SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 78,370

PATRICIA DOSDOURIAN,

Petitioner,

vs.

RICHARD PAUL CARSTEN,

Respondent.

ON APPEAL FROM THE FLORIDA FOURTH DISTRICT COURT OF APPEAL.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

In this Brief the parties hereto will be referred to as "Petitioner", "Respondent" or by their respective names, "Dosdourian" or "Carsten".

References to the Record on Appeal will be by the symbol "(R.)."

References to the Trial Transcript will be by the symbol "(T.)."

All emphasis herein is supplied unless otherwise indicated.

JURISDICTION

Pursuant to Rule 9.030(a)(2)(A)(v), Petitioner, Patricia Dosdourian, seeks to invoke this Court's discretionary jurisdiction to review a decision of the Fourth District Court of Appeal that passed upon a question certified to be of great public importance. In Case No. 90-01063, the Fourth District Court of Appeal construed the legislative modification of the joint and several liability doctrine contained within § 768.81(3), Fla. Stat. (1989) and certified to this Court 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 LAWSUIT?[1]

On August 8, 1991 this Court entered an Order postponing its decision on jurisdiction. Accordingly, Petitioner hereby submits her Initial Brief on the Merits.

STATEMENT OF THE CASE AND THE FACTS

This case arose out of a November 30, 1988 motor vehicle accident which occurred on Haverhill Road, just south of its intersection with Elmhurst Road, in Palm Beach County, Florida. (T. 286). Carsten initiated this litigation on June 12, 1989 against Christine Demario and Patricia Dosdourian. (R. 957-959). Carsten asserted that both Demario and Dosdourian negligently operated their respective vehicles while travelling southbound on Haverhill Road so as to cause said vehicles to strike him while he was a pedestrian on Haverhill Road. (T. 957-959).[2] Great Western Life Insurance Company intervened in the action to recover the money it paid to cover Carsten's medical expenses. (R. 1010-1011). The case proceeded through

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[1] Assuming this Court decides to exercise its discretion to review this case, the scope of this Court's review extends to the decision of the District Court, rather than the question on which it passed. Cf. Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976).

[2] The physical evidence later demonstrated that the vehicle operated by Demario actually made impact with Carsten on Haverhill Road (T. 294, 421), and that there was no impact physical damage on the Dosdourian vehicle. (T. 313).

pretrial discovery and was scheduled for trial for the period commencing February 5, 1990. (R. 973). However, on February 22, 1990 Carsten filed a motion in limine which set forth that Carsten and Demario had entered into an agreement and requested that the Court prevent Dosdourian from disclosing the "settlement" during the trial. (R. 1079-1081). A copy of this agreement appears at the last page of this Brief as Appendix "A".[3]

When the parties appeared for trial on February 28, 1990 Carsten presented the motion in limine for determination and asserted that the agreement between Carsten and Demario was a release and not a "Mary Carter" type of agreement, and therefore its existence could not be disclosed to the jury pursuant to the prohibition contained in § 768.041(3), Fla. Stat. (1989). (T. 8-9). Demario's counsel also contended that the agreement was a release. (T. 16, R. 1074). Dosdourian asserted that the purpose of the agreement was beyond a mere release and settlement and was designed to permit Demario to aid Carsten in recovering against Dosdourian. (T. 9). Carsten maintained that Demario was "required" to remain in the case as a party in order for the jury to apportion Demario's negligence. (T. 12-13). Dosdourian responded and suggested

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[3] The agreement essentially provided that Carsten fully released Demario from any and all claims arising out of the November 30, 1988 automobile accident in consideration of Demario's $100,000 liability insurance limits. However, Demario agreed to remain as a party in the lawsuit so that the jury could determine her proportionate share of negligence.

that there was absolutely no need for Demario to be a party because there was nothing the jury could do that would in any way impact or affect the rights of Demario. (T. 17).

The trial court granted Carsten's motion in limine and ruled that the agreement could not be brought to the attention of the jury unless the live testimony of Demario was presented at trial, and then the matter could be addressed only on cross-examination. (T. 17-18). Further, the court ruled that Dosdourian could not conduct such cross-examination to raise matters pertaining to the agreement if it was Dosdourian that called Demario as a witness during trial. (T. 18). In light of this ruling, Dosdourian requested that Demario be dismissed from the litigation based upon the agreement which both Carsten and Demario contended was a release. (T. 24).[4] Carsten objected to dismissal of Demario and argued that Demario was required to remain as a party (even in face of a total release) so that the jury would be able to resolve the issue of Demario's proportionate share of negligence. (T. 25-26). Carsten further argued that it would be "error" to dismiss Demario. (T. 26).

Dosdourian maintained that proportionate liability meant absolutely nothing to Demario based upon the release in her favor. (T. 26). However, the trial court denied Dosdourian's

[4] When the trial judge inquired of Demario's counsel concerning Demario's position with regard to dismissal of Demario, counsel responded by stating that he would defer to Carsten's counsel on the issue. (T. 24).

motion to dismiss (T. 26) and proceeded to afford Demario full and complete rights of a party in the litigation (T. 29), including preemptory strikes (T. 20), even though Demario had absolutely no interest in the litigation.

Finally, the trial court ruled that Carsten could circumvent the ruling (with regard to cross-examination of Dosdourian) by simply reading the deposition of Demario. (T. 29). Notwithstanding the trial court's acknowledgement that there was no way Dosdourian could cross-examine the deposition of Demario with regard to the settlement agreement, the trial court permitted Carsten to engage in such strategy. (T. 29-30).

