d 1 (1970) (trial court findings based on a written record, rather than live testimony, may be disregarded and an appellate court will determine what findings should have been made).

In order to be entitled to relief, the State does not have to establish that the existence of the covenant and \$20,000 payment were deliberately hidden by opposing counsel. Even if inadvertent, the failure to disclose prejudiced the fair presentation of the State's case entitling the State to relief under CR 60(b)(4).¹⁰ A lack of intent maybe considered in

¹⁰ Importantly, the standard for relief regarding the constitutional error in Jury Instruction 18 is significantly lower than the standard under CR 60(b)(4). Prejudice is presumed and the burden to rebut it was on the Linvogs. Const. art. IV, § 16, *see* Br. Appellant at 37-39, Reply to Brief of Respondent Barton at 18-19, incorporated herein to avoid duplication.

fashioning a discovery sanction. *Allied Fin. Servs. v. Magnum*, 72 Wn. App. 164, 168-69, 864 P.2d 1 (1993). Nevertheless, it is the State's position that the failure of Mr. Brindley's and Mr. Spencer's law firms to disclose the existence of the covenant not to execute and the \$20,000 payment was **not** inadvertent. See Brief of Appellant (Br. Appellant) at 19, 24, 29, 33-37, 40, 43, 47. Both law firms are extremely thorough and detailed in their litigation management. It strains credulity to believe that one, much less both would fail for eight months to supplement answers to the same interrogatories that specifically inquired about the existence of any covenants or advance payments. One would have to suppose Mr. Brindley was unaware of an interrogatory requesting disclosure of any advance payments, even though a request for such information is made in almost every multi-party personal injury lawsuit. CP at 1245. One would also have to believe that two highly skilled tort practitioners were both ignorant of the case law and statutory provision mandating that a covenant not to execute operates as a release of liability.¹¹ One would have to assume that Mr. Brindley was completely unaware of the article written by two of his partners that specifically criticized the holdings in the *Maguire* and *Romero* cases to that effect. See Br. Appellant, App. 6. David Beninger and Joel Cunningham, *Settlement Agreements: Are Lions Now*

¹¹ *Maguire*, 120 Wn. App. at 398; *Romero*, 123 Wn. App. at 385; and RCW 4.22.060(2).

Tigers and Bears (Oh My)?, Trial News at 5, 9 (January 2006). One would have to suppose that both Mr. Spencer and Mr. Brindley forgot that they had an agreement limiting the Linvogs parents' liability to \$100,000 when they both stated in their opening statements that the Linvog parents were responsible for, and on the hook for, the damages the jury awarded against their daughter Korrine. CP at 785, 801-02. One would have to assume that they suffered the same lapse in memory when Jury Instruction 18 was proposed to and given by the court again erroneously telling the jury that as a matter of law the Linvog parents were responsible for any damages awarded against their daughter. CP at 1232, 1235. One would have to believe that Mr. Spencer forgot that his clients were entitled to a \$20,000 credit, and the State to a \$20,000 offset when judgment was entered against both the State and the Linvogs without any reference to the \$20,000 the plaintiff had already received. See RCW 4.56.050-.075; Br. Appellant at 7 n.3. CP at 227-29. One would also have to explain how their memories returned a month later when the Linvogs paid plaintiff not \$100,000; but the \$80,000 balance due after the \$20,000 advance payment was credited, pursuant to the agreement. CP at 844.

Finally, to the extent the trial court did state in its memorandum opinion that Mr. Brindley's and Mr. Spencer's failure to supplement their discovery answers was due to oversight, the court then, in the next

sentence, inexplicably and paradoxically contradicts itself by concluding that both counsel were aware that RCW 4.22.060 required them to give the State notice of the agreement and payment five days before it was executed “and failed to comply with it.” CP at 9. Because the trial court did not make any formal findings of fact and its decision was based on a written record, this court is entitled to consider the evidence as a whole and make its own determination of the facts. *In re Riley Estate*, 78 Wn.2d at 654; *Federal Way Family Physicians Inc. v. Tacoma Stands up for Life*, 106 Wn.2d 261, 266, 721 P2d 946 (1986) (findings of fact based on affidavits deserve less deference on appeal).

