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PHILIP J. VON KAHLE, as Conservator of P&S Associates, General Partnership and S&P Associates, General Partnership	IN THE CIRCUIT COURT FOR THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA
Plaintiffs,	Case No. 12-034123 (07)
vs.	Complex Litigation Unit
MICHAEL D. SULLIVAN, et al.,	
Defendants. /	

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT FRANK AVELLINO'S MOTION TO COMPEL PLAINTIFF TO PRODUCE DOCUMENTS IN RESPONSE TO HIS SECOND REQUEST FOR PRODUCTION DATED APRIL 29, 2014

Plaintiffs, Philip J. Von Kahle as Conservator (the "Conservator") of P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership ("S&P", together with P&S, the "Partnerships", with the Conservator, the "Plaintiffs"), by and through their undersigned attorneys, file this hereby this supplemental brief in support of their Response and Memoranda in Opposition to *Defendant Frank Avellino's ("Defendant") Motion to Compel Plaintiff to Produce Documents in Response to His Second Request for Production Dated April 29, 2014* (the "Motion"). In support thereof, Plaintiffs state as follows:

SUMMARY OF BRIEF AND ARGUMENT

This supplemental brief addresses an issue raised by the Court at oral argument that was not raised by the defendant's Motion. On August 12, 2014, the Court conducted a hearing (the "Hearing") on, among other things, the Motion that was filed by the Defendant. The Motion seeks, among other things, the production of confidential settlement agreements entered into by the Plaintiffs and the former co-defendants in this instant action (the "Settlements").

At the Hearing he Court inquired as to whether the non-monetary terms of the Settlements are discoverable and directed the parties to submit supplemental briefs on the issue.

The non-monetary terms of the Settlements are not discoverable because they are irrelevant to the claims and defenses in this matter. Further, the Settlements do not constitute prohibited "Mary Carter" agreements which, under Florida law, are generally discoverable.

The Settlement Agreements, including any Non-Monetary Terms, are Irrelevant and Not Subject to Discovery

In this instance, the Settlements are irrelevant to issues of liability and would only become relevant, if at all, for those claims where the defense of set-off may apply. *See Centex Homes v. Mr. Stucco, Inc.*, 807-CV-365-T-33AEP, 2009 WL 2948476 (M.D. Fla. Sept. 14, 2009). Like *Centex* the issue of set-off is not yet ripe and the settlement agreements with the co-defendants, including their monetary terms are not discoverable. *Id.* ("At the present stage of the case, the issue of set-off is not relevant, and thus, the Defendant's requested documents are not discoverable at this time."); *see also Wal-Mart Stores, Inc. v. Strachan*, 82 So. 3d 1052, 1054 (Fla. 4th Dist. Ct. App. 2011) ("The settlement information is not admissible or likely to lead to the discovery of admissible information.")

The Settlement Agreements are Not Discoverable Mary Carter Agreements

Mary Carter agreements which are defined as undisclosed settlements in which a co-defendant is required to remain in the litigation to defend themselves in exchange for releasing or limiting their liability are void and discoverable in Florida. *See Dosdourian v. Carsten*, 624 So. 2d 241, 243 (Fla. 1993). In this case the Settlement agreements do not constitute Mary Carter agreements as the settling defendants have been dismissed from this instant action and the fact of settlement is known by order of this Court. Therefore, the Defendant's claim that he needs the documents for potential witness bias is without merit. Accordingly, the terms of the Settlements are not relevant on the basis that their terms may include an impermissible Mary Carter agreement like terms.

CONCLUSION

The Settlements are irrelevant to the claims and defenses in this action. Florida's public policy which encourages settlement would be undermined if a party is able to simply compel discovery of irrelevant confidential settlement agreements. Further, the Defendant's purported concerns regarding the former defendants, including potential bias, do not require production as the Settlements do not constitute Mary Carter agreements. Accordingly, the Court should deny the motion to compel.

WHEREFORE the Plaintiffs request that this Court enter an order denying the Motion, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: August 19, 2014

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Exhibits

Cases Cited in Plaintiffs' Supplemental Brief

2009 WL 2948476
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, M.D. Florida, Tampa Division.

CENTEX HOMES, Plaintiff,
v.
MR. STUCCO, INC.; Universal Lumber Specialties, Inc. d/b/a Universal Window Specialties d/b/a Universal Window Solutions, LLC.; and Wink Stucco, Inc., et al., Defendants.

No. 8:07–CV–365–T–33AEP. | Sept. 14, 2009.

Attorneys and Law Firms

Adam M. Wolfe, Elizabeth Ann Petterson, Richard Thomas Petitt, Bricklemyer, Smolker & Bolves, PA, Tampa, FL, for Plaintiff.

Opinion

ORDER

ANTHONY E. PORCELLI, United States Magistrate Judge.

