IN THE SUPREME COURT OF FLORIDA

BECHTEL JEWELERS, INC.,

Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA, etc., et al,

Respondents.

CASE NO. 64,023

FILED

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ANN SLOAN,

Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA, etc.,

Respondent.

CASE NO. 64,022

PETITIONER, BECHTEL JEWELERS, INC.'S BRIEF ON THE MERITS

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INTRODUCTION

This is petitioner, BECHTEL JEWELERS, INC.'S brief on the merits. It will be called Bechtel. Bechtel was defendant in the trial court and an appellee in the district court. The other petitioner, ANN SLOAN, will be called Sloan. She was plaintiff in the trial court and an appellee in the district court. Respondent, INSURANCE COMPANY OF NORTH AMERICA, was a defendant in the trial court and appellant in the district court. It will be called INA. Respondents, TERENCE F. McCABE, INC., and HANOVER INSURANCE, were the other defendants in the trial court and appellees in the district court. They will be called McCabe and Hanover. They have filed no notice to invoke this court's discretionary jurisdiction.

R means record on appeal. A means appendix.

STATEMENT OF THE CASE AND THE FACTS

Sloan, intending to sell it, entrusted her sapphire ring to McCabe, a jeweler, to estimate its value. R 64. McCabe entrusted the ring to Bechtel, another jeweler, to appraise it. R 74 and R 165. Bechtel put the ring in an ultrasound machine to clean it. In the process, the sapphire was fractured. R 165-166 and R 175.

Sloan sued Bechtel and its insuror, INA, and McCabe and its insuror, Hanover, for damages. R 623-626. Hanover at first denied and finally admitted coverage. INA never admitted coverage. R 642-649. Bechtel crossclaimed against INA for coverage, and Bechtel and McCabe sought contribution from each other. R 628-630, R 896-898, and R 902-904.

Before the trial, two "Mary Carter" agreements were produced, one between Sloan, McCabe and Hanover, and the other between Sloan and Bechtel. Copies of them are furnished in the appendix, A 1-3.

INA moved, R 1050-1051, that the jury be advised only of the existence of the agreements, not the reasons for the agreements as expressed in them. R 23-32 and R 306-308. The motion was denied and the entire agreements were admitted in evidence at INA's request. R 381-382.

In a special interrogatory verdict, the jury found

that McCabe was Sloan's bailee, but was not negligent; that Bechtel was 100% negligent; that the incident was covered by INA jeweler's block insurance policy and assessed Sloan's damages at $55,000.00. R 1123-1124. The court entered an amended final judgment for Sloan, R 1150-1151, and an order awarding Bechtel attorney's fees against INA, R 1148-1149.

The jury answered an interrogatory in the verdict:

> "3. Was the incident complained of covered by the INSURANCE COMPANY OF NORTH AMERICA policy to BECHTEL JEWELERS, INC.?
>
> Yes." R 1123.

INA maintained its denial of coverage through the time it filed its notice of appeal, R 1156-1157, from the amended final judgment and from the order awarding Bechtel attorney's fees and costs against INA.

The amended final judgment recites that the jury found ". . . the incident complained of was covered by the Insurance Company of North America policy issued to Bechtel Jewelers, Inc." and awards recovery over against INA for all sums recovered against it by Sloan and reasonable attorney's fees and taxable costs.

INA abandoned its appeal from the order awarding attorney's fees and costs and from the judgment finding coverage and awarding indemnity and attorney's fees and costs against INA by not arguing those points on appeal.

INA argued two points on appeal:

I.

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE SELF-SERVING DOCUMENTS EVINCING A "MARY CARTER" AGREEMENT IN EVIDENCE.

II.

WHETHER THE COURT ERRED IN GIVING PLAINTIFF'S REQUESTED INSTRUCTION 4 AND 4A.

The District Court of Appeal of Florida, Fourth District, reversed the judgment and certified as a matter of great public interest the question whether an entire Mary Carter agreement must always be put in evidence. The decision is Insurance Co. of North America v. Sloan, 432 So.2d 132 (Fla. 4th DCA 1983).

