SUPREME COURT OF FLORIDA

PATRICIA DOSDOURIAN, Petitioner, vs. RICHARD PAUL CARSTEN, Respondent.	:	CASE NO. 78,370

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

SUPPLEMENTAL BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION (In support of position of Petitioner)

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INTRODUCTION

Amicus Curiae, American Insurance Association, an association of 252 member insurance companies, which underwrite approximately 33.3% of the commercial insurance coverage of Florida, were granted amicus curiae status to file a brief in support of Petitioner's position by order of the Court entered December 4, 1991. On December 24, 1991, Amicus Curiae filed and served said brief. *See* Brief of Amicus Curiae American Insurance Association (In support of position of Petitioner).

Pursuant to this Court's order dated February 17, 1993, Amicus Curiae American Insurance Association files this supplemental brief addressing the continuing viability of Mary Carter agreements.

SUMMARY OF ARGUMENT

Mary Carter like agreements constitute a disservice to Florida's system of justice and do not serve any proper judicial purpose and should be banned in Florida. Mary Carter arrangements disrupt the efficient and fair administration of the judicial system, distort the balance of adversarial fact finding, dissuade the settlement of cases in their entirety, promote collusions of an unethical nature, and create incentives to pin the less culpable defendant with full liability. Mary Carter-like arrangements disrupt the fair and efficient administration of our judicial system by permitting settling defendants with a potential eye toward assisting the plaintiff to remain a party in the lawsuit.

A Mary Carter arrangement, which requires a settling defendant to remain a party throughout trial, serves no fair or

efficient adjudicatory purpose. In fact, the arrangement usually complicates matters of litigation. This is true even where the Mary Carter arrangement creates no written financial incentives for the settling defendant to aggressively participate in persuading the fact finder.

By facilitating a settling party's use of the judicial system as though settlement has in fact not occurred, Mary Carter arrangements unfairly and needlessly expend judicial time and money. Additionally, whether parties act through secrecy, subtlety, or outright expression, Mary Carter arrangements encourage those parties to tinker with and distort fair and neutral adjudicatory fact-finding processes.

Mary Carter arrangements encourage parties to violate the standards of ethics to which this Court adheres. At the least, these arrangements give the appearance of ethical impropriety, and moreover, work as a vehicle of maintenance and champerty. They may often encourage parties to obstruct truth and notions of fair play.

A Mary Carter arrangement that requires the settling defendant to remain a party at trial raises the suspicion that the settling defendant must be agreeing to participate for some financial benefit to himself or to the plaintiff.

Where financial incentives exist for one co-defendant to covertly assist in the prosecution of the plaintiff's case, our system of contribution among joint tortfeasors and our system of comparative negligence stand subject to the mockery of parties who

hold the financial incentives and are capable by their joint efforts of convincing the jury of some "truth" beyond reality. It is often a professed goal of the Mary Carter arrangement to bind settling parties to remain an active party through trial merely to maximize a favorable judgment on behalf of the plaintiff at the expense of non-settling defendants. Mary Carter arrangements encourage perjury and collusion, and air to the public a distinct appearance of impropriety.

Furthermore in Florida, one who intermeddles in a suit which in no way belongs to him or her by assisting either party to the action is guilty of maintenance, a criminal offense at common law. In other words, it is unlawful for a person to maintain the suit of another unless that person has some legitimate interest in the subject of the suit. Furthermore, one is guilty of champerty where he or she takes a financial interest in the suit in which he or she attempts to intermeddle. Mary Carter arrangements, in effect, permit and encourage just these things. Mary Carter arrangements allow plaintiffs to purchase "adversarial" support for their cases.

This Court should hold that Mary Carter arrangements be forbidden. These arrangements are unethical, or alternatively, give the appearance of impropriety. Moreover, a Mary Carter arrangement wherein the settling defendant remains a party to the suit seeks to work maintenance and champerty, both of which are criminal offenses of common law.

