**Missouri Law Review**

Volume 64
Issue 3 *Summer 1999*

Article 4

Summer 1999

# When Your Rival Becomes Your Dance Partner: Mary Carter Agreements in Missouri Courts

Thomas G. Pirmantgen

# When Your Rival Becomes Your Dance Partner: Mary Carter Agreements in Missouri Courts

*Newman v. Ford Motor Co.*[1]

## I. INTRODUCTION

Mary Carter agreements[2] occur when a plaintiff asserting liability against joint tortfeasors[3] enters into a settlement agreement with less than all of the defendants. The settling defendant, who remains a party at trial, obtains the possibility of offsetting her financial exposure depending on how much money the plaintiff recovers from the other defendants. These agreements pose a potential threat to the adversarial nature of the trial process. This threat is especially severe when the trier of fact is not apprised of the agreement.[4]

Although maintaining the adversarial character of judicial proceedings is a public policy deserving of protection,[5] the ability of a plaintiff to control the tenor of her lawsuit also merits judicial consideration.[6] Mary Carter agreements implicate both of these public policies in ways that require trial courts to administer actions with procedural safeguards. However, these safeguards must

---

1. 975 S.W.2d 147 (Mo. 1998).

2. The term "Mary Carter agreement" is derived from the Florida case *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8, 10 (Fla. Dist. Ct. App. 1967). *See generally* Pat Shockley, *The Use Of Mary Carter Agreements In Illinois*, 18 S. Ill. U. L.J. 223, 225 (1993); Christopher Vaeth, Annotation, *Validity And Effect Of "Mary Carter" Or Similar Agreement Setting Maximum Liability Of One Cotortfeasor And Providing For Reduction Or Extinguishment Thereof Relative To Recovery Against Nonagreeing Cotortfeasor*, 22 A.L.R.5th 483, 497 (1995); Part III. A. and accompanying text *infra*.

3. *See* Beare v. Yarbrough, 941 S.W.2d 552, 555 (Mo. Ct. App. 1997) (explaining that a joint tortfeasor is an actor who has acted independently but concurrently with one or more other actors in causing harm to a person, which harm is incapable of division, and for which harm each actor is a substantial factor of causation) (citing Costello v. Ellisville, 921 S.W.2d 134, 137 (Mo. Ct. App. 1996); McDowell v. Kawasaki Motors Corp., 799 S.W.2d 854, 861-62 (Mo. Ct. App. 1990); Brickner v. Normandy Osteopathic Hosp., 687 S.W.2d 910, 912 (Mo. Ct. App. 1985)).

4. *See generally* John E. Benedict, *It's A Mistake To Tolerate The Mary Carter Agreement*, 87 COLUM L. REV. 368, 368-82 (1987). Benedict states that Mary Carter agreements should never be tolerated because they distort "tort litigation by prejudicing non-settling defendants at trial, undermining the equitable apportionment of damages among tortfeasors, and contravening legal ethics." *Id.* at 368.

5. Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 175-76 (Mo. 1993) (citing Hackman v. Dandamudi, 733 S.W.2d 452, 457 (Mo. Ct. App. 1986)).

6. *Id.* (finding that these public policies can coexist even when a Mary Carter agreement is used, as long as the non-settling defendant is not deceived).

be selected and applied with caution so as to not impinge on another public policy, that of affording all of the parties a fair trial.[7]

In *Newman v. Ford Motor Co.*,[8] the Missouri Supreme Court identified the particular features of Mary Carter agreements which, when present, warrant specified remedial measures.[9] The court reasoned that because of the competing public policies implicated by these agreements, and because of the potential for almost limitless possibilities in structuring them,[10] no *per se* rule will afford trial courts the flexibility necessary to cope with one of these agreements and obtain a fair result.

Therefore, the court reiterated the existing approach in Missouri that the existence of a Mary Carter agreement must generally be disclosed to the jury, but not when doing so would be unfair to the settling defendant, which must be determined on a case-by-case basis.[11] Although the *Newman* court did not articulate a new rule, or identify explicit exceptions to the existing rule, the court did clarify and expand existing law. This treatment was necessary given that the court below was adjudicating the issues presented by the Mary Carter agreement with a general rule that was overruled in 1993.[12]

## II. FACTS AND HOLDING

In 1993, Deborah Newman was severely injured and became a paraplegic when the Ford Aerostar she was driving was impacted from behind by a dumptruck.[13] The dumptruck was carrying gravel and weighed approximately 53,000 pounds.[14] The impact caused the Aerostar to instantly accelerate from a standstill to approximately thirty miles per hour, whereupon it struck another

---

7. *Id. See generally* Part III. C. and accompanying text *infra*.

