047 w/app

FILED
SID J. WHITE
DEC 24 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

SUPREME COURT OF FLORIDA

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

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

BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION

(In support of position of Petitioner)

MARGUERITE H. DAVIS, of
Katz, Kutter, Haigler, Alderman,
Davis, Marks & Rutledge, P.A.
215 S. Monroe Street, Suite 400 — See change of address
Tallahassee, Florida 32301
(904) 224-9634

ATTORNEYS FOR AMICUS CURIAE, AMERICAN INSURANCE ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

INTRODUCTION

Amicus Curiae, American Insurance Association, an association of 252 member insurance companies which underwrite approximately 33.3% of the commercial insurance coverage written in Florida, were granted amicus curiae status to file a brief in support of Petitioner's position by order of this Court entered December 4, 1991. The purpose of this amicus curiae brief is to aid this Court in the determination of the issue certified by the fourth district as one of great public importance: Whether a non-settling defendant is entitled to have the jury informed of a settlement agreement between the plaintiff and another defendant whereby the settling defendant's obligation is fixed, but the settling defendant is required by the terms of the settlement agreement with plaintiff to continue in the lawsuit. This is an issue of great concern and importance to the insurers and insureds in this State.

STATEMENT OF THE CASE AND OF THE FACTS

Amicus adopts the Statement of the Case and Facts set forth in the Brief of Petitioner. Briefly, the facts as accurately stated in the fourth district's decision are that Respondent, Richard Paul Carsten, sued Petitioner and Christine DeMario. Respondent Carsten filed a complaint alleging that Petitioner and DeMario operated their cars in a negligent manner which resulted in injuries to Respondent Carsten. Before trial, Carsten and DeMario entered into a settlement agreement whereby Carsten settled all his claims against DeMario in exchange for payment of her insurance policy limits of $100,000 and her agreement that she would remain in the litigation throughout the trial and through judgment in the case.

Prior to trial, Carsten moved in limine to exclude this settlement agreement from disclosure to the jury. The trial court classified the agreement as a release and granted Carsten's motion. At close of trial, the trial court instructed the jury that there were two pending claims which required independent consideration: one against Dosdourian and one against DeMario. The jury found Dosdourian 35% negligent, DeMario 55% negligent and Carsten 10% negligent. The trial court entered final judgment ordering Dosdourian to pay 35% of Carsten's non-economic damages.

On appeal to the fourth district, Dosdourian claimed that the settlement agreement between DeMario and Carsten should have been disclosed to the jury. Petitioner argued that the subject agreement was of the kind involved in *Booth v. Mary Carter Paint Company*, 202 So.2d 8 (Fla. 2d DCA 1967), and thus should have been disclosed to the jury. Petitioner further argued that the exclusion of the agreement and the fact that DeMario remained in

the lawsuit as a party constituted a deception and resulted in injustice to Petitioner. Respondent, on the other hand, argued that the subject agreement lacked an essential factor found of "Mary Carter" agreements, *i.e.*, defendant's retention of an active role in the litigation in order to diminish his own liability in proportion to another defendant's liability.

Although explaining in some detail its chagrin in feeling constrained to so hold, the fourth district affirmed the final judgment, but certified its decision to this Court as one involving a question of great public importance. The district court cited *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973), and *Imperial Elevator Co., Inc. v. Cohen*, 311 So.2d 732 (Fla. 3d DCA 1975), *cert. denied*, 327 So.2d 32 (Fla. 1976) for the propositions that the search for truth requires the disclosure of "Mary Carter" agreements and that a jury is entitled to know of a "Mary Carter" agreement since it relates to the credibility and demeanor of witnesses and their interest in the outcome of the case, as well as the conduct of counsel during the course of trial. The Court explained that overwhelming decisional precedent in this state holds that "Mary Carter" agreements not only are admissible, but also should be admitted into evidence to avoid misleading the jury. It found that DeMario had agreed to settle with Carsten for the $100,000 liability limitation of her insurance policy and that the settlement was conditioned upon DeMario's continued participation in the lawsuit. It held that section 768.041(3), Florida Statutes, generally providing that releases are not admissible into evidence, only contemplates the usual situation where a claim is settled, a party released, and no further judicial proceedings against that party are contemplated; the Court disagreed with Respondent's claim that since both economic and non-economic damages depend upon relative percentages of fault, it was necessary to have DeMario in the lawsuit. The Court noted

that there will be numerous instances, such as those involving pre-suit settlements or tort-feasors immunized under workers compensation or other legal immunities, where other tort-feasors will not be parties to the litigation. Thus, the Court held section 768.81, Florida Statutes, relating to apportionment of damages, does not require the joinder of settling parties under circumstances similar to those involved in the present case. It is because of the difficulty in demonstrating prejudice to a non-settling defendant, the Court stated, that "Mary Carter" agreements are required to be disclosed to the jury. The Court further accurately explained that, under our adversary system, a jury can usually assume that the parties and their counsel are motivated by the obvious interests each has in the litigation, but that assumption is no longer valid when the parties have actually made an agreement to the contrary prior to trial. It emphasized that the fairness of the system is undermined when the alignment of interests in the litigation is not what it appears to be. The Court opined:

> Jurors are also deceived by being informed that they are resolving an existing dispute between parties that have already resolved their differences. In our view, this undermines the integrity of the jury system which exists to fairly resolve actual disputes between our citizens. Hence, even if the parties and counsel conduct themselves with honesty and integrity, a cloud of doubt remains over the proceedings because of the information withheld from the jurors.