***1** THIS MATTER is before the court on Defendant, Wink Stucco, Inc.'s ("Defendant") Renewed Motion to Compel Discovery From Plaintiff (Doc. No. 167) ("Motion to Compel"). The Defendant seeks an Order compelling Centex Homes ("Plaintiff") to produce documents responsive to its Request for Production of Documents propounded on May 7, 2009, which specifically requested "[a]ny and all settlement agreements and related documents to the settlement between CENTEX and UNIVERSAL LUMBER SPECIALITIES, INC., relating to this current litigation, Case No. 8:07–cv–00365–VCM–TBM."

The Defendant previously sought the identical relief from the court in its original Motion to Compel Discovery From Plaintiff (Doc. No. 161). In the original motion, the Defendant argued that the requested settlement documents between the Plaintiff and Universal Lumber Specialties, Inc., d/b/a Universal Window Specialties d/b/a Universal Window Solutions, LLC, ("Universal"), a Co–Defendant in this action, were necessary for the Defendant "to defend the claims asserted against it and [it] w[ould] be prejudiced in its pursuit if the information and documentation ... [was] not produced."(Doc. 161 at 2, ¶ 6). The court issued an Order (Doc. No. 165) denying without prejudice the Defendant's original motion finding that "aside from its boiler-plate urging that it is necessary to defend the claims against it, Defendant simply fails to make an adequate showing at present that it is entitled to discover the settlement agreement between Centex and Universal or any documents related to the same."

The Defendant now asserts in its renewed motion that the requested documents are relevant to determine a potential set-off to which the Defendant would legally be entitled. The Defendant acknowledges that the requested documents would not be relevant to prove liability at trial, but claims that if a verdict was entered against the Defendant, it would be entitled to a setoff from the amount the Plaintiff recovered from Universal.

In support of its position that it would be entitled to a set-off amount, the Defendant cites to *Schadel v. Iowa Interstate R. R., Ltd.,* 381 F.3d 671 (7th Cir.2004), an action brought under the Federal Employers Liability Act that applied federal substantive law; *Lee v. Adrales,* 778 F.Supp. 904 (W.D.Vir.1991), a medical malpractice action that applied Virginia state substantive law; and to Florida Statute § 46.015(2), which states that "if any person shows the court that the plaintiff, or his other legal representative, has delivered a written release or covenant not to sue any person in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment."In turn, the Plaintiff asserts that under the appropriate applicable procedural and substantive law, the Defendant would not be legally entitled to a set-off.

***2** Rule 26(b)(1) provides in pertinent part that "[f]or good cause, the court may order discovery of any matter *relevant to the subject matter involved in the action."*Fed.R.Civ.P. 26(b) (1) (emphasis added). At this stage in the case the Defendant has not filed an Answer, and thus has not alleged a set-off as an affirmative defense. The Defendant notes that it has not filed an Answer to the Third Amended Complaint because the Defendant has before the court a pending Motion to Dismiss pursuant to Fed. R. Civ. Pr. 12(b)(6). However, the Defendant claims that if the court denies the pending Motion to Dismiss, the Defendant fully intends to raise a

set-off as an affirmative defense.

The court finds that if the Defendant is legally entitled to a set-off in this case, then the Defendant would be entitled to some of the requested relief in its Motion to Compel (Doc. No. 167).[1] However, the issue of whether the Defendant would be entitled to a set-off is not ripe for resolution based upon the lack of an Answer by the Defendant alleging set-off as an affirmative defense. At the present stage of the case, the issue of set-off is not relevant, and thus, the Defendant's requested documents are not discoverable at this time.

Upon consideration, Defendant, Wink Stucco, Inc.'s Motion to Compel Discovery From Plaintiff (Doc. 167) is **DENIED without prejudice.**

Done and Ordered.

Footnotes

1 The court makes no finding at this time as to whether the Defendant would be entitled to a set-off in this case. However, the court notes that it is unpersuaded by the Defendant's authorities cited in its Motion to Compel (Doc. No. 167).

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82 So.3d 1052
District Court of Appeal of Florida,
Fourth District.

WAL–MART STORES, INC., Petitioner,
v.
Nicolette STRACHAN, Continental Tire The Americas, LLC, Ford Motor Company, and Al Packer Ford West, Inc., Respondents.

No. 4D11–2539. | Oct. 12, 2011.

Synopsis

Background: Motorists brought action against seller of tire, manufacturer of tire, seller of automobile, and manufacturer of automobile, seeking damages arising out of an automobile accident allegedly caused by a failure of the tire. After the other three defendants entered into confidential settlements with motorists, the Fifteenth Judicial Circuit Court, Palm Beach County, David F. Crow, J., denied tire seller's motion for discovery of the settlement amounts. Tire seller filed petition for writ of certiorari.

Holdings: The District Court of Appeal held that:

[1] tire seller was not entitled to discovery of the confidential settlement amounts, and

[2] tire seller had an adequate remedy on appeal.

Petition dismissed.

West Headnotes (3)

[1] **Certiorari**
Particular proceedings in civil actions

The denial of discovery is generally not reviewable by certiorari.

