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THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 78,370

PATRICIA DOSDOURIAN,

Petitioner,

vs.

RICHARD PAUL CARSTEN, et al.,

Respondents.

_________________________________/

SUPPLEMENTAL AMICUS CURIAE BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS

On discretionary review from a certified question
from the district court of appeals, fourth district

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INTRODUCTION

This brief is submitted in response to the court's February 17, 1993 order requesting supplemental briefs on the continued viability of *Mary Carter* agreements.

SUMMARY OF ARGUMENT

Mary Carter agreements are an important settlement tool, result in reduction of litigation, do not adversely affect the administration of justice, and should remain viable.

ISSUE
Should *Mary Carter* Agreements Remain Viable?

ARGUMENT
***Mary Carter* Agreements Should Remain Viable.**

A.
Are we to assume that jurors are stupid?

Mary Carter agreements are discoverable and admissible. *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973). The discovery of these agreements might occur in several ways; they may be revealed in the plaintiff's, or agreeing defendant's, answers to the standard "General Personal Injury Negligence" interrogatories. Fla.R.Civ.P. Form 1, ¶21, Form 2, ¶14. Plaintiff's counsel apparently has a duty to disclose (even without request) any *Mary Carter* agreements entered into close to trial. *Imperial Elevator Company, Inc. v. Cohen*, 311 So. 2d 732 (Fla. 3d DCA 1975). Therefore, any competent attorney should discover this information publish it to the jury, and (if desired) comment on the agreement in the opening statement or closing argument or both.

Witnesses may be cross-examined on bias, F.S. §90.608(2), so if the *Mary Carter* agreement engenders bias in that witness, the jury will probably be so informed. Florida Standard Jury Instruction 2.2(a) tells the jury that it "may. . . consider. . . any interest the witness [might] have in the outcome of the case." Therefore, in a properly presented case the jury will know about the agreement and be allowed to give it the weight the jury believes it deserves.

Are we to then assume that the jurors are too stupid to properly evaluate this type of evidence? Why? Far more complicated issues are regularly presented to juries, and the jury regularly does what is right. *See, Kries v. Turtle Reef Condominium I,* __So.2d__, 18 FLW 667 (Fla. 4th DCA March 10, 1993).

B.
Are we to assume that lawyers are necessarily liars?

Counsel for petitioner quotes six different disciplinary rules, relating to lying to the judge or jury, which he states are probably violated when a *Mary Carter* agreement exists. There shouldn't even need to be a rule that prohibits this type of reprehensible conduct, much less a need to cite to the rules to show that a lawyer should not lie to a judge or jury. Nevertheless, that fact that this conduct is prohibited is a separate issue from whether it actually occurs in a case in which a *Mary Carter* agreement exists. Since this Honorable Court has posed this hypothetical question, counsel are attempting to address it; however, there was no *Mary Carter* agreement involved in the trial court, and there is no record to support counsel's conjectures about these agreements causing lawyers to lie to the tribunal.

Petitioner's argument assumes, without evidence, that lawyers regularly lie about these

agreements. Shouldn't we assume that lawyers regularly follow, rather than violate ethical rules? Is this Honorable Court ready to publish an opinion stating, or at least assuming, that lawyers are typically dishonest?

Why, when a defense lawyer disputes obvious liability is it merely advocacy, but when that lawyer concedes obvious liability is that lawyer accused of being dishonest? Why, when a party testifies dishonestly or shades the truth, to serve that party's interest, are no judicial eyebrows raised; but, when that party testifies truthfully do we hear complaints? The fact that we have an adversarial system does not mean that a party has a duty to mislead the tribunal (only to zealously represent the client); but, petitioner seems to complain that honesty is so unusual it should be prohibited.

Petitioner attaches a strange connotation to the sign "[W]e who labor here seek only the truth." The **goal** is the truth. The **means** to reach the goal however is different from the goal; the means is the system of advocacy. The advocate's job is to zealously represent the client, not necessarily to seek the truth. Could a criminal defense lawyer be disciplined or even criticized for arguing that the client was not guilty when the client obviously was guilty?

C.
Should the courts attempt to remove bias from lawsuits or to simply disclose it?

Several district courts have refused to invalidate *Mary Carter* agreements, finding them to be a legitimate settlement tool. *Frier's, Inc. v. Seaboard Coastline Railroad Company*, 355 So. 2d 208 (Fla. 1st DCA 1978); *Weinstein v. National Car Rentals,* 288 So.2d 509 (Fla. 3d DCA 1974); *Maule Industries, Inc. v. Roundtree*, 264 So. 2d 445 (Fla. 4th DCA 1972), *affirmed,* 284 So. 2d 389 (Fla. 1973); *Booth v. Mary Carter Paint Company*, 202 So. 2d 8 (Fla. 2d DCA

1967).

