SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 78,370

PATRICIA DOSDOURIAN,

Petitioner,

vs.

RICHARD PAUL CARSTEN,

Respondent.
_____/

# PETITIONER'S REPLY BRIEF ON THE MERITS

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## ARGUMENT

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

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On page six of his Brief, Respondent relies on Whited v. Barley, 506 So.2d 445 (Fla. 1st DCA), rev. den. 515 So.2d 230 (Fla. 1987), in support of her contention that the trial court did not err in refusing to dismiss the settling defendant as a party. Petitioner submits to this Court that Whited should no longer be considered as authority for the stated proposition for several reasons. First, Whited was decided prior to the enactment of § 768.81(3), Fla. Stat. (1987). That is, jurors are now permitted to adjudicate the comparative fault of non-party tortfeasors who have been dismissed pursuant to settlement agreements. Cf. Messmer v. Teachers Ins. Co., 588 So.2d 610 (Fla. 5th DCA 1991). Second, a careful review of the case authorities cited in Whited reveals that said authorities did not and do not support the result reached by the Whited court. That is, as authority for its conclusion, the Whited court cited Eller & Company, Inc. v. Morgan, 393 So.2d 580 (Fla. 1st DCA 1981) and Charles McArthur Dairies, Inc. v. Morgan, 449 So.2d 998 (Fla. 4th DCA 1984). Whited, supra. at p. 446-447. Eller was cited in Whited for the proposition that the First District Court of Appeal had previously approved a trial court's endorsement of an agreement by litigants to

withhold from the jury all knowledge concerning the release of one defendant, which agreement "expressly contemplated the trial participation of the settling third party defendant." Whited, supra. at p. 447. With all deference to the First District's analysis of Eller in the Whited opinion, it appears that the reason the settling defendant in Eller remained in the litigation was because there had been no release of an indemnity claim in favor of the non-settling defendant against the settling defendant. Eller, supra. at p. 582. Also, in Eller, all parties agreed that the release should not be made known to the jury. Id. Further, as to Charles McArthur Dairies, Inc. v. Morgan, Petitioner respectfully suggests to this Court that the dicta in said decision supports the proposition that dismissal of a co-defendant, who unconditionally agrees to pay Plaintiff a sum certain in exchange for a release and to remain in the action as a co-defendant, is appropriate. Charles McArthur Dairies, Inc., supra. at p. 999-1000.

Respondent asserts on page seven of his brief that the trial court did not err in refusing to dismiss Demario since her proportionate negligence would have been an issue in the case under § 768.81(3), Fla. Stat. (regardless of whether she was a party or dismissed). This argument simultaneously confuses and glosses over the real issue before this court. Assuming this record was not filled with juror deception, confusion and tactics by an "apparent" Co-Defendant (i.e.



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Demario) which prejudiced Petitioner's entitlement to a fair trial, Respondent's argument might have some merit. However, just because the settling Defendant's percentage of negligence remains an issue under § 768.81(3) does not mean that the non-settling Defendant's right to a fair jury trial should be swept under the carpet. The modification of the joint and several liability doctrine contained within § 768.81(3) Fla. Stat. (1987) represents a legislative effort to make an individual defendant's tort liability more equitable. This statute should not be applied, as it was by the trial court, to undermine that laudable goal.[1]

On page eight of his Brief, Respondent cites Rule 1.250(b), Fla.R.Civ.Pro. and Nationwide Mut. Fire Ins. Co. v. Vosburgh, 480 So.2d 140 (Fla. 4th DCA 1985) in support of his contention that the trial court did not err in denying Dosdourian's motion to dismiss Demario as a party defendant.

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[1] Assuming, arguendo, that the subject agreement between Carsten and Demario was in good faith under § 768.31(5)(b), Fla. Stat., Dosdourian's right to obtain contribution against Demario for the approximately $550,000.00 in economic damages assessed against Dosdourian (for which Demario remained jointly and severally liable under § 768.81) is foreclosed by the Carsten/Demario agreement. Indeed, based on the release there was no judgment entered against Demario (R. 1226). However, that same agreement enabled Carsten and Demario to attack Dosdourian as the target Defendant at trial (T. 858, 861, 886), impaired Dosdourian's comparative negligence defense (T. 883, 886), and also allowed Demario to artificially exalt Carsten's damage claim (by not opposing it) (T. 888). The fundamental unfairness of this "arrangement" is glaringly obvious. Quite simply, there was absolutely no rational reason to allow Demario to remain in the litigation as a "party", and every reason to have required Demario's dismissal pre-trial.

