IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JARED K. BARTON, a single man,

Respondent

v.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant,

SKAGIT COUNTY, DEPARTMENT OF PUBLIC WORKS,

Defendant,

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

Respondents.

No. 65673-2-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: October 24, 2011

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

FACTS

Korrine Linvog was driving her parents' automobile when she stopped at a painted stop line, then pulled out into an intersection and collided with Jared Barton, who was approaching on his motorcycle with the right of way. On the night of the

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

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

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

and costs for the trial and appeal. The State alleged its "interests were profoundly compromised by the hidden release agreement between the plaintiff and the Linvog parents."

The facts relevant to the nondisclosure are as follows. The Linvogs had $100,000 of insurance liability coverage. Their counsel, Spencer, offered Barton that amount in settlement at the outset of litigation. Barton's counsel, Brindley, refused the offer, because Barton wanted to preserve joint and several liability between the State and the Linvogs, which would be destroyed if the Linvogs were dismissed under a settlement and release agreement. Brindley told Spencer that it was his general practice not to pursue a claim above the insurance policy limit against individual defendants like the Linvogs, when there was also an institutional defendant.

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

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

against Linvog's parents that exceeded the $100,000 limit of their insurance coverage.

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

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

The trial court denied the State's motion to vacate on June 4, 2010,

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

On August 27, 2010, the State presented a judgment on its claim for contribution against the Linvogs. The State had earlier paid "in excess of its equitable share, a portion of the [Linvogs'] equitable share under the Judgment . . ., in the amount of $92,632.30 (the principal amount of $80,000 owed by [the Linvogs], plus interest at the rate of 6.151% in the amount of $12,632.30)." The trial court entered judgment for the State for contribution against the Linvogs in that amount of $92,632.30, plus interest of 2.208 percent until paid.

DISCUSSION

The State argues that the trial court erred by denying its motion to vacate judgment under CR 60(b)(4). It argues that the judgment should be vacated for two

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

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

> A party prior to entering into a release, covenant not to sue, covenant not

> to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court.

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

I. Standard of Review

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

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

II. Prejudice

The central question here is whether the State was prejudiced by the agreement and by Spencer and Brindley's failure to amend the discovery responses to disclose it. The State presents two main arguments for why it was prejudiced. Both are based on the State's foundational assertion that the agreement between Barton and the Linvogs had the operative legal effect of releasing Linvog's parents from liability. The State concedes that the language of the stipulation stated that it was not a settlement, but nevertheless insists that it was a release that negated joint and several liability of Linvog's parents. The State contends that because of this release it had no right to seek contribution from Linvog's parents.[1] The State relies primarily on RCW 4.22.060(2) to support its assertion that the agreement discharged any claim for contribution. RCW 4.22.060(2) provides in relevant part:

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

The State also relies on Maguire v. Tueber, 120 Wn. App. 393, 85 P.3d 939 (2004), for its assertion that the agreement not to execute operated as a full release of Linvog's parents, regardless of what the parties to the agreement may have actually intended. In Maguire, the court concluded that RCW 4.22.060's use of the word "release" refers to all similar agreements listed in RCW 4.22.060 that memorialize a settlement in which the settling defendants have no further liability. Maguire, 120 Wn. App. at 396-97. But, as the trial court noted, the Maguire court was very careful to emphasize that such

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

a release only arose due to the parties' intent to make a full settlement. Id. at 397-98. This case, by contrast, arose from an agreement not to execute, and that agreement plainly reflected both parties' intention that it did not constitute a settlement. The trial court stated:

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

The trial court declined to make a final determination on the validity of the agreement, finding that doing so was not necessary to resolve the motion to vacate. We agree with the trial court's analysis. If, as the State suggests, Maguire's holding invalidates the agreement and we treat it as unenforceable, the State is left in precisely the same position it is in now.[2] If the agreement was a nullity from the outset, the State would have received exactly the same trial as it did in this case—the jury would have remained oblivious to any agreement, and would have been entitled to assign liability just as it did: 95 percent to the State and 5 percent to Linvog. Conversely, if the agreement is valid, then the relevant consideration is the parties' understanding of the agreement and its terms. As the trial court stated:

