THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FL

CASE NO. 78,370

PATRICIA DOSDOURIAN,

Petitioner,

vs.

RICHARD PAUL CARSTEN,

Respondent.
_____/

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION

This Supplemental Reply Brief is submitted in response to Respondent's Supplemental Brief in which Respondent countered Petitioner's contention that Mary Carter agreements should be declared void as against public policy in Florida. These briefs have been submitted in response to this Court's order dated February 17, 1993 which requested supplemental briefs with respect to the continuing viability of Mary Carter agreements.

ARGUMENT

I. MARY CARTER AGREEMENTS SHOULD BE DECLARED VOID AS AGAINST PUBLIC POLICY.

A. This Court should declare the agreements invalid.

Many of the arguments asserted by Petitioner in her Supplemental Brief have not been addressed in Respondent's Supplemental Brief. Petitioner will hereinafter reply only to those contentions made by Respondent in his supplemental brief.

Respondent asserts on page three of his Supplemental Brief that this Court should not address the question of whether Mary Carter agreements should remain viable because the agreement in this case was not a Mary Carter agreement. This contention by Respondent exalts form over substance. The evil of which Petitioner here complains was a secret agreement between CARSTEN and DeMario which resulted in jury deception and an unfair trial for DOSDOURIAN. Indeed, secrecy is both the

essence of a Mary Carter agreement[1] and the first enemy of justice.[2]

The record in this case is filled with examples of the precise evils which were recognized by this Court in Ward v. Ochoa, supra. Artificial labeling devices should not constrain this Court from meting out justice. Clearly, the forms and terms of these agreements are limited only by "the ingenuity of counsel and the parties' willingness to sign."[3] Moreover, the absence of a "rebate" to the settling defendant should not affect the substantive analysis on a record where secret collusion and jury deception is prevalent. As one commentator recently noted:

> Even without a formal rebate provision, however, settling parties may enter a Mary Carter agreement to prejudice the nonsettling defendant, particularly if the settling defendant has shallow pockets. The plaintiff may accept a fixed payment from the settling defendant (typically the full extent of his insurance coverage) in exchange for his assistance in securing a large judgment against his co-defendant.

See, John E. Benedict, It's a Mistake to Tolerate a Mary Carter Agreement, 87 Columbia L. Rev. 368 (1987).

The quoted reasoning reinforces this Court's pronouncement

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[1] See, Ward v. Ochoa, 284 So.2d 385, 387 (Fla. 1973).

[2] See, Elbaor v. Smith, 845 S.W. 2d 240, 254 (Tex. 1992) (Doggett, J., dissenting).

[3] Maule Industries v. Rountree, 264 So.2d 445 (Fla. 4th DCA 1972), rev'd. on other grounds, 284 So.2d 389 (Fla. 1973); see also, General Motors Corp. v. Lahocki, 410 A.2d 1039, 1042 (Md. 1980) (It is probably safe to say that no two pacts dubbed [a] Mary Carter agreement have been alike."),

that it is secrecy (and the attendant adulteration of the fact finding process) which is the essence of a Mary Carter agreement. See, Ward v. Ochoa, supra. Thus, Respondent's assertion on page three of his brief that the rebate feature is the "most essential element of a Mary Carter agreement" is incorrect. As such, Respondent's contention that this Court should not address the continuing viability of Mary Carter agreements should also not be accepted.

Respondent next contends on pages four through six of his brief that when there is a fixed settlement and the settling defendant's liability is not affected by the verdict the trial judge should be given discretion to: a) admit the agreement in evidence; b) nullify the agreement, or c) determine what procedural safeguards are necessary to ensure a fair trial. To facilitate this, Respondent suggests that all settlement agreements, whether fixed or contingent, should be disclosed to the trial court.

This argument brings to the surface the very reasons why all settlement agreements (wherein the settling defendant remains in the courtroom as an "apparent adversary") should be declared void by this Court.

First, as evidenced in the trial below, to the extent a trial judge believes that a fixed settlement agreement is a "release", any "discretion" on the admissibility question will likely be constrained by § 768.041 (3) Fla. Stat. However, even assuming that fixed and/or contingent settlement

agreements are received in evidence, this is not a viable solution. The very existence of the agreement can deal a fatal blow to the nonsettling defendant who would otherwise be able to martial a comparative negligence and/or no damage defense. The fact that one defendant makes a voluntary payment sends a message to the jury that at least one party felt that the plaintiff's claim possessed sufficient merit to warrant a voluntary payment. Such "mixing" of the settlement and trial arenas impugns the sanctity of the courtroom process for a litigant who exercises his or her constitutional right to have a jury resolve a dispute.