Cases that cite this headnote

[2] **Pretrial Procedure**
Particular Subjects of Disclosure

Seller of tire, which was sued by motorists for damages arising out of an automobile accident allegedly caused by failure of the tire, was not entitled to discovery of the confidential settlement amounts paid by manufacturer of the tire, manufacturer of the automobile, and seller of the automobile, despite contention that the information was necessary to support tire seller's set-off defense; settlement information was not admissible or likely to lead to the discovery of admissible information, given the abolishment of joint and several liability for economic damages, and tire seller's ability to ask the finder of fact to determine its percentage of fault. West's F.S.A. § 768.81.

Cases that cite this headnote

[3] **Certiorari**
Existence of Remedy by Appeal or Writ of Error

Seller of tire that was sued by motorists for damages arising out of an automobile accident allegedly caused by failure of the tire had an adequate remedy on appeal for trial court's denial of its motion seeking discovery of the settlement amounts paid by the manufacturer of the tire, the seller of the automobile, and the manufacturer of the automobile and, thus, was not entitled to certiorari review of the order denying the motion; if tire seller were to be determined on appeal to be entitled to a set-off, matter could be remanded for discovery of the settlement amounts and deduction of those amounts from the final judgment.

Cases that cite this headnote

Attorneys and Law Firms

***1053** Timothy D. Kenison and David Tarlow of Quintairos, Prieto, Wood & Boyer, P.A., Fort Lauderdale, for petitioner.

No appearance for respondents.

Opinion

PER CURIAM.

Wal–Mart Stores, Inc. petitions for a writ of certiorari, seeking review of an order denying discovery of the settlement amounts the plaintiffs received from other co-defendants.

Plaintiffs were involved in an auto accident that was allegedly caused by tire failure. They sued the car manufacturer, the tire manufacturer, the car dealer, and Wal–Mart (the tire dealer/installer/servicer). Following mediation, three of the defendants entered separate confidential settlement agreements. Wal–Mart is the only remaining defendant.

In answer to the complaint, Wal–Mart raised an affirmative defense of set-off. In support of this defense, Wal–Mart requested the amounts of each settlement agreement, and the car manufacturer objected. Following hearings and supplemental memoranda, the trial court denied Wal–Mart's motion to compel discovery. The court agreed with the tire manufacturer that the 2006 amendments to section 768.81, Florida Statutes, which abolished joint and several liability for economic damages, effectively abolished the right of a remaining defendant to seek a set-off. The court concluded that, following the abolition of joint and several liability, the settlement amounts are no longer relevant.

***1054** [1] The denial of discovery is generally not reviewable by certiorari. *Power Plant Entm't., LLC v. Trump Hotels & Casino Resorts Dev. Co.,* 958 So.2d 565, 567 (Fla. 4th DCA 2007); *see also Romanos v. Caldwell,* 980 So.2d 1091, 1092 (Fla. 4th DCA 2008). In this petition, however, Wal–Mart asserts that certiorari is the appropriate remedy because it will suffer material irreparable harm without any alternative evidence to prove its entitlement to a set-off at trial. Wal–Mart contends that the trial court's order denying the discovery request effectively abrogates its set-off defense and deprives it of any practical way to determine after a judgment how the requested discovery would have affected the outcome of the proceedings.

In arguing that it is irreparably harmed, Wal–Mart relies on *Anderson v. Vander Meiden ex rel. Duggan,* 56 So.3d 830 (Fla. 2d DCA 2011). In *Anderson,* the beneficiary of trusts brought separate complaints against the defendant and other nonparties alleging mishandling of the trusts. After settling claims against nonparties, the defendant sought discovery of the settlement documents, asserting that any settlement amount between the nonparties and beneficiary would act as a set-off against damages which defendant might be ordered to pay. The trial court denied the discovery request, whereupon the defendant sought relief by a petition for writ of certiorari. The Second District granted the petition, reasoning that the defendant needed the settlement documents to prove whether the claims the beneficiary asserted against the nonparties arose out of the same injury as the claims made against the defendant. Without those documents, the court concluded, the defendant's affirmative defense of set-off would be eviscerated and he would be unable to meet his burden of proof required by Florida Statutes sections 46.015(2) and 768.041(2). *Id.* at 832.[1]

[2] Unlike the defendant in *Anderson,* Wal–Mart is seeking discovery of the settlement amounts, not discovery to ascertain whether the settled claims arose from the same injury. Here, it is undisputed that all of the claims in this case relate to the auto accident and arise from the same injuries. Wal–Mart cannot show that discovery of the settlement amounts is necessary to determine entitlement to set-off; it has not shown that the denial of this discovery will eviscerate its defense. At trial, Wal–Mart can ask the fact-finder to determine its percentage of fault. It does not need the settlement information to show that the claims arise from the same injury. The settlement information is not admissible or likely to lead to the discovery of admissible information.

[3] Even if the trial court erred in concluding that Wal–Mart is not entitled to a set-off as a matter of law, Wal–Mart has an adequate remedy on appeal. The alleged error is based on a question of law, not unknown facts as in *Anderson.* If on appeal Wal–Mart is determined to be entitled to a set-off, the case can be remanded for the trial court to allow discovery of the settlement amounts and to set-off these amounts from the final judgment.