Moreover, Mary Carter arrangements do not serve their alleged

purpose of encouraging settlements. Although their availability may promote some settlements, that same availability ensures that those settlements are never entire. That is, a non-settling party--a party most often less culpable--must always be victimized by the suit against it. Mary Carter arrangements do not promote fair settlements. They carry the potential coercive effect that should not be countenanced by the judiciary. The more culpable defendant is in the position to force the less culpable defendant to either litigate, and risk the possibility of bearing the burden of the entire judgement, or settle. While it is the policy of the law to encourage settlements, this policy should not be applied to the detriment of possibly innocent parties.

Amicus Curiae urges this Court to ban Mary Carter-like arrangements and declare them void and unenforceable as against public policy.

ARGUMENT

MARY CARTER ARRANGEMENTS DO A DISSERVICE TO FLORIDA'S SYSTEM OF JUSTICE AND DO NOT SERVE ANY PROPER JUDICIAL PURPOSE AND THEREFORE MUST BE BANNED AS VIOLATING JUDICIAL PUBLIC POLICY.

In response to this Court's questioning whether Mary Carter agreements should continue to be viable in Florida, Amicus Curiae submits that now is the time to discontinue allowing Mary Carter agreements and other similar arrangements which are antithetical to a fair system of jurisprudence. Among other effects, Mary Carter arrangements disrupt the efficient and fair administration of the judicial system, distort the balance of adversarial fact finding, dissuade the settlement of cases in their entirety, promote collusions of an unethical nature, and create incentives to pin the less culpable defendant with full liability. In essence, by every facet of their influence, Mary Carter arrangements thwart the policies of our system of justice. Amicus Curiae urges this Court to ban Mary Carter-like arrangements and declare them void and unenforceable as against public policy.

A. Mary Carter-like arrangements disrupt the fair and efficient administration of our judicial system by permitting settling defendants, with a potential eye toward assisting the plaintiff, to remain a party in the lawsuit.

Only the ingenuity of an attorney limits the form a Mary Carter arrangement may take. Unique to the scheme of Mary Carter-like arrangements, settling defendants retain their influence upon the outcome of the lawsuit from which they settled: so-called settling defendants continue "defending" their case! Principally,

defendants who have allegedly settled remain parties throughout the negligence suit, even through trial. These defendants thereby remain able to participate in jury selection. They present witnesses and cross-examine the witnesses of the plaintiff by leading questions. They argue to the trial court the merits and demerits of motions and evidentiary objections. Most significantly, Mary Carter defendants' party status permits them to have their counsel argue points of influence before the jury. These procedural advantages "distort the case presented before a jury that came to court expecting to see a contest between plaintiff and the defendants and instead sees one of the defendants cooperating with the plaintiff," *Elbaor v. Smith*, 1992 WL 353288, at *7 (Tex. Dec. 2, 1992) (a copy of this decision is attached to Amicus' Notice of Supplemental Authority filed previously with this Court), and the entire trial process is thereby skewed. *Watson Truck & Supply Co. v. Males*, 801 P.2d 639, 643-44 (N.M. 1990) (Wilson, J. specially concurring).

In many instances, Mary Carter defendants may exert influences upon the adversarial process before a trial, as well. They may, for example, share with a plaintiff work product previously (or subsequently, if the agreement remains secret) disclosed by a non-settling defendant. Plaintiff and settling defendant can combine their combatant energies far in advance and coerce non-settling defendants, out of fear that they will be subject to an unfair trial, to settle for sums in excess of that which would otherwise be proportional to that defendant's fair share of the burden. June

F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 U. Fla. L. Rev. 521, 576 (1986).

Thus, a Mary Carter defendant retains even after settlement every right that his or her non-settling co-defendant may hold. If this Court is to permit the rights of a defendant to continue even after that defendant has settled his or her dispute, it seems only proper then to ask a series of questions. What judicial purpose is served by this? What legal and fair interests remain after a Mary Carter-like arrangement that gives settling defendants the same rights as non-settling ones? Why should the wheels of justice turn for those who have settled their case? Why should judges hear their objections to evidence or entertain their arguments on legal motions? Why should juries be forced to listen to their pleas?

