D.A. 12-9-92 047

FILED
SID J. WHITE
APR 5 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 78,370

PATRICIA DOSDOURIAN,

Petitioner,

vs.

RICHARD PAUL CARSTEN,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S SUPPLEMENTAL BRIEF

PARIENTE & SILBER, P.A.
By: LOUIS M. SILBER
Attorneys for Respondent
400 Australian Ave., S., #855
W. Palm Beach, Florida 33401
(407) 655-6640
and
JANE KREUSLER-WALSH
Suite 503 Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(407) 659-5455

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This brief is submitted in response to this court's Order of February 17, 1993 which requested supplemental briefs on the continuing viability of Mary Carter Agreements.

SUMMARY OF THE ARGUMENT

This Court need not decide whether Mary Carter Agreements should remain viable because the agreement in this case was not a Mary Carter Agreement. However, the law regarding Mary Carter Agreements should not change. These agreements, where one defendant profits from the increased liability of another defendant, should be admitted into evidence. On the other hand, settlement agreements where a defendant pays a fixed amount regardless of the outcome against the other defendant should be handled on a case by case basis by the trial court. The trial court should determine whether the agreements should be admissible or what if any procedural safeguards are necessary to protect the interests of all the parties.

Settlement agreements such as the one in present case, should not be declared invalid as against public policy because of the changes of the law brought about by § 768.81(3) Florida Statutes. This Statute requires that all defendants, both settling and non-settling be listed on the verdict form so the jury can determine their proportionate share of liability. Since it is now

necessary to determine the proportionate share of liability of settling defendants, they should be allowed to participate in the trial where that is part of the settlement agreement. Any procedural safegaurds that might be necessary, can be determined by the trial court.

Invalidating the type of settlement agreement that was entered into in this case will discourage settlements and prolong litigation. Moreover, when a settlement agreement is disclosed to all of the parties and to the trial court, there is no deception or fraud.

Finally, in the present case, there was no prejudice as reflected by the jury verdict which found the settling defendant primarily liable. Thus, regardless of how this court answers the certified question or revisits Mary Carter Agreements, the judgment in the present case should be affirmed.

ARGUMENT

I. MARY CARTER AGREEMENTS SHOULD BE ADMISSIBLE

The question of whether Mary Carter Agreements remain viable is not an issue that this court needs to address because the agreement here was not a Mary Carter Agreement. Unless this court is going to redefine Mary Carter Agreements and change the case law, the issue of Mary Carter Agreements as applied to this case is not applicable. This court should avoid ruling on such an important policy question when not directly confronted with the issue.

Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973), defined the Mary Carter Agreement as follows:

> "A 'Mary Carter Agreement,' however, is basically a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants ... if the agreement shows that the signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants, such agreement should be admitted into evidence at trial upon the request of any other defendants who may stand to lose as a result of such agreement."

In the present case, there was no agreement that the settling defendants liability would be reduced by increasing the liability of the non-settling defendant. Thus, the most essential element of a Mary Carter Agreement is missing. The agreement in the

present case was a settlement with the co-defendant for $100,000, the full policy limits, to be paid to the plaintiff regardless of the jury's finding as to the non-settling defendant. The Fourth District Court of Appeal agreed that this agreement was not a Mary Carter Agreement.

In any event, Mary Carter Agreements should be admitted into evidence. However, settlement agreements when a defendant remains in the courtroom should be handled on a case by case basis. The rational for the admission of a Mary Carter Agreement is similar to allowing a witness to be impeached by a showing of bias. If a witness could profit from his or her testimony then the jury has a right to know of this. See Florida Statute § 90.608(2) (1992).

On the other hand, when there is a fixed settlement, and one defendant's liability is not affected by what the jury determines as to the other defendant, then the trial court should be given discretion as to whether to admit the agreement, nullify the agreement, or determine what procedural safeguards are necessary to insure a fair trial for all of the defendants. This would mean that all agreements between the parties, whether they are a Mary Carter Agreements or fixed settlement agreements, should be disclosed so the trial court can determine what, if any, procedural safeguards are necessary.

In the present case, it was respondent/plaintiff who disclosed the agreement to both the non-settling defendant and the court. The respondent/plaintiff moved in Limine prior to trial to preclude admission under Section 768.041(3) because this was a

settlement agreement and not a Mary Carter Agreement. The trial court, after a full hearing, ruled that the settlement agreement was inadmissible unless the settling defendant testified, at which time the court would allow the agreement to be used for impeachment purposes.

A case by case analysis of these types of settlements, giving the trial court the discretion similar to other evidentiary matters, is the most reasonable approach. As this court is aware, every case of multiple defendants presents different factual possibilities involving the number of parties, the relationship of parties, liability and vicarious liability issues, as well as indemnity and contribution. Even the timing of an agreement, whether it is made prior to trial, during the taking of evidence, prior to closing arguments or during deliberations, might also affect a court's decision as to the necessity and type of procedural safeguards.