Dosdourian v. Carsten, 580 So.2d 869, 872 (Fla. 4th DCA 1991) (Appendix, Tab A).

The Court concluded that the same policy reasons requiring disclosure of secret settlement agreements in the "Mary Carter" line of cases apply in the present case (even though the motivations of the settling parties are not as clear), and that the integrity of our justice system is placed in question when a jury charged to determine the liability and damages of the parties is deprived of the knowledge that there is, in fact, no actual dispute

between two of the three parties. Because of this Court's decision in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), however, the fourth district felt constrained to follow the holdings of the Florida Supreme Court on this issue, and instead certified the following question to this Court as one of great public importance:

> IS A NON-SETTLING DEFENDANT ENTITLED TO HAVE THE JURY INFORMED OF A SETTLEMENT AGREEMENT BETWEEN THE PLAINTIFF AND ANOTHER DEFENDANT WHEREBY THE SETTLING DEFENDANT'S OBLIGATION IS FIXED BUT THE SETTLING DEFENDANT IS REQUIRED TO CONTINUE IN THE LAWSUIT?

SUMMARY OF ARGUMENT

A non-settling defendant is entitled to have the jury informed of a settlement agreement between the plaintiff and another defendant whereby the settling defendant's obligation is fixed but the settling defendant is required to continue in the lawsuit. The agreement at issue resulted in a realignment of the parties, unknown to the jury, and the inclusion of a co-defendant at trial when there were no issues left to be resolved as to the settling co-defendant, and therefore the agreement at issue is the functional equivalent of a Mary Carter agreement.

The typical features of agreements encompassed generally within the category of denominated "Mary Carter" agreements include secrecy, the agreeing defendants remain as party defendants in the lawsuit, the agreeing defendants' liability is decreased in direct proportion to the non-agreeing defendants increase in liability, and the agreeing defendant guarantees to the plaintiff a certain amount of money if plaintiff does not receive a judgment against any of the defendants or if the judgment is less than a specified sum.

Any number of other terms which result in the same consequences, however, can serve as a basis for the same requirement of admissibility as has been found in cases considering *pure* "Mary Carter" agreements as described by *Booth v. Mary Carter Paint Company*, *Ward v. Ochoa* and their progeny. The terms of the agreement in the present case have the same ultimate effect on the adversary system as pure "Mary Carter" agreements limited only by the ingenuity of counsel.

This Court, unlike the fourth district, should not feel constrained from answering the certified question in the affirmative and requiring introduction of the subject agreement into

evidence merely because the present secret agreement did not contain one characteristic which has been typical of "Mary Carter" agreements. The mere absence of a contingency in the settlement amount giving the settling defendant a proportional financial interest in the outcome of the case should not bar admission of the agreement. The lack of this contingency should not serve as a sufficient basis to remove the subject agreement from the rule of admissibility and disclosure.

Because the variations in "Mary Carter" agreements are virtually unlimited, courts should require that agreements, such as the present one, having great potential of engendering consequential prejudice to the non-settling defendants due to, among other things, realignment of the parties of which the jury is unaware, be admitted into evidence even when the element of direct proportionality may be absent. This disclosure and requirement of admissibility are essential to the search for truth and justice in our adversary system and to avoid unfair prejudice to the non-settling defendant.

Jurors are clearly deceived by being informed that they are resolving an existing dispute between parties that have already resolved their differences. As the fourth district accurately suggests, this undermines the integrity of the jury system which exists to fairly resolve actual disputes between citizens. Even if parties and counsel conduct themselves with honesty and integrity, a cloud of doubt and prejudice to the non-settling defendant remains over the proceedings due to withholding of significant information from the jurors.

The key features of a "Mary Carter" agreement compelling disclosure and the requirement of admissibility are secrecy, continuation of the settling defendant in the lawsuit, giving the jury an incorrect perspective on credibility and the true alignment of the

parties, and the incentive for collusion. These are present in the agreement now before this Court. To eliminate the collusive atmosphere created by settlement agreements where the settling defendant continues as a party defendant although effectually aligned with the plaintiff unbeknownst to the jury, courts have concluded that these secret agreements must be disclosed to the jury.

Furthermore, the present agreement is not a "release" within the meaning of section 768.041(3), Florida Statutes. Releases differ from "Mary Carter" agreements in that statutory protections are in place to insure fairness to the non-settling defendant(s). This statute contemplates the usual situation where a claim is settled, a party released, and no further judicial proceedings against that party contemplated as opposed to the agreement in the present case where the non-settling party remained as an active party throughout trial and through judgment.

Due to the suspect nature of the peculiar agreement in the present case, it is the type of agreement akin to a "Mary Carter" agreement that should be disclosed promptly, especially when the agreement is such that it is subject to question as being potentially collusive. The jury should have been informed of the agreement so they could assign the correct weight to the testimony of witnesses being presented.

This Court should reverse the fourth district's affirmance, but it should agree with the analysis of the fourth district and answer the certified question in the affirmative.

ARGUMENT

A NON-SETTLING DEFENDANT IS ENTITLED TO HAVE THE JURY INFORMED OF A SETTLEMENT AGREEMENT BETWEEN THE PLAINTIFF AND ANOTHER DEFENDANT WHEREBY THE SETTLING DEFENDANT'S OBLIGATION IS FIXED BUT THE SETTLING DEFENDANT IS REQUIRED TO CONTINUE IN THE LAWSUIT. (THE AGREEMENT AT ISSUE RESULTED IN A REALIGNMENT OF THE PARTIES, UNKNOWN TO THE JURY, AND THE INCLUSION OF A CO-DEFENDANT AT TRIAL WHEN THERE WERE NO ISSUES LEFT TO BE RESOLVED AS TO THE SETTLING CO-DEFENDANT, AND THEREFORE THE AGREEMENT AT ISSUE IS THE FUNCTIONAL EQUIVALENT OF A MARY CARTER AGREEMENT.)