The record in this case reflects that thereafter, the entire trial proceeded without the jury knowing the real truth. Even before the jurors were questioned during <u>voir dire</u>, the trial court advised everyone that Demario was a "defendant" in the litigation (T. 34) and that Plaintiff was "jointly suing" Demario and Dosdourian, who Plaintiff claimed were responsible for his injuries. (T. 175-176). Thereafter, Demario's counsel participated in <u>voir dire</u> (T. 140-147), as if Demario was a true Defendant in the case. Demario's counsel lent credibility and support to Carsten's damage claim by commenting in <u>voir dire</u> that Carsten had been badly injured in the accident. (T. 144). These comments were made in a context wherein Demario was creating an impression that she was a presumptive adversary of Carsten. That is, Demario's counsel concluded

voir dire by inquiring of the prospective jurors about their ability to decide the case fairly to Demario and give her a fair trial. (T. 147). The entire voir dire was a sham and a charade which resulted from the agreement between Carsten and Demario, as well as the trial court's refusal to disclose the true facts to the jury or dismiss Demario from the litigation.[5]

Dosdourian sustained further prejudice during jury selection. Demario's counsel made repeated statements which suggested that from Demario's perspective, the only issue in the case was the respective negligence of Dosdourian and Demario. (T. 233-234).[6] Again during voir dire, Demario, under the pretense of being a party adverse to the Plaintiff, proceeded to advise the jury that Carsten had sustained "significant damages". (T. 234).[7]

After the jury was sworn, the trial court again advised the jury that the case was "between" the Plaintiffs, Richard

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[5] During his portion of voir dire, counsel for Intervenor Great Western Life Insurance Company also advised the venire panel that if the evidence established that Demario and Dosdourian were at fault in the accident, Great Western would be entitled to recover from them the monies it paid for Carsten's medical expenses. (T. 228).

[6] This statement created the impression before the jury panel that one of Carsten's purported "adversaries" was essentially stipulating that Plaintiff's damage claim was uncontestable.

[7] Although Demario's counsel attempted to maintain a semblance of an adversarial posture by stating that he was "not saying that I won't talk about damages", in point of fact Demario's counsel never asked one question of a witness or made one argument throughout the entire trial which in any way contested Plaintiff's damage claim.

Carsten and Great Western Insurance Company against the Defendants, Demario and Dosdourian. (T. 241).

The theme that Demario was a true Defendant in the case was continued during opening statement. Plaintiff's counsel advised the jury that the accident in suit occurred only because of the negligence of "these two Defendants" (T. 264) and that Carsten was entitled to a substantial verdict as a result of the Defendants' negligence. (T. 265).

In its opening statement, Great Western again emphasized that if the evidence showed that the Defendants' negligence caused Carsten's personal injuries, Great Western could "recover" from the Defendants the expenses it paid. (T. 266).

The prejudicial effect of the secret settlement and the failure to dismiss Demario continued through opening statements. Demario's counsel did not assert in his opening statement that Carsten was comparatively negligent for jay-walking (T. 269-273), but rather maintained that Demario was wholly without fault in the accident. (T. 269). Demario contended that it was Dosdourian's actions in preventing Carsten from continuing to walk across the highway which produced the accident. (T. 273). Again, Demario's counsel, a presumptive adversary of Carsten, endorsed the credibility of Carsten's damage claim by advising the jury that he doubted that he would "be addressing damages very much." (T. 273).

The substantive testimony at trial on the liability issue was presented through Dosdourian, the deposition of Demario and

various other lay and expert witnesses. The investigating police officer arrived after the event occurred and outlined the physical evidence found at the scene. (T. 287). Trooper Timothy Watts testified that Carsten was struck by the left front of the Demario vehicle and there was no evidence that Demario attempted to brake. (T. 294-295). The evidence demonstrated that Carsten had been struck approximately 14 feet from the sidewalk running along the western side of Haverhill Road. (T. 301). The investigating police officer confirmed that there was no impact to the Dosdourian vehicle. (T. 313).

The testimony of Demario was presented through deposition and established that she was operating a BMW motor vehicle in the right-hand lane travelling south on Haverhill Road on the day of the incident. (T. 419). Dosdourian's vehicle was travelling in the same direction as Demario, but was in the adjacent left-hand lane and somewhat ahead of Demario. (T. 419). Both vehicles were travelling at 35 miles per hour. (T. 420). Demario stated that after proceeding through the intersection on Elmhurst Road, the next thing she was aware of was a body on her vehicle. (T. 420). Demario stated that she did not see Carsten cross her southbound lane and perceived that he approached her vehicle from the left. (T. 421).

Dosdourian testified that she was also travelling southbound in the left hand lane on Haverhill Road at approximately 6:00 p.m. on the evening in question. (T. 432). As she proceeded through the intersection on Elmhurst Road she

observed Carsten and a dog standing in the roadway. (T. 434). Carsten was standing on the broken line that separates the two southbound lanes and the dog was in front of Carsten in the left southbound lane. (T. 434). When Dosdourian observed Carsten and the animal they were approximately 20 or 30 feet ahead of her (T. 435), and she swerved to the left to miss the animal, which was in her lane of travel. (T. 436). It appeared to Dosdourian that Carsten pulled on the leash of the dog as he was facing east. (T. 437). After she passed Carsten and the animal Dosdourian looked in the rear-view mirror and saw Carsten as he was hit by Demario. (T. 437-440). Dosdourian testified that she never made contact with Carsten. (T. 440-441). Rather, at the scene of the accident Demario admitted that she was the one who made contact with Carsten. (T. 438-439).