B. The State Only Entered A Contribution Judgment After It Was Ordered To Pay The Remaining Portion Of The Linvogs Share Of The Judgment, Over Its Objection

After Judge Farris sent the parties the memorandum decision on May 3, 2010, Mr. Barton filed a motion for an order mandating the State’s payment of judgment balance. CP at 53-57, 217-61. The State opposed that motion.¹² CP at 80-182. Over the State’s opposition, the court granted plaintiff’s motion mandating the State pay the remaining judgment balance owed by the Linvogs. CP at 40-42. In compliance with the court’s order, the State paid the remaining \$80,000 share of the Linvogs’

¹² The Linvogs never explained why they did not pay the \$80,000 plus interest they argued that they owed on the judgment. The record reflects they own real property in Whatcom County that is valued at \$4,529,426. CP at 291.

portion of the judgment, plus interest accrued. Given the one year statute of limitations, under RCW 4.22.050(3), the State entered a contribution judgment against the Linvogs in order to protect its rights pending outcome of this appeal. CP at 1507-09. No payment has been made on that judgment into the registry of the court, and if such payment were made, the State would only disburse the funds if the State did not prevail on this appeal. The State has received no benefit from the contribution judgment other than to preserve the status quo until the real legal effect of the covenant is decided in this appeal. *See infra* at 22.

III. ARGUMENT

A. **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**

Contrary to the Linvogs' argument, the State's primary argument is not that the secret agreement between the Linvogs and Mr. Barton was an alignment-changing event. *See* Br. Resp'ts Linvog at 9, 10, 14, 15, 17, 24, 35, and 38.¹³ While the limitation of liability strongly reduced plaintiff's incentive to recover from the Linvogs, the primary prejudice was from the agreement's non-disclosure. From the outset, Korrine Linvog had a strong

¹³ Throughout the brief of respondents Linvog they refer to the agreement as "the Advance." However, the \$20,000 advance payment is only relevant because it was not disclosed as required in discovery and was not referenced as an offset in the judgment entered against the Linvogs and the State. *See* Br. Appellant at 7. It was the undisclosed covenant not to execute that had the operative legal effect of releasing the Linvog parents.

incentive to do what the plaintiff wanted in order to eliminate the catastrophic liability she had created for her parents. She and her parents were facing a multimillion dollar judgment and had only a \$100,000 in insurance. So she met with Mr. Brindley, plaintiff's counsel, and his highway design expert, Ed Stevens, long before the lawsuit was ever filed and then provided the only evidence establishing that the State's trees, in conjunction with the location of the stop bar, had caused the accident.¹⁴ Her deposition (CP at 928-41) and trial (CP at 1007-08) testimony that she went back to the accident scene and concluded the trees must have blocked her view occurred long after her meeting with Mr. Brindley and Mr. Stevens. CP at 484-45.

After Korrine provided the key testimony in her deposition setting up the plaintiff's claim against the State, the plaintiff entered into an agreement limiting her parents' liability to \$100,000.¹⁵ The Linvogs' claim that Korrine "received nothing at all in the Advance" is inaccurate. *See* Br. Resp'ts Linvog at 6. The covenant not to execute eradicated the disastrous liability exposure she had created for her parents. This bargain was undoubtedly extremely important to Ms. Linvog.

¹⁴ At trial the evidence was undisputed that if Ms. Linvog had pulled forward to the edge of the road and looked again, she would have had a clear view of approaching west bound traffic on SR 536. CP at 780. *See* Br. Appellant Exhibit 51, App. 1.

¹⁵ The Br. Resp'ts Linvog at 4 incorrectly indicates Mr. Brindley approached Mr. Spencer to discuss the possibility of an agreement in April 2007. The agreement was executed on March 1, 2007. CP at 919.

If the agreement limiting the liability of Korrine's parents had not been hidden, the State could have cross examined her about the fact that after she provided the critical deposition testimony that established plaintiff's liability theory against the State (trees blocked her view), the plaintiff rewarded her by eliminating the potential destruction of her parents financial security through the consummation of the covenant not to execute above their insurance policy limits.¹⁶ Accordingly, the covenant not to execute was directly relevant to Korrine Linvog's motive, bias, and credibility, and material to the jury's finding and apportionment of fault against the State.¹⁷ Hiding the covenant not to execute prevented cross examination on this critical testimony.