This Court should hold what the fourth district said that it wished to hold: A non-settling defendant is entitled to have the jury informed of a settlement agreement between the plaintiff and another defendant whereby the settling defendant's obligation is fixed but the settling defendant is required to continue in the lawsuit. The fourth district only rendered its decision to affirm and declined to adopt this holding because it felt constrained to do so by this Court's decision in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), which holds that a district court of appeal does not have the authority to overrule a decision of this Court, although it is free to certify questions of great public interest to the Supreme Court and even to state their reasons for advocating change.[1]

In the present case, the fourth district carefully followed this Court's pronouncement in *Hoffman*. It determined that the more compelling considerations, based on the nature of our adversary system and our system of jury trials, required a holding that a non-settling

---

[1] In *Hoffman*, the fourth district attempted to overrule all precedent of this Court in the area of contributory negligence and to establish comparative negligence as the proper test. Although this Court in *Hoffman* chastised the district court for abandoning judicial precedent of this Court, it ultimately agreed with the district court that the comparative negligence rule should be adopted and delineated when this rule was to be applied at the trial and appellate levels.

defendant is entitled to have the jury informed of a settlement agreement between the plaintiff and another defendant whereby the settling defendant's obligation is fixed but the settling defendant is required to continue in the lawsuit. As summarized in the Statement of the Case and of the Facts in this brief, the rationale of the district court for the position it wished to take is well-explained and should be adopted as the basis for answering the certified question in the affirmative.

The fourth district determined that the decisions of this Court dealing with "Mary Carter" agreements, including particularly *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973), made it appear that this Court was holding that one of the elements of a "Mary Carter" agreement must be that a signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants.

The absence of a contingency in the settlement amount giving the settling defendant a financial interest in the outcome of the case should not preclude the agreement at issue from being treated as a Mary Carter Agreement.

This Court, however, should not feel constrained from answering the certified question in the affirmative and requiring introduction of the subject agreement into evidence merely because the present secret agreement did not contain one characteristic which has been typical of "Mary Carter" agreements. The mere absence of a contingency in the settlement amount giving the settling defendant a financial interest in the outcome of the case should not bar admission of the agreement. The lack of this contingency should not serve as a sufficient basis to remove the subject agreement from the rule of admissibility and disclosure adopted by this Court in *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973), approving the

earlier decision of the second district in *Booth v. Mary Carter Paint Company*, 202 So. 2d 8 (Fla. 2d DCA 1967).

There is no mystique to the term "Mary Carter" agreement, named such after the early case of *Booth v. Mary Carter Paint Company*. A "Mary Carter" agreement is a contract between a plaintiff and one of the defendants whereby the settling defendant effectively becomes an ally of the plaintiff against the non-settling defendant at the trial.

The agreement in *Booth v. Mary Carter Paint Co.* was described as a settlement device whereby the plaintiff and less than all of the defendants enter into an agreement where the settling defendant remains in the litigation but has his liability is fixed at a ceiling figure which will be reduced in proportion to the court's judgment against the non-settling co-defendant. The result of "Mary Carter" type agreements is a settlement between the plaintiff and at least one defendant aligning these parties against the non-settling defendant at trial. What distinguishes "Mary Carter" agreements from other settlements is that the settling defendant guarantees the plaintiff a minimum payment, the settling defendant remains in the trial as a party, the plaintiff and settling defendant agree to secrecy of the agreement or have an understanding that the agreement will not be disclosed voluntarily, and plaintiff agrees not to enforce the court's judgment against the settling defendant. All these characteristics exist in the agreement involved in the present case.

The key features of a Mary Carter Agreement are secrecy and the incentive for collusion both of which are present in the agreement at issue.

In *Frier's Inc. v. Seaboard Coastline Railroad Co.*, 355 So.2d 208 (Fla. 1st DCA), *cert. dismissed*, 360 So.2d 1250 (Fla. 1978), the first district listed the typical features of

agreements encompassed generally within the category denominated "Mary Carter" agreements:

> (A) secrecy;
>
> (B) the agreeing defendants remain as party defendants in the lawsuit;
>
> (C) the agreeing defendants' liability is decreased in direct proportion to the non-agreeing defendants increase in liability;
>
> (D) the agreeing defendant guarantees to the plaintiff a certain amount of money if plaintiff does not receive a judgment against any of the defendants or if the judgment is less than a specified sum.

Id. at 210.

Although the typical features enumerated are generally considered basic to what have been termed "Mary Carter" agreements, any number of other terms which result in the same consequences should serve as a basis for the same requirement of admissibility as has been found in cases considering *pure* "Mary Carter" agreements as described by *Booth v. Mary Carter Paint Company*, *Ward v. Ochoa* and their progeny. The terms of agreements such as the one in the present case have the same ultimate effect on the adversary system as pure "Mary Carter" agreements limited only by the ingenuity of counsel.