QUESTIONS FOR REVIEW

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

QUESTION 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 court answered the very question, yes. In Ward v. Ochoa, 284 So.2d 385 at page 387 of the opinion, the court said:

> "A 'Mary Carter Agreement', however, is basically a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportinately by increasing the liability of the other co-defendants. Secrecy is the essence of such an arrangement, because the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants. By painting a gruesome testimonial picture of the other defendant's misconduct or, in some cases, by admissions against himself and the other defendants, he could diminish or eliminate his own liability by use of the secret 'Mary Carter Agreement'.
>
> The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion. To prevent such deception, we are compelled to hold that such agreements must be produced for examination before trial, when sought to be discovered under appropriate rules of procedure. If the agreement shows that the signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants, such agreement should be admitted into evidence at trial upon the request of any other defendant who may stand to lose as a result of such

> agreement. *If defendants not directly affected by such agreement move for severance because of possible prejudice to them, the Court shall exercise its sound discretion in granting or denying such motion."* (Emphasis supplied)

The nonparticipating defendant's remedy is to move for a severance.

Discovery and admission of Mary Carter agreements is allowed since they are relevant to the credibility and demeanor of the witnesses and their interests in the outcome of the case as well as to the conduct of counsel. Imperial Elevator Company, Inc. v. Cohen, 311 So.2d 732 (Fla. 3rd DCA 1975), Cert. Denied 327 So.2d 32 (Fla. 1976).

If INA had been permitted to edit those portions of the agreements which it felt were against its interests, a reverse effect would have resulted. The jury would have known of the agreement and evaluated the parties to it accordingly, but the jury would have been denied an opportunity to assess the parties' reasons for entering into the agreement.

In Warn Industries v. Geist, 343 So.2d 44 (Fla. 3rd DCA 1977), the court says in footnote 1:

> "It (a Mary Carter agreement) also involves a motive for cooperation between the parties to the agreement which should be disclosed to the jury."

If it were not required that the whole agreement be received in evidence, the party obtaining the disclosure of the agreement would have the benefit of the jury knowing

about the agreement without the jury getting to know what motivated the agreement. Your writer can find no case in Florida which allows edition of a Mary Carter agreement. In the case of Swanson v. State Farm Fire & Casualty Co. 349 So.2d 202 (Fla. 4th DCA 1977), the Fourth District Court called it error to admit a Mary Carter agreement into evidence in a modified or excised form.

QUESTION II

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

INA did not argue on appeal and abandoned the question of coverage under the jeweler's block policy as determined by the amended final judgment, and did not argue the validity of the order awarding fees. INA made no point on appeal urging reversal of the amended final judgment because the jury's answer to the special interrogatory finding coverage was incorrect or that the judgment was incorrect so far as it found coverage. The district court's opinion is in conflict with an opinion of this court, Chaachou v. Chaachou, 135 So.2d 206 (Fla. 1961) and with decisions of the District Court of Appeal of Florida, Third District, in Weisman v. Weisman, 141 So.2d 622 (Fla. 3rd DCA 1962), Central Bank And Trust Company v. Banner Trading Co., 157 So.2d 201 (Fla. 3rd DCA 1963), and Lesperance v. Lesperance, 257 So.2d 66 (Fla. 3rd DCA 1971). Only points urged for reversal in an appellant's brief are preserved for review.

CONCLUSION

The district court's decision should be reversed and the trial court's amended final judgment and order awarding fees should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to JONES & FOSTER, P.A., Attorneys for Insurance Company of North America, P. O. Drawer E, West Palm Beach, Florida 33402, MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, Attorneys for Ann Sloan, P. O. Drawer 3626, West Palm Beach, Florida 33402, EDNA L. CARUSO, Attorney for Ann Sloan, 1615 Forum Place, Suite 4B, West Palm Beach, Florida 33401, BERNARD CONKO of BRENNAN, McALILEY, HAYSKAR, McALILEY & JEFFERSON, Attorneys for Terence F. McCabe, Inc., P.O. Box 2439, West Palm Beach, Florida 33402, and PATRICK FOGARTY, 501 South Flagler Drive, West Palm Beach, Florida 33401 by mail this 25th day of August, 1983.

Attorney