In addition, the non-disclosure of the covenant not to execute allowed the Linvog parents to remain as sham parties and create false sympathy for them at trial. If the Linvogs had not kept the existence of the covenant not to execute and advance payment a secret, the State would have recognized that the covenant not to execute operated as a release (RCW 4.22.060(2)) and moved to have them dismissed. RP(1/15/10) at 7-8. *See Maguire v. Teuber*, 120 Wn. App. 393, 398, 85 P.3d 939, *review*

¹⁶ Of course, if the agreement had been disclosed before trial, the State could have deposed the Linvogs about the circumstances surrounding its creation.

¹⁷ *See State v. McDonald*, 122 Wn. App. 804, 95 P.3d 1248 (2004), *review denied*, 153 Wn.2d 1006, 103 P.3d 1247 (2005) (failure to disclose material evidence that could be used to impeach the credibility of a witness whose testimony was the only evidence supporting the jury's verdict is reversible error).

denied, 152 Wn.2d 1026, 101 P.3d 421 (2004).¹⁸ If they had not been dismissed, then the State would have known to object when the jury was told in opening statement by both counsel that the Linvog parents were “on the hook” for all damages allocated against their daughter Korrine. The State would have objected to Jury Instruction 18 which erroneously told the jury that the Linvog parents were responsible for paying all damages awarded against Korrine, because there was an agreement limiting the parents’ liability to \$100,000. These affirmative misrepresentations created false sympathy for the Linvog parents—that they would be financially ruined if the jury assigned a large percentage of fault in its \$3.6 million verdict against their daughter.¹⁹

B. Under Washington Law Jurors Should Be Advised Of Agreements That Change The Liability Of The Parties

Citing a couple cases from the state of Ohio,²⁰ the Linvogs argue that it was appropriate to allow the Linvog parents to remain defendants,

¹⁸ The Linvogs attempt to distinguish this court’s decision in *Maguire* on its facts. See Br. Resp’ts Linvog at 29-33. However, conspicuously absent from their argument is any mention or analysis of the express language in RCW 4.22.060(2) stating that, like a release, a covenant not to execute or similar agreement negates contribution rights and joint liability.

¹⁹ Here again, this kind of agreement conflicts with the Tort Reform Act of 1986, specifically RCW 4.22.070, which was enacted by the legislature with an intent to protect deep pocket defendants from bearing more than their fair share of liability. See J. Michael Phillips, *Looking out for Mary Carter: Collusive Settlement Agreements in Washington Tort Litigation*, 69 Wash. L. Rev. 255, 257 (1994). See Br. Appellant at 25-27.

²⁰ *Hodesh v. Korelitz*, 123 Ohio St.3d 72, 76-77, 914 N.E.2d 186, 191 (2009); *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St.3d 10, 615 N.E.2d 1022 (1993). See Br. Resp’ts Linvog at 20-23.

and the jury should have heard nothing about the agreement they made with the plaintiff limiting their liability to \$100,000. Br. Resp'ts Linvog at 22. The Ohio cases are inapposite.²¹

First, they are in conflict with *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 in *McCluskey* 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 then noted that where 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 the jurors can consider the relationship in evaluating evidence and the credibility of witnesses. *McCluskey*, 68 Wn. App. at 104, citing *Daniels v. Penrod*, 339 F. Supp. 1056 (1975); *Ward v. Ochoa*, 284 So. 2d 385 (1973); *Maule v. Rountree*, 284 So. 2d 389 (1973); *Ratterree v. Bartlett*, 238 Kan. 11, 707 P.2d 1063 (1985). The Linvogs failed to cite or distinguish *McCluskey*, the only Washington case to address this issue.

²¹ Ohio represents the minority view. The majority of jurisdictions require that the agreements limiting a party's liability be disclosed and admitted into evidence. *General Motors Corp. v. Lahocki*, 286 Md. 714, 728, 410 A.2d 1039 (1989) (citing cases); *Packaging Corp. of America v. DeRycke*, 49 So. 3d 286, 291-92 (2010) (reversing trial court's failure to disclose to jury agreement where plaintiff accepted payment of insurance policy limits from defendant who remained a party at trial).

Second, in both of the Ohio cases the existence of the advance payment and agreement limiting liability was disclosed to the court and the opposing parties. In contrast, Mr. Barton and the Linvogs' violated RCW 4.22.060(1) in failing to disclose their agreement prior to its execution in March 2007. They violated their discovery obligations under CR 26 and 37 in failing to reveal the existence of the advance payment and covenant not to execute in discovery, despite specific interrogatories calling for disclosure. CP at 831-41. They hid the existence of the agreement and \$20,000 advance payment again by failing to include the payment as an offset in the judgment entered on the jury's verdict.²²

Third, there is no indication that a covenant not to execute operates under Ohio law as a release, eliminating contribution rights and joint liability, as it does under Washington law. *See* RCW 4.22.060(2), .070.