This case by case approach was adopted by the Court of Appeals of Arizona in Sequoia Mfg. Co., Inc. v. Halec Construction Co., 570 P. 2d 782 (Ariz. 1977). Sequoia, involved an agreement with a right of repayment. In determining not to admit such an agreement into evidence, the Court of Appeals of Arizona stated as follows:

> "In this in-between situation, we believe a trial court is in a unique position to view the factors surrounding such an agreement and to decide, when requested, whether such an agreement should be admitted. The record in this case reflects the wisdom of such a holding. The trial court was aware of all the adverse

> possibilities inherent in the existence of the agreement and was fully prepared to impose sanctions, if necessary, to prevent injustice, up to and including admitting the agreement into evidence. After observing the conduct of all counsel, their demeanor, their witnesses, and the overall atmosphere of the courtroom, the trial judge determined it unnecessary in this case to disclose the agreement to the jury. In an instance such as this, we invest the trial court with considerable discretion. We find no abuse of discretion."

In Florida, there is already a procedure where a non-settling defendant can challenge the good faith settlement of a co-defendant. See Florida Statute §768.31(5) (1990). When this occurs, the court holds an evidentiary hearing and establishes whether the settlement was made in good faith. The court considers, among other things, the amount of the settlement, the liability of the parties, the intent and motive of the settlement and the fairness of the settlement as it relates to the non-settling defendant. See e.g. Sobik's Sandwich Shops, Inc. v. Davis, 371 So 2d 709 (Fla. 4th DCA 1979). This same discretion should be given to the trial court on a case by case basis as to whether the agreement should be admitted into evidence or whether any other safeguards shall suffice.

II SETTLEMENT AGREEMENTS WITH A CO-DEFENDANT WHO AGREES TO REMAIN A PARTICIPANT IN THE CASE SHOULD NOT BE DECLARED INVALID AS AGAINST PUBLIC POLICY

If the court disallows all settlements solely because the settling defendant remains in the litigation, then it presumably will

declare invalid "high-low" settlements of co-defendants such as the one in Weddle v. Voorhis, 586 So. 2d 494 (Fla. 1st DCA 1991) and fixed amount settlements where the jury still must apportion negligence between the parties such as in Whited v. Barley, 506 So. 2d 445 (Fla. 1st DCA 1987) rev. denied, 515 So. 2d 230 (Fla. 1987); and Nationwide Mutual Fire Insurance Company v. Vosburgh, 480 So. 2d 140 (Fla. 4th DCA 1985).

In Whited v. Barley, supra, the First District Court of Appeal held that a settlement of a co-defendant who remained in the trial was proper when the settling defendant's negligence remained an issue. Similarly, in the present case, the proportionate share of the settling defendant's negligence had to be determined by the jury and her name would have remained on the verdict form. This is because Section 768.81 Florida Statutes provides in relevant part:

> (3) Apportionment of damages. In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Since this case went to trial there is a dispute over the definition of "party" as it applies to Section 768.81(3) Florida Statutes. Compare Messmer v. Teacher's Insurance Company, 588 So. 2d 610 (Fla. 5th DCA 1991), with Fabre v. Marin, 597 So. 2d 883 (Fla. 3d

DCA 1992). Until that dispute is resolved, it was reasonable for respondent to assume that the definition of "party" in Section 768.81 should apply to those defendants that the respondent chose to sue. Thus, it was necessary for the jury to determine the settling defendant's proportionate share of negligence. This meant that the settling defendant would be listed on the verdict form. That is why the settling defendant should remain a participant in the trial, if the defendant agrees to this as part of the settlement.

The petitioner's objections and accusations of fraud and deception are primarily based on the fact that she would be deprived of the "empty chair" argument or deprived of a hostile co-defendant who could join forces with the defendant against the plaintiff. However, defendants have no right to an "empty chair" defense or a "comrade in arms." The non-settling defendant is entitled to have the jury determine her proportionate share of negligence with that of the settling defendant. If the settling defendant was not in the courtroom, the jury would still have to determine her proportionate share of negligence. Further, the policy of this state, as articulated in Section 768.041, Florida Statutes (1990), is that a release or covenant not to sue shall not be made known to a jury. There should be no difference when the settling defendant remains in the courtroom in order to determine its proportionate share of negligence.

What the petitioner seeks by declaring all of these agreements invalid is, not only to avail herself of the empty chair argument, but to have the jury determine proportionate share of

negligence against all the defendants, by including the settling and non-settling defendants on the verdict form with instructions from the trial court to determine the negligence of all the parties whether they were in the courtroom or not. If fairness is what this court wants to achieve, then if the settling party is to be included on the verdict form, they should be allowed to participate in the trial if they so agree. This court must consider the ramifications of Section 768.81 before it decides whether to nullify settlement agreements of the type that was entered into here.