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

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

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

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

or personal preference in favor of Linvog's parents, which ultimately led it to return a disproportionate verdict against the State.[3]

This argument is undermined by the trial court's conclusion below that Linvog's parents were never released from joint and several liability. The opening statements by Brindley and Spencer were not a misrepresentation. Joint and several liability was retained and the State's right to pursue contribution against Linvog's parents was preserved. The same can be said of jury instruction 18. It was not an improper comment on the evidence, as the State alleges. An instruction that accurately states the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge under the Washington Constitution article 4, § 16. Hamilton v. Dept. of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). An impermissible comment is one which conveys to the jury a judge's personal attitudes towards the merits of the case. Id. Jury instruction 18 was an accurate statement of the law, which expressly adhered to the Washington pattern jury instruction and did not reflect any of the trial court judge's personal attitudes. WPI § 72.05.

Moreover, the trial court considered the State's argument that the jury may have been improperly sympathetic towards the Linvog parents, so as to avoid putting them into financial ruin. The trial court found that argument to be baseless and supported only by speculation: "No one made any statement or argument to the jury suggesting they do this. Such argument was forbidden by a motion in limine." The record does not

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

contradict this finding. The trial court also pointed out that the jury was given an instruction not to be swayed by sympathy, and there was no evidence to suggest that they ignored that instruction. Indeed, a jury is presumed to follow the court's instructions. State v. Yates, 161 Wn.2d 714, 763, 168 P.3d 359 (2007). We hold that the State was not prejudiced by any undue juror sympathy.[4]

The State's second argument suggests that Linvog tailored her testimony to "set up" the State and that it should have had the right to cross-examine her about Barton and Brindley having "rewarded her" with the agreement by limiting her parents' liability to $100,000. But, this argument also relies on its preliminary assertion that Linvog's parents were actually released from joint and several liability, which was never the case. Based on the terms of the agreement which left the Linvogs "on the hook" for a contribution claim from the State, there was no factual basis to argue that Linvog's testimony was biased. The trial court expressly considered the State's argument, before concluding that Linvog's testimony was not biased by the agreement, and that the agreement did not have any impact on her already established incentive to place blame on the State for the accident. The trial court noted that the parties' alignment was plain before the agreement, based on the most plausible theory of the case for the Linvogs: "The agreement did not realign the parties in this case. Linvogs aligned with Plaintiff blaming the State because of the facts in the case. More importantly, . . . the alignment was not secret so did not affect the fairness of the trial." Regardless of whether the State was aware of the agreement before trial, that agreement in no way

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

biased Linvog's testimony at trial, nor did it change the Linvogs' incentive to blame the State for the accident. The trial court did not err in determining that the failure to supplement discovery did not prejudice the State or its ability to prepare for or try the case.

III. Willful or Deliberate Failure to Disclose

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

IV. Sanctions

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

On appeal the State asserts that Brindley and Spencer should have been sanctioned and that it was an abuse of discretion not to do so. Brindley was sanctioned by the trial court. Its decision to deprive him of the use of the judgment funds and interest for almost a year while the trial court resolved the State's motion to vacate was a sanction. After the State had deposited its share of the judgment into the registry of the court in August 2009, it opposed Barton's October 2009 motion to allow

distribution of the funds. The trial court ultimately denied Barton's motion for approximately $146,000 in interest, holding that payment of interest should have been required, but stating that "sanctions are assessed against [Brindley's] law firm in the exact amount of said interest." (Capitalization omitted.) The trial court did not enter a sanction against the Linvogs' counsel, Spencer. Based on the finding of inadvertence and based on the trial court's ultimate conclusion that the State was not prejudiced, we hold that the trial court did not abuse its discretion by administering sanctions as it did.

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

We affirm.

Appelwick, J.

WE CONCUR:

Dwyer, C.J.

Grosse, J.