As Demario and Dosdourian were proceeding southbound through the intersection at Elmhurst Road, a vehicle travelling west on Elmhurst had come to the traffic signal at Haverhill Road and was waiting in the left-turn lane for the appropriate traffic signal. (T. 320-322). The operator of this vehicle testified that as the light changed to green for westbound traffic on Elmhurst Road, two motor vehicles came through the intersection southbound on Haverhill Road. (T. 322-324). One witness confirmed that the southbound vehicle in the left lane was slightly in front of the vehicle in the right southbound lane. (T. 325). After this, the westbound vehicle made a left

turn to travel south on Haverhill Road and the operator of the vehicle observed Carsten's dog jumping around and Carsten's body in the roadway. (T. 326-328). The operator of the westbound vehicle admitted that he did not see the actual impact occur. (T. 336). The passenger in the vehicle facing Haverhill Road testified that she observed two vehicles proceed southbound through the intersection of Elmhurst Road while the traffic signal was green for westbound traffic. (T. 447).

The basic theory of Carsten's claim against Dosdourian and Demario was that Carsten had been crossing the roadway and as he was attempting to cross, he could not proceed across the left southbound lane of travel occupied by Dosdourian, but instead attempted to either jump back, step back or pull his dog in a backward motion. This placed Carsten in Demario's lane of travel where he was struck by the Demario vehicle. (T. 541-545). Plaintiff's expert witness connected Dosdourian with the event by either striking the dog, which was on a leash, or breaking the leash itself. (T. 541). The theory asserted was that if Dosdourian and Demario had not proceeded through the red traffic signal, no accident would have occurred. (T. 545). The evidence reconstructed after the incident further demonstrated that, rather than being in the crosswalk at the intersection, Carsten was located approximately 75 to 80 feet south of the Elmhurst Road intersection on Haverhill Road when he was struck by Demario. (T. 520).

On the question of damages, Carsten presented numerous lay and expert witnesses. Although Dosdourian's counsel did not cross-examine all of these witnesses (T. 580, 651, 659, 671, 692, 764), Demario's counsel did not cross-examine any of them. (T. 580, 594, 605, 619, 651, 659, 671, 692, 699, 764, 799).

With regard to Carsten's claim for loss of earning capacity, prior to the accident he was employed by Belvedere Construction Company as a pipe layer and was earning approximately $11.00 per hour. (T. 607). However, based on the injuries sustained in the accident Carsten was demoted to a laborer's position and was earning $8.00 per hour. (T. 607). Carsten contended that if he continued in his position as a laborer earning $8.00 per hour, his future earning loss would be $202,000.00. (T. 795). However, if he lost his laborer's job due to his injuries and was forced to take an unskilled position at $5.00 per hour, his future loss of earnings would instead be approximately $383,000.00. (T. 796). In support of this claim Plaintiff offered the testimony of three representatives of Belvedere Construction Company and also a vocational rehabilitation expert. (T. 599, 608, 693, 772). In an effort to counter this claim Dosdourian's counsel cross-examined all of these witnesses. (T. 605, 619, 700, 799). However, when it came time for Carsten's other purported adversary to counter this claim, Demario's counsel, at each instance, responded: "No Questions". (T. 605, 619, 699, 799).

In closing argument Carsten's counsel devoted the overwhelming majority of his time on the liability issue arguing that Dosdourian was the party responsible for the accident. (T. 852-857). Although Carsten's counsel contended that both Defendants were negligent, he suggested to the jury that liability should be apportioned as follows: Dosdourian - 80%; Demario - 20%; Carsten - 0%. (T. 858, 861).

In Demario's closing argument, her counsel bolstered Carsten's contention that he was not comparatively negligent. Demario's counsel asserted that it was appropriate for Carsten to assume that he could safely cross the roadway and that Carsten acted reasonably under the circumstances. (T. 883). Demario concluded his full support for Carsten on the liability issue by contending that Dosdourian was 100% at fault for causing the accident and that both Carsten and Demario were free of fault. (T. 886). Further, Demario's counsel made no argument whatsoever in closing to counter Carsten's claim for substantial damages, other than to say that the incident was a very tragic accident. (T. 888).

Against this confusing "opposition" by Demario, Dosdourian's counsel argued that Carsten was comparatively negligent in not crossing at the corner crosswalk and for failing to observe and avoid the oncoming vehicles. (T. 896-898). Dosdourian also asserted that she was not at fault in the accident. (T. 907). Although Dosdourian admitted that Carsten had sustained a serious injury (T. 894), her counsel

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argued that the evidence revealed that Carsten was able to return to work after his extended recovery and that he had worked continuously thereafter. (T. 894). With regard to the loss of earnings issue, Dosdourian further argued that Carsten's supervisors had admitted that there was no plan to lay him off or that he was going to be fired in the future. (T. 895).

In rebuttal closing, Carsten's counsel maintained some credibility by stating that he did not believe that Demario should be found to be completely free from fault. (T. 920). However, it is clear from the record that the overwhelming majority of Carsten's rebuttal closing was directed towards countering the arguments made by Dosdourian's counsel. (T. 910-920).