> **To expunge the collusive atmosphere created by these types of secret agreements courts have concluded that their its existence must be exposed to the jury.**

The underlying rationale for admissibility of these types of agreements, explained by this Court in *Ward v. Ochoa,* applies equally to the subject agreement whereby the settling defendant was required as part of the settlement agreement to remain in the litigation through entry of final judgment and to be a participant in the trial. Because they were

prevented from learning of the agreement, the jurors were misled into thinking that the settling defendant was an active defendant vigorously defending herself. In fact, this was not the case. As this Court carefully set forth in *Ward*:

> 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.

Id. at 387.

Similarly applicable to the present issue of admissibility is the rationale of *Imperial Elevator Co., Inc. v. Cohen*, 311 So.2d 732 (Fla. 3d DCA 1975), *cert. denied*, 327 So.2d 32 (Fla. 1976), wherein the third district held that a jury was entitled to know of a "Mary Carter" type agreement since it relates to the credibility and demeanor of witnesses and their interest in the outcome of the case, as well as the conduct of counsel during the course of trial. The agreement in the present case directly related to the demeanor and credibility of the witnesses as well and the conduct of their counsel.

Courts have given settlement agreements with characteristics similar to "Mary Carter" agreements many different labels,[2] including loan agreements (*Palmer v. Arco Distributing Corp.*, 82 Ill.2d 211, 412 N.E. 2d 959 (1980), and high-low contracts (*General Motors Corp. v. Lohocki*, 286 Md. 714, 410 A.2d 1039 (1980) and *Bedford School Dist. v. Caron Construction Co.*, 367 A.2d 1051 (1976)). These cases hold that these types of agreements should be

---

[2]*See* Note, "It's a Mistake to Tolerate the Mary Carter Agreement," 87 Columbia Law Rev. 368, 369 n.4 (1987).

admitted into evidence to avoid juror prejudice. In *Lahocki*, Maryland's highest appellate court explained:

> It is probably safe to say that no two pacts dubbed "Mary Carter Agreement" have been alike. However three basis features seem to be contained in each: (1) The agreeing defendant is to remain a party and is to defend himself in court. However, his liability is limited by the agreement. In some instances this will call for increased liability on the part of other co-defendants. (2) The agreement is secret. (3) The agreeing defendant guarantees to the plaintiff that he will receive a certain amount, notwithstanding the fact that he may not recover a judgment against the agreeing defendant or that the verdict may be less than that specified in the agreement.

General Motors Corp. v. Lohocki, 410 A.2d at 1042.

Because the variations in "Mary Carter" agreements are virtually unlimited, courts should require that agreements, such as the present one, which has the great potential of engendering consequential prejudice to the non-settling defendants due to, among other things, realignment of the parties of which the jury is unaware, be admitted into evidence even when the element of direct proportionality may be absent. This disclosure and requirement of admissibility are essential to the search for truth and justice in our adversary system and to avoid unfair prejudice to the non-settling defendant.

The quid pro quo reached in the present agreement was that Carsten accepted Demario's insurance limits of $100,000, with DeMario agreeing to remain in the lawsuit and not to disclose the secret agreement. No contingency existed in the outcome of the case because DeMario locked-in her liability. The fact that Petitioner suffered prejudice, however, is no different than had the agreement contained the element of proportionality.

As the fourth district correctly reasoned in the present case, a rationale which should be adopted by this Court:

> [I]t [is] difficult to identify actual prejudice resulting from the nondisclosure of the agreement or the continued participation of DeMario in the action. The appellee claims there is none because the settling defendant, having limited her liability already, did not have the same motivation as the settling defendant did in *Mary Carter*. The appellant, on the other hand, cites numerous instances at trial in which she claims DeMario's counsel openly supported the case *for* the plaintiff and *against* appellant. We are unable to conclude with any certainty that such was the case. Indeed, under ordinary circumstances such conduct would not be subject to question. However, it is because it is difficult to demonstrate prejudice to a non-settling defendant that "Mary Carter" agreements are required to be disclosed to the jury. Under our adversary system a jury can usually assume that the parties and their counsel are motivated by the obvious interests each has in the litigation. That assumption is no longer valid when the parties have actually made an agreement to the contrary prior to trial. 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, Case No. 90-0163 (Fla. 4th DCA 1991), slip opinion at pages 7-8.

Jurors are clearly deceived by being informed that they are resolving an existing dispute between parties that have already resolved their differences. As the fourth district accurately suggests, this undermines the integrity of the jury system which exists to fairly resolve actual disputes between citizens. Even if parties and counsel conduct themselves with honesty and integrity, a cloud of doubt and prejudice to the non-settling defendant remains over the proceedings due to withholding of significant information from the jurors.

The key features of a "Mary Carter" agreement compelling disclosure and the requirement of admissibility are secrecy, continuation of the settling defendant in the lawsuit, giving the jury an incorrect perspective on credibility and the true alignment of the

parties, and the incentive for collusion. These are present in the agreement now before this Court.

In *Atlantic Ambulance & Convalescent Services, Inc. v. Asbury*, 330 So.2d 477 (Fla. 4th DCA 1975), the court stated that "[t]he essence of the 'Mary Carter' agreement is the *secrecy* of its existence or arrangement whether in form or substance prior to or during the trial the disclosure of which is required so as to enable the trier of fact, *i.e.* the jury, to be fully apprised of all factors bearing upon the testimony and conduct of the signing as well as the non-signing parties." *Id.* at 478. (Emphasis in original.)