It is not unusual that settling defendants acquire by a Mary Carter arrangement substantial financial interests in a trial's outcome should the jury rule favorably for the plaintiff. *See, e.g., Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. 2d DCA 1967). A settling defendant, for example, may agree to settle at some ceiling figure upon the condition that if the jury awards the plaintiff a judgment against the non-settling defendant in excess of some certain amount, the settling defendant's settlement money is returned proportionately or perhaps entirely. There is no doubt then that, in these instances, Mary Carter defendants desire to remain parties to the suit so that their counsel may influence the jury's verdict to their financial benefit, *i.e.*, in favor of the plaintiff and against the non-settling defendant.

In other words, rather than cooperating with their codefendants to minimize the culpability of all defendants and to minimize the jury's assessment of plaintiff's damages, Mary Carter defendants offer to the plaintiff their counsel's services for the purpose of persuading the jury that it apportion to non-settling defendants the greatest percentage of fault and that they award the full array of damages plaintiff has requested. Even "possible collusion between the plaintiff and the settling defendant creates an inherently unfair trial setting [which] may lead to an inequitable attribution of guilt and damages to the [nonsettling defendant]." *Watson Truck & Supply Co. v. Males*, 801 P.2d 639, 643 (N.M. 1990) (Wilson, J., specially concurring).

Thus, among other things, these arrangements interfere with judicial and legislative policies providing for contribution and/or comparative fault among co-tortfeasors. *Watson Truck & Supply Co.*, 801 P.2d at 644-46 (Wilson, J. specially concurring). *See generally* Entman, *supra*, at 540-49 & 557-58; John E. Benedict, Comment, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Columbia L. Rev. 368, 374-77 (1987).

In Florida, particularly, as has occurred in several other states, Mary Carter arrangements invite parties to attempt to circumvent key provisions of Chapter 768, Florida Statutes including sections 768.041, 768.31, and 768.81. *See, e.g., Stein v. American Residential Management*, 781 S.W.2d 385, 389 (Tex. App. 1989) (holding that parties' Mary Carter agreement would not be permitted to destroy another's contribution rights); *In Re Waverly*

Accident, 502 F. Supp. 1, 5 (M.D. Tenn. 1979) (noting that the Mary Carter agreement at issue there attempted to circumvent Tennessee Code § 23-3102, a provision identical to § 768.31(1)(d), Florida Statutes); *Alder v. Garcia*, 324 F.2d 483 (10th Cir. 1963) (holding void a Mary Carter agreement which attempted to indirectly do what was prohibited by New Mexico's Contribution Among Tortfeasors Act).

Of course, Respondent Carsten maintains, by an expressed provision of his settlement with Christine DeMario, that Christine DeMario remained a party to their lawsuit so that the jury could "determine the proportionate share of negligence between Christine DeMario and Patricia Dosdourian [(Petitioner)]." But, again, it must be asked: Why was this necessary if DeMario could just as well have been a witness? Also, if DeMario's settlement fixed liability at $100,000, why would DeMario even want to remain a party to the suit and have her counsel spend time and money in that regard? It is true, of course, that DeMario remained a party as a required condition of settlement. Upon that fact, however, it must be asked: What interests of Respondent required that this demand be a condition of settlement? And what prompted DeMario to take more than a mere passive role at trial? Her Mary Carter arrangement required that she remain a party, but why did DeMario participate at trial as though something was to be gained or lost by her presence? It would have appeared in her best interest, at least as a matter of efficiency, that she remain a silent party throughout the trial unless at some point her $100,000 settlement stood at stake. In fact, however, DeMario's counsel did not act so

discretely. Rather, her counsel actively participated throughout trial, acting as though some interest of DeMario remained to be settled. The only suggestion that reasonably resolves these points is that DeMario remained a party to the suit at the behest of Respondent solely to protect some interest of Respondent. In other words, a Mary Carter agreement specifically omitting an expressed financial incentive for the settling defendant still gives the impression that some hidden incentive exists, for that same agreement requires that a settling defendant remain a party to the suit where it is unnecessary.