The perception of the jury that Demario was a true adversary of Carsten, which had been maintained throughout the entire trial, was reinforced in the jury instructions. The trial court advised the jury that there were two distinct claims in the case, one against Demario and one against Dosdourian. (T. 926-927). The Judge instructed the jury that although the claims had been tried together, each was separate, and "each party is entitled to have you separately consider each claim as it affects that party." Consistent with customary practice when true adversaries are involved, the Judge instructed the jury as to the issues for the determination on the claim of Richard Carsten against Defendant

Christine Demario. (T. 927). Finally, with regard to the verdict form, the trial judge instructed the jury that the Court would take into account each Defendant's percentage of negligence <u>in entering judgment against that Defendant</u>. (T. 933-934). These instructions were inaccurate and misleading.

After deliberation, the jury returned its verdict (T. 953) and found the following percentages of negligence: Dosdourian - 35%; Demario - 55%; Carsten - 10%. The jury then proceeded to award medical and hospital expenses in the amount of $193,206.27, and an additional $22,240.00 for medical and hospital expenses in the future. (T. 953). The jury also awarded $21,369.00 for past lost earnings, along with the sum of $383,631.50 for future loss of earning capacity. Intangible damages of $80,000.00 for past losses and $1,300,000.00 for future losses were also awarded. (T. 953-954).

Contrary to the trial court's express instruction to the jury, no final judgment was entered against Demario in light of the fact that she had previously been released. However, the trial court entered judgment in favor of Carsten and against Dosdourian pursuant to § 768.81(3), <u>Fla</u>. <u>Stat</u>. by assessing 90% of the economic damages and 35% of the non-economic damages against Dosdourian. (R. 1226-1227). Although a set-off in the amount of $8,000.00 (for personal injury protection benefits received by Carsten) was made (R. 1226), no set-off was

applied to the judgment for the $100,000.00 which Carsten received in exchange for the full release of Demario.

Dosdourian's motion for new trial (R. 1217-1218) was denied (R. 1219) and this timely appeal to the Fourth District Court of Appeal was perfected. (R. 1228-1229). See, Dosdourian v. Carsten, 580 So.2d 869 (Fla. 4th DCA 1991).

ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DOSDOURIAN'S MOTION TO DISMISS CO-DEFENDANT DEMARIO WHEN DEMARIO HAD BEEN FULLY RELEASED BY CARSTEN.

II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ALLOW THE JURY TO HEAR EVIDENCE WITH REGARD TO THE AGREEMENT BETWEEN CARSTEN AND DEMARIO.

III. WHETHER DOSDOURIAN WAS SUBSTANTIALLY PREJUDICED IN HER DEFENSE OF THE CASE BY THE TRIAL COURT'S FAILURE TO EITHER DISMISS DEMARIO OR ALLOW THE JURY TO HEAR EVIDENCE WITH REGARD TO THE TERMS OF THE CARSTEN/DEMARIO AGREEMENT.

IV. WHETHER THE TRIAL COURT ERRED IN FAILING TO REDUCE THE JUDGMENT AGAINST DOSDOURIAN BY THE AMOUNT OF THE CARSTEN SETTLEMENT WITH DEMARIO.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error when it denied Dosdourian's motion to dismiss Demario from the litigation once Demario had been fully released by Carsten. In light of the

modification of the joint and several liability doctrine set forth in § 768.81(3), Fla. Stat. (1989), there was no requirement that Demario remain in the litigation as a party defendant. Rather, § 768.81(3) now allows for a jury to apportion a percentage of negligence to a non-party defendant. The provision in the Carsten/Demario agreement for Demario to remain in the litigation should not have been enforced by the trial court as such a provision is contrary to the public policy expressed in § 768.81 and § 768.31, Fla. Stat., as well as the citizenry's interest in maintaining the integrity of our adversarial system of justice. Put another way, Demario simply had no standing to participate in the trial and the only purpose that her participation served was to mislead the jury to the detriment of Dosdourian.

Alternatively, the trial court committed reversible error by refusing to allow the jury to hear evidence with regard to the agreement. The trial record in this case reveals that, for all intents and purposes, the subject agreement had the same components as a Mary Carter agreement. The only way to cure the evils attendant to this and other similar agreements is to alert the jury as to their existence, so that the non-settling defendant can have a fair trial. Alternatively, in light of the social upheaval codified in § 768.81, this Court should recede from the strict requirements of Ward v. Ochoa, 284 So.2d 385 (Fla. 1973) when all of the policy considerations supporting admissibility of a Mary Carter agreement are

present. However, even if this Court is disinclined to recede from Ward v. Ochoa and expand the definition of a Mary Carter agreement, the judgment below should be reversed. The trial court committed reversible error by preventing admission of the subject agreement because the agreement was relevant to prove the motivation and interest of both Carsten and Demario in the litigation. Quite simply, if the trial court accepted Petitioner's contention that the subject agreement was something other than a traditional release or a Mary Carter agreement, the agreement was not inadmissible under § 768.041, Fla. Stat.

Dosdourian was substantially prejudiced in her defense of this case by the trial court's failure to either dismiss Demario or allow the jury to hear evidence with regard to the terms of the Carsten/Demario agreement. Although it is sometimes difficult to prove actual prejudice when a Mary Carter type arrangement is involved, the record in this case reveals actual prejudice. The jury was instructed by the Court (and the parties) to believe that Carsten and Demario were adversaries. Armed with this knowledge, the jury observed Demario, Carsten's presumptive adversary, endorse and support Carsten's position on the comparative negligence and damage issues throughout the trial. This scenario could only result in an actual miscarriage of justice. Thus, Dosdourian is entitled to a new trial.