In *Quinn v. Millard*, 358 So.2d 1378 (Fla. 3d DCA 1978), the third district held that failure to admit a settlement agreement was not erroneous because the co-defendants who settled were voluntarily dismissed from the suit after voir dire but prior to trial, unlike the situation in the present case where the settling defendant continued to participate in the case through trial to final judgment. In *Quinn*, the court noted that the fundamental rationale for admitting a "Mary Carter" agreement into evidence is the secrecy of the agreement between a plaintiff and an *active* co-defendant (emphasis in original). The court held that in *Quinn*, "the injustice which is likely to arise from the jury's ignorance of the settlement," did not result in significant misapprehensions on the part of the jury because of the dismissal of the agreeing defendant. *Id.* at 1383, 1384. The court characterized a "Mary Carter" agreement as

> "essentially a pact between a plaintiff and one or more multiple defendants which is kept secret from the jury and thus operates unfairly to the advantage of the assentors over the non-participating defendants. The excluded co-defendant(s) would have to bear the prejudicial impact of this secret arrangement if the settlement were hidden from the jury, the prejudice aris-

> ing from the weight the triers of fact would be likely to give the testimony of an apparent co-defendant. *See Ward v. Ochoa, supra.*

Id. at 1383. The reasoning of the Court in *Quinn* likewise is persuasive to an affirmative response to the question certified by the fourth district.

To eliminate the collusive atmosphere created by settlement agreements where the settling defendant continues as a party defendant although effectually aligned with the plaintiff unbeknownst to the jury, courts have concluded that these secret agreements must be disclosed to the jury. In *Imperial Elevator Co., Inc. v. Cohen*, 311 So.2d 732 (Fla. 3d DCA 1975), the third district found reversible error in the trial court's decision not to permit disclosure of a "Mary Carter" agreement to the jury. The court reasoned that "the jury is entitled to be advised of such an agreement since it relates to the reliability and demeanor of the witnesses and their interest in the outcome of the case, as well as to conduct of counsel during the course of the trial.

In *Kuhns v. Fenton*, 288 So.2d 253 (Fla. 1973), this court accepted jurisdiction to review a decision of the fourth district on the basis of conflict with *Maule Industries, Inc. v. Rountree*, 264 So.2d 445 (Fla. 4th DCA), cause remanded by, 284 So.2d 389 (Fla. 1973). In that case, the Kuhns and Nationwide Insurance Company were defendants in the trial court. Respondents were co-defendants who had entered into a settlement agreement akin to a "Mary Carter" agreement. The trial court denied the non-settling defendant's motion to have the agreement introduced into evidence in the jury trial. The district court found no prejudicial error and affirmed. This Court, relying upon *Maule Industries*, 284 So.2d 389

(Fla. 1973), and *Ward v. Ochoa*, reversed and held that denial of Petitioners' request to admit the "Mary Carter" agreement into evidence was prejudicial.

Releases differ from Mary Carter-look-alike agreements in that statutory protection are in place to insure fairness to the non-settling defendant(s).

Furthermore, the present agreement is not a "release" within the meaning of section 768.041(3), Florida Statutes. Releases differ from "Mary Carter" agreements in that statutory protections are in place to insure fairness to the non-settling defendant(s). The fourth district in the present case accurately discusses the distinction between the agreement now before this Court and releases as contemplated by section 768.041(3), which generally provides that releases are not admissible into evidence. The Court held that this statute contemplates the usual situation where a claim is settled, a party released, and no further judicial proceedings against that party contemplated as opposed to the agreement in the present case where the non-settling party remained as an active party throughout trial and through judgment.

In this case, no dismissal of the settling party or set-off was granted, and therefore the court must order that the non-settling defendant be given the judicially created safeguards common to Mary Carter Agreements.

The general rule is that settlement agreements are not admissible into evidence at trial. The policy behind this rule is to encourage settlement and unfettered settlement negotiations without the threat of possible disclosure to a jury of information revealed during the negotiating process. In *Lotspeich Co. v. Neogard Corp.*, 416 So.2d 1163 (Fla. 3d DCA 1982), the court stated that "[s]ettlement agreements are highly favored in law and will be upheld whenever possible because they are means of amicably resolving doubts and preventing lawsuits," *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *reh.*

denied, 525 F.2d 1407 (5th Cir. 1975). *Lotspeich* at 1164, 1165. The nature of these agreements, however, does not cause a deception to the jury and prejudice to the non-settling defendant because the settling defendant does not continue with full participation in the jury trial.

The primary rationale for the disclosure and admissibility of the subject agreement is the difficulty that a non-settling defendant encounters in demonstrating prejudice. Our system of jurisprudence contemplates adversaries who are self-interested parties demonstrating their own versions of the truth. The assumption that each is motivated by the interests each has in the litigation is no longer valid when the settling defendant has made contrary agreement with the Plaintiff prior to trial. In that case, the settling defendant effectually becomes a secret partner with the Plaintiff who could act in concert to assist the Plaintiff because he no longer has any further real stake in the litigation. In the present case, the settling defendant participated throughout trial, aligned in the jury's mind as a true party defendant in the lawsuit, albeit without any real incentive to zealously advocate non-settling defendant's position. The offensive nature of the alliance between plaintiff and the settling defendant cannot be positively eliminated by deleting the financial interest of the non-settling defendant in the jury verdict.