Respondent suggests that based on Nationwide and Rule 1.250(b), trial courts have the discretion to drop parties "on such terms as are just." Petitioner responds to this argument in two ways. First, although Nationwide supports the proposition that dismissal of a settling defendant who agrees to remain in the case as a party defendant is not required, there is no mention in the opinion as to whether or not the jury was apprised of the covenant not to enforce judgment.[2] Thus, it is not apparent from the Nationwide decision as to whether or not the trial court's refusal to dismiss the settling defendant was, in fact, on "just" terms. Clearly, in order to do justice and avoid deception, prejudice, etc., a trial judge must, upon proper motion, either dismiss a settling defendant or inform the jury of the settlement. In the case now before this Court, the trial judge did neither.

## 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.

Respondent attempts to convince this Court that there was nothing secret or deceptive about the Carsten/Demario agreement because "it was the Plaintiff who disclosed the agreement and filed the motion in limine for the trial court to determine

[2] Indeed, under both § 768.041 and § 46.015, Fla. Stat., there is no prohibition against admissibility of covenants not to enforce judgment. See discussion, infra.



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whether it should be admissible." (Respondent's Brief, p. 9). Again, Respondent's reasoning is misapplied to the issue under consideration. This Court, at the outset, ordained that the focus of the "secrecy" characteristic of Mary Carter type agreements is on the fact that the agreements are kept secret from the jury. In Ward v. Ochoa, 284 So.2d 385 (Fla. 1973) this Court noted:

> 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 defendants. Id. at 387.

The fact that the trial court and counsel for Petitioner were made aware of the agreement by Respondent is irrelevant and did nothing to apprise the jury of the existence of the agreement and/or Plaintiff's artificially created motivation to target Dosdourian as the prime Defendant in this case.

Respondent next focuses on the precise terms of the Carsten/Demario agreement and contends that under Ward v. Ochoa the agreement is inadmissible because Demario's ultimate payment was not contingent on the outcome of the trial. (Respondent's Brief, p. 10). However, at the same time, Respondent candidly admits that he cannot argue to this Court that all settlement agreements other than Mary Carter agreements should never be admitted into evidence. (Respondent's Brief, p. 11). Clearly, there are numerous and varied types of "settlement agreements" which are limited only

by the imagination and ingenuity of lawyers. However, for purposes of an admissibility analysis, the agreements can generally be placed into legally distinct categories. Although Respondent classified the subject agreement as a "release" in order to preclude its admission into evidence (T. 8-9), the agreement is actually a covenant not to enforce judgment. See, Nationwide Mut. Fire Ins. Co. v. Vosburgh, 480 So.2d 144 (Fla. 4th DCA 1985). As such, the agreement is not inadmissible under either § 768.041 or § 46.015, Fla. Stat. (1989). As drafted by the legislature, both of these statutes only preclude admission of releases, covenants not to sue and orders of dismissal pursuant to said agreements. Id. Thus, Petitioner submits to this Court that Respondent's refusal to permit dismissal of Demario (T. 26) (as a party would if they truly, unconditionally "released" a defendant), coupled with his contention that the subject agreement is not a Mary Carter agreement (T. 8), leaves Respondent in a position of having to admit that the subject agreement is something other than a release or a Mary Carter agreement. The only remaining rational classification is that the Carsten/Demario agreement is a covenant not to enforce judgment which is not inadmissible under § 768.041 or § 46.015, Fla. Stat. (1989). See also, Diaz v. Sears Roebuck & Co., 475 So.2d 932 (Fla. 3d DCA 1985) (trial court properly advised jury of terms of settlement whereby one defendant's liability was limited to $75,000.00, but the settling defendant remained as a defendant throughout trial).