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Finally, following retrial after remand, Dosdourian should be given an opportunity to assert that the $100,000.00 settlement with Demario should be set off against any amounts awarded against Dosdourian.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DOSDOURIAN'S MOTION TO DISMISS CO-DEFENDANT DEMARIO WHEN DEMARIO HAD BEEN FULLY RELEASED BY CARSTEN.

At the time the subject cause came on for trial, both Carsten and Demario admitted that the subject agreement was a release. (T. 8, 9, 16). Petitioner submits to this Court that, even before the passage of § 768.81(3), Fla. Stat., dismissal of Demario was required. As support for this proposition Dosdourian directs the Court's attention to Charles McArthur Dairies, Inc. v. Morgan, 449 So.2d 998 (Fla. 4th DCA 1984). There, the Fourth District noted that an agreement whereby one co-defendant unconditionally agreed to pay plaintiff a sum certain in exchange for a release and to remain in the action as a co-defendant was a release. Id. at 99. In *dicta*, the Morgan court further noted that the proper procedure for the non-settling co-defendant is to request that the settling co-defendant be dismissed. Id. at 1000. Although the holding in Morgan was based on an application of the "invited error" doctrine, Petitioner submits to this Court that the case

is factually on point, and the reasoning of the case supports the proposition that the trial court's denial of Dosdourian's motion to dismiss Demario as a party defendant from the case was erroneous.

In opposition to Dosdourian's motion to dismiss Demario from the proceedings, Carsten contended that it would have been reversible error for the trial court to have granted the motion to dismiss. (T. 26). Petitioner submits that this contention was fallacious. During the Pre-Section 768.81(3) reign of full joint and several liability among joint tortfeasors, Defendants that went to trial alone after a co-defendant settled (and was dismissed) would commonly make an all or nothing "empty chair" argument in defense of the liability issue. If the defendant was unsuccessful in this argument, the court would then reduce the judgment against the defendant by the amount of the settlement pursuant to § 768.31(5), Fla. Stat. Indeed, under the law prior to the enactment of § 768.81(3) it was customary for courts to rule that it was improper for a jury to adjudicate a non-party tortfeasor's percentage of negligence. E.g., Blocker v. Wynn, 425 So.2d 166 (Fla. 1st DCA 1983). However, based on the holding of the Fifth District in Messmer v. Teachers Insurance Company, 16 FLW D2471 (5th DCA Sept. 19, 1991), it is now proper for the fact-finder to consider the relative percentage of fault of non-party tortfeasors, such that judgment for non-economic damages should be entered against the defendant tortfeasor based only on that defendant's

share of negligence. In support of its conclusion, the Messmer court relied on this Court's opinion in Conley v. Boyle Drug Company, 570 So.2d 275 (Fla. 1990). There, this Court adopted the "market share" theory of liability in actions against companies which manufactured the drug DES. In adopting this theory of liability, this Court rejected the suggestion that the defendant drug company should be jointly and severally liable for the plaintiff's damages, rather than simply being held liable for its percentage share of damages. One of the reasons espoused by this Court for rejecting this suggestion was that joint and several liability is now only favored within this state in the specifically limited situations set forth in § 768.81, Fla. Stat. Id. at 284.

Petitioner submits to this Court that in light of the substantial modification of the joint and several liability doctrine, as set forth in § 768.81(3), Fla. Stat., defendants in the state of Florida now have a right to obtain dismissal of a co-defendant who has settled and have the jury determine his or her percentage of negligence, as compared to the comparative fault of the plaintiff and all other potential tortfeasors (even if the other tortfeasors are not parties to the action).

The trial court's refusal to dismiss Demario from the litigation was erroneous for another fundamental reason. It is a basic concept of our jurisprudence that parties to litigation must have standing to participate in a lawsuit. E.g., Kumar Corporation v. Nopal Lines, Ltd., 462 So.2d 1178 (Fla. 3d DCA

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1985). A party has standing to participate in litigation only where the party has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation. See Jamlynn Investments Corp. v. San Marco Residences of Marco Condominium Association, Inc., 544 So.2d 1080 (Fla. 2d DCA 1989). That is, one who has no personal stake in the outcome of a controversy lacks standing. See Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973).

In the case before this Court, once Demario was released by Carsten, Demario had no interest at stake in the controversy which possibly could have been affected by the outcome of the litigation. Demario clearly lacked standing to participate in the litigation. See also Charles McArthur Dairies, Inc. v. Morgan, supra.[8] Further, the concept of standing is so basic to our jurisprudence that it has been equated with subject matter jurisdiction in that neither can be conferred by consent. See Askew v. Hold The Bulkhead - Save Our Bays, Inc., 269 So.2d 696 (Fla. 2d DCA 1972). Thus, the provision of the subject agreement whereby Demario agreed that he would remain in the litigation as a party defendant, notwithstanding the full release, was void, unenforceable and contrary to public policy. The trial court erred by denying Dosdourian's motion

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[8] Compare with Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. 2d DCA 1967) (party to a Mary Carter agreement has standing to remain in the litigation because of the contingent nature of the settlement agreement).

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to dismiss and permitting Demario to remain in the litigation. See also Montgomery v. Department of Health & Rehabilitative Services, 468 So.2d 1014 (Fla. 1st DCA 1985) (the requisite personal interest that must exist at the commencement of litigation must continue throughout its existence).