III TO INVALIDATE THESE AGREEMENTS WOULD DISCOURAGE SETTLEMENTS AND PROLONG LITIGATION.

The most important reason why this court should not invalidate agreements such as the one entered into in the present case is because such a holding would realistically eliminate any chance of settlements in cases involving multiple defendants, where some defendants will not settle. The public policy of encouraging settlements is firmly established in our jurisprudence. See Robbie v. City of Miami, 469 So. 2d 1384 (Fla. 1985). The defendant's argument that settlements with co-defendants do not promote settlements is absurd. There is absolutely no question that if the court rules that these types of settlements are invalid, and further interprets Section 768.81 to require that all parties be listed on the verdict form whether they settled or not, then there would be little incentive, if any, to settle with a co-defendant under these circumstances. The plaintiff would not only have the empty chair to

contend with, but, by including the settling defendant on the verdict form with instructions from the court to determine proportionate share of liability, would play right into the hands of the non-settling defendant. The effect of this would be to avoid settlement. On the other hand, if a non-settling defendant recognizes that they would not have the empty chair argument or have a friendly defendant to gang up with against the plaintiff, then the considerations of settlement would certainly be greater and there would be less litigation.

IV THERE WAS NO DECEPTION IN THE PRESENT CASE.

The petitioner states that Mary Carter Agreements cause jurors to be deliberately and artificially deceived about the litigants' motivations and interests and that the agreements are "tantamount to fraud on the court and jury which seriously erode public confidence in the judicial system and the bar." (Petitioner's supplemental brief page one).

Petitioner contends that these type of agreements corrupt the administration of justice because an impression is given to the jury that both defendants are adverse to the plaintiff when they are not. Certainly, there are times when defendants, even without agreements, fight among themselves on negligence and damages relating to an innocent plaintiff. There are many instances when the courtroom battle is really between adverse defendants attempting to diminish or eliminate their responsibility for the damages of an

innocent plaintiff. Further, because one defendant plays more of an active role than another defendant, or that the main differences are between two defendants does not make the trial less adversarial. In other words, as long as there are two parties whose interests are antagonistic to one another, the likelihood that the truth will emerge is not diminished.

In the present case, there was no deception. The respondent disclosed the agreement to petitioner weeks before trial, and in fact, moved in limine so petitioner and the court would be fully aware of the agreement.

As stated in Hackman v. Dandamudi 733 S.W. 2d 452 (Mo. App. 1986):

> "There is a strong public policy against allowing secret agreements to work a fraud on either the non-settling defendant(s), the jury or the trial court. However, there are also strong public policy considerations in favor of allowing plaintiffs to control their own cases and settle with defendants as they chose. This court finds no reason that these policies cannot co-exist, even in the presence of a Mary Carter Agreement, so long as the other defendant is not deceived."

V THERE WAS NO PREJUDICE IN THE PRESENT CASE

Finally, regardless of how this court views Mary Carter Agreements, in the present case, there was no prejudice. As the jury verdict demonstrated, there was a much greater finding of liability against the settling defendant than the non-settling defendant. The Fourth District Court of Appeal candidly admitted that it could not

find any prejudice. See Dosdourian v. Carsten, 580 So. 2d 869 (Fla. 4th DCA 1991). The jury verdict refutes any claim of prejudice. Therefore, regardless of how this court answers the certified question, the judgment in the present case should be affirmed.

PARIENTE & SILBER, P.A.
400 Australian Ave., S., #855
W. Palm Beach, Florida 33401
(407) 655-6640

By _____
LOUIS M. SILBER
Florida Bar No. 176031

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 2nd day of April, 1993.

William E. Hoey, Esq.
VERNIS & BOWLING, P.A.
204 River Plaza
900 South U.S. Highway 1
Jupiter, Florida 33477

Elliot R. Brooks, Esq.
350 Australian Avenue South
Suite 1400
West Palm Beach, Florida 33401

John VanLaningham, Esq.
STEEL, HECTOR & DAVIS
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, Florida 33401-4307

Marguerite H. Davis, Esq.
KATZ, KUTTER, HAIGLER, ALDERMAN, ET AL.
215 S. Monroe Street
Suite 400
Tallahassee, Florida 32301

John P. Joy
WALTON LANTAFF SCHROEDER & CARSON
One Biscayne Tower
25th Floor
2 South Biscayne Boulevard
Miami, Florida 33131

Clifford M. Miller
601 21st Street
Barnett Bank Building
Suite 408
Vero Beach, Florida 32960