8. 975 S.W.2d 147 (Mo. 1998).

9. *Id.* at 150. *See generally* Part III. C. and accompanying text *infra*.

10. *See generally* Part III. A. and accompanying text *infra*.

11. Newman v. Ford Motor Co., 975 S.W.2d 147, 151 (Mo. 1998); *see infra* Part III. B. and accompanying text.

12. *See* Newman v. Ford Motor Co., Nos. 20573, 20560, 1997 WL 778512, at *4 (Mo. Ct. App. Dec. 19, 1997) (concluding that the existence of a Mary Carter agreement should generally not be disclosed to the jury). The Missouri Court of Appeals for the Southern District of Missouri in *Newman* was relying on a rule articulated by the Missouri Court of Appeals for the Eastern District of Missouri in *Hackman v. Dandamudi*, 733 S.W.2d 452, 458 (Mo. Ct. App. 1986). The *Hackman* rule of general nondisclosure of Mary Carter agreements was overruled by the Missouri Supreme Court in *Carter v. Tom's Truck Repair, Inc.*, 857 S.W.2d 172, 178 (Mo. 1993) (citing Ratterree v. Bartlett, 707 P.2d 1063, 1074 (Kan. 1985)).

13. Newman v. Ford Motor Co., 975 S.W.2d 147, 149 (Mo. 1998).

14. Newman v. Ford Motor Co., Nos. 20573, 20560, 1997 WL 778512, at *1 (Mo. Ct. App. Dec. 19, 1997).

vehicle that was stopped in front of the Newmans.[15] The driver's seat in the Aerostar was designed and produced with a weak point, causing the seat frame to collapse backward upon impact.[16] When the Aerostar's seat collapsed, Ms. Newman was injured after she was propelled backward into the seat behind her.[17] The Newmans brought suit in the Circuit Court of Greene County, Missouri against the dumptruck owner CBS Redi-Mix Inc. (CBS) and driver McCoy for negligence, and against Ford Motor Company (Ford) for defective design.[18]

Before trial, the Newmans agreed to limit satisfaction of any judgment against CBS and McCoy (hereinafter CBS defendants)[19] exclusively to the policy limits of CBS's liability insurance, with no guarantee of recovering anything from them.[20] In return, the CBS defendants agreed not to appeal any unfavorable judgment, to remain in the suit, and to employ counsel not affiliated with their insurance company.[21] Ford and the trial court were aware of the agreement, but, after a hearing, and over the objections of Ford, the trial court ruled against disclosing the terms of the agreement to the jury.[22]

After a jury verdict in favor of the Newmans, Ford appealed to the Missouri Court of Appeals for the Southern District of Missouri.[23] Ford contended on appeal that the agreement was a Mary Carter agreement, and that the trial court's

---

15. *Id.*

16. *Id.*

17. *Id.*

18. *Newman*, 975 S.W.2d at 149. Mr. Newman's claim was for loss of consortium. *Newman*, 1997 WL 778512, at *1. A jury verdict was entered in favor of the Newmans, with damages assessed at $12.5 million. Newman v. Ford Motor Co., 975 S.W.2d 147, 149 (Mo. 1998). Fault was apportioned among the plaintiff and defendants; 70% to CBS and McCoy, 25% to Ford, and the remaining 5% to the Newmans. On appeal, the fault allocated to the Newmans was re-allocated proportionally between Ford and the CBS defendants because the court found that the trial court erred in giving a comparative negligence instruction premised upon Section 307.178 of the Missouri Revised Statutes. The statute requires most front seat occupants of passenger vehicles to wear seatbelts, but limits the extent to which failure to wear a seatbelt is admissible as evidence of comparative negligence against an injured motorist. MO. REV. STAT. § 307.178.3 (1994). Ms. Newman was not wearing a seatbelt at the time of the accident. *Newman*, 975 S.W.2d at 154. The judgment of the trial court was affirmed as modified, with the Newmans' fault reapportioned to the defendants. *Id.* at 155.