Fourth, neither of the Ohio cases involved a situation where counsel affirmatively misrepresented the liability of the party whose liability had been limited by the agreement. There is no reason to believe that if the Ohio courts had been faced with such fraudulent deception they

²² Even now the judgment entered on November 29, 2007, fails to reflect the State's entitlement to a \$20,000 offset credit against the judgment pursuant to RCW 4.56.050 - .075. The Linvogs assumed that credit when they paid only the \$80,000 balance due and obtained a partial satisfaction of judgment for \$100,000 on January 24, 2008. CP at 844.

would not have advised the jury of the truth by disclosing the existence of the agreement.

Finally, in *Ziegler v. Wendel Poultry Serv., Inc.*, 67 Ohio St.3d 10, 615 N.E.2d 1022 (1993), the presence of the poultry company at trial actually served the purpose of determining the amount plaintiff could recover from them. In the case at bar, the presence of the Linvog parents served no purpose at all other than to evoke false sympathy from the jury.

Under the position advocated by the Linvogs and Mr. Barton, “wink-wink deals” can be kept hidden, in violation of statutory and discovery obligations, with impunity.²³ All agreements that affect the liability of parties in the litigation should be disclosed to the court, to opposing parties, and to the jury. That way the jury can consider the actual relationship of the parties and evaluating the evidence and the credibility of witnesses. *McCluskey*, 68 Wn. App. at 104.

If Respondents’ rule is accepted, then, hypothetically, the State and the Linvogs could enter into a partial indemnification agreement in which the State agreed to pay any damages awarded against the Linvogs above their insurance policy limits. Then, if Ms. Linvog testified that the reason she didn’t see Mr. Barton’s motorcycle was because of its dim headlight, and not that the State’s trees blocked her view, the jury wouldn’t be

²³ As Judge Farris noted, there is a concern about the number of “wink-wink deals” going on. RP(6/4/10) at 38.

entitled to know of the agreement.²⁴ If there was a defense verdict, there would be no reversible error even when the defendants **forgot** to disclose the agreement in violation of discovery rules. Such a rule does not promote candor and would be contrary to sound public policy.

C. RCW 4.22.060 Requires Notice To The Court And All Parties To Prevent Sham Defendants From Remaining In A Lawsuit

The pre-settlement notice requirement of RCW 4.22.060 is designed to prevent sham defendants from remaining in a lawsuit, not as the Linvogs argue because of a need for a reasonableness hearing. *See* Br. Resp'ts Linvog at 44-46. The reasonableness hearing aspect of RCW 4.22.060 does not apply in this case. It is applicable in cases involving multiple tortfeasors who are exempt from RCW 4.22.070 (Tort Reform Act of 1986) or when a plaintiff is contemplating a bad faith claim against a defendants' insurer. 16 David K. DeWolf and Keller W. Allen, *Washington Practice: Tort Law and Practice* § 12.43 (3d ed. 2011).

The reasonableness hearing requirement was part of the Tort Reform Act of 1981 that implemented contributory fault but retained joint and several liability in all cases. In 1986 the Legislature further revised Washington's tort law by establishing proportionate liability, making joint liability the exception rather than the rule. Under RCW 4.22.070(2),

²⁴ Two eye witnesses to the accident stated that the headlight on Mr. Barton's motorcycle was very dim, fading in and out as it approached the intersection where the accident occurred. CP at 1147-54.

RCW 4.22.060 comes into play in determining contribution rights against other jointly and severely liable defendants. *See Bunting v. State*, 87 Wn. App. 647, 651-52, 943 P.2d 347 (1997). However, because under RCW 4.22.060(2) a covenant not to execute negates contribution rights, it also negates joint liability. *Id.*

It would be a “procedural sham” to allow a party to settle with one tortfeasor, keep the settlement proceeds, and then retain that tortfeasor as a party in order to maintain joint liability for non-settling defendants. *Bunting*, 87 Wn. App. at 653. The Linvogs are correct that RCW 4.22.060 does provide a settling defendant *protection* from contribution claims. *See* Br. Resp’ts Linvog at 45. The fact that the Linvogs’ attorney has never argued that RCW 4.22.060 protected the Linvog parents from the State’s contribution rights highlights the conflict of interest they face. If they invoke the mandate of RCW 4.22.060(2) and assert they are “off the hook” because the covenant not to execute negated the State’s contribution rights, then they would be conceding the prejudice of the opening statements and jury instruction that mislead the jury into believing they were on the hook. If they continue to argue that RCW 4.22.060(2) does not mean what it says, and did not negate contribution rights, then Thomas and Madonna Linvog could end up having to pay \$92,632.30 that they don’t owe. CP at 1570; *see infra* at 22.