If a plaintiff and one co-defendant can enter into a settlement agreement whereby the settling defendant remains in the litigation as a party AND the jury is not made aware of the agreement, the concepts of due process and fair play which are so fundamental to our jury system will be severely compromised. Petitioner submits that it would be a miscarriage of justice for this Court to sanction a procedure which is inherently misleading and collusive. A settling defendant such as Demario who had no cognizable interest in the litigation should not have been permitted to remain as a party defendant and essentially perpetrate a fraud on the jury whose role was to seek and determine the truth. See also Diaz v. Sears, Roebuck & Co., 475 So.2d 932 (Fla. 3d DCA 1985) (provision of agreement between one defendant and plaintiff whereby defendant would only be liable for damages up to $75,000 was unenforceable under § 768.31(5), Fla. Stat. as it was collusive and in bad faith).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ALLOW THE JURY TO HEAR EVIDENCE WITH REGARD TO THE AGREEMENT BETWEEN CARSTEN AND DEMARIO.

The Fourth District Court of Appeal below interpreted this Court's opinion in Ward v. Ochoa, 284 So.2d 385 (Fla. 1973) as specifically requiring 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. See Dosdourian v. Carsten, 580 So.2d 869 (Fla. 4th DCA 1991). Petitioner submits to this Court that the trial court erred in placing such a strict and narrow construction on Ward, and further that inflexibility in this regard can only lead to a miscarriage of justice.

At the outset, Petitioner would direct this Court's attention to the fundamental reasoning which formed on the basis for this Court's opinion in Ward, to wit:

> The search for the truth, in order to give justice to 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 boarder on collusion. Id. at 387.

In light of this rationale for the rule, this Court has recognized that, to be admissible, a Mary Carter agreement need not be contingent upon the settling defendant's liability being extinguished if the verdict against another defendant exceeds a certain amount. See Maule Industries, Inc. v. Rountree, 284 So.2d 389 (Fla. 1973). Rather, the agreement is similarly admissible if the agreeing defendant is assured of immunization from the judgment if the verdict is against all defendants (as opposed to just the agreeing defendant). Id. at 390.

Petitioner submits to this Court that this is exactly what happened in the case under review. Although Demario paid a set price for immunity (i.e., $100,000.00), the trial record in this case strongly suggests that the intent of the agreement was to obtain a verdict against "all defendants". Although Demario's agreement to assist Carsten in obtaining a verdict against Dosdourian is not apparent on the face of the agreement, the true intent of Carsten and Demario was revealed by Demario's collusive conduct during the trial. Indeed, Demario was found to be immune from the subject judgment based on the agreement.

The reasoning and language of various other appellate decisions in Florida strongly suggest that this Court's decision in Ward should not be limited to agreements where the settling defendant's liability is contingent on the outcome of the trial. For example, in Frier's, Inc. v. Seaboard Coastline Railroad Company, 355 So.2d 208 (Fla. 1st DCA 1978), the court noted that the contingent liability feature was a "typical" feature of a Mary Carter agreement. Id. at 210. Similarly, in Warn Industries v. Geist, 343 So.2d 44 (Fla. 3d DCA 1977), the Third District Court of Appeal opined that although contingent agreements are contained in Mary Carter agreements, the key feature is an agreement that the Plaintiff will recover a minimum sum from the agreeing defendant. Id. at 47, footnote 1; see also, Ward v. Ochoa, supra. at p. 387 (secrecy is the essence of such an arrangement because the court or jury as

trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendant).

In further support of her contention that the trial court erred in refusing to allow admission of evidence pertaining to the Carsten/Demario agreement, Petitioner directs the Court's attention to Atlantic Ambulance & Convalescent Service, Inc. v. Asbury, 330 So.2d 477 (Fla. 4th DCA 1975). There, the precise terms of the limitation of liability agreement at issue were not precisely clear from the opinion.[9] However, the Asbury court denied the non-agreeing defendant's motion for new trial (based on the trial court's failure to admit evidence of the agreement) because the agreement did not exist prior to or during trial. Thus, the agreement could not be properly characterized as a Mary Carter agreement within the contemplation of this court's decision in Ward v. Ochoa. Asbury, supra. at p. 478. In ruling that the limitation of liability agreement was not admissible, the Asbury court further noted:

> The record sufficiently reflects that the subject agreement did not arise until after the jury retired and was not entered in to in such manner or in an effort to circumvent the pronouncements of Ward v. Ochoa. Id. at 478.

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[9] In any event, a payment of $3,297.00 was made to the plaintiff by the agreeing defendant.

Petitioner submits to this Court that the sum total of the maneuvers in the trial below amounted to a calculated circumvention of pronouncements of this Court in Ward v. Ochoa. All of the evils which the courts of this state have attempted to avoid were visited upon Dosdourian based on the trial court's refusal to allow the jury to know that the subject agreement between Carsten and Demario existed. That is, the motivation of the parties, the witnesses and counsel for the agreeing parties was hidden from the jury. The fact-finder was thus substantially impeded in its ability to search for and decide the truth.