The facts at hand, therefore, serve as an example of why this Court should not permit parties to settle according to a Mary Carter agreement that requires the settling party to remain a party throughout trial. Furthermore, it is even more obvious that where, in fact, expressed and written financial incentives exist for the settling defendant to increase the award against the non-settling defendant in favor of the plaintiff, the risk of harm to our judicial system from permitting the settling defendant to remain a party at trial magnifies exponentially.

This Court must consider the impact Mary Carter-like arrangements have upon judicial efficiency and fairness. A Mary Carter arrangement, which requires a settling defendant to remain a party throughout trial, serves no fair or efficient adjudicatory purpose. In fact, the arrangement usually complicates matters of litigation. This is true even where the Mary Carter arrangement creates no written financial incentives for the settling defendant

to aggressively participate in persuading the fact finder. Judicial efficiency would be served best if the Court dismissed all parties who have settled, despite the terms of a Mary Carter agreement existing to the contrary. Where a settling defendant must be present to determine the non-settling party's proportion of fault, requiring that defendant to serve as witness seems far more efficient and appropriate than permitting him or her to remain a party. Mary Carter agreements do not simplify litigation. "[T]he agreement itself and its impact on the parties' positions becomes an additional issue that must be dealt with at trial and considered by the jury." Entman, *supra*, at 576.

Trial fairness demands that a party who has settled and who allegedly has no interest at stake not be permitted to have his or her counsel influence the fact finder either arbitrarily or to the deliberate detriment of a non-settling defendant. "The fairness of the system is undermined when the alignment of interests in the litigation is not what it appears to be." *Dosdourian v. Carsten*, 580 So. 2d 869, 872 (Fla. 4th DCA 1991). Even if a parties' Mary Carter arrangement is disclosed to the jury, that arrangement may still deprive a trial of its proper adversarial character. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 11 (Spears, J., concurring). A settling defendant who remains a party may, for instance, undermine the non-settling defendant's selection of a fair-minded jury. Note also that a jury will always remain ignorant of matters exclusively between the court and counsel, and for various reasons peculiar to each agreement, "the disclosure of

Mary Carter agreements by itself may prejudice the jury." *Id; see also* Comment, *Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems*, 36 Ark. L. Rev. 570, 582 (1983). As well, it is unlikely that a jury can consciously appreciate, and account for, each and every subtle motive in the settling defendant's courtroom presentations. Scurlock Oil Co., 724 S.W.2d at 11 (Spears, J., concurring). Regardless of "whoever is prejudiced, the nonsettling defendant and society are entitled to a fair trial," *id.*, a trial conducted "without hazarding the prospect that such consideration might affect [a] jury's verdict." *Lum v. Stinnett*, 488 P.2d 347, 353.

Thus, if this Court intends to permit settling defendants to remain parties under the terms of a Mary Carter arrangement, it would serve justice far better to have the settling defendant sit and act at trial as a member of the plaintiff's team.

Our judicial system exists to promptly and fairly resolve actual disputes between real parties. By facilitating a settling party's use of the judicial system as though settlement has in fact not occurred, Mary Carter arrangements unfairly and needlessly expend judicial time and money. Additionally, whether parties act through secrecy, subtlety, or outright expression, Mary Carter arrangements encourage those parties to tinker with and distort fair and neutral adjudicatory fact-finding processes. *See, e.g., Lum*, 488 P.2d at 352-353. (As will be addressed later, the resulting distorted outcome falls at the expenses of non-settling defendants.) To quote the lower court: "Jurors are . . . deceived

by being informed that they are resolving an existing dispute between parties that have already resolved their differences." *Dosdourian*, 580 So. 2d at 872. Inimical to the adversary system then, Mary Carter arrangements are best prohibited. *E.g.*, *Elbaor v. Smith*, 1992 WL 353288, at *7 (Tex. Dec. 2, 1992); *Lum*, 488 P.2d at 351; *Trampe v. Wisconsin Tel. Co.*, 252 N.W.2d 675 (Wisc. 1934); *Watson Truck & Supply Co.*, 801 P.2d at 643-46 (Wilson, J. specially concurring); *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 8 (Tex. 1986) (Spears, J., concurring); *see also Cox v. Kelsey-Hayes Co.*, 594 P.2d 354, 359 (Okl. 1978) (holding that trial court must "either hold that portion of the agreement granting defendant an interest in a large plaintiff's verdict unenforceable . . . or dismiss the agreeing defendant from the suit").