D. The Linvog Parents Were Not Subject To An Involuntary Adverse Judgment

It is undisputed that from the very beginning of this case the Linvogs offered Mr. Barton their entire \$100,000 in insurance policy limits to try to settle the case. CP at 555; Br. Resp'ts Linvog at 3. This offer was refused because the plaintiff wanted to maintain joint liability between the Linvogs and the State so that he could collect the entire judgment (minus the \$100,000 in insurance) from the deep pocket governmental defendant. CP at 560-61. The covenant not to execute limited the Linvog parents' liability to \$100,000. Therefore, the entire amount of money that the Linvog parents would ever have to pay Mr. Barton was the same amount they had already offered and never withdrew. The reason Korrine Linvog was not included in the covenant not to execute was expressly because Mr. Barton didn't want to do anything that would affect joint liability. CP at 561. Ms. Linvog's exclusion from the covenant not to execute demonstrates that the Linvog parents and Mr. Barton knew that the covenant not to execute negated joint liability of the Linvog parents notwithstanding what they contend now.

As noted previously, the Linvog parents' presence in this lawsuit served no purpose other than to evoke false sympathy from the jury.

Supra at 14. Because their liability was purely vicarious under the family car doctrine, payment of the remaining \$80,000 in available insurance proceeds would occur upon the jury's inevitable verdict against Korrine Linvog, whether her parents continued as parties or not.

The Linvogs have never offered any explanation as to why the Linvog parents were not simply dismissed in exchange for the \$20,000 advance payment. RP(1/15/10) at 10-11. The only logical explanation is they were kept in the case as a sympathy ploy—hoping the jury would feel sorry for them and thereby impose a lower verdict against their daughter.

To follow the metaphor that the Linvogs borrow from Professor Sisk, the Linvog parents no longer remained in the boat—truly subject to an involuntary adverse judgment—after their liability to the plaintiff was limited to an amount they had already voluntarily offered to pay in settlement. Only Korrine and the State were in the boat together when the lawsuit came ashore for entry of judgment. Only Korrine and the State were liable for the \$3.6 million judgment entered on the jury's verdict. *See* Br. Resp'ts Linvog at 36, quoting *Maguire*, 120 Wn. App. at 399; citing Gregory Sisk, *Interpretation of the Statutory Modification of Joint*

and Several Liability: Resisting the Deconstruction of Tort Reform, 16 U. Puget Sound L. Rev. 1, 50-51 (1992).²⁵

The most pertinent part of Professor Sisk's discussion of covenants not to execute is where he notes that a:

[C]ourt should decline to permit such circumvention of the statute. The court should insist that any such covenant not to execute a judgment be revealed prior to the entry of the judgment, and then it should refuse to enter judgment against a party that is not truly subject to its consequences. The court retains the power of judgment and may refuse to exercise that power when the parties seeking such a judgment are attempting to manipulate the judicial process to an improper end.

16 U. Puget Sound L. Rev. at 51; see *Maguire*, 120 Wn. App. at 399 nn.24, 25.

Since the liability of the Linvog parents to Mr. Barton was limited to \$100,000, judgment should not have been entered against them above the amount that they owed to the plaintiff. CP at 1237-39. Contribution rights and joint liability between the State and the Linvogs parents were eliminated by the covenant not to execute. RCW 4.22.060(2). Thanks to the covenant not to execute, the Linvog parents were already safely on shore when the jury rendered a \$3.6 million verdict, in favor of Mr. Barton.

²⁵ The Linvogs assertion that the State convinced the trial court to enter a judgment in its favor against the Linvog parents is misleading at best. Br. Resp'ts Linvog at 37. The State opposed Mr. Barton's motion to compel the State to satisfy the remaining unpaid portion of the judgment against the Linvogs. See *supra*, pp. 7-8.