19. Newman v. Ford Motor Co., Nos. 20573, 20560, 1997 WL 778512, at *2 (Mo. Ct. App. Dec. 19, 1997). CBS and McCoy were covered by the same insurance policy.

20. *Newman*, 975 S.W.2d at 149. After the CBS defendants had settled with seven other claimants involved in the accident, $468,432.98 remained under the policy. *Newman*, 1997 WL 778512, at *2.

21. *Newman*, 975 S.W.2d at 149.

22. *Newman*, 1997 WL 778512, at *3-4.

23. *Id.* at *1.

refusal to disclose its terms to the jury constituted reversible error.[24] The court, without explicitly finding that the agreement was a Mary Carter agreement, concluded that Ford was not prejudiced by the trial court's refusal to disclose the agreement's existence to the jury.[25] The court explained that the general rule is to not disclose Mary Carter agreements to the jury,[26] but the decision whether to disclose must be made on a case-by-case basis, at the trial court's discretion.[27] The court ruled that Ford did not meet the burden of showing that the trial court had abused its discretion.[28]

The cause was transferred to the Missouri Supreme Court in 1998.[29] There, Ford argued that a Mary Carter agreement exists whenever a settling defendant remains at trial, and that such agreements must always be disclosed to the jury.[30] The Supreme Court held that when: (1) a settlement agreement between a plaintiff and less than all of the co-defendants is not kept secret from the trial court; (2) the plaintiffs are not guaranteed a minimum recovery from the settling defendants; and (3) any judgment against the settling defendants is not to be offset by the amount recovered against any non-settling defendant, the agreement is not a "typical"[31] Mary Carter agreement.[32] The court further held that the trial court will not abuse its discretion in declining to disclose the existence of such agreements to the jury.[33]

---

24. Newman v. Ford Motor Co., Nos. 20573, 20560, 1997 WL 778512, at *4 (Mo. Ct. App. Dec. 19, 1997).

25. *Id.*

26. *Id.* (citing Hackman v. Dandamudi, 733 S.W.2d 452, 458 (Mo. Ct. App. 1986)). The Missouri Court of Appeals for the Southern District of Missouri relied on the rule articulated by the Missouri Court of Appeals for the Eastern District of Missouri in *Hackman v. Dandamudi*, 733 S.W.2d 452, 458 (Mo. Ct. App. 1986). The *Hackman* rule as articulated by the Southern District is that "[i]n the absence of compelling reasons to disclose the existence of [a Mary Carter agreement] such agreements should generally not be admissible." *Newman*, 1997 WL 778512, at *4. This rule was overruled by the Missouri Supreme Court in 1993. *See supra* note 13.

27. Newman v. Ford Motor Co., Nos. 20573, 20560, 1997 WL 778512, at *4 (Mo. Ct. App. Dec. 19, 1997) (citing Montgomery v. Clubb, 907 S.W.2d 174, 175 (Mo. Ct. App. 1995)). In *Montgomery*, the Missouri Court of Appeals for the Western District of Missouri explained that whether a particular Mary Carter agreement will be *allowed* should be determined on a case by case basis. *Montgomery*, 907 S.W.2d at 175. The *Montgomery* court did not discuss the issue of whether or when the existence of a Mary Carter agreement should be *disclosed* to the jury. *Id.* at 175. However, the *Montgomery* court did discuss the trial court's discretion in regard to the admissibility of evidence in general. *Id.* at 176.

28. *Newman*, 1997 WL 778512, at *5.

29. Newman v. Ford Motor Co., 975 S.W.2d 147 (Mo. 1998).

30. *Id.* at 150.

31. *See infra* note 35.

32. *Newman*, 975 S.W.2d at 150.

33. *Id.* at 151.

## III. LEGAL BACKGROUND

### *A. Characteristics of Mary Carter Agreements*

Mary Carter agreements occur when a plaintiff asserting liability against joint tortfeasors enters into a settlement agreement with less than all of the defendants.[34] The typical features[35]of Mary Carter agreements are: (1) the plaintiff is guaranteed a minimum recovery; (2) the settling defendant remains a party at trial and is limited to a maximum liability which may be offset by a specific recovery against the non-settling defendant; and (3) the existence or terms of the agreement are not fully disclosed to the jury, judge, or non-settling parties, absent a court order.