Second, as Florida law now exists, there is no legal precedent upon which a trial court could rely to nullify such agreements prior to or during trial. This is the very reason why this Court should address the issue now and prohibit such agreements from being used in Florida courtrooms.

Respondent's third suggestion is that case by case procedural safeguards can be employed to ensure a fair trial. The futility and unworkability of this approach is best demonstrated by the trial record sub judice. That is, despite the trial judge's most cavalier intentions and efforts, it was impossible for the jury to understand the motivations of the plaintiff and the settling defendant when the jury was led to believe that the Demario was a "defendant", as that term is traditionally understood. Trial judges should not be expected to perform the impossible task of rehabilitating and/or

prophylactically maintaining the integrity of a fact finding process which is infected by legally permissive jury deception.

Respondent next suggests on pages six and seven that if the court disallows all settlements where the settling defendant remains in the case, it will presumably declare invalid "high-low" settlements by co-defendants and fixed amount settlements where the jury will apportion the defendant's respective negligence. Petitioner contends that the only type of agreements which should be declared void are those agreements which by their very nature promote unethical or deceptive practices by attorneys and/or which foster jury disillusionment and loss of confidence in the bar and judicial system. High-low agreements should not generate these unsavory results because the settling defendant retains his or her conventional interest in keeping the verdict down. E.g. Weddle v. Voorhis, 586 So.2d 494 (Fla. 1st DCA 1991). However, as evidenced by the record in the case under review, the fixed amount/jury apportionment arrangements result in the same juror misapprehension problems which this Court identified in Ward v. Ochoa, supra. Quite simply, if someone has either no interest in the outcome of a case or an interest which will result in practices which jeopardize the continued functioning of the trial process, that "party" should not be permitted in the courtroom. The most effective way to attain this goal would be to outlaw any such agreements which, by their very nature, pose threats of juror deception and "rigged" trials. See, Ward v.

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Ochoa, supra.

With final regard to this point, Petitioner submits that the issue of whether the name of a person or entity who is not a defendant in the case should be on a verdict form is wholly severable and distinct from the question under consideration. That is, the extent of a defendant's joint and several tort liability for damages ultimately awarded by a jury is not at all logically germane to whether or not that same defendant is permitted to receive a fair trial. Regardless of how the conflict between Messmer v. Florida Teacher's Insurance Company[4] and Fabre v. Marin,[5] is resolved, this Court can and should rid our system of private agreements which promote unethical practices, deceive and disillusion jurors, and result in unfair trials for an "actual defendant".

B. Mary Carter agreements do not promote settlement of cases.

Respondent asserts on page nine of his brief that the most important reason why this Court should not invalidate agreements such as the Carsten/DeMario agreement is because such a holding would eliminate any chance of settlement in cases involving multiple defendants, where some defendants will not settle. The clear inference from this contention is an

[4] 588 So.2d 610 (Fla. 5th DCA 1991)

[5] 597 So.2d 883 (Fla. 3d DCA 1992)

admission by Respondent that fixed amount agreements (such as the one at bar) confer upon the plaintiff special leverage over the nonsettling defendant. This is precisely Petitioner's point. In point of fact, the collusive aspects of these agreements, as well as the "apparent adversary" syndrome, result in unfair trials. Further, if a confederated plaintiff is permitted to have an artificially contrived advantage, that plaintiff will have good reason to expect more out of his or her claim against the nonsettling defendant. This situation is clearly inimical to settlement, especially with an otherwise obstinate defendant. Moreover, as the obvious intent of these agreements is to set up an inflated judgment against the nonsettling defendant, there would be no reason to craft the agreement unless it is carried out through verdict. The practical obstacles to settlement are thus obvious.