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On page eleven of his Brief, Respondent suggests that settlement agreements should be admitted into evidence if the trial court, in its discretion, deems it necessary in order to prevent the deception this Court recognized in Ward v. Ochoa. Petitioner made a virtually identical argument on page 28 of her Initial Brief in support of the contention that the Ward test should not be inflexibly applied to the subject agreement to preclude admission. With this framework for analysis, Petitioner emphasizes that the failure to admit the subject agreement into evidence engendered the precise evil which this Court sought to avoid in Ward, to wit: the jury was prevented from knowing the Plaintiff's motivation in targeting Dosdourian as a Defendant (T. 861, 910-920) and was further precluded from assessing the credibility and motivation of Demario in not contesting Plaintiff's damage claim (T. 888) and supporting Plaintiff on Petitioner's attempt to establish the comparative negligence defense (T. 883, 886). Apparently, the trial court was not able to foresee how Petitioner would be prejudiced by the jury's ignorance of the agreement. However, the trial record in this case is replete with examples of how the jury was mislead by statements of counsel (T. 147, 228, 266) and instructions by the Court (T. 34, 175-176, 241, 926-927, 933-934) to believe that Demario was a "real" defendant in this case. This clearly created an appearance that Respondent had made an actual or real decision (i.e. based on the facts of the accident, rather than the settlement agreement) that Dosdourian



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was the target Defendant in the case. None of these statements, instructions or motivations were genuine.

Respondent's final argument on the admissibility question is that the salutary public interest in encouraging settlements will be undermined if the Demario/Carsten agreement is deemed admissible. (Respondent's Brief, p. 11-13). This argument overlooks the fact of life that all strategy decisions in litigation have beneficial and detrimental ramifications. That is, under both § 768.041 and § 46.015, Fla. Stat. (1989), if a Plaintiff truly releases (and thereby covenants not to sue or continue suit) against one defendant, the benefit is that the continuation of the litigation against the non-settling defendant(s) is essentially "financed" and the release/dismissal of the settling defendant is inadmissible. However, the concomitant detriment of such a decision is that the non-settling defendant can make an "empty chair" argument.[3] In the case now before the Court, the trial court allowed Respondent to have all the benefits of the decision to "settle" with Demario, and absolved him of all the detriments. That is, Carsten was placed in the enviable position of securing a guaranteed recovery from Demario, avoiding the empty chair defense, and having the jury believe that Carsten genuinely

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[3] Prior to the enactment of § 768.81(3), Fla. Stat., the empty chair argument was more risky in that it was an "all or nothing" proposition. Now, under § 768.81(3), the chair of the settling defendant is only empty to the extent of his or her proportionate responsibility for non-economic damages.

believed that Dosdourian was the target Defendant. At the same time, Carsten received credible support from his apparent adversary ("co-defendant" Demario) on the liability and damage issues. This arrangement was plainly unfair and prejudicial to Dosdourian.

The legislature has expressed its appreciation for this very problem and the courts have dealt with it in a fair fashion. That is, § 768.041 has been interpreted as prohibiting a non-settling defendant from informing the jury that a witness was a prior defendant in the action. See, Ellis v. Weisbrot, 550 So.2d 15 (Fla. 3d DCA 1989), rev. den., 562 So.2d 348 (Fla. 1990); see also, Black v. Montgomery Elevator Co., 581 So.2d 624 (Fla. 5th DCA 1991) (§ 768.041 prohibits defendants from informing the jury that a settlement has been made with the empty chair). The reasoning and logic of these decisions achieves a reasonable compromise between the public policy of encouraging settlements and treating parties fairly in litigation that continues after a partial settlement. Further, the logical corollary which flows from this reasoning is that if a plaintiff chooses a covenant not to enforce judgment which results in the settling defendant occupying a chair which would otherwise be empty, the jury should be aware of this so that a fair trial can occur. See, Diaz v. Sears Roebuck & Co., supra. The trial court's combined ruling on the dismissal/admissibility issues was incorrect and precluded a fair trial in this case.

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.