Almost twenty years after the Florida case which put the phrase "Mary Carter Agreement" into the judicial vernacular,[36] a Missouri appellate court, in *Hackman v. Dandamudi*,[37] first discussed the characteristics of these settlement devices.[38] In *Hackman*, the plaintiff was a patient at a nursing home, where she developed gangrene necessitating amputation of her leg above the knee.[39] The co-defendants were the nursing home and the plaintiff's attending physician.[40] A Mary Carter agreement was reached between the plaintiff and the nursing home.[41] The agreement provided for the plaintiff to receive $100,000 in

---

34. Booth v. Mary Carter Paint Co., 202 So. 2d 8,10 (Fla. Dist. Ct. App. 1967). In *Booth*, the case from which the term "Mary Carter agreement" was coined, the plaintiff brought a wrongful death action (the plaintiff's wife had been killed in a car accident) against five defendants. *Id.* at 9. Before trial, the plaintiff entered into a settlement agreement with two of the defendants. *Id.* The agreement limited the liability of the settling defendants to $12,500, and guaranteed the plaintiff a minimum recovery of that amount. *Id.* at 10. The agreement further provided that if a verdict was entered against the non-settling defendants exceeding $37,500, the settling defendants would not contribute anything. *Id.* The agreement also stipulated that the settling defendants would remain in the lawsuit as active defendants, and that the existence of the agreement would not be revealed to the jury, nor the contents of the agreement to the judge, absent a court order. *Id.* at 11. The court upheld the validity of the agreement. *Id.* at 8-11.

35. Although the enumerated features are asserted as typical of Mary Carter agreements, *see* Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 175 (Mo. 1993), the agreements are also said to be of potential infinite variety, with the features limited only by the imaginations of the counsel shaping them. For this proposition see *Maule Ind., Inc. v. Rountree*, 264 So. 2d 445, 446 (Fla. Dist. Ct. App. 1972) and *Carter*, where the Missouri Supreme Court recognized that Mary Carter agreements can appear in an "unlimited variety of contractual arrangements." *Carter*, 857 S.W.2d at 176.

36. *Booth*, 202 So. 2d at 10.

37. 733 S.W.2d 452, 455-58 (Mo. Ct. App. 1986).

38. *Id.* at 454.

39. *Id.*

40. *Id.*

41. *Id.*

installments from the settling defendant.[42] If recovery against the settling defendant exceeded the agreed upon amount, the plaintiff was to execute on the excess only against the settling defendant's insurer, which was in liquidation.[43] The agreement provided that any judgment rendered against the non-settling defendant, up to the amount of the settlement, was to offset the amount that the settling defendant would be required to pay.[44]

The court characterized the agreement as a combination of a loan receipt agreement, and the type of agreement authorized by Missouri's contribution between tortfeasors statute.[45] A loan receipt agreement allows a plaintiff to receive money from the settling defendant, which must be repaid only if the plaintiff receives a judgment against the settling defendant.[46] This can be advantageous to a plaintiff who might otherwise not have the financial wherewithal to proceed with an action.[47]

Of particular interest in *Hackman* is the fact that the settling defendant's liability was not actually limited by the agreement. Rather, any judgment in excess of the agreed amount was to be executed only against the settling defendant's insurance company, not the settling defendant.[48] Because the insurance company was in liquidation at the time the parties entered into the agreement, the practical effect of the agreement was to limit the settling defendant's liability, without expressly doing so.[49]

The court concluded that the parties had "in effect" entered into a Mary Carter agreement,[50] and that the agreement was not admissible to show that a settlement had been reached, but would be admissible if necessary to show witness bias.[51] According to the court, the non-settling defendant simply did not articulate any acceptable purpose justifying disclosure of the agreement;[52] thus,

---

42. Hackman v. Dandamudi, 733 S.W.2d 452, 454 (Mo. Ct. App. 1986).

43. *Id.*

44. *Id.*

45. *Id.* at 456. The statute allows a plaintiff to agree to release, not sue, or not enforce a judgment against "one of two or more persons liable in tort for the same injury[,]" if the agreement is entered into in good faith. MO. REV. STAT. § 537.060 (1994).

46. *Hackman*, 733 S.W.2d at 456.