Petitioner also relies on Quinn v. Millard, 358 So.2d 1378 (Fla. 3d DCA 1978) in support of reversal. There, the defendant contended that the trial court erred in failing to admit evidence of a settlement agreement reached between one defendant and the plaintiff. The non-settling defendant contended that the agreement was an admissible Mary Carter arrangement. In its discussion of the issue, the Quinn court relied upon this Court's decision in Ward v. Ochoa and offered an analysis which is particularly germane to the case now before this Court:

> A Mary Carter agreement is essentially a pact between a plaintiff and one or more of 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 plaintiff is commonly guaranteed a stipulated minimum recovery against a participating co-defendant(s) regardless of the outcome of the litigation, and also the

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> participating co-defendant(s) will proceed to trial in the guise of true adversaries. The consenting co-defendant(s) have the advantage of a predetermined limit to their liability regardless of the verdict. The excluded defendant(s) would have to bear the prejudicial impact of the secret agreement if the settlement were hidden from the jury, the prejudice arising from the weight that triers of fact would be likely to give testimony of an apparent co-defendant. Id. at 1383.

This is precisely what occurred in the trial below. The conduct of the "apparent co-defendant" Demario, in supporting Carsten on the issues of damages and Carsten's comparative negligence must have been given considerable weight by the jury, all to the detriment of Dosdourian. There is simply no legal, logical or rational reason why the subject agreement should have been excluded.[10] The Quinn court further opined with regard to the nature of Mary Carter arrangements:

> Thus, at least two fundaments underlie the rational for admitting Mary Carter agreements into evidence: the secrecy of the agreement between a plaintiff and an active co-defendant; and the injustice which is likely to arise from the jury's ignorance of the settlement. Id. at 1383-4.

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[10] Carsten's motion in limine to preclude admissibility of the subject agreement was made and granted prior to the commencement of trial. (T. 8, 9, 17, 18). However, once the prejudicial effect and collusive nature of the agreement unfolded during trial based on Demario's actions in affirmatively supporting Carsten's claim against Dosdourian, counsel for Dosdourian again asked the court for permission to put on evidence with regard to the agreement. (T. 819). However, at this point in the trial the judge confirmed his earlier ruling and denied Dosdourian's request to introduce evidence with regard to the agreement. (T. 819).

Based on this framework for analysis, however, the Quinn court found that reversible error was not demonstrated because the bases for asserting the admissibility of the settlement agreement were not present. The Quinn court specifically noted: "MacMillan was not an apparent defendant, so the court's refusal to admit the settlement agreement resulted in no significant misapprehension on the part of the jury." Id. at 1384. Based on the fact that the settling defendant has been voluntarily dismissed during the trial and both sides developed their cases in awareness of the fact that the non-settling defendants were the "real" defendants in the action, the Quinn court concluded that the appellant's request for a new trial was without merit because there was no prejudicial impact resulting from the exclusion of the settlement. Id. at 1384.

Petitioner thus submits to this Court that the more appropriate and just analysis for determining admissibility of arrangements such as the Carsten/Demario agreement is for the trial court to assess the potential prejudice which will be sustained by the non-agreeing defendant based on the jury's likely misapprehension of the remaining parties' motivation and interests in the litigation. A strict application of the Ward v. Ochoa test can only lead to a miscarriage of justice.

If this Court is inclined to overturn Messmer v. Teachers Insurance Company, supra, and construe § 768.81, Fla. Stat. to permit settling defendants to remain in a case as a party,

Petitioner respectfully suggest that Ward v. Ochoa must be revisited, modified and/or clarified to encompass mandatory admissibility of arrangements such as the Carsten/Demario agreement. This is the only way a fair trial can be afforded to a non-settling defendant such as Dosdourian.

Finally, Petitioner would alternatively suggest to this Court that the final judgment under review can be reversed and a new trial granted to Dosdourian, even without receding from the "contingent outcome" requirement set forth in Ward v. Ochoa. That is, the Respondent herein should be estopped from contending that the subject agreement is neither a release nor a Mary Carter agreement. That is, the only way that Respondent was able to convince the trial court that Demario should not have been dismissed was to successfully contend that the subject agreement was not an absolute release which would thus end Demario's tenure as a party defendant in the litigation. Rather, Respondent successfully argued that the agreement had an additional feature whereby Demario was required to remain in the case so that the jury could apportion Demario's relative fault. (T. 25-26). At the same time, Respondent vociferously contended that the arrangement was not a classical Mary Carter agreement. (T. 8-9). Assuming arguendo that Respondent is correct on this latter contention (based on the Fourth District's interpretation of Ward v. Ochoa), and assuming that the subject agreement was not a release which mandated dismissal of Demario, Respondent should not be entitled to hide

behind the veil created by § 768.041, Fla. Stat. with regard to inadmissibility of releases. Rather, as Respondent benefitted from the denial of Dosdourian's motion to dismiss Demario, he should in equity be saddled with the concomitant responsibility that the agreement is not sheltered by § 768.041, Fla. Stat. Petitioner submits to this Court that based on this scenario courts can and should simply rule that such arrangements (with the possible exception of the consideration for the release) are relevant and admissible because they tend to prove the motivation in the litigation of the parties to the agreement, as well as their interest in the outcome. Litigants should not be given incentive to circumvent the search for the truth by casting agreements which engender all of the evils of Mary Carter agreements, and at the same time enjoy the protection afforded by § 768.041(3), Fla. Stat. with regard to inadmissibility of that same agreement. See also Diaz v. Sears Roebuck & Company, 475 So.2d 932 (Fla. 3d DCA 1985) (trial court advised jury of the terms of a settlement whereby one defendant's liability was limited to $75,000.00 but settling defendant remained as a defendant throughout trial).