B. Mary Carter arrangements encourage parties to violate the standards of ethics to which this Court adheres. At the least, these arrangements give the appearance of ethical impropriety, and moreover, work as a vehicle of maintenance and champerty.

As one commentator and jurist has succinctly stated: "[The use of a Mary Carter agreement] is one the ugliest and most disreputable sides of law practice today," Freedman, *The Expected Demise of "Mary Carter": She Never Was Well!*, 633 Ins. L.J. 602, 603 (1975), for that agreement may often encourage parties to obstruct truth and notions of fair play. Therefore, before deciding their continuing viability, this Court must consider the impact Mary Carter arrangements have upon the enforcement of our system of ethics.

Mary Carter arrangements promote unethical conduct and give the appearance of impropriety. Furthermore, a Mary Carter agreement contracts that parties commit maintenance and champerty. For these reasons alone, these arrangements should be banned.

A Mary Carter arrangement that requires the settling defendant to remain a party at trial raises the suspicion that the settling defendant must be agreeing to participate for some financial benefit to himself or to the plaintiff. For if no such incentive in fact existed, what value would there be to either settling party that the settling defendant pay his or her attorney to remain active in the case and throughout trial? Moreover, because a settling defendant may act (and may be required to act) as a witness at trial for the purpose of apportioning fault among co-tortfeasors, it defies logic to respond that the settling defendant remains a party for that same, and only that same, purpose.

Where financial incentives exist for one co-defendant to covertly assist in the prosecution of the plaintiff's case, our system of contribution among joint tortfeasors and our system of comparative negligence stand subject to the mockery of parties who hold the financial incentives and are capable by their joint efforts of convincing the jury of some "truth" beyond reality. It is often a professed goal of the Mary Carter arrangement to bind settling parties to remain an active party through trial merely to maximize a favorable judgement on behalf of the plaintiff at the expense of non-settling defendants. Typically, the party who has settled pursuant to a Mary Carter arrangement has settled in this

manner because that party was in fact the most culpable.[1] As concluded by the Supreme Court of Texas, Mary Carter arrangements "motivate more culpable defendants to make a 'good deal' [in order to] end up paying little or nothing in damages." *Elbaor v. Smith*, 1992 WL 353288, p. *7 (Tex. Dec. 2, 1992); *see also* John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement*, 87 Columbia L. Rev. 368, 371-74 (1987). "As most Mary Carter agreements are entered into for the express purpose of maximizing the judgment against the nonsettling defendant, counsel [for the settling defendant] will utilize whatever opportunities are available to prejudice the interests of the non-settling party. [Again], the adversary contest of the trial is thus seriously distorted." Benedict, *supra*, at 374.

Yet despite the interests of their clients, lawyers are bound to act with candor and fairness. When admitted to The Florida Bar, every attorney promises to employ "means only as are consistent with truth and honor, and [to] never seek to mislead the judge or jury by any artifice or false statement of fact or law." *See* Oath of Admission to The Florida Bar. An attorney further promises never to advance a "fact prejudicial to the honor or reputation of

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[1] The less culpable party is the party least likely to participate in a Mary Carter arrangement with the plaintiff. For one, the pressure to settle in any manner is not present where the less culpable defendant can at trial rightly and fairly blame the more culpable defendant for the plaintiff's injuries. For two, because the presentation of bare facts alone will show to the jury the more culpable defendant to be the one who should pay the most toward the plaintiff's injuries, plaintiff's counsel does not need the assistance of additional parties and their counsel to pin blame and responsibility for damages.

a party or witness, unless required by the justice of the cause with which" that attorney is charged. *Id.*

Moreover, the ideals and goals of our professionalism require that a lawyer "should at all times avoid the appearance of impropriety." Florida Board of Governors, *Ideals and Goals of Professionalism*, Goal 1.1 (adopted May 16, 1990). He or she "should at all times be guided by a fundamental sense of honor, integrity, and fair play . . . ." *Id.* Ideal 2; *see also id.*, Goal 2.14. A lawyer shall neither "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation [nor] engage in conduct that is prejudicial to the administration of justice." Florida Rules of Professional Conduct 4-8.4(c)-(d); *see also id.* 4-3.5(a).