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Although Respondent on page thirteen of his Brief takes issue with whether or not Dosdourian was prejudiced by the failure to dismiss Demario or advise the jury of the settlement agreement, Respondent has not rebutted Petitioner's contention that the jury was deceived into believing that Demario was a real or conventional defendant in the case. The reason that this latter contention has not been rebutted by Respondent is because it cannot be disputed on this record. Based on the numerous statements and actions by counsel and the court, the jury had no choice but to believe that Demario was a real adversary of Carsten. This scenario laid a predicate for the occurrence of the specific evils which this Court recognized in Ward v. Ochoa. For example, in Ward, this Court noted that if the jury is not apprised of the existence of the settling defendant's agreement with the plaintiff, the settling defendant can make admissions against the remaining defendants. Ward, supra. at p. 387. This is exactly what happened in the trial below. The jury was lead to believe (and did believe) that Demario was a real adversary of Carsten. However, that same "adversary" made a statement before the jury which suggested that there was no issue as to Plaintiff's damage

claim (T. 233-234), did not at any time during the entire trial contest damages, and supported Carsten on Dosdourian's comparative negligence defense (T. 883-886). Although the jury did not realize it, Demario's counsel was effectively serving as co-counsel for the Plaintiff.

The jury was also deprived from knowing why it was that Plaintiff's counsel was clearly targeting Dosdourian as a Defendant in the case. It is easy for Respondent to say, as he does on page fifteen of his Brief, that there was no prejudice to Petitioner since the jury found her "only" 35% at fault and found the settling Defendant 55% at fault. However, not only does this conclusory contention ignore the comparative negligence defense[4], there were facts presented to the jury which supported a finding that Demario was substantially more responsible for the accident than Dosdourian[5].

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[4] The evidence established that Haverhill Road is straight and level in the area where the accident occurred and there was nothing to obstruct Carsten from observing southbound traffic on Haverhill road (T. 289). Although there was no suggestion at trial that Demario did not have her headlights on, the evidence established that Dosdourian's headlights were on (T. 436). Further, rather than crossing Haverhill Road at the Elmhurst Road intersection (which would have avoided the accident), Carsten crossed Haverhill Road at dusk (T. 320) during evening travel hour (T. 420) approximately 75-80 feet south of the Haverhill/Elmhurst intersection (T. 520). Accordingly, the trial court instructed the jury, in essence, that jaywalking was prohibited by traffic regulations and that jaywalking pedestrians had a duty to yield the right of way to all vehicles upon the roadway (T. 931). See, § 316.130 (10) and (11), Fla. Stat. (1989).

[5] The evidence established that Carsten and his dog left the west curb of Haverhill Road and proceeded east across Haverhill, crossing Demario's right hand lane of travel. (T. (continued...)

Respondent's statement on page fifteen of his Brief that there was nothing wrong with Demario's counsel arguing that Petitioner was 100% at fault "since any defendant in the same position, whether he had settled or not, would do likewise" is plainly wrong. Clearly, any "real" co-defendant would argue that a plaintiff who jaywalked at dusk during evening travel hour was at least partially responsible for the accident.

Finally, Respondent maintains on page fifteen of his brief that Petitioner has not demonstrated prejudice with regard to Carsten's damage claim. The record in this case clearly belies this contention. Petitioner's counsel actively cross examined several of Carsten's damage witnesses and elicited facts which established that Carsten: A) had shown improvement in his post-treatment recovery (T. 595); B) was able to drive and jog (T. 596); and C) had worked on a steady basis as a laborer at $8.00 per hour in the six month period preceding trial (T. 607, 800). Petitioner's counsel argued these facts to the jury in closing argument (T. 893-896). However, Petitioner's efforts in this regard were stifled by the fact that Demario's counsel: A) told

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[5] (...continued)
437, 466). There was also uncontradicted evidence that Carsten stopped in between the right and left southbound lanes of traffic on Haverhill Road (T. 434). Demario did not observe any of this (T. 420, 421, 429). Rather, the first time Demario observed Carsten was when his body was on her vehicle (T. 420). Although Dosdourian was able to swerve her vehicle to the left (T. 436) and avoid striking Carsten (T. 313, 440, 441), there was no evidence of evasive maneuvers by Demario (T. 294, 414-430). The left front of Demario's vehicle struck and injured Carsten (T. 294, 295, 517, 557). Further, Demario went through the intersection after Dosdourian (T. 419).