Because Wal–Mart has not shown that the discovery order departed from the essential requirements of law and caused Wal–Mart any irreparable harm that cannot be remedied on appeal, we dismiss the petition. *See Bared & Co., Inc. v.* ***1055** *McGuire,* 670 So.2d 153 (Fla. 4th DCA 1996).

Petition Dismissed.

GROSS, TAYLOR and CONNER, JJ., concur.

Parallel Citations

36 Fla. L. Weekly D2262

Footnotes

1 *Anderson* does not address section 768.81 and the 2006 amendments. Wal–Mart also relies on *W & W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc.,* 35 So.3d 79, 83 (Fla. 4th DCA 2010), which does not address section 768.81. Our records reflect the action in *W & W Lumber* arose prior to 2006 and would not have been affected by the statutory amendments.

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624 So.2d 241
Supreme Court of Florida.

Patricia DOSDOURIAN, Petitioner,
v.
Richard Paul CARSTEN, et al., Respondents.

No. 78370. | Aug. 26, 1993.

Injured party filed personal injury action against drivers who allegedly caused his injuries. Injured party settled with one of the drivers in agreement providing that settling defendant's obligation was fixed but settling defendant was required to continue in suit, and injured party sought to exclude evidence of the settlement. The Circuit Court, Palm Beach County, Edward A. Garrison, J., ruled that settlement need not be disclosed to jury and entered judgment on jury verdict, ordering nonsettling driver to pay 35% of damages, and nonsettling driver appealed. The District Court of Appeal, Anstead, J., 580 So.2d 869, affirmed and certified to the Supreme Court the question of whether nonsettling defendant was entitled to have jury informed of settlement agreement entered into by injured party and settling defendant. The Supreme Court, Grimes, J., held that: (1) "*Mary Carter* agreements" would no longer be recognized by state's courts; (2) trial court did not err in refusing to dismiss settling defendant from suit; and (3) agreement between plaintiff and settling defendant had to be disclosed to jury.

Question answered.

Barkett, C.J., filed specially concurring opinion in which Shaw, J., concurred.

West Headnotes (4)

[1] **Compromise and Settlement**
Validity
Courts
In General; Retroactive or Prospective Operation

State courts will no longer recognize "*Mary Carter* agreements" between plaintiff and one of multiple defendants, including any agreement which requires settling defendant to remain in litigation, regardless of whether there is specified financial incentive to do so, when such agreements are entered into subsequent to instant opinion; such agreements are against public policy in light of settling defendant's ability to retain influence on outcome of lawsuit and adversarial process, settling defendant's often resulting financial interest in trial's outcome, and agreement's tendency to promote unethical practices by attorneys, notwithstanding fact that such agreements promote partial settlements.

29 Cases that cite this headnote

[2] **Compromise and Settlement**
Operation and Effect

Trial court was not required to dismiss defendant who entered "*Mary Carter* agreement" with plaintiff because, at time of agreement, plaintiff and defendant could agree that defendant would remain in lawsuit against second defendant, even though, under statute, it was not essential for defendant to remain in suit in order to determine her share of negligence. West's F.S.A. § 768.81(3).

19 Cases that cite this headnote

[3] **Compromise and Settlement**
Mary Carter and High-Low Agreements
Compromise and Settlement
Disclosure Requirements

Agreement between plaintiff and defendant which fixed defendant's liability at defendant's insurance policy limit if defendant remained party to plaintiff's suit against second defendant, but which did not provide that settling defendant could reduce liability by staying in litigation, was treated as "*Mary Carter* agreement" and was subject to disclosure requirements for such agreements.

2 Cases that cite this headnote

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[4] **Compromise and Settlement**
Disclosure Requirements

Trial court retained discretion not to advise jury of amount of settlement between plaintiff and one of two defendants under agreement, entered into before invalidation of *Mary Carter* agreements, which fixed settling defendant's liability in exchange for settling defendant's promise to remain in lawsuit, though agreement itself was to be disclosed to jury, if to disclose amount would unfairly prejudice any of the parties.

37 Cases that cite this headnote

Attorneys and Law Firms

***242** John P. Joy of Walton, Lantaff, Schroeder & Carson, Miami, for petitioner.

Louis M. Silber of Pariente & Silber, P.A., West Palm Beach, and Larry Klein of Jane Kreusler-Walsh, West Palm Beach, for respondents.

Marguerite H. Davis of Katz, Kutter, Haigler, Alderman, Davis & Marks, P.A., Tallahassee, amicus curiae for American Ins. Ass'n.

Clifford M. Miller of Clifford M. Miller, Chartered, Vero Beach, amicus curiae for the Academy of Florida Trial Lawyers.

Opinion

GRIMES, Judge.

We review *Dosdourian v. Carsten,* 580 So.2d 869 (Fla. 4th DCA 1991), in which the court certified the following question as being 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 LAW SUIT?