47. *See* Grillo v. Burke's Paint Co., 551 P.2d 449, 452 (Or. 1976) (explaining that loan receipt agreements may be beneficial in that they encourage out of court settlements, and help injured plaintiffs solve financial problems brought about by delays in the court system). *But see* Benedict, *supra* note 4, at 368-82 (arguing that the plaintiff often must wait until after trial to receive funds from the settling defendant, and that contingency fee arrangements with counsel serve the same purpose without settlement).

48. Hackman v. Dandamudi, 733 S.W.2d 452, 454 (Mo. Ct. App. 1986).

49. *Id.* at 456.

50. *Id.*

51. *Id.*

52. *Id.* at 458. Acceptable purposes justifying admission of the existence of a

the trial court did not err in keeping the existence of the agreement from the jury.[53]

The Missouri Supreme Court first discussed the use and attributes of Mary Carter agreements in *Carter v. Tom's Truck Repair, Inc.*[54] There, the plaintiff entered into an agreement with one of two defendants, whereby the plaintiff was guaranteed a minimum recovery and the settling defendant was guaranteed a maximum liability of $250,000, to be offset dollar for dollar by any judgment against the non-settling defendant.[55] The settling defendant also agreed to remain a party at trial and not to appeal any judgment.[56] The existence and terms of the agreement were made known to the non-settling defendant prior to trial, and the amount of the settlement was made known to the non-settling defendant on the first day of trial.[57]

In addition, during cross-examination of the settling defendant's witnesses, the court informed the jury of the existence and basic terms of the agreement.[58] The court stated that of the typical features of Mary Carter agreements, the element of secrecy, coupled with the settling defendant's interest in increasing the plaintiff's recovery against the non-settling defendant, threatens "distort[ing] the adversarial process and potentially undermin[ing] the right to a fair trial."[59] In *Carter*, the "worst feature"[60] of Mary Carter agreements, "deception of the tribunal,"[61] was not present.

## *B. Propriety of Mary Carter Agreements*

In *Hackman v. Dandamudi*,[62] the Missouri Court of Appeals for the Eastern District of Missouri recognized that Mary Carter agreements implicate the competing public policy considerations of allowing plaintiffs to control the tenor of their lawsuits and of ensuring that the existence of a secret agreement does not

---

Mary Carter agreement, would include not revealing to the non-settling defendant the fact that the settling defendant has a financial stake in increasing the plaintiff's recovery against the non-settling defendant. *Id.*

53. Hackman v. Dandamudi, 733 S.W.2d 452, 458 (Mo. Ct. App. 1986).

54. 857 S.W.2d 172, 175 (Mo. 1993).

55. *Id.* at 174. The plaintiff was in his vehicle, stopped at a red light, when he was impacted from behind by the settling defendant's truck. *Id.* The driver of the truck asserted that the truck's brakes failed; the non-settling defendant was the company responsible for repairing and maintaining the brakes. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 176 (Mo. 1993).

60. *Id.*

61. *Id.*

62. 733 S.W.2d 452, 456-57 (Mo. Ct. App. 1986).

perpetrate a fraud on parties not privy to the agreement.[63] The Missouri Supreme Court, appreciating the tension created by Mary Carter agreements on these public policy considerations, held, in *Carter v. Tom's Truck Repair, Inc.*,[64] that the proper judicial treatment of such agreements requires examining them on a case-by-case basis, rather than outrightly forbidding their use.[65]

The same year that *Carter* was decided in Missouri, the Florida Supreme Court[66] held that Florida state courts will no longer allow plaintiffs to enter into Mary Carter agreements or agreements of any kind which call for the settling defendant to remain at trial.[67] The court indicated that Mary Carter agreements, although conducive to settlement with one defendant, actually promote litigation rather than settlement.[68] Because the settling defendant may ultimately pay nothing to the plaintiff, depending on the amount of money for which the non-settling defendant is found liable, there is a strong incentive for the settling defendant to increase the recovery against the non-settling defendant.[69] This incentive promotes unethical behavior on the part of counsel because in "maintain[ing] the charade of an adversarial relationship . . . ." the attorneys representing the settling parties will be tempted to make misrepresentations to the court.[70]

---

63. *Id.* at 457.

64. 857 S.W.2d 172, 176 (Mo. 1993).