the jury that the "only" issue in the case was liability (T. 233-234); B) did not cross examine any of Carsten's damage witnesses (T. 580, 594, 605, 619, 651, 659, 671, 692, 699, 764, 799); and C) did not make any effort in closing argument to contest Carsten's damage claim (T. 880-888). The fact that one of Respondent's purported adversaries was not opposing his damage claim must have impressed the jury.[6]

Of course, the reason that Demario did not in any way contest damages was because, in light of the settlement agreement, she had no reason to do so (and/or had privately agreed not to do so). The jury was prevented from knowing this material evidence. As a result, Petitioner's ability to effectively contest the amount of money which was fairly awardable for loss of future earnings and intangible damages was severely compromised.

In cases involving Mary Carter type agreements, prejudice to the non-settling defendant is sometimes difficult to identify with precision. See, Dosdourian v. Carsten, 580 So.2d 869, 872 (Fla. 4th DCA 1991). However, Petitioner submits to this Court that reversible error has been shown because the poisonous influence of the undisclosed settlement agreement infected the entire trial, from voir dire to jury instructions.

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[6] Indeed, in rebuttal closing Carsten's counsel argued that one of the reasons why Carsten had proven his entitlement to damages for significant and permanent injury was because counsel for Demario had not even argued to the jury what he thought would be fair and reasonable damages (T. 921).

Cf., City of Miami v. Veargis, 311 So.2d 693 (Fla. 3d DCA 1975). When trial rulings effectively impair a litigant's fundamental right to a fair and impartial jury trial, any and all doubts on the reversible error question should in equity be resolved in favor of the aggrieved party.

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

Respondent maintains on page sixteen of his Brief that there should be no remand for a hearing to determine whether the Carsten/Demario settlement should be setoff from the subject judgment because the claim for this setoff is not the type of fundamental error which can be raised for the first time on appeal. In response, Petitioner contends that the record in this case shows a $100,000.00 settlement with a joint tortfeasor (R. 1081) which was not deducted from the subject judgment (R. 1226-1227). Thus, as this record arguably shows that the trial court authorized an award of damages which was not authorized by statute, fundamental error has been demonstrated. Cf., Keyes Company v. Sens, 382 So.2d 1273 (Fla. 3d DCA 1980); see also, § 768.31(5)(a), Fla. Stat. (1989).

On the merits of this issue, as the subject release does not on its face show whether the $100,000.00 payment was intended to apply towards economic or non-economic damages,

Respondent cannot retroactively tailor the applicability of the payment to his benefit. Cf., Dionese v. City of West Palm Beach, 500 So.2d 1347 (Fla. 1987).

Finally, Respondent cites Lapidus v. Citizen's Federal Savings & Loan Association, 389 So.2d 1057 (Fla. 3d DCA 1980) and Insurance Company of North America v. Edmondson, 354 So.2d 887 (Fla. 1st DCA 1977) on page seventeen of his Brief in support of his contention that there is no statutory right to a setoff where a jury can apportion damages for which each Defendant is solely responsible. Petitioner suggests to this Honorable Court that these cases have no application to the issue under consideration. That is, Defendants Demario and Dosdourian were clearly charged with acts of negligence which coincided to produce the identical damage to Plaintiff (R. 958). In this instance, Dosdourian is only contending that she should be entitled to a hearing to assert and prove that the $100,000.00 payment was intended to compensate Respondent for damages for which Demario was jointly and severally liable under § 768.81(3), Fla. Stat. (1989) (i.e. economic damages).

## CONCLUSION

For the foregoing reasons, Petitioner, Patricia Dosdourian, respectfully requests that the final judgment below be reversed and this cause be remanded for a new trial.



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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and seven copies of the Petitioner's Initial Brief was furnished by mail this 5th day of March, 1992 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 mailed to all counsel of record listed on the attached service list.

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