Id. at 872. We have jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

Richard Paul Carsten brought suit against Patricia Dosdourian and Christine DeMario alleging that each of them had negligently operated their automobiles in such a manner as to cause him serious personal injuries. Shortly before trial, Carsten filed a motion in limine seeking to prevent disclosure to the jury that he had entered into an agreement under which he settled all claims against DeMario in return for payment of her insurance policy limits of $100,000 and her continued participation in the litigation through trial and judgment. The trial judge granted Carsten's motion by ruling that the agreement would not be disclosed to the jury unless the live testimony of DeMario was presented at trial. In that event, the matter could be addressed on cross-examination. Further, the judge ruled that Dosdourian could not raise matters pertaining to the agreement if it was Dosdourian who called DeMario as a witness during trial. In the face of this ruling, Dosdourian moved that DeMario be dismissed from the litigation. This motion was denied.

At the trial, Carsten introduced DeMario's deposition, which had been taken before the settlement was reached. Because DeMario did not personally testify at the trial, the jury was not made aware of the settlement agreement between Carsten and DeMario. At the conclusion of the trial, the jury allocated negligence as follows: Dosdourian 35%, DeMario 55%, and Carsten 10%. The jury awarded over $2 million in damages for medical costs, lost earnings, and pain and suffering.

Dosdourian argued on appeal that the trial judge should have permitted the jury to be apprised of the settlement agreement under the rationale of *Ward v. Ochoa,* 284 So.2d 385 (Fla.1973). In *Ward,* this Court addressed the issue of whether "Mary Carter agreements" ***243** [1] should be disclosed to the jury. We described the typical 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. 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. By painting a gruesome testimonial picture of the other defendant's misconduct or, in some cases, by admissions against himself and the other defendants, he could diminish or eliminate his own liability by use of the secret "Mary Carter Agreement."
>
> *Id.* at 387. Concluding that such agreements tend to mislead judges and juries and border on collusion, we held that they must be produced for examination before trial if sought to be discovered under appropriate rules of procedure and should be admitted into evidence at trial upon the request of any other defendant who may stand to lose as a result of the agreement. *Id.*

In the instant case, the agreement did not provide that DeMario had the opportunity to diminish her own liability by staying in the litigation and the district court of appeal found it difficult to identify actual prejudice resulting from the nondisclosure of the agreement. Therefore, the court felt constrained by the language of this Court's opinion in *Ward* to affirm the judgment. However, the court expressed a view that whenever there is an agreement by which the settling party is required to remain in the case, the agreement should be disclosed to the jury. The court reasoned:

> Under our adversary system a jury can usually assume that the parties and their counsel are motivated by the obvious interests each has in the litigation. That assumption is no longer valid when the parties have actually made an agreement to the contrary prior to trial. The fairness of the system is undermined when the alignment of interests in the litigation is not what it appears to be.
>
> Jurors are also deceived by being informed that they are resolving an existing dispute between parties that have already resolved their differences. In our view, this undermines the integrity of the jury system which exists to fairly resolve actual disputes between our citizens. Hence, even if the parties and counsel conduct themselves with honesty and integrity, a cloud of doubt remains over the proceedings because of the information withheld from the jurors.

Dosdourian, 580 So.2d at 872.

In deciding this case, it became necessary for us to consider in depth the ramifications of Mary Carter agreements and the effect such agreements have on the trial process. As a consequence, this Court asked the parties to submit supplemental briefs with respect to the continuing viability of Mary Carter agreements and permitted the filing of amicus curiae briefs on the subject. We now conclude that the time has come to do away with Mary Carter agreements.

[1] Unique to the scheme of Mary Carter agreements, settling defendants retain their influence upon the outcome of the lawsuit from which they settled: so-called *settling* defendants continue "defending" their case. Defendants who have allegedly settled remain parties throughout the negligence suit, even through trial. As a consequence, these defendants remain able to participate in jury selection. They present witnesses and cross-examine the witnesses of the plaintiff by leading questions. They argue to the trial court the merits and demerits of motions and evidentiary objections. Most significantly, the party status of settling defendants permits them to have their counsel argue points of influence before the jury.

***244** In many instances, Mary Carter defendants may exert influences upon the adversarial process before a trial as well. They may, for example, share with a plaintiff work product previously (or subsequently, if the agreement remains secret) disclosed to them by a nonsettling defendant. The plaintiff and the settling defendant can combine their combatant energies far in advance and coerce nonsettling defendants, out of fear that they will be subject to an unfair trial, to settle for sums in excess of that which would otherwise be proportional to those defendants' fair shares of the burden.

By virtue of a Mary Carter agreement, settling defendants often acquire a substantial financial interest in a trial's outcome should the jury rule favorably for the plaintiff. *See, e.g., Booth v. Mary Carter Paint Co.,* 202 So.2d 8 (Fla. 2d DCA 1967), *rejected by Ward v. Ochoa,* 284 So.2d 385 (Fla.1973). For example, a settling defendant may agree to settle at some ceiling figure upon the condition that if the jury awards the plaintiff a judgment against the nonsettling defendant in excess of a certain amount, the settling defendant's settlement money is returned proportionately or perhaps entirely. In these instances, Mary Carter defendants desire to remain parties to the suit so that their counsel may influence the jury's verdict in favor of the plaintiff and against the nonsettling defendant.