E. Judicial Estoppel Does Not Bar The State From Arguing That The Covenant Not To Execute Released The Linvog Parents From Liability

As the basis for their judicial estoppel argument, the Linvogs' claim that the State is asserting inconsistent positions by taking the position that the covenant not to execute negated its contribution rights against the Linvog parents, but then taking a contribution judgment against the Linvog parents.²⁶ See Br. of Resp'ts Linvog at 26-28. What the Linvogs fail to note is that the State only took the contribution judgment after it was ordered, over its objection, to pay the Linvogs unpaid portion of the judgment, \$92,632.30.²⁷

Judicial estoppel requires the court to analyze three questions: (1) whether a party's current position is inconsistent with an earlier position; (2) whether judicial acceptance of an inconsistent position in the later proceeding will create the perception that the party misled either the first or second court; and (3) whether the party asserting the inconsistent position will obtain an unfair advantage or impose an unfair detriment on the opposing party if not stopped. *Miller v. Campbell*, 164 Wn.2d 529,

²⁶ There is no dispute that the contribution judgment against Korrine Linvog is proper.

²⁷ Because the final resolution of this appeal will not occur until after the one year statute of limitations for obtaining a contribution judgment expires, the State needed to enter that judgment in order to protect its financial interests. See RCW 4.22.050(3).

539, 192 P.3d 352 (2008). The Linvogs fail to satisfy any of these three elements.

First, the State's position is not inconsistent with an earlier position. Since learning of the secret covenant not to execute, the State had steadfastly asserted that the covenant negated joint liability between the State and the Linvog parents and any contribution rights between them. That was the State's argument to the trial court and in this appeal.

Second, there is no chance that the State misled the first or second court with inconsistent positions because, its positions are not inconsistent, and all rulings have been in the same case and before the same judge. Judge Farris ruled **against** the State by rejecting its argument that the covenant not to execute negated contribution rights and then by ordering the State to pay the Linvogs' unpaid portion of the judgment. Judicial estoppel only applies if the litigant benefitted from its prior inconsistent position benefitted the litigant or it was accepted by the court. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001); *see also Miles v. State Child Protective Servs. Dep't 6*, 102 Wn. App. 42, 6 P.3d 112 (2000), *review denied*, 142 Wn.2d 1021, 16 P.3d 1266 (2001) (judicial estoppel prevents a party from taking a factual position that is inconsistent with the factual position asserted in previous litigation).

Finally, the State will not obtain any advantage or impose any detriment on Thomas and Madonna Linvog. If this court ultimately adopts the State's position that the covenant not to execute negated contribution rights and joint liability between the State and the Linvog parents then the contribution judgment can be vacated. If the court agrees with the position asserted by the Linvogs' counsel that the covenant not to execute did not negate contribution rights or joint liability and they owe the State the \$92,632.30, then the status quo before Judge Farris's ruling **against** the State has been maintained. In short, the State is not trying to "have it both ways." To the contrary the State is simply asking this court to give the covenant not to execute its actual, operative legal effect under RCW 4.22.060(2) and then properly analyze the prejudicial effect that its non-disclosure had on the trial.

F. The Trial Court Abused Its Discretion By Misinterpreting And Misapplying RCW 4.22.060 and .070

When the trial court erroneously concluded that the covenant not to execute did not operate as a release of the Linvog parents, at least above \$100,000, this skewed the trial court's analysis of the prejudicial impact of the failure to disclose. The proper interpretation of RCW 4.22.060 and .070 is an issue of law subject to de novo review. A court abuses its discretion when it applies the law to the fact on untenable grounds. *Mayer*

v. *STO Industry*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). See Br. Appellant at 23-33.

The failure of counsel for the Linvogs and Mr. Barton to disclose the covenant not to execute and the \$20,000 payment in response to specific interrogatory requests, and as required by statute and case law constitutes fraud.²⁸ See *Crisman v. Crisman*, 85 Wn. App. 15, 21-23, 931 P.2d 163, review denied, 132 Wn.2d 1008, 940 P.2d 653 (1997) (when a duty to disclose exists, suppression of a material fact is tantamount to an affirmative misrepresentation). See Br. Appellant at 21-23. In addition, the misrepresentations made by counsel for the Linvogs and Mr. Barton in their opening statements that the Linvogs were “on the hook” when their liability was limited to \$100,000 also constitutes fraud. The misstatement in Jury Instruction 18 regarding the parents’ liability is a grossly misleading comment on the evidence, the prejudice of which has not been rebutted.