Respondent's final contention on the settlement issue again implicates this court's impending resolution of the Messmer/Fabre conflict. CARSTEN suggests that if this Court rules that these types of settlements are invalid and interprets § 768.81 to require all tortfeasors to be listed on the verdict form, settlement with a co-defendant will be inhibited. In support of this argument Respondent reasons that plaintiffs will be unfairly disadvantaged if they are forced to deal with empty chair arguments by nonsettling defendants and proportionate reduction of judgments by the percentage of fault attributable to nonparty tortfeasors. Respondent concludes his

syllogism by asserting that settlements will be more likely if nonsettling defendants are forced to accept the fact that they: a) do not have an empty chair argument; or b) do not have a settling defendant to gang up with against the plaintiff. Petitioner asserts that this reasoning is flawed for several reasons.

First, regardless of how this Court resolves the Messmer/Fabre conflict, plaintiffs in Florida courts will have to contend with empty chair arguments by defendants. The only impact which the resolution of the Messmer/Fabre conflict will have on this defense will be to determine whether it is an "all or nothing" defense (as it was prior to the passage of § 768.81); or, whether there will only be a proportionate reduction of the noneconomic damages assessed against the trial defendant. Even if this Court interprets § 768.81 to make the empty chair defense proportional (as opposed to all or nothing), the effect of such a ruling would only be to make the defense less harsh and risky for both the plaintiff and the nonsettling defendant. Thus, Respondent's first concern will not be an empirically significant factor in determining whether settlement will be more or less likely.

Respondent's second point is, in essence, an assertion that plaintiffs should be permitted to align themselves at trial by a private agreement with a settling defendant in order to overcome the advantage which might be accorded the nonsettling defendant by the empty chair defense. Here again,

under the guise of promoting settlement of cases, Respondent asks the Court to condone unsavory tactics by which plaintiffs can overcome a disadvantage which really does not exist and can not come to pass. By asking the Court to outlaw Mary Carter agreements, Petitioner is not asking the Court for an unreasonable advantage or protection. Rather, Petitioner is only requesting that defendants not be placed in the position where the very juries which will decide their fate are precluded from knowing or truly appreciating the consequences of having one of the defendants' chairs actually occupied by the plaintiff.

The only reason why the agreements at issue are crafted is to effectively eliminate the plaintiff's and the settling defendant's litigation risk. This purpose is fundamentally at odds with the mechanism in litigation which promotes settlement, i.e. risk and uncertainty. Quite simply, if the outcome can be made more predictable and controllable it is less risky for the signing parties to gamble on a jury verdict. Mary Carter agreements thus frustrate settlement of cases.

Finally, there is no reason why Florida jurisprudence should not return to the pre-1967[6] system where litigants were faced with a simple choice: Settle or go to trial. When parties are permitted to craft agreements to reduce or eliminate the risk attendant to this decision, the force which

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[6] Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. 2d DCA 1967).

pushes parties to settle is rendered impotent. This factor is another reason why such agreements should be declared void.

C. Mary Carter agreements are deceptive.

Respondent seems to assert that there is no reason for this Court to concern itself with the deception attendant to Mary Carter
agreements because there are many instances in litigation where co-defendants oppose each other on issues and have different approaches to trial strategy. According to Respondent, "as long as there are two parties whose interests are antagonistic to one another, the likelihood that the truth will emerge is not diminished." (Respondent's Supplemental Brief, p. 11).

This contention only reinforces Petitioner's position with regard to the deception which does occur. That is, the search for truth is impeded when parties are permitted to fashion agreements which skew or shift a jury's conventional understanding of our adversarial system. If the jury never learns of the agreement, deception can not be avoided. On the other hand, if the jury is alerted to the agreement, juror confusion and/or disillusionment will result.

Petitioner has, in her briefs on the merits, demonstrated the specific juror deception and trial prejudice which directly resulted from the subject agreement and will not here reiterate the specific examples as said discussion would appear to be beyond the scope of this Court's order requesting supplemental

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briefs.

With regard to the arguments asserted in the supplemental amicus curiae brief filed by the Academy of Florida Trial Lawyers ("AFTL"), Petitioner has the following observations.

First, there is no requirement in Florida that attorneys have a duty to disclose, even without request, Mary Carter agreements. Thus, the suggestion that Imperial Elevator Co., Inc. v. Cohen[7] "apparently" imposes such a duty is inaccurate. Rather, the current case authorities only require production in response to a specific request by the settling defendant. E. g., Ward v. Ochoa, supra. Thus, the specific "message" currently being sent to Florida attorneys is that they are not legally required to voluntarily bring the agreements to the attention of the court and/or the settling defendant. This message conflicts with an attorney's ethical obligation to disclose all material facts to a tribunal when disclosure is necessary to avoid assisting a fraudulent act by a client. See, Rule 4-3.3, Rules of Professional Conduct. Moreover, as these agreements are often cast during trial, prior requests for production of same do not offer suitable protection.