III. DOSDOURIAN WAS SUBSTANTIALLY PREJUDICED IN HER DEFENSE OF THE CASE BY THE TRIAL COURT'S FAILURE TO EITHER DISMISS DEMARIO OR ALLOW THE JURY TO HEAR EVIDENCE WITH REGARD TO THE TERMS OF THE CARSTEN/DEMARIO AGREEMENT.

The most compelling reason why Dosdourian is entitled to relief from this Court is because the aggregate effect of the

trial court's refusal to dismiss Demario or advise the jury of the existence of the subject agreement was to deny Dosdourian a fair trial and due process of law. The trial judge's effort to adequately protect Dosdourian by allowing her to cross-examine Demario with regard to the agreement if Dosdourian was called as a live witness by Carsten or Demario (T. 18) fell miserably short of the mark.[11] The fact of the matter is that the poisonous influence of the agreement infected the entire proceeding, as throughout the trial the jury saw counsel for Demario (who was purportedly Carsten's adversary) endorse Carsten's claim at every opportunity.

Although the Fourth District in its decision noted that it is precisely because of the difficulty in demonstrating prejudice to a non-settling defendant that Mary Carter agreements are required to be disclosed to the jury,[12] in this case there clearly were several instances of severe prejudicial conduct which occurred. For example, the undisputed evidence at trial was that Carsten was jaywalking at the time of the accident. (T. 421, 435, 520). However, in closing argument counsel for Demario argued that Carsten had acted reasonably

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[11] Additionally, the "protective" feature of the order which permitted Dosdourian to cross-examine Demario with regard to the agreement if Demario was called as a witness by a party other than Dosdourian was easily sidestepped by Carsten when the trial court permitted Carsten to read the deposition of Demario. (T. 29).

[12] Dosdourian v. Carsten, 580 So.2d at 872 (Fla. 4th DCA 1991).

under the circumstances (T. 883) and that he was completely without fault. (T. 886). Demario's counsel may as well have been co-counsel for Carsten. If the jury would have known Demario's true status, they could have considered her counsel's motivation in the litigation. However, without this knowledge and in the face of explicit instructions from the trial court that Carsten was making a claim against Demario (T. 926-927), the only impression which the jury could have received was that one of Carsten's adversaries was conceding the correctness of Carsten's position on the comparative negligence issue.[13] This was not fair to Dosdourian who was in good faith attempting to mitigate her exposure by arguing that Carsten's comparative negligence was a significant factor in precipitating the accident. (T. 896-898).

Further, Dosdourian was substantially prejudiced in her ability to defend the damage claim. Whenever a lawsuit goes through trial, true co-defendants always have the same interest and motivation in trying to mitigate damages. Although there are bound to be differences in trial strategies by defense lawyers attempting to mitigate damages, in this particular instance Demario's counsel did not cross-examine <u>any</u> of Carsten's damage witnesses and did not make <u>one</u> argument to suggest that Carsten's damages were less than as he claimed. Again, the only impression this conduct could have created was

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[13] Carsten's counsel also argued that Carsten was wholly without fault in the incident. (T. 861).

to undermine Dosdourian's efforts to limit damages and lend further support to Carsten's claim. Our jury system is not supposed to work this way. A defendant should not be subjected to misleading influences and unfair inferences which are easily correctable by a trial court. Although the intangible nature of the prejudice is difficult to measure, it is unquestionably present. In this Court Petitioner should at least be entitled to a new trial as on this record the jury verdict very well may have been different if the trial court had not erred in failing to dismiss Demario or in refusing to advise the jury of the Carsten/Demario agreement. See Marks v. Delcastillo, 386 So.2d 1259 (Fla. 3d DCA 1980). Accordingly, Petitioner respectfully suggests to this Court that reversible error has been demonstrated.

IV. THE TRIAL COURT ERRED IN FAILING TO REDUCE THE JUDGMENT AGAINST DOSDOURIAN BY THE AMOUNT OF THE CARSTEN SETTLEMENT WITH DEMARIO.

Clearly, under § 768.31(5), Fla. Stat. (1989), Carsten's claim against Dosdourian should have been reduced by the amount of the settlement with Demario. Although the issue is admittedly colored by the application of § 768.81(3), Fla. Stat. (1989) to the subject judgment, Petitioner requests that it be granted an evidentiary hearing upon remand to determine

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the applicability of the set-off in this instance.[14] As there is no indication on the face of the subject agreement with regard to whether or not the $100,000.00 payment was intended to apply to economic or non-economic damages, Petitioner should not be summarily denied the right to question the intended apportionment. Cf. Dionese v. City of West Palm Beach, 500 So.2d 1347 (Fla. 1987).

CONCLUSION

Petitioner contends that she has demonstrated reversible error and an entitlement to a new trial. The aggregate effect on the trial court's refusal to dismiss Demario or advise the jury of the Carsten/Demario agreement effectively denied Dosdourian due process of law and the right to a fair trial. Our jury system is founded upon an actual and unimpeded search for the truth where the finders of fact are not subjected to significantly misleading influences which can only jeopardize this laudable process. When a defendant settles with the plaintiff but argues to remain in the case as a party and the record reveals that the settling defendant secretly sides with the plaintiff on the issues of fact, the fact-finding process is undermined and derailed to the detriment of the non-settling defendant. Based on the legislative modification of the joint and several liability doctrine, the proportionate share of

[14] In its opinion the Fourth District Court of Appeal noted that Petitioner should be entitled to seek a set-off in the trial court in the event the case is remanded. See Dosdourian v. Carsten, 580 So.2d 869, 870 n.1 (Fla. 4th DCA 1991).

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