In *Lum v. Stinnett*, 488 P.2d 347 (Nev. 1971), the Supreme Court of Nevada properly recognized the ethical dilemmas that are born by the use of Mary Carter arrangements. The court held that Mary Carter-like agreements violate Nevada's Rules of Professional Conduct. *Lum*, 488 P.2d at 351-52. It relied principally on an opinion of the Arizona State Bar Committee on Rules of Professional Conduct, which having considered the "propriety of certain 'settlement agreements' calling for defense counsel to participate in litigation when they were actually interested in furthering the plaintiff's cause," *id.* at 351, concluded that "the same contravened [the] policy of [Arizona's] Canons of Professional Conduct concerned with representing conflicting interests, candor and fairness, taking technical advantage of opposing counsel, and

unjustifiable litigation." *Id.*; *see* Op. No. 70-18, Ariz. State Bar Committee on Rules of Prof. Conduct (1970). Particularly, the court noted the following paragraph from the Arizona Bar Committee's opinion:

> "A lawyer may not, in order to get decided a question of law in which he is interested, foist a fictitious controversy on the court; and again: He may not ostensibly appear for a stooge client when he really represents others."
>
> These statements are not direct parallels, but they express a clear intent with respect to the canons cited, that trials and legal proceedings shall be honest, shall call forth the best possible legal abilities of the lawyer on behalf of his client and shall be directed to the achievement of justice.

Lum, 488 P.2d at 352 (quoting Op. No. 70-18, *supra*, quoting H. Drinker, *Legal Ethics* 75 (1953)). Amicus Curiae submits that this Court should follow *Lum* by noting these same concerns.

At the very least, Mary Carter arrangements encourage perjury and collusion, and air to the public a distinct appearance of impropriety. *See also* June F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 U. Fla. L. Rev. 521, 537-39 (1986); Benedict, *supra*, at 377-78. Because it is the nature of Mary Carter arrangements that the settling defendant remain a party to the suit when a mere requirement the party withdraw and participate only as witness would accomplish the same lawful goal, even if the parties and counsel conduct themselves with honesty and integrity, a cloud of ethical doubt nonetheless lingers.

Addressing another ethical-like issue, *Lum* noted the champertous nature of Mary Carter arrangements and their possible violation of the common law prohibition against maintenance in

Nevada. *See Lum*, 488 P.2d at 350-51. In *Elbaor v. Smith*, the Texas Supreme Court reiterated *Lum*'s notice of this matter, citing *Lum* and an appellate opinion from the state of Washington. *See Elbaor*, 1992 WL 353288, at *7; *Monjay v. Evergreen School Dist.*, 537 P.2d 825, 829-30 (Wash. App. 1975).

In Florida, one who intermeddles in a suit which in no way belongs to him or her by assisting either party to the action is guilty of maintenance, a criminal offense at common law. Fla. Jur. 2d, *Champerty and Maintenance* §§ 1-2 (1979). Put another way, it is unlawful for a person to maintain the suit of another unless that person has some legitimate interest in the subject of the suit. One is, furthermore, guilty of champerty where he or she takes a financial interest in the suit in which he or she attempts to intermeddle. *Id.* Mary Carter arrangements, in effect, permit and encourage just these things. *Elbaor*, 1992 WL 353288, at *7; *Lum*, 488 P.2d at 350-51; *cf. Monjay*, 537 P.2d at 829-30.

Mary Carter arrangements allow plaintiffs to purchase "adversarial" support for their cases. The arrangement serves as an inappropriate vehicle by which one or more of the defendants of a suit can acquire a specific interest in a plaintiff's claim. Yet, pursuant to a Mary Carter arrangement and despite the common law prohibition against maintenance, parties who should be dismissed from the action in that they have fully settled their disputes attempt to remain at trial anyway, bearing with them the full force of their counsel and doing so merely to assist or damage some other party to the suit.