Petitioner agrees that there should not need to be a rule that prohibits reprehensible conduct such as lying to juries. However, because Mary Carter agreements are currently permissible in Florida, such conduct can and does occur.

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[7] 311 So.2d 732 (Fla. 3d DCA 1975).

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Manifestly, judicial prohibition of these devices is necessary.

AFTL further maintains that the occurrence of such unethical conduct and whether it actually occurs via Mary Carter agreements are separate issues. This statement overlooks the problem at issue. If the existing case authority in Florida permits attorneys to draft and perform Mary Carter agreements and thus go down to the courthouse and tell venire panels that the case is "against" the confederated defendant and act as if he or she is pursuing a judgment against said defendant, the effect of this is that misleading conduct and concealment of material facts is permitted, rather than prohibited, by law.

AFTL next asserts that there is no record in this case to support a contention that these agreements cause lawyers to lie to a tribunal. While in this case a ruling was sought in the trial court on whether or not the Carsten/DeMario agreement was admissible, this Court can judicially notice that in a state where there is no mandatory, voluntary disclosure of such agreements, the plaintiff and settling defendant have every interest in concealing the existence of the agreement by expressly or implicitly acting as if conventional claims against the confederated defendant remain. Counsel for the confederated parties have a motivation to carefully choose their words so as to avoid making direct misrepresentations to the judge while at the same time concealing the existence of

the agreement.[8]

Petitioner will not individually address the case authorities cited by AFTL wherein courts have declined to invalidate Mary Carter and/or loan receipt agreements. Indeed, up until the current time, Florida courts have taken this position. See, Frier's, Inc. v. Seaboard Coastline Railroad Co., 355 So.2d 208 (Fla. 1st DCA 1978); but see, Ward v. Ochoa, 284 So.2d 385, 388 (Fla. 1973) (Ervin, J., dissenting). Rather, Petitioner would urge this Court to adopt the reasoning and analysis of those courts and legal commentators who have long realized the legal and ethical inappropriateness of these devices and prohibited their use. E.g., Elbaor v. Smith, 845 S.W. 2d 240 (Tex. 1992).

The fact that these settlement agreements do not fall within the technical definition of champerty, as it has evolved and now exists in Florida, does not change the fact that these devices have deleterious effects on attorney conduct, public confidence and the fundamental fairness of trial proceedings. Such problems go well beyond the need for admissibility of the agreements to show bias, and implicate the more serious issue of whether legal deception should be tolerated. It can not fairly be said that admissibility is a suitable safeguard when one of these agreements surfaces in the middle of a trial.

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[8] There are limits on permissible advocacy. Even the most zealous and effective trial attorneys are not permitted to assert positions which have no basis; nor are attorneys permitted to misrepresent or conceal material facts in court. See, Rules 4-3.1 and 4-3.3, Rules of Professional Conduct.

Admission of the agreement into evidence at such time only confirms to the jurors that they have been intentionally deceived by two of the parties who only a few days before had asked the jury to fairly decide their case. There is simply no legitimate reason to burden our system with these devices. If this Court accepts the premise that these agreements are not and never were intended to settle cases prior to trial, but are rather designed to rig trials which can not be settled, it must conclude that the agreements have no redeeming value.

Petitioner urges this Court to declare all such agreements void as against public policy.

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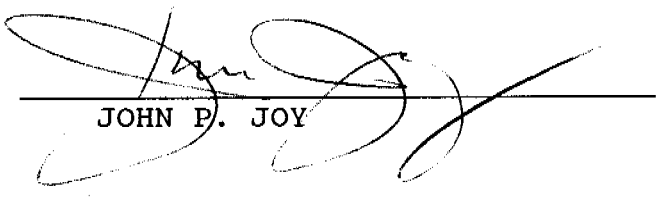
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished by mail this 10th day of May, 1993 to: The Honorable Sid J. White, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 Duval Street, Tallahassee, FL 32399-1927 and copies all counsel of record listed on the attached Service List.



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