Accordingly, the order denying the State’s Motion to Vacate the Judgment should be reversed. The court should either order a new trial or, as an alternative, require Mr. Brindley and Mr. Spencer to pay the State’s costs and attorneys fees and disgorge all funds that their law firms received in profit and pay that amount to the State as a sanction for their

²⁸ RCW 4.22.060(1); *McClusky*, 68 Wn. App. at 104.

discovery violations and in restitution. *See* RAP 12.8; Br. Appellant at 48-49.

At a minimum, substantial sanctions are warranted under CR 26 and 37. Whether analyzed under CR 26(g) or 37(a), the failure to disclose the covenant not to execute and \$20,000 payment were not trifling errors especially when compounded by misrepresentations as to the Linvog parents' liability that were perpetuated at trial. The discovery rules are intended to "make a trial less a game of blind mans bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Gamon v. Clark Equip. Co.*, 38 Wn. App. 274, 279-80, 686 P.2d 1102 (quoting *United States v. Proctor & Gamble Company*, 356 U.S. 677, 683, 78 S. Ct. 983, 986, 2 L. Ed. 2d 1077 (1958)), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985)). A violation of the discovery rules is willful if done without a reasonable excuse. *Id.*

The Linvogs cite *Panorama Village Homeowners Ass'n v. Golden Rule Roofing Inc.*, 102 Wn. App. 422, 10 P.3d 417 (2000), for the proposition that the trial court does not abuse its discretion in failing to impose a sanction when there is no potential prejudice from the discovery violation. As a general proposition, that is correct. But once again, by misinterpreting RCW 4.22.060 and .070 the court improperly assessed the prejudice to the State and therefore the propriety and level of sanction to

be imposed. In the *Panorama Village* case, the draft letter at issue was disclosed prior to trial and the court observed that late disclosure could have been cured because Panorama’s expert Mr. Hill was available to testify at trial.²⁹

The sanctions the State requests are consistent with the overarching standard to be applied to redress discovery violations—to ensure that the wrongdoer does not profit from the wrong. *See Magana v. Hyundai Motor America, Inc.*, 167 Wn.2d 570, 590, 220 P.3d 191 (2009), quoting *Wash. State Physician Ins. Exchange & Ass’n v. Fisons Corp.*, 122 P.2d 299, 355-56, 858 P.2d 1154 (1993).

IV. CONCLUSION

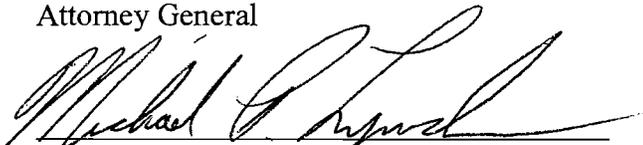
The agreement in this case is just one manifestation of the type of “wink-wink deals” that are done to subvert RCW 4.22.070 and the policies underlying the Tort Reform Act of 1986. Non-disclosure of such agreement should be condemned, not rewarded. The State of Washington respectfully requests that this court reverse the trial court’s order denying its Motion to Vacate Judgment and impose sanctions, and award the State its reasonable attorneys’ fees pursuant to CR 26 and 37. *See* RAP 18.1.

²⁹ In *Panorama Village* the court specifically noted that Golden Rule was not contending that the trial court failed to apply the proper standard in making its ruling and therefore de novo review of its decision was not warranted. *See Panorama Village*, 102 Wn. App. at 431 n.2. In the case at bar, disclosure happened years after the covenant was executed and the check was cashed—long after the prejudice to the State had occurred at trial.

RESPECTFULLY SUBMITTED this 10th day of February,

2011.

ROBERT M. McKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Michael P. Lynch", 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:

US Mail Postage Prepaid via Consolidated Mail Service

Ralph Brindley
Luvera Barnett Brindley, et al
6700 Bank of America Tower
701 Fifth Ave.
Seattle, WA 98104

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

Howard Goodfriend
1109 First Avenue, Suite 500
Seattle, WA 98101

ABC/Legal Messenger

State Campus Delivery

Hand delivered by _____

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

DATED this 10th day of February, 2011, at Olympia, WA.



HILARY GALLIGAN, Legal Assistant