This Court should hold that Mary Carter arrangements be forbidden. These arrangements are unethical, or alternatively, give the appearance of impropriety. Moreover, a Mary Carter arrangement wherein the settling defendant remains a party to the suit seeks to work maintenance and champerty, both of which are criminal offenses of common law.

C. Mary Carter arrangements do not serve their alleged purpose of encouraging settlements

The courts "rely heavily on the rhetoric" that Mary Carter arrangements are to be tolerated because they encourage settlements. David R. Miller, *Mary Carter Agreements: Unfair and Unnecessary* 32 Sw. L.J. 779, 785 (1978). The Academy of Florida Trial Lawyers, as amicus curiae, set forth this argument for instance in the case at hand. *See* Br.of Academy of Fla. Trial Lawyers, at 1, 5-7. Although the availability to litigants of Mary Carter agreements may promote some settlements, that same availability ensures that said settlements are never entire. That is, a non-settling party--a party most often less culpable--must always be victimized by the suit against it. This fact recently prompted the Texas Supreme Court to strike invalid all Mary Carter agreements. *See Elbaor v. Smith*, 1992 WL 353288, at *6 - *8 (Tex. Dec. 2, 1992). The court stated:

> A Mary Carter agreement exists, under our definition, when the plaintiff enters into a settlement agreement with one defendant and goes to trial against the remaining defendant(s). The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgement recovered at trial. This creates a tremendous incentive for the settling defendant to ensure

> that the plaintiff succeeds in obtaining a sizable recovery, and thus motivates the defendant to assist greatly in the plaintiff's presentation of the case
>
> . . . .
>
> Given this Mary Carter scenario, it is difficult to surmise how these agreements promote settlement. Although the agreements do secure the partial settlement of a lawsuit, they nevertheless nearly always ensure a trial against the non-settling defendant. Mary Carter agreements frequently make litigation inevitable, because they grant the settling defendant veto power over any proposed settlement between the plaintiff and any remaining defendant. Thus, "only a mechanical jurisprudence could characterize Mary Carter arrangements as promoting a compromise and discouraging litigation--they plainly do just the opposite."

Id. at *6 (citations omitted) (quoting *Stein v. American Residential Management*, 781 S.W.2d 385, 389 (Tex. App. 1989)); *see also* Miller, *supra*, at 785-88.

Nevertheless, this matter may not be merely one of settlement. The appropriate question for this Court is whether Mary Carter arrangements promote <u>fair</u> settlement. They do not. As previously maintained, Mary Carter arrangements carry

> the potential coercive effect that should not be countenanced by the judiciary. This would be true in a situation in which the liability of settling defendants is relatively clear, while the liability of the litigating defendant is not. [*E.g.*, this case.] The more culpable defendant is in the position to force the less culpable defendant to either litigate, and risk the possibility of bearing the burden of the entire judgement, or settle--thus, coercing contribution. While it is the policy of the law to encourage settlements, this policy should not be applied to the detriment of possibly innocent parties.

Monjay v. Evergreen School Dist., 537 P.2d 825, 829 (Wash. App. 1975).

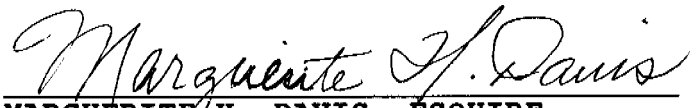
Lastly, even if it is admitted that Mary Carter arrangements

encourage settlement, what benefit to our judicial system is conferred when both of the parties who have "settled" remain litigants of the lawsuit nonetheless? The answer is that there is no benefit conferred except a benefit which bestows to the settling defendant's counsel and his nominal adversary, the plaintiff.

CONCLUSION

This Court should declare that all Mary Carter like agreements, whereby the defendant settles and yet promises to remain a party to the suit, be declared void as against the public policy of this State and as against the policies of proper and fair administration of justice. Mary Carter agreements should no longer be condoned.

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. mail, to all counsel listed below on this 8th day of March, 1993.

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