65. *Id.*

66. The state which decided the case from which the phrase "Mary Carter agreement" is derived. *See supra* note 34.

67. Dosdourian v. Carsten, 624 So. 2d 241, 246 (Fla. 1993).

68. *Id.* at 245. The settling defendant may retain veto power over the plaintiff's ability to settle with other defendants, thereby acting as an impediment to complete settlement. *Id.*

69. *Id.*

70. *Id.* at 244-245. *See also* Lum v. Stinnet, 488 P.2d 347, 350 (Nev. 1971). The Nevada Supreme Court in *Lum* characterized the agreement between the plaintiff and two of three co-defendants as champerty and maintenance. *Id.* The agreement called for the plaintiff to receive a guaranteed sum from the settling defendants, bringing recovery up to $20,000 in the event of a jury award less than that amount, in exchange for not contesting the settling defendant's motion for a directed verdict, and for not settling with the remaining defendant without the consent of the settling defendants. *Id.* The court reasoned that the settling defendants, by virtue of the trial court's grant of their motion for a directed verdict, were not parties to the action, and so were meddling in the suit between the plaintiff and the non-settling defendant without any interest in the action. *Id.* This, the court said, is maintenance. *Id.* The court also characterized the agreement as champerty in that the settling defendants stood to profit from the suit, to the extent that the plaintiff's recovery against the non-settling defendant would offset the settling defendants' liability. *Id. See also* Elbaor v. Smith 845 S.W.2d 240, 249 (Tex. 1992) (stating that Mary Carter agreements "present to the jury a sham of adversity between the plaintiff and one codefendant" and that "[t]he Mary Carter agreement is simply an unwise and champertous device").

Missouri is aligned with the vast majority of jurisdictions that do not prohibit Mary Carter agreements.[71] Missouri does recognize, however, that these agreements, depending on a particular settlement's characteristics, effect, and factual setting, do present dangers that trial courts must contend with on a case-by-case basis.[72]

### C. *Procedural Safeguards to Reduce the Potential Risks of Mary Carter Agreements*

The particular features of Mary Carter agreements identified by the *Carter* court as posing a threat to a fair trial are: (1) the settling defendant's pecuniary stake in increasing the amount of money any non-settling defendant becomes responsible for at trial, and (2) the secret nature of such agreements.[73] The court has identified a number of procedural safeguards a trial court may employ to minimize the dangers of unfairness and "distort[ion] of the adversarial process"[74] created by these features.

When the above-mentioned features are present in a Mary Carter agreement, and the non-settling defendant moves for disclosure of the existence and basic terms of the agreement to the jury, the trial court should make such disclosure unless doing so would cause "substantial danger of undue prejudice or confusion."[75] Disclosure should not include the amount of the settlement, or refer to insurance coverage, and the jury should be instructed not to consider the agreement in assessing any party's liability.[76]

---

71. Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 176 (Mo. 1993). *See also* J. Michael Phillips, *Looking Out For Mary Carter: Collusive Settlement Agreements In Washington Tort Litigation*, 69 WASH. L. REV. 255, 259 (1994).

72. *Carter*, 857 S.W.2d at 176.

73. *Id.*

74. *Id.*

75. *Id.* at 178 (citing Ratterree v. Bartlett, 707 P.2d 1063, 1074-76 (Kan. 1985)). In *Ratterree*, the Kansas Supreme Court held that where a party to a Mary Carter agreement is a witness at trial the existence and general terms of the agreement shall be disclosed to the jury, unless the court finds in its discretion that disclosure would confuse the issues, mislead the jury, or create a "substantial danger of undue prejudice." *Ratterree*, 707 P.2d at 1076. The amount of the settlement is never to be disclosed to the jury, but the settling defendant's financial interest in the outcome of the case shall be made known in general terms. *Id.* The *Ratterree* court cites to a California statute that requires, in all cases, the disclosure of the existence of Mary Carter agreements to the court and other parties. *Id.* at 1075 (citing CAL. CIV. PROC. CODE § 877.5(b) (West 1980)). The *Carter* court held that the trial court's failure to allow disclosure of the agreement during the non-settling defendant's opening statement was an abuse of discretion, but any prejudice resulting was insufficient to warrant reversal because the jury eventually was made aware of the existence of the agreement. *Carter*, 857 S.W.2d at 179.