In admitting "Mary Carter" agreements into evidence, the court can, in the exercise of its discretion, excise prejudicial language within the agreement before admitting its contents into evidence. In *Bechtel Jewelers v. Insurance Co. of North America*, 455 So.2d 383 (Fla. 1984), this Court held that self-serving statements should be excised from "Mary Carter" agreements before the text of the agreement is entered into evidence. In *Bechtel*

Jewelers, plaintiff, a jewelry store customer, sued the jeweler, gemologist and their insurance companies when her sapphire ring was fractured during cleaning. Plaintiff entered into "Mary Carter" agreements with the defendants separately. In explaining its holding, this court stated "in order that judges and juries are not deceived by such agreements, we have held that they are discoverable and admissible into evidence," (*Bechtel* at 384) quoting *Ward v. Ochoa*, 284 So.2d 385, 387 (Fla. 1973). The Court reasoned that, "to hold that a "Mary Carter" agreement must always be admitted in its entirety would encourage creative drafting that would prejudice non-agreeing defendants." *Id.* at 384.

In the present case, the settling parties' clever excising of the contingency aspect of their "Mary Carter" agreement resulted in this secret agreement being excluded from evidence and jury consideration, with prejudice to the non-settling defendant resulting from the realignment of the parties of which the jury was unaware. This type of release is a perversion of the justice system. Although the present agreement can be argued to differ from those agreements defined by the Courts to be "Mary Carter" agreements because no contingency exists to give the settling defendant a financial interest in the judgment against the non-settling defendant, as the fourth district wanted to hold in the present case, the result was the same: secret realignment of the parties of which the jury was unaware and the grave potential impact this had on the jury, particularly where the settling but participating defendant openly supported the case for Respondent Carsten and against Petitioner.

Due to the suspect nature of the peculiar agreement in the present case, it is the type of agreement akin to a "Mary Carter" agreement that should be disclosed promptly, especially when the agreement is such that it is subject to question as being potentially collusive.

As the settling defendant's witnesses were being heard, the jury should have been informed of the agreement so they could assign the correct weight to the testimony being presented.

This Court should reverse the fourth district's affirmance, but it should agree with the analysis of the fourth district and answer the certified question in the affirmative.

CONCLUSION

This Court should answer the certified question in the affirmative and hold that a non-settling defendant is entitled to have the jury informed of a settlement agreement between the plaintiff and another defendant whereby the settling defendant's obligation is fixed but the settling defendant is required to continue in the lawsuit.

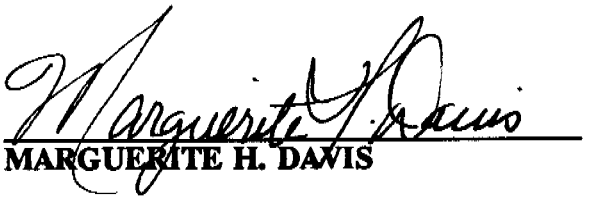
Respectfully submitted,

MARGUERITE H. DAVIS, ESQUIRE
Florida Bar No. 136563
Katz, Kutter, Haigler, Alderman,
Davis, Marks & Rutledge, P.A.
First Florida Bank Building
215 S. Monroe Street, Suite 400
Tallahassee, Florida 32301
(904) 224-9634

ATTORNEYS FOR AMICUS CURIAE, AMERICAN INSURANCE ASSOCIATION

CERTIFICATE OF SERVICE

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 24th day of December, 1991.



MARGUERITE H. DAVIS

John Patrick Joy, Esquire
Walton Lantaff Schroeder & Carson
One Biscayne Tower, 25th Floor
1 South Biscayne Boulevard
Miami, Florida 33131
(305) 379-6411

R. Fred Lewis, Esquire
Magill & Lewis, P.A.
7211 S.W. 62 Avenue
Suite 200
Miami, FL 33143
(305) 662-9999

Barbara Jean Compiani, Esquire
Klein & Walsh, P.A.
Suite 503
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

Larry Alan Klein, Esquire
Klein & Walsh, P.A.
Suite 503
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

Louis M. Silber, Esquire
Pariente & Silber
400 Australian Avenue, South
Suite 855
West Palm Beach, FL 33401
(407) 655-6640

Elliot R. Brooks, Esquire
250 Australian Avenue, South
Suite 1300
West Palm Beach, FL 33401
(407) 659-2038

William E. Hoey, Esquire
Vernis & Bowling, P.A.
204 River Plaza
900 South U.S. Highway 1
Jupiter, FL 33477

John G. Van Laningham, Esq.
Steel, Hector & Davis,
777 S. Flagler Drive
Suite 1900
West Palm Beach, FL 33401-6198

APPENDIX

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Affirmed.

Patricia DOSDOURIAN, Appellant,

v.

Richard Paul CARSTEN and Christine DeMario, Appellees.

No. 90-1063.

District Court of Appeal of Florida, Fourth District.

May 29, 1991.

Rehearing and Rehearing En Banc Denied July 2, 1991.

Injured party filed personal injury action against drivers who allegedly caused his injuries. The injured party settled with one of the drivers and sought to exclude evidence of the settlement. The Circuit Court, Palm Beach County, Edward A. Garrison, J., determined that the settlement was a release that would not be disclosed to the jury and ultimately entered judgment on a jury verdict that ordered the nonsettling driver to pay 35% of the damages. Nonsettling driver appealed. The District Court of Appeal, Anstead, J., held that the settlement agreement was a release, not a "Mary Carter agreement," where the settling driver's liability was fixed and was not contingent upon the outcome of the trial.

Affirmed; question certified.

1. Damages ⇐182

Agreement between injured party and settling driver was not "Mary Carter agreement" and, thus, was not admissible, even though settling driver continued to participate in suit pursuant to terms of settlement, where there was no term of settlement reducing settling driver's liability in proportion to nonsettling driver's liability. West's F.S.A. § 768.041(3).