Rather than cooperating with their codefendants to minimize the culpability of all defendants and to minimize the jury's assessment of plaintiff's damages, Mary Carter defendants offer to the plaintiff their counsel's services for the purpose of persuading the jury

to apportion to nonsettling defendants the greatest percentage of fault and to award the full amount of damages the plaintiff has requested. Even possible collusion between the plaintiff and the settling defendant creates an inherently unfair trial setting that could lead to an inequitable attribution of guilt and damages to the nonsettling defendant. *Watson Truck & Supply Co. v. Males,* 111 N.M. 57, 801 P.2d 639, 643 (1990) (Wilson, J., specially concurring).

In addition, Mary Carter agreements, by their very nature, promote unethical practices by Florida attorneys. If a case goes to trial, the judge and jury are clearly presuming that the plaintiff and the settling defendant are adversaries and that the plaintiff is truly seeking a judgment for money damages against both defendants. In order to skillfully and successfully carry out the objectives of the Mary Carter agreement, the lawyer for the settling parties must necessarily make misrepresentations to the court and to the jury in order to maintain the charade of an adversarial relationship. These actions fly in the face of the attorney's promise to employ "means only as are consistent with truth and honor and [to] never seek to mislead the Judge or Jury by any artifice or false statement of fact or law." Oath of Admission to The Florida Bar, *Florida Rules of Court* 977 (West 1993). The Arizona State Bar Committee on Rules of Professional Conduct has expressly concluded that certain types of Mary Carter agreements contravene the canons of professional ethics concerned with representing conflicting interests, ensuring candor and fairness, taking technical advantage of opposing counsel, and pursuing unjustified litigation. Op. No. 70-18, Ariz. State Bar Committee on Rules of Prof. Conduct (1970). Some courts have even held that a Mary Carter agreement in which the settling defendant retains a financial interest in the plaintiff's success against the nonsettling defendant is champertous in character. *Lum v. Stinnett,* 87 Nev. 402, 488 P.2d 347 (1971); *Elbaor v. Smith,* 845 S.W.2d 240 (Tex.1992).

Commentators have frequently criticized Mary Carter agreements. *See, e.g.,* Warren Freedman, *The Expected Demise of "Mary Carter": She Never Was Well!,* 1975 Ins.L.J. 602, 603 (Mary Carter agreements are "one of the ugliest and most disreputable sides of law practice today, in the opinion of most trial lawyers."); John E. Benedict, Note, *It's a Mistake to Tolerate the Mary Carter Agreement,* 87 Colum.L.Rev. 368, 386 (1987) ("Mary Carter agreements distort the entire litigation process...."); David R. Miller, Comment, *Mary Carter Agreements: Unfair and Unnecessary,* 32 Sw.L.J. 779, 801 (1978) ("Mary Carter agreements ... serve no worthwhile function in our judicial system....").

***245** In a 1986 article, Professor June Entman made a comprehensive analysis of Mary Carter agreements and concluded as follows:

> Mary Carter agreements defeat the policies underlying all systems of allocation of liability among tortfeasors used in the United States today. Mary Carter agreements are used purposely to defeat any system of equitable sharing and to shift liability to the nonsettling defendant through manipulation of the trial process....
>
> ....
>
> ... In order to give a plaintiff and codefendant the freedom of making whatever arrangement they wish in settling their dispute, the civil litigation system and the nonsettling parties must pay the price of risking perjury, confusing juries and permitting evasion of the various allocation systems designed to ensure equitable sharing of liability among tortfeasors. Because it is not possible to ensure a fair trial for the nonsettling defendant when a Mary Carter agreement is involved, and because these agreements do not fairly encourage settlements, there is no reason to permit a Mary Carter agreement to determine the relative liability of those responsible to the plaintiff. Rather, public policy and an untainted adversary trial should determine the distribution of liability among the potential obligors.
>
> The best solution is outright prohibition of Mary Carter agreements.

June F. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions,* 38 U.Fla.L.Rev. 521, 574, 579 (1986).

Some courts have done exactly what Professor Entman recommends by declaring Mary Carter agreements void as against public policy. *Lum,* 488 P.2d 347; *Elbaor,* 845 S.W.2d 240; *Trampey v. Wisconsin Telephone Co.,* 214 Wis. 210, 252 N.W. 675 (Wisc.1934); *see also Cox v. Kelsey-Hayes Co.,* 594 P.2d 354, 359 (Okla.1978) (trial court must "*either hold that portion of the agreement granting agreeing defendant an interest in a large plaintiff's verdict unenforceable ... or dismiss the agreeing defendant from the suit.* "). While acknowledging their potential for unfairness, other courts have allowed Mary Carter agreements, provided their existence is made known to the jury. *E.g., Firestone Tire & Rubber Co. v. Little,* 276 Ark. 511, 639 S.W.2d 726 (1982); *Ratterree v. Bartlett,* 238 Kan. 11, 707 P.2d 1063 (1985); *General Motors Corp. v. Lahocki,* 286 Md. 714, 410 A.2d 1039 (1980); *Hegarty v. Campbell Soup Co.,* 214 Neb. 716, 335 N.W.2d 758 (1983).