76. Carter v. Tom's Truck Repair Inc., 857 S.W.2d 172, 178 (Mo. 1993).

In addition to disclosing the existence of the agreement, a trial court may reallocate peremptory strikes.[77] Under the Missouri Revised Statutes, in Section 494.480.1, each party in a civil action is entitled to three peremptory challenges of jurors.[78] When there are multiple plaintiffs or defendants, each group is treated as if there were only one plaintiff or defendant.[79] A trial court has discretion to distribute these challenges among a respective group of plaintiffs or defendants.[80] Because a Mary Carter agreement may unite the settling defendant with the plaintiff in attempting to maximize the amount of money recovered against the non-settling defendant, the trial court may allocate all of the "defendant" peremptory strikes to the non-settling defendant.[81]

In *Carter*,[82] the non-settling defendant sought to have the settling defendant either realigned as a plaintiff at trial or dismissed from the action altogether.[83] The court held that formal realignment of the settling defendant as a plaintiff could promote confusion regarding the interests of the parties.[84] Furthermore, where co-defendants have filed cross-claims to apportion fault against each other, an adversarial relationship exists between them, regardless of whether one of them has reached a settlement agreement with the plaintiff.[85] Therefore, neither the formal realignment nor the dismissal sought by the non-settling defendant was warranted.[86]

However, the *Carter* court recognized that some type of realignment (other than calling the settling defendant a plaintiff at trial) can and should be achieved in some fashion.[87] Reallocation of peremptory strikes is one possible means of achieving realignment.[88] Informal realignment may also be reached by making the jury aware of the settling defendant's financial interest in the plaintiff's recovery against the non-settling defendant,[89]or by prohibiting the settling defendant from involvement in the issue of damages at trial.[90] The trial court in

77. *Id.* at 177.

78. MO. REV. STAT. § 494.480.1 (1994).

79. *Id.*

80. *Id.*

81. Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 177 (Mo. 1993). The trial court's failure to reallocate peremptory challenges was not shown to be clearly prejudicial to the non-settling defendant. *Id.* at 178.

82. *Carter*, 857 S.W.2d at 176.

83. *Id.*

84. *Id.* at 177.

85. *Id.*

86. Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 177 (Mo. 1993). *But see* Burkett v. Crulo Trucking Co., 355 N.E.2d 253, 259 (Ind. Ct. App. 1976) (holding that non-settling defendant is entitled to separate trial).

87. *Carter*, 857 S.W.2d at 177.

88. *Id.*

89. *Id.*

90. *Id.*

*Carter* achieved informal realignment by allowing the non-settling defendant twice as much time as the settling defendant to present a closing argument.[91]

In *Carter*, the Missouri Supreme Court recognized that Mary Carter agreements serve favorable purposes in allowing plaintiffs to control the tenor of their lawsuit and choose to settle as they see fit.[92] The court also recognized that such agreements threaten unfairness to the non-settling defendant and can distort the adversarial process.[93] Because of the risks presented by Mary Carter agreements, trial courts must exercise discretion in taking remedial measures to guard against such risks.[94]

## IV. THE INSTANT DECISION

In *Newman v. Ford Motor Co.*,[95] the Missouri Supreme Court noted that after *Carter*, Missouri courts are adjudicating with a rule that mandates disclosure of Mary Carter agreements to the jury, unless there has been a finding that disclosure would be unduly prejudicial.[96]

The *Newman* court identified the settling defendant's interest in increasing the amount the plaintiff recovers against any non-settling defendant as a feature of Mary Carter agreements threatening to undermine the adversary process, and thus mandating disclosure under *Carter*.[97] This feature was not present in the agreement between the Newmans and the CBS defendants.[98] However, the court also indicated that any agreement that calls for a party to hide an interest from the jury at trial may constitute undue prejudice.[99]

The court stated that because the trial court was aware of the agreement, and because the Newmans were not guaranteed a minimum recovery, and because the CBS defendants were not able to offset any judgment obtained against them, the agreement did not mandate disclosure to the jury.[100] Furthermore, the court indicated that because the agreement did not release the CBS defendants from liability, and because the Newmans did not receive any

---

91. Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 177 (Mo. 1993).

92. *Id.* at 176.

93. *Id.*

94. *Id.* at 176-80.

95. 975 S.W.2d 147 (Mo. 1998).

96. *Id.* at 150.

97. *Id.* The danger is that the settling defendant will inflate the plaintiff's damages, in order to reduce its exposure. *Id. See* Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 178 (Mo. 1993) (asserting that "the worst feature" of Mary Carter agreements is "deception of the tribunal").