Counsel for petitioner has cited only three cases in which traditional *Mary Carter* agreements were held void in all circumstances: *Lum v. Stinnett,* 488 P. 2d 347 (Nev. 1971); *Cox v. Kelsey-Hayes Company,* 594 P. 2d 354 (Okla. 1979); and *Elbaor v. Smith,* 845 S.W. 2d. 240 (Texas 1992). Other courts, faced with challenges similar to those being made herein, have refused to invalidate *Mary Carter* agreements. *Bass v. Phoenix Seadrill/78, Ltd.,* 749 F.2d 1154 (5th Cir. 1985); *Tucson v. Gallagher,* 493 P.2d 1197 (Ariz. 1972); *Gatto v. Walgreens Drug Co.,* 337 NE 2d 23 (Ill. 1975); *Johnson v. Moberg,* 334 NW 2d 411 (Minn. 1983); *Riccio v. Prudential Property & Casualty Ins. Co.*, 478 A. 2d 785 (NJ Super. Ct. App. Div. 1984); *Grillo v. Burke's Paint Company, Inc.*, 551 P. 2d 449 (Or. 1976); *Slusher v. Ospital,* 777 P. 2d 437 (Utah 1989).

A settlement tool similar to a *Mary Carter* agreement is a loan receipt agreement. In these agreements the settling defendant lends money to the plaintiff; but, the loan does not have to be repaid from any funds other than funds of the non-settling defendant(s). Many courts have upheld the validity of these agreements, even in the face of challenges similar to the case at bar. *Reese v. Chicago, Burlington & Quincy Railroad Co.*, 303 N.E.2d 382 (Ill. 1973); *American Transport Company v. Central Indiana Railway Company,* 264 N.E.2d 64 (Ind. 1970); *Crocker v. New England Power Company,* 202 N.E.2d 793 (Mass. 1964).

The principal case relied upon by petitioner, *Lum*, held *Mary Carter* agreements void as champertous. However, in Florida, the doctrine prohibiting champerty does not prohibit transfers for purposes of litigation. *Nationwide Mutual Ins. Co. v. McNulty,* 229 So. 2d 585 (Fla. 1969). Even when the doctrine was valid, only the parties to the illegal agreement could raise it (this

would exclude the non-settling defendant). *Cone v. Benjamin,* 157 Fla. 800, 27 So. 2d 90 (1946). Additionally, a *Mary Carter* agreement is not champertous because the settling defendant has an interest in seeing the litigation against it end. *Lahocki v. Contee Sand & Gravel Co.*, 398 A. 2d 490 (Md. Ct. Spec. App. 1979), *reversed sub nom. (on other grounds), General Motors Corp. v. Lahocki,* 410 A. 2d 1039 (1980); *Wright v. Commercial Union Insurance Co.,* 305 S.E. 2d 190 (N.C. 1983); *accord, McIntoch v. Harbor Club Villas Condominium Association,* 421 So. 2d 10 (Fla. 3d DCA 1982). Since *Lum's* rationale is faulty, its conclusions (and the conclusions of the remaining authorities cited by petitioner, which relied upon *Lum*) should have no weight before this court.

The rules of evidence show that our adversarial system is based, not on the removal of witness bias, but on the disclosure of it. F.S. §90.601 removes the old common-law rules making an interested party, or a felon incompetent to testify. F.S. §§ 90.608 and 90.610 allow these facts to be brought before the jury. A person with a poor reputation in the community for truthfulness may testify, but that poor reputation can be shown. F.S. §90.609. The judge is not allowed to prohibit evidence because the judge believes it to be untrue. F.S. §§90.106, 90.702.

Are expert witnesses to be prohibited from testifying because they are being paid by one side and are therefore biased?

Are attorneys to be prohibited from being retained privately because then they are therefore biased? Should all attorneys work for the state?

The traditional method of dealing with bias is to disclose it, not to attempt to eradicate it. That traditional approach has served well since *Ward* and before, and should not be abandoned.

D.
Mary Carter agreements promote partial settlements

Obviously, a *Mary Carter* agreement does not dispose of a case because the non-settling defendants still will proceed to trial. However, the *Mary Carter* agreement does settle the case as far as the parties to it are concerned. *Bass* at 1164. It would also shorten the trial because the proof from the settling defendants will be abbreviated. Without an option to enter into a *Mary Carter* agreement the plaintiff has these options:

> 1. Settle outright and allow the remaining defendant(s) to use the "empty chair" argument.
> 2. Don't settle at all and proceed to trial, even though it is not in either the plaintiff's or prospective settling defendant's best interest.
> 3. Do as counsel for plaintiffs did here, and settle outright, but require the settling defendant to remain seated in its otherwise empty chair. (Assuming this Honorable Court does not prohibit this option with this opinion).

The first option is often a tactical mistake, so would seldom be used. The third option is the basis for this appeal. The second option is the option petitioner would force on all plaintiffs. This option will increase litigation by preventing partial settlements.

CONCLUSION

Mary Carter agreements promote partial settlements and do not adversely affect the administration of justice. They should therefore not be prohibited.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been duly furnished to all counsel of record listed on the attached service list by U.S. Mail this 26 day of April, 1993.

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