The main argument in favor of Mary Carter agreements is that they promote settlement. However, while it is true that a Mary Carter agreement accomplishes a settlement with one of the defendants, the intent of the agreement is to proceed with the trial against the other. Some agreements even give the settling defendant veto authority over a prospective settlement with the other defendant. Therefore, the existence of Mary Carter agreements may result in an increased number of trials, and they certainly increase the likelihood of posttrial attacks on verdicts alleged to have been unfairly obtained as a result of such agreements. Of course, if the existence of the agreement is known, it is possible that the other defendant may feel compelled to also reach a settlement. However, in that event the remaining defendant may have been unfairly coerced into settling for more than his fair share of liability.

In *Ward v. Ochoa,* we endeavored to ameliorate the inherent unfairness of Mary Carter agreements by requiring disclosure and admission into evidence. However, even admitting the agreement into evidence can be a double-edged sword to the extent that it conveys a message to the jury that at least one of the defendants felt that the plaintiff's claim was meritorious. Moreover, the agreements are often worded in such a way as to paint the nonsettling defendant in a most unfavorable light before the jury. As Professor Entman stated in addressing the efficacy of this remedy:

> The disclosure and admission approach to controlling Mary Carter agreements has been criticized as being insufficient to cure the prejudice to the nonsettling defendant. Admitting the Mary Carter agreement into evidence does not resolve several problems of unfairness in the trial process. Even if ***246** the jurisdiction permits the nonsettling defendant to inform the jury of the agreement for impeachment purposes or to disclose the parties' true positions, courts permitting the settling defendant to remain a party defendant still may enable the settling defendant to enjoy the advantages of that position to the detriment of the nonsettling defendant. The settling defendant may still use peremptory challenges to aid the plaintiff in jury selection, thus allotting more challenges to the plaintiff's side of the litigation, and less to the defendant's, than the applicable law provides. The settling defendant may still be permitted to use leading questions to cross-examine witnesses who are not really adverse. Also, the continuing presence of the settling defendant may serve to block the nonsettling defendant from removing a case to federal court when in reality there is complete diversity of citizenship between those parties who are truly adverse.

Entman, 38 U.Fla.L.Rev. at 563 (footnotes omitted).

In light of all these arguments, we agree with the Supreme Court of Texas when it said:

> Mary Carter agreements ... "present to the jury a sham of adversity between the plaintiff and one codefendant, while these parties are actually allied for the purpose of securing a substantial judgment for the plaintiff and, in some cases, exoneration for the settling defendant." The agreements pressure the "settling" defendant to alter the character of the suit by contributing discovery material, peremptory challenges, trial tactics, supportive witness examination, and jury influence to the plaintiff's cause. These procedural advantages distort the case presented before a jury that came "to court expecting to see a contest between the plaintiff and the defendants [and] instead see[s] one of the defendants cooperating with the plaintiff."
>
> Mary Carter agreements not only allow plaintiffs to buy support for their case, they also motivate more culpable defendants to "make a 'good deal' (and thus) end up paying little or nothing in damages." Remedial measures cannot overcome nor sufficiently alleviate the malignant effects that Mary Carter agreements inflict upon our adversarial system. No persuasive public policy justifies them, and they are not legitimized simply because this practice may continue in the absence of these agreements. The Mary Carter agreement is simply an unwise and champertous device that has failed to achieve its intended purpose.

Elbaor, 845 S.W.2d at 249.

We are convinced that the only effective way to eliminate the sinister influence of Mary Carter agreements is to outlaw their use. We include within our prohibition any agreement which requires the settling defendant to remain in the litigation, regardless of whether there is a specified

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financial incentive to do so.[2]

We recognize that until this opinion Mary Carter agreements were legal in Florida, and we are loath to penalize those who have entered into such agreements. In some instances it might even be impossible to restore the parties to the status quo if such agreements were set aside. Therefore, our holding shall be prospective only and shall not affect the legality of any such agreements that have been entered into prior to the date of this opinion. Accordingly, we must decide the instant case upon the premise that the settlement agreement was legal.

[2] Dosdourian first argues that the trial judge erred in refusing to dismiss DeMario as a party in view of her settlement with Carsten. Carsten argues that the trial judge properly refused to dismiss the settling defendant upon the authority of *Whited v. Barley,* 506 So.2d 445 (Fla. 1st DCA), *review denied,* 515 So.2d 230 (Fla.1987). In *Whited,* ***247** the trial judge dismissed one of three defendants from a lawsuit because he had entered into an agreement which settled his liability at $10,000 but required him to remain as a defendant in the case. The district court of appeal held that the judge had erred in dismissing the defendant from the suit because the settlement agreement did not resolve the issue of that defendant's proportionate share of negligence.