98. *Newman*, 975 S.W.2d at 150.

99. *Id.*

100. Newman v. Ford Motor Co., 975 S.W.2d 147, 150 (Mo. 1998). The court noted that the CBS defendants actually had an interest in making sure that the total amount of damages remained as small as possible. *Id.*

payment, there was very little of the agreement which could have been disclosed without creating undue prejudice to the CBS defendants.[101]

The court recognized that settlement agreements whereby the parties remain at trial can be of almost unlimited variety.[102] Because of this potential for variation, no bright-line rule adaptable to the facts of every particular agreement can be articulated.[103] What must be accomplished at trial is a balance between the goal of maintaining the adversarial nature of the action and the goal of encouraging settlements, in part by protecting the settling parties from the dangers inherent in disclosure of their agreement.[104] The trial court is entrusted with the responsibility of exercising discretion in an effort to maintain the integrity of the adversarial process.[105]

The *Newman* court concluded that because the trial court postponed ruling on Ford's motion to disclose the agreement, allotted Ford two of the three defendants' peremptory strikes, and allowed Ford to argue after the CBS defendants during closing arguments, adequate precautions had been taken to preserve the adversarial nature of the proceeding.[106] Therefore, the trial court did not abuse its discretion in declining to disclose the agreement to the jury.[107]

## V. COMMENT

The *Newman* court reiterated the "mandatory disclosure" rule articulated by the *Carter* court in 1993,[108] and then indicated that there is no *per se* rule.[109] The court seemingly articulated a rule, and then refused to enforce it. A rule should not be labeled "mandatory" if it is not. The apparent inconsistency of the court's assertions is resolved when one reads the *Carter* and *Newman* decisions in light of the particular features of the settlement agreement between the Newmans and the CBS defendants, and in light of the public policy considerations the court sought to preserve.[110]

---

101. *Id.* at 151. *See Carter*, 857 S.W.2d at 178 (identifying references in a Mary Carter agreement to the amount of settlement and the existence of insurance coverage as information which would be prejudicial to the settling defendant).

102. *Newman*, 975 S.W.2d at 151.

103. *Id.*

104. *Id.*

105. Newman v. Ford Motor Co., 975 S.W.2d 147, 151 (Mo. 1998). The court mentioned that the surest way to prevent the ills threatened by Mary Carter agreements is to disclose their existence to the jury. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (referring to "*Carter*'s mandatory disclosure rule").

109. *Id.* (acknowledging that when the agreement gives the settling defendant a direct financial interest in the plaintiff's recovery against the non-settling defendant, disclosure is "generally" mandated).

110. *See Hackmann v. Daridon*, 733 S.W.2d 452, 457 (Mo. Ct. App. 1986)

First, it is helpful to appreciate that the settlement agreement in *Newman* did not contain the features Missouri courts have said are typical of Mary Carter agreements.[111] The Newmans were not guaranteed a minimum recovery;[112] the CBS defendants were not necessarily going to pay any damages;[113] no amount recovered from Ford was to offset the CBS defendants' financial exposure;[114] and the terms and existence of the agreement were not kept secret from Ford or the trial court.[115] Although the court did not explicitly say so, this settlement agreement was not a Mary Carter agreement as defined by Missouri courts. Therefore, the general rule pertaining to the disclosure of settlement agreements to the jury, not the *Carter* "mandatory disclosure" rule, seems applicable.[116] The mere fact that a settling defendant remains a party at trial is not sufficient to create the potential problems Missouri courts have identified as flowing from Mary Carter agreements.[117]

Second, assuming *arguendo* that the agreement between the Newmans and the CBS defendants was a Mary Carter agreement, the court's treatment of the issues presented is fair and comports with the approach taken by the vast majority of jurisdictions.[118] Rather than disallow plaintiffs the opportunity to settle with defendants as they see fit, the court will allow them to enter into

---

(explaining that "[t]here is a strong public policy against allowing secret agreements to work a fraud .... However, there are also strong public policy considerations in favor of allowing plaintiffs to control their own cases and settle with defendants as they choose.").

111. *See* Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 175 (Mo. 1993). In *Carter*, the court identified the typical features of Mary Carter agreements as:

> 1) The liability of the settling defendant is limited, and the plaintiff is guaranteed a minimum recovery; 2) The settling defