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IN THE SUPREME COURT OF FLORIDA

BECHTEL JEWELERS, INC.,

Petitioner,

vs. CASE NO. 64,023

INSURANCE COMPANY OF NORTH AMERICA, a foreign corporation doing business in the State of Florida, ANN SLOAN, TERENCE F. McCABE, INC., a foreign corporation doing business in the State of Florida and HANOVER INSURANCE, a foreign corporation,

Respondents.

ANN SLOAN,

Petitioner,

vs. CASE NO. 64,022

INSURANCE COMPANY OF NORTH AMERICA, a foreign corporation doing business in the State of Florida, ANN SLOAN, TERENCE F. McCABE, INC., a foreign corporation doing business in the State of Florida and HANOVER INSURANCE, a foreign corporation,

Respondents.

A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

BRIEF ON THE MERITS OF RESPONDENT, INSURANCE COMPANY OF NORTH AMERICA

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PREFACE

This is a certified question of great public importance in an appeal from a final judgment, amended final judgment and an order awarding attorney's fees and costs in a property damage case. The appealed final judgment, based on a jury verdict, awarded the plaintiff, Ann Sloan, $55,000 against the defendant, Insurance Company of North America. The appealed order taxed attorney's fees in the amount of $15,000 and costs in favor of Bechtel Jewelers and against INA. The respondent, INA was a defendant/third party plaintiff before the trial court and the appellant before the Fourth District Court of Appeal. The petitioner, Bechtel Jewelers, Inc., was a co-defendant before the trial court and appellee before the Fourth District Court of Appeal. The petitioner, Ann Sloan, was the plaintiff before the trial court and an appellee before the Fourth District Court of Appeal. The respondents, Terence F. McCabe, Inc. and Hanover Insurance were co-defendants before the trial court; and appellees before the Fourth District Court of Appeal.

In this brief the parties will be referred to as INA, Sloan, Bechtel Jewelers, McCabe and Hanover Insurance.

The following symbols will be used in this brief:

(R. ______) record on appeal

(A. ______) appendix to brief

(P. Ex. ____) plaintiff's exhibit

(D. Ex. ____) defendant's exhibit

STATEMENT OF THE CASE AND FACTS

Ann Sloan owned a sapphire and diamond ring. The stone, an 18.5 carat emerald cut Ceylon sapphire, was set in platinum and diamond baguettes. (R. 88-90; 248) She intended to sell the ring. She took it to McCabe Jewelers for an opinion as to its value. (R. 64) McCabe sent the ring to Robert Bechtel of Bechtel Jewelers, Inc. to determine whether the stone was natural or some other material. (R. 170)

Bechtel attempted to microscopically examine the ring. It appeared to need cleaning. (R. 175) He cleaned the ring in an ultrasonic machine. (R. 165) He then viewed it again under the microscope. (R. 166) He observed that the sapphire had been internally fractured in the ultrasonic machine. It was undisputed that the damage occurred while the ring was in the ultra-sound machine. (R. 166)

Bechtel Jewelers had purchased a "jewelers block" insurance policy from INA. That policy provided liability coverage to Bechtel Jewelers for jewelry entrusted to it by others, except under certain conditions. Section 5(B) of the policy insuring conditions provided there was an exception for "damage sustained while the property is actually being worked upon and directly resulting therefrom." (R. 651; P. Ex. 6)

Before filing this suit Ann Sloan made a claim against McCabe and its insurer, Hanover Insurance and

Bechtel Jewelers and its insurer, INA. (R. 149 et seq.; 166) Both insurers initially denied coverage for the damage based on the policy coverage exception. Sloan then instituted this suit against McCabe, Hanover Insurance, Bechtel Jewelers and INA. Hanover Insurance eventually admitted coverage for McCabe. INA denied coverage for Bechtel Jewelers, on the basis that cleaning a ring in an ultrasonic machine constituted "actually working on" the ring. (R. 642-649)