See publication Words and Phrases for other judicial constructions and definitions.

2. Damages ⇐182

"Mary Carter agreements" are required to be disclosed to jury by virtue of difficulty in demonstrating prejudice to nonsettling defendant; assumption that parties and their counsel are motivated by obvious interests each has in litigation is no longer valid when parties have actually made contrary agreement before trial, and jurors are deceived by being informed that they are to resolve existing dispute that may already have been resolved. West's F.S.A. § 768.041(3).

3. Damages ⇐182

For agreement between plaintiff and settling defendant to be "Mary Carter agreement" that is to be disclosed to jury, agreement must be contingent-type agreement that prospectively reduces liability of settling defendant depending upon outcome at trial. West's F.S.A. § 768.041(3).

R. Fred Lewis of Magill & Lewis, P.A., Miami, for appellant.

Barbara J. Compiani and Larry Klein of Klein & Walsh, P.A., and Louis M. Silber of Pariente & Silber, West Palm Beach, for appellees.

ANSTEAD, Judge.

Appellant, Patricia Dosdourian, challenges a final judgment apportioning fault among the parties and awarding damages to the appellee, Richard Paul Carsten. She claims that a settlement agreement between appellees Christine DeMario and Carsten should have been disclosed to the jury. We affirm but certify a question of great public importance.

Carsten brought suit against Dosdourian and DeMario, alleging that both operated their cars in a negligent fashion causing his injuries. Shortly before trial began, Carsten moved in limine to exclude from disclosure to the jury an agreement reached between he and DeMario pursuant to which

Carsten settled all claims against DeMario in return for payment of her insurance policy limits of $100,000 and an agreement that DeMario would remain in the litigation through trial and judgment. The trial judge granted Carsten's motion, classifying the agreement as a release, and ruling that it would not be disclosed to the jury unless DeMario put into question her credibility and interest in the litigation by testifying. The trial judge also denied Carsten's motion to dismiss DeMario from the proceedings.

At the conclusion of the trial, the trial judge instructed the jury that there were two pending claims, each requiring separate consideration: one against Dosdourian and one against DeMario. The jury charged Dosdourian with 35% negligence, DeMario with 55% and Carsten with 10%. It found medical damages and hospital costs amounted to $193,206.27; lost earnings were set at $21,369; future medical costs were deemed to be $22,240 and future lost wages totalled $383,631.50. For pain and suffering, the jury awarded Carsten $80,000 (past) and $1,300,000 (future). The court subsequently entered final judgment ordering Dosdourian to pay 35% of Carsten's non-economic damages.[1]

THE SETTLEMENT AGREEMENT

[1] Appellant argues that the agreement between Carsten and DeMario is an agreement of the kind involved in *Booth v. Mary Carter Paint Company*, 202 So.2d 8 (Fla.2d DCA 1967), which should have been disclosed to the jury. She claims that the exclusion of the agreement, and the fact that DeMario remained in the lawsuit as a party, amounted to deception and resulted in injustice. Appellees characterize the agreement as a release which is statutorily excluded from jury consideration.

In *Frier's, Inc. v. Seaboard Coastline Railroad Co.*, 355 So.2d 208 (Fla. 1st DCA), *cert. dism'd*, 360 So.2d 1250 (Fla.1978), the court explained that the loosely-grouped category of agreements encompassed by the term "Mary Carter" are generally

> entered into between a plaintiff and one or more but not all defendants which typically ha[ve] the following features:
> (A) secrecy;
> (B) the agreeing defendants remain as party defendants in the lawsuit;
> (C) the agreeing defendants' liability is decreased in direct proportion to the non-agreeing defendants increase in liability;
> (D) the agreeing defendant guarantees to the plaintiff a certain amount of money if plaintiff does not receive a judgment against any of the defendants or if the judgment is less than a specified sum.

Id. at 210. *See generally Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla.2d DCA 1967). This court pointed out in *Charles McArthur Dairies, Inc. v. Morgan*, 449 So.2d 998, 1000 (Fla.4th DCA 1984), that "Mary Carter" agreements presuppose settlement is dependent upon a proportional reduction in the agreeing defendant's liability to the increase in the non-agreeing defendant's as determined at trial.

In *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973), the court held that the search for truth requires the disclosure of "Mary Carter" agreements:

> 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*

1. Appellant also complains about the trial court's failure to order a set off for the $100,000.00 settlement. However, appellant concedes that no request was made to the trial court to do so. We find no error by the trial court in not acting on its own to grant a set off. Our finding is without prejudice to the appellant to seek a set off in the trial court upon remand.

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.

Id. at 387–88. (Emphasis added). Similarly, the third district held in *Imperial Elevator Co., Inc. v. Cohen*, 311 So.2d 732 (Fla.3d DCA 1975), *cert. denied*, 327 So.2d 32 (Fla.1976), that a jury was entitled to know of a "Mary Carter" agreement since it relates to the credibility and demeanor of witnesses and their interest in the outcome of the case, as well as the conduct of counsel during the course of trial. These, as well as numerous other cases, stand for the undeniable proposition that "Mary Carter" agreements not only are admissible, but should be admitted into evidence to avoid misleading the jury.

