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SUPREME COURT OF FLORIDA

PATRICIA DOSDOURIAN,

Petitioner,

vs.

RICHARD PAUL CARSTEN,

Respondent.
_____/

CASE NO. 78,370

ACADEMY OF FLORIDA TRIAL LAWYERS' *AMICUS CURIAE* BRIEF

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

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STATEMENT OF THE CASE AND OF THE FACTS

Amicus curiae, Academy of Florida Trial Lawyers, defers to the statement of the case and of the facts of respondent, Carsten.

SUMMARY OF ARGUMENT

The trial court correctly excluded the settlement agreement from evidence since it did not reduce the settling defendant's exposure at the expense of the non-settling defendant; it was inadmissible under F.S. §768.041 and was not admissible as a "Mary Carter" agreement due to the lack of shifting of exposure.

The trial court correctly refused to dismiss the settling defendant since the agreement required her presence at trial and would not be fulfilled if the settling defendant was dismissed. There was, is and should be no requirement to dismiss a defendant who agrees to remain in the case until the end of the case.

This honorable court should not modify the definition of a "Mary Carter" agreement to include all agreements which require the settling defendant to remain in the case; not only is there no good reason to do so but that modification would discourage settlements by automatically giving an "empty chair" argument to non-settling defendants.

ISSUE PRESENTED:

QUESTION CERTIFIED

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?

ARGUMENT

A NON-SETTLING DEFENDANT IS NOT 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.

There are many situations where the actions of two or more people combine to injure another person. Before the passage of F.S.§768.041, a release of any of these tortfeasors would release the others. *Eason v. Lau*, 369 So.2d 600 (Fla. 1st DCA 1978). F.S.§768.041 not only abrogates that common-law rule but also makes the fact of the release inadmissible into evidence. If the release were ordinarily admissible the jury could easily conclude that the responsible tortfeasor had, in essence, admitted liability and the remaining tortfeasor(s) shared little or no responsibility for the victim's injuries. If the release were admissible, settlement with less than all of the responsible parties would be an obvious strategical error for plaintiff's counsel;

settlement would therefore occur rarely, and would be discouraged. The ordinary rule of non-admissibility of F.S. §768.041 is therefore quite logical.

It is this common-sense implication of an admission of liability by another party which is the real reason that any defense attorney would like to put the settlement before the jury. However, this real reason is not sufficient to defeat the dictate of secrecy of F.S. §768.041; so defense attorneys, such as counsel for Dosdourian, attempt to persuade the court that another legally valid reason for disclosure exists.

This honorable court has held that when the settlement agreement reduces the amount due from the settling defendant at the expense of the non-settling defendant then the agreement is not a release but is a "Mary Carter agreement" and therefore admissible. *Ward v. Ochoa*, 284 So.2d 385. (Fla. 1973); *accord, Booth v. Mary Carter Paint Company*, 202 So.2d 8 (Fla. 2d DCA 1967). In *Booth*, the settling defendants agreed to pay $12,500, however, if the verdict against the non-settling defendant and the settling defendants (as joint tortfeasors) exceeded $37,500 then the amount due from the settling defendants dropped to zero. *Booth* at 10-11. The settling defendants therefore had a motive to color their testimony, and their attorney had a motive in presenting their case to increase the verdict against his own clients. It was to show these motives to the fact finder that the agreement was held admissible. *Ward* at 387.

The rational of *Ward* is very similar to the rationale of allowing a witness to be impeached by a showing of bias. F.S. §90.608(2). If the witness could profit from

coloring his or her testimony then the jury has a right to know of the profit motive. The evidence code now allows a lawyer to impeach a witness called by that lawyer, F.S. §90.608, however, it would be ludicrous to attempt to impeach that witness, upon unfavorable testimony being elicited, by showing the witness was *not biased.* It is this ludicrous argument counsel for Dosdourian is attempting to make.

The agreement at bar provided for DeMario to pay $100,000 in all cases. If there was a defense verdict, DeMario would pay $100,000. If there was a verdict for $100,000, DeMario would pay $100,000. If there was a verdict for $10,000,000, DeMario would pay $100,000. No matter what DeMario's counsel did, DeMario (actually his insurance company) would pay $100,000. There was therefore no reason for DeMario's counsel to color his presentation. DeMario had no personal assets at stake so there was no reason for her to color her testimony.

Counsel for Dosdourian attempts to imply that there was some other silent agreement to shift the liability to Dosdourian and attempts to document the agreement by references to various statements of DeMario's counsel. Since DeMario's counsel had no motive to color his presentation, perhaps he was simply being honest. Perhaps he felt this brain-damaged plaintiff was seriously injured. Perhaps he felt this pedestrian bore no blame for the accident when both Dosdourian and DeMario ran the red light. Perhaps counsel for Dosdourian lost credibility before the jury by disputing both liability (in a clear case) and damages (where they were obviously severe) and therefore, himself, inadvertently bolstered Carsten's damages. These are speculations, but they are no less speculative than the speculations of

counsel for petitioner and *amicus curiae*, American Insurance Association, regarding DeMario's counsel's purpose. This court's decision should not be based on the speculation of the existence of an unwritten, unlikely agreement between counsel for Carsten and counsel for DeMario. *See, Lott v. City of Orlando*, 142 Fla. 338, 196 So. 313 (1940); F.S. §59.041.