The defendant Bechtel Jewelers crossclaimed against INA for insurance coverage. (R. 628-630) Additionally, Bechtel Jewelers and McCabe sought contribution from one another. (R. 879-881; 896-898; 902-904) Bechtel Jewelers also brought a third party complaint for indemnity against L&R Manufacturing Company, the manufacturer of the ultrasonic cleaning machine. Trial of that complaint was severed from the main action. (R. 1019)

Prior to trial the plaintiff, Bechtel Jewelers and McCabe and its insurer, in response to a motion by INA, produced two "Mary Carter" type agreements. In its agreement with the plaintiff, McCabe and its insurer stated:

> Since Hanover Insurance Company agrees that the "working on exclusion does not apply and has now extended coverage for Terence F. McCabe, Inc., you agree that . . ."

(A. 1; defendant's Exhibit 2)

Bechtel Jewelers, in its agreement with the plaintiff, stated:

> We have litigated this case over a period of one year and seven months and we both agree that the insurance carrier should have afforded Bechtel Jewelers, Inc. with a defense and agreed to pay the loss since it is not arguable that there is no exclusion from coverage. The insurance company has forced us to trial.
>
> Recognizing that the range of possible verdicts will be on the order of $80,000.00, we have agreed to put up a united front against the insurance company in consideration of which Mrs. Sloan has agreed that on the odd chance that the insurance company does not have to pay the loss, that Bechtel Jewelers, Inc. will be required to pay no more than $30,000.00, which is for principal, interest, attorney's fees and costs, of any judgment which the court may enter.
>
> (A. 3; defendant's Exhibit 1)

Prior to trial INA filed a motion in limine to prevent the plaintiff and co-defendants from advising the jury of the alleged reasons for the agreements. (R. 1050-1051) INA argued that the jury should be apprised of the settlement agreements, but that the documents themselves should not be admitted in evidence because they were self-serving. (R. 23-32) The trial court denied INA's motions and admitted the entire documents in evidence. (R. 306-308; defendant's Exhibit 1 and 2; A. 1-3)

The jury returned a special interrogatory verdict. (R. 1123-1124) It found Bechtel Jewelers, Inc. was negligent. The jury found INA provided insurance coverage

for Bechtel Jewelers. The jury assessed plaintiff's damages at $55,000. (R. 1124) The trial court entered an amended final judgment in plaintiff's favor. (R. 1145-1146) The trial court granted Bechtel Jewelers' motion for attorney fees and costs. It awarded Bechtel Jewelers $15,000 as attorney fees plus costs. (R. 1148)

INA filed a timely notice of appeal seeking review of the final judgment, amended final judgment and order awarding attorney fees. (R. 1156-1157)

The Fourth District Court of Appeal reversed the appeal judgments and order awarding attorneys fees. The court certified the following question to this court:

> IF A MARY CARTER AGREEMENT IS ENTERED INTO AND NONPARTICIPATING DEFENDANTS REQUEST THAT THE JURY BE SO ADVISED, MUST THE ENTIRE AGREEMENT ALWAYS BE PUT IN EVIDENCE.

QUESTIONS PRESENTED

I.

IF A MARY CARTER AGREEMENT IS ENTERED INTO AND NONPARTICIPATING DEFENDANTS REQUEST THAT THE JURY BE SO ADVISED, MUST THE ENTIRE AGREEMENT ALWAYS BE PUT IN EVIDENCE.

II.

IF A POINT IS NOT URGED FOR REVERSAL IN AN APPELLANT'S BRIEF, IS IT PRESERVED.

ARGUMENT

I.

IF A MARY CARTER AGREEMENT IS ENTERED INTO AND NONPARTICIPATING DEFENDANTS REQUEST THAT THE JURY BE SO ADVISED, MUST THE ENTIRE AGREEMENT ALWAYS BE PUT IN EVIDENCE.

This case presents an opportunity for this court to re-examine the validity of "Mary Carter" agreements. This case amply illustrates why such agreements should be held void as against public policy and violative of the canons of professional ethics. The Mary Carter agreement, especially the one utilized in this case, is inherently inequitable and misleading to both the court and jury. This court should hold that Mary Carter agreements are unenforceable. Alternatively, this court should answer the certified question in the negative and hold the jury must be informed of the contents of the agreement, but that where the agreement contains self-serving, prejudicial statements, that it cannot be shown to the jury.

An annotation found at 65 ALR3d 602 discusses the validity of Mary Carter agreements. Some jurisdictions, most notably Nevada and Oklahoma, have held such agreements are invalid because they are void as against public policy and because they violate the ethical principles of the legal profession. We respectfully submit that the time has come for this court to re-examine its ostensible ruling in Ward v. Ochoa, 284 So.2d 385 (Fla. 1973) that this type of

settlement agreement is valid. This court should determine, as have Nevada and Oklahoma, that such agreements are void and invalid.[1]

In Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971) the plaintiff sued three physicians for medical malpractice. The plaintiff entered into an agreement which limited the liability of two of the defendant doctors, Green and Romeo. The agreement limited their liability to $20,000 and provided that if the jury awarded less than $20,000 that the agreeing defendants, Green and Romeo, would pay the sum necessary to bring recovery to $20,000. The agreement further provided that if the verdict exceeded $20,000 that the plaintiff would not execute against the agreeing defendants. The case proceeded to trial against all three defendants. Counsel for the agreeing defendants took a major part in choosing jurors who might have been rejected by the third defendant, Dr. Lum, if he had known his co-defendants were not allies and had settled with the

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1 We anticipate that petitioners will argue on reply that this court may not consider this issue because it was not raised before the Fourth District Court of Appeal. We believe this court can, and should, on a certified question of great public interest, consider this initial premise which was the underlying basis for the decision of the Fourth District Court of Appeal. The Fourth District Court of Appeal could not properly, under the dictates of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) overrule this court's prior decision in Ward v. Ochoa, supra. Only this court can do that.

plaintiff. The agreeing defendants, Green and Romeo, were called as adverse witnesses by plaintiff's counsel and led at length.

At the conclusion of the plaintiff's case, the trial court directed a verdict for the two defendants, Green and Romeo, parties to the agreement. Plaintiff did not oppose the motion. The third defendant, Dr. Lum, opposed it, arguing he, too, should be dismissed. Dr. Lum, had been told of the agreement a day after it was made and after the jury had been selected. His lawyer apparently did not know all the terms of the agreement. The plaintiff's lawyer suggested that the settlement agreement be shown to the jury. The trial court denied Dr. Lum's motion for mistrial and did not determine whether the jury would be informed of the agreement. The court later ruled "the matter would be handled by jury instructions," but subsequently refused to give Dr. Lum's requested instruction. The jury returned a verdict against Dr. Lum for $50,000.

The Nevada Supreme Court reversed the judgment. The court declared that the agreement violated the canons of professional ethics concerning representation of conflicting interests, candor and fairness, taking technical advantage of an opponent and unjustifiable litigation. The court observed that a lawyer may not ostensibly appear for a stooge client when he really represents others. The court declared the agreement void as violative of public policy.

The court discussed admission of the agreement in evidence and the effect it might have on the jury:

> If appellant's counsel had undertaken to examine Greene and Romeo on an edited text of the agreement, could he be sure its prejudicial aspects would not be revealed to the jury by their answers? Further, had its bare terms been laid before the jury, how would this have affected their treatment of appellant? Might they not then be more casual about awarding at least some recovery against appellant, knowing Greene and Romeo must pay the difference up to $20,000? Might they not infer, even from the agreement's bare terms, that the others considered appellant the intransigent wrongdoer, and let this affect their verdict against him? Might knowledge a minimum value of $20,000 had been placed on respondent's injuries affect their deliberations? We do not know; we know only that appellant had the right to litigate his case without hazarding the prospect that such considerations might affect the jury's verdict.
>
> 488 P.2d at 352-353

The court found the agreement resulted in prejudice to Dr. Lum because the trial was deprived of its true adversary character. The irregularities so warped the trial as to deny a fair trial.