We reject the contention that it was essential that DeMario remain in the suit in order to determine her share of negligence. For the purpose of apportioning noneconomic damages, section 768.81(3), Florida Statutes (1989),[3] requires the fault of all persons responsible for an accident to be determined regardless of whether they are parties to the litigation. *Fabre v. Marin,* 623 So.2d 1182 (Fla.1993). On the other hand, prior to this opinion we know of nothing that would have precluded Carsten and DeMario from agreeing that DeMario would remain in the suit. In fact, a requirement that the settling defendant remain in the litigation is one of the ingredients of a Mary Carter agreement. The trial judge did not err in refusing to dismiss DeMario as a defendant. *Nationwide Mut. Fire Ins. Co. v. Vosburgh,* 480 So.2d 140 (Fla. 4th DCA 1985).

[3] Turning to the certified question, Carsten argues that his was not a true Mary Carter agreement because it did not provide that DeMario could reduce her liability by staying in the litigation. Thus, he asserts that the agreement was more in the nature of a release or covenant not to sue which was protected from disclosure to the jury by the provisions of section 768.041(3), Florida Statutes (1989). Dosdourian argues, however, that the jury was still misled by not knowing that Carsten had settled his claim against DeMario while DeMario remained in the litigation. Dosdourian points out several instances in which she claims she was prejudiced in the eyes of the jury by the conduct of DeMario's attorney. For example, she says that it was undisputed that Carsten was jaywalking at the time of the accident, but that in closing argument DeMario's lawyer stated that Carsten had acted reasonably under the circumstances and was completely without fault. She also says that DeMario's counsel did not cross-examine any of Carsten's damage witnesses and did not make even a single argument to suggest that Carsten's damages were less than claimed.

Consistent with our decision to ban all future agreements in which the settling defendant remains in the case, we believe that the same policy reasons requiring the disclosure of secret settlement agreements in the "Mary Carter" line of cases apply here, even though the motivations of the settling parties are not as clear. While Carsten's agreement with DeMario was not the usual Mary Carter agreement, we believe that it falls within the scope of secret settlement agreements which are subject to disclosure to the trier of fact under the principles of *Ward v. Ochoa.* As noted by the court below, "[t]he integrity of our justice system is placed in question when a jury charged to determine the liability and damages of the parties is deprived of the knowledge that there is, in fact, no actual dispute between two out of three of the parties." *Dosdourian,* 580 So.2d at 872. Thus, we answer the certified question in the affirmative.

In reaching our conclusion, we do not impugn the integrity of DeMario's counsel in any way. However, even though a defendant may be required to remain in the litigation, once that defendant has agreed to settle there is simply no longer any incentive to actively defend the case. In fact, it is no longer even in the settling defendant's interest to put forth further effort or incur additional expense in the litigation. Simple inaction on the part of one defendant can adversely affect the codefendant.[4]

[4] Thus, we declare that all Mary Carter agreements entered into after the date of ***248** this opinion are void as against public policy. We quash the decision below and remand the case for a new trial. The settlement agreement shall remain intact, but it shall be admitted into evidence upon the request of Dosdourian.[5]

It is so ordered.

OVERTON, McDONALD, SHAW, KOGAN and

HARDING, JJ., concur.

BARKETT, C.J., concurs specially with an opinion, in which SHAW, J., concurs.

BARKETT, Chief Justice, specially concurring.

I agree with the majority's analysis of Mary Carter agreements and with its disposition of the case under review. I write only to address the majority's conclusion that on remand, "the trial judge retains the discretion not to advise the jury of the *amount* of the settlement should it appear that to do so would unfairly prejudice any of the parties." Majority op. at 248 n. 5 (emphasis supplied). I believe that in almost all cases litigating valid Mary Carter agreements, discretion would dictate that although the existence of such an agreement should be disclosed, the amount of the settlement should not. Disclosure of the settlement amount in most cases is unnecessary and/or invites prejudice because a jury's liability and damages determinations are almost certainly going to be affected.

SHAW, J., concurs.

Parallel Citations

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Footnotes

1 These agreements derive their name from the case of *Booth v. Mary Carter Paint Co.,* 202 So.2d 8 (Fla. 2d DCA 1967), *rejected by Ward v. Ochoa,* 284 So.2d 385 (Fla.1973), which first approved them in Florida.

2 *See* John E. Benedict, Note, *It's a Mistake to Tolerate a Mary Carter Agreement,* 87 Colum.L.Rev. 368, 372 n. 14 (1987):

> 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 codefendant.

3 Apparently, section 768.81(3), which was first enacted in 1986, was not applicable in *Whited.*

4 We readily acknowledge that where no settlement has been reached a defendant has no right to rely upon the actions of a codefendant. However, where, as here, there was a settlement, the jury was entitled to weigh the codefendant's actions in light of its knowledge that such a settlement has been reached.

5 Because there are no contingencies involved, the trial judge retains the discretion not to advise the jury of the amount of the settlement should it appear that to do so would unfairly prejudice any of the parties. *See Bechtel Jewelers v. Insurance Co. of N. Am.,* 455 So.2d 383 (Fla.1984) (court may excise specific language of Mary Carter agreement to eliminate undue prejudice).

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