Counsel for petitioner suggests *Ward* should be modified to allow evidence of all secret settlement agreements requiring the settling defendant to remain in the case to come before the jury. (Initial brief at 29). "Secret" is really a misnomer. If the agreement was really secret there would be no review of its admissibility because no one other than the parties to it would know about it. We are really discussing agreements which, the parties intend to be kept from the fact finder. Since all releases are inadmissible, they are "secret." F.S. §768.041. Since all "Mary Carter" agreements, by their terms, seek to be kept from the fact finder, they are "secret." The question then becomes: should *Ward* be modified to make any settlement agreement admissible if the agreement requires the settling defendant to remain a party?

The effect of such a ruling would be to end all settlement agreements requiring a defendant to remain in the litigation (or else the jury would have the release to review and would assume the released defendant(s) was responsible for the incident); i.e., all settlements would result in the settling defendant being dismissed in order to maintain the secrecy of the release. Settling with one of many defendants would therefore give all the remaining defendants a perfect "empty chair" argument. If

DeMario were dismissed, what would have prevented counsel for Dosdourian from arguing at trial: "WHY ISN'T DeMARIO BEFORE YOU? SHE WAS RESPONSIBLE FOR THE INCIDENT. SHE, NOT DOSDOURIAN, WAS AT FAULT."? The jury would have assumed a settlement had been reached with DeMario (perhaps even in the absence of the "empty chair" argument) and would have assessed a larger share of the negligence to her, thinking that no settlement would have been reached absent significant responsibility on DeMario's part. Because of this very persuasive, automatically available, "empty chair" argument, settlements with one of several tortfeasors would become rare. The intent of F.S. §768.041 encouraging settlements would be defeated and trials, not settlements, would be the ordinary resolution of multi-defendant lawsuits.

Since there is no good reason to modify *Ward* to redefine "Mary Carter" agreements to include all agreements requiring the settling defendant to remain in the litigation; and since such a modification would discourage rather than encourage settlement, *Ward* should remain unmodified. The present definition of "Mary Carter" agreements, in which the settling defendant must stand to benefit at trial from his or her position at trial for the agreement to be a "Mary Carter" agreement and therefore admissible, protects the non-settling defendants in all circumstances in which they need protection. There is no good reason to allow non-settling defendants to point out that other defendants no longer have any motive to lie or color their testimony or positions.

Counsel for Dosdourian complains that DeMario should have been dismissed

as a defendant if the settlement agreement was truly a release. (Initial brief at 18). Practically, Dosdourian's lawyer would then have had a perfect "empty chair" argument. He would have been able to argue that DeMario was responsible and the jury would have concluded that plaintiff's counsel was not being candid since he had not sued DeMario. Such a ruling would have undermined the credibility of plaintiff's counsel. Requiring the automatic dismissal of a defendant who settles will undermine settlements because of the "empty chair" agreement, i.e., very few attorneys will settle with less than all defendants in multi-defendant litigation if faced with "empty chair arguments." Is there, therefore, any reason to require the dismissal of released parties?

Counsel for Dosdourian argues that DeMario was not required to be joined as a defendant in order to have fault assessed against her. (Initial brief at 19). Whether or not this honorable court agrees with that proposition, its resolution is outside the issues of the case at bar since the question of whether or not DeMario's joinder was **required** is not the same question as whether or not DeMario's joinder was **permissible**. Counsel for Dosdourian presents no authority to support the position that the joinder is not **permissible**. It must be kept in mind that the consideration for the release was not only $100,000 but also included presence at trial. There is simply no good reason to require the trial court to rewrite the settlement agreement.

Nor can counsel for Dosdourian show any actual (not speculative) harm to his case because of the presence of DeMario as a party. There are no allegations that Dosdourian's lawyer was not allowed *voir dire*, opening, closing, cross-examination,

the ability to present his own case, or any other important right. Perhaps the inability to combine with counsel for co-defendant to double-team plaintiff's counsel is unusual, but there is no protected right to double-team plaintiff's counsel. This court should affirm the trial court's decision to allow DeMario to remain in the case not only because the decision was correct, but also because Dosdourian cannot demonstrate prejudice from the ruling and therefore reversal is not warranted. F.S. §59.041; *Hanshaw v. State*, 106 Fla. 865, 143 So. 753 (1932); *Hooker v. Johnson*, 10 Fla. 198 (1860).

CONCLUSION

The certified question should be answered in the negative, the trial court and appellate court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been duly furnished to: **Marguerite H. Davis, Esq.**, 215 South Monroe Street, Suite 400, Tallahassee, Florida 32301; **Larry A. Klein, Esq.**, 501 South Flagler Drive, Suite 503, West Palm Beach, Florida 33401; **Louis M. Silber, Esq.**, 400 Australian Avenue South, Suite 855, West Palm Beach, Florida 33401; **Elliot R. Brooks, Esq.**, 350 Australian Avenue South, Suite 1400, West Palm Beach, Florida 33401; **William E. Hoey, Esq.**, 204 River Plaza, 900 South U.S. Highway 1, Jupiter, Florida 33477; **John G. Van Laningham, Esq.**, 1900 Phillips Point West, 777 South Flagler Drive,

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