Similarly, in <u>Cox v. Kelsey Hayes Company</u>, 594 P.2d 354 (Okla. 1978) the Oklahoma Supreme Court reversed a final judgment for plaintiffs, holding that Mary Carter agreements are void as against public policy. There, plaintiff brought a products liability and negligence action against three defendants. The accident occurred while plaintiff was driving a hay truck. Scott's vehicle, which

was pulling a horse trailer, approached from the other direction. A wheel came off the horse trailer and rolled across the highway in front of plaintiff. Plaintiff lost control of his truck. Plaintiff sued Scott, the manufacturer of the trailer axle assembly and the distributor. Plaintiff entered into a "limitation of execution" agreement with Scott whereby plaintiff conditionally settled with Scott, but Scott remained as a defendant in the suit. Under the agreements Scott's liability for payment decreased in proportion to the size of plaintiff's verdict against the nonagreeing defendants.

The other defendants became aware of the agreement and filed motions to dismiss and to realign the parties, claiming the agreement was a fraud and sham on the court. The trial court denied the motions and refused to allow cross examination regarding the agreement or its introduction in evidence. The appellate court reversed the judgment, finding the agreement destroyed and distorted the normal adversary relationship between plaintiff and defendant. The court observed that if a pretrial agreement has settled the suit completely between plaintiff and one defendant, then that defendant should be dismissed. If an agreement does not absolutely settle the conflict, but hinges on the amount of the verdict, the trial court should review the agreement and either hold the agreement unenforceable as against public policy or dismiss the agreeing defendant from the suit. The court stated that "in

no circumstances should a defendant who will profit from a large plaintiff's verdict be allowed to remain in the suit as an ostensible defendant."

The court further observed that in most cases full disclosure of the agreement to the jury is probably inadvisable:

> In most cases full disclosure to the jury of the exact terms of the agreement is probably inadvisable. Full disclosure could in some cases be detrimental to the non-agreeing defendant who would be torn between need to inform the jury of the agreement and the potentially self-serving statements of plaintiff and agreeing defendant contained therein.
>
> 594 P.2d 360

The court concluded that parties ought to be able to contract for an advantageous settlement, but the agreement should not affect the rights of nonparties to the agreement by shifting one defendant's liability to another. The court held any agreement whereby one defendant benefits from a joint award is void and unenforceable as against public policy, if the agreeing defendant remains in the lawsuit.

The same rationale should be adopted by this court. Mary Carter agreements should be declared void, unenforceable and violative of the code of professional responsibility. Disciplinary Rule 5.105 provides that it is unethical for a lawyer to represent conflicting interests. A defense lawyer who enters into a Mary Carter agreement in

effect has a "stooge" for a client. The plaintiff's interests become his. The attorney is in the posture of representing conflicting interests in the same suit. Disciplinary Rule 7-106 governs trial conduct of a lawyer and, in effect, prohibits a lawyer from taking technical advantage of another lawyer. Mary Carter agreements also violate that provision. Disciplinary Rules 1-103, 2-103 and 2-104, in effect, provide that it is unethical to stir up strife and litigation. Mary Carter agreements also violate these provisions. They result in a fraud and sham on both the jury and the court. The agreements should not be enforceable, or, if they are construed as a settlement, then the contracting defendant should be dismissed as a party to the suit.

We believe that admitting the agreement in evidence does not cure the prejudice to the remaining defendant. This case illustrates that. Since the decision in Booth v. Mary Carter Paint Co., 202 So.2d 81 (Fla. 2d DCA DCA 1962) lawyers have used many ingenious variations on Mary Carter agreements. One trend has been to put much self-serving, highly prejudicial language into those agreements. The result is that a non-contracting co-defendant is doomed whether he puts the agreement in evidence or does not put it in evidence.