However, appellee points out that the agreements in the cited cases share a factor absent from the instant agreement. In the earlier "Mary Carter" cases, defendants remained active in the litigation in order to diminish their own liability in proportion to another defendant's. *See, e.g., Warn Industries v. Geist*, 343 So.2d 44, 47 n. 1 (Fla.3d DCA), *cert. denied*, 353 So.2d 680 (Fla.1977) (key to "Mary Carter" agreement is plaintiff's recovery of a minimum sum from agreeing defendant, but recovery is premised on contingencies such as minimum or maximum verdict); *Quinn v. Millard*, 358 So.2d 1378 (Fla.3d DCA 1978); *Imperial Elevator*, 311 So.2d at 733 (codefendants agreed that to pay $50,000, *if* verdict not in excess of $125,000; *if* in excess of $125,000, defendants would not contribute). The question then becomes whether the Carsten-DeMario agreement should be classified as a "Mary Carter" agreement given the admitted lack of any term reducing DeMario's liability in proportion to Dosdourian's.

In the instant case, DeMario agreed to settle with Carsten for the $100,000 liability limitation of her insurance policy. The settlement in this case was also conditioned upon DeMario's continued participation in the lawsuit. Florida Statutes section 768.041(3) generally provides that releases are not admissible into evidence. However, this statute seems to contemplate the usual situation where a claim is settled, a party released, and no further judicial proceedings against that party are contemplated. Dosdourian claims that if the instant agreement is a simple release, the trial judge should have dismissed DeMario pursuant to *Morgan*. 449 So.2d at 1000. Carsten counters by arguing that DeMario's presence was required pursuant to *Whited v. Barley*, 506 So.2d 445, 447 (Fla.1st DCA), *rev. denied*, 515 So.2d 230 (Fla.1987), where the first district recognized *Morgan*, but held without elaboration that the trial court improperly dismissed the agreeing defendant from the lawsuit because the release failed to resolve the issue of that defendant's proportionate share of negligence. We disagree with *Whited*.

In 1986, after *Morgan*, the Legislature adopted section 768.81, Florida Statutes, which provides in pertinent part:

> (3) **Apportionment of damages.**—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of joint and several liability.

The appellee claims that since both economic and non-economic damages depend upon relative percentages of fault, it was necessary to have DeMario in the lawsuit. We again disagree. As the appellant notes, there will be numerous instances, such as those involving pre-suit settlements or tort-feasors immunized under workers compensation or other legal immunities, where other tort-feasors will not be parties to the litigation. We do not believe this statute requires the joinder of settling parties under circumstances similar to those involved herein.

PREJUDICE

[2] We find it difficult to identify actual prejudice resulting from the nondisclosure

of the agreement or the continued participation of DeMario in the action. The appellee claims there is none because the settling defendant, having limited her liability already, did not have the same motivation as the settling defendant did in *Mary Carter*. The appellant, on the other hand, cites numerous instances at trial in which she claims DeMario's counsel openly supported the case *for* the plaintiff and *against* appellant. We are unable to conclude with any certainty that such was the case. Indeed, under ordinary circumstances such conduct would not be subject to question. However, it is because it is difficult to demonstrate prejudice to a non-settling defendant that "Mary Carter" agreements are required to be disclosed to the jury. Under our adversary system a jury can usually assume that the parties and their counsel are motivated by the obvious interests each has in the litigation. That assumption is no longer valid when the parties have actually made an agreement to the contrary prior to trial. The fairness of the system is undermined when the alignment of interests in the litigation is not what it appears to be.

Jurors are also deceived by being informed that they are resolving an existing dispute between parties that have already resolved their differences. In our view, this undermines the integrity of the jury system which exists to fairly resolve actual disputes between our citizens. Hence, even if the parties and counsel conduct themselves with honesty and integrity, a cloud of doubt remains over the proceedings because of the information withheld from the jurors.

CONCLUSION

[3] We believe the same policy reasons requiring disclosure of secret settlement agreements in the "Mary Carter" line of cases apply here even though the motivations of the settling parties are not as clear. The integrity of our justice system is placed in question when a jury charged to determine the liability and damages of the parties is deprived of the knowledge that there is, in fact, no actual dispute between two out of three of the parties. However, under *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973), we are bound to follow the holdings of the Florida Supreme Court on this issue. In our view, the holding in *Ward v. Ochoa* specifically contemplates a contingent-type agreement prospectively reducing the liability of the settling defendant depending on the outcome at trial, before requiring disclosure of the agreement to the jury. We have previously quoted with emphasis a portion of the *Ward* opinion to that effect. *See Ward*, 284 So.2d at 387.

Based upon our interpretation of *Ward*, we affirm. However, because of our concerns, and in order to give the appellant an opportunity to have this issue reviewed by the supreme court, we certify the following as a question of great public importance:

IS A NON-SETTLING DEFENDANT ENTITLED TO HAVE THE JURY INFORMED OF A SETTLEMENT AGREEMENT BETWEEN THE PLAINTIFF AND ANOTHER DEFENDANT WHEREBY THE SETTLING DEFENDANT'S OBLIGATION IS FIXED BUT THE SETTLING DEFENDANT IS REQUIRED TO CONTINUE IN THE LAW SUIT?

STONE and WARNER, JJ., concur.

Howard BLOOM, Appellant,

v.

Judy BLOOM, Appellee.

No. 89-2601.

District Court of Appeal of Florida, Fourth District.

May 29, 1991.

Rehearing Denied July 11, 1991.

Appeal from the Circuit Court for Broward County; Larry Seidlin, Judge.

Howard Bloom, Coral Springs, pro se.

Russell S. Bohn of Edna L. Caruso, P.A., West Palm Beach, and S. Robert Zimmerman, Pompano Beach, for appellee.