The appellate courts have observed that trials should not be "by ambush." Condoning Mary Carter agreements, holding them enforceable and permitting

introduction in evidence of agreements which contain highly prejudicial, otherwise inadmissible statements results in a "trial by ambush." Juries should only decide real controversies between real adversaries. Purportedly adversary parties should not be permitted to perpetrate frauds on the court and jury, as was done in this case.

We respectfully submit that this court should hold all Mary Carter agreements, written or oral, are void, unenforceable and violative of the canons of ethics. If this court determines this case is not in a posture for that decision, then this court should answer the certified question in the negative and approve the decision of the Fourth District Court of Appeal.

In Maule Industries, Inc. v. Roundtree, 284 So.2d 389 (Fla. 1973) this Court determined that a Mary Carter agreement is "... available for use in evidence to the extent that it is relevant to any of the matters in issue." 284 at 390. Also see Ward v. Ochoa, 264 So.2d 385 (Fla. 1973).

In this case the entire documents should not have been presented to the jury. The only information relevant to the issues was that the plaintiff and three defendants had a secret settlement pact. All the self-serving language as to the insurer's actions or the value of damages was not relevant or admissible. The statements were highly prejudicial and should not have been presented to the jury.

II.

IF A POINT IS NOT URGED FOR REVERSAL IN AN APPELLANT'S BRIEF, IS IT PRESERVED.

INA appealed the final judgment, the amended final judgment and the order awarding attorneys fees. (R. 1156-1157) The final judgment and amended final judgment were based on the jury verdict which determined there was insurance coverage provided by INA and which assessed the plaintiff's damages. The appealed final judgment and amended judgment were entered on that verdict. The error complained of on appeal, which formed the basis of the decision on appeal, tainted the entire verdict and the judgments entered thereon and mandated reversal. This was called to the attention of the Fourth District Court of Appeal at argument and in the conclusion of appellant's brief.

The cases which Bechtel Jewelers cite on this issue are irrelevant. Chaachou v. Chaachou, 135 So.2d 206 (Fla. 1961); Weisman v. Weisman, 141 So.2d 622 (Fla. 3d DCA 1963); Lesperance v. Lesperance, 257 So.2d 66 (Fla. 3d DCA 1971); Central Bank & Trust Co. v. Banmr Trading Co., 157 So.2d 201 (Fla. 3d DCA 1963) are distinguishable because they were decided prior to amendment of the appellate rules. Those cases concern abandonment of assignments of error.

The dispositive issue on this question is whether the appealed judgment was separable in nature and whether the Fourth District Court of Appeal could affirm one part of

the judgment and reverse another part. It could not. The appeal was taken from the entire judgment. The provisions of the judgment were not separable in nature. Thus, the appellate court could not affirm as to one part and reverse as to another. See Mutual Loan & Building Assn v. Miles, 19 Fla. 127 (Fla. 1882) and Brookbank v. Mathiew, 152 So.2d 526, cert. denied 157 So.2d 817 (Fla. 1963).

CONCLUSION

This court should declare Mary Carter agreements void and unenforceable. Alternatively, the certified question should be answered in the negative and the decision of the Fourth District Court of Appeal approved.

Respectfully submitted,

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By: Marjorie Gadarian Graham
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: RONALD SALES, P. O. BOX 3107, West Palm Beach, Florida 33402; DENNIS VANDENBERG, P. O. BOX 2439, West Palm Beach, Florida 33402; PATRICK FOGARTY, 501 S. Flagler Drive, Suite 200, West Palm Beach, Florida 33401; MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, P.A., P. O. Drawer 3626, West Palm Beach, Florida 33402 and EDNA L. CARUSO, P.A. Suite 4B-Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401 this 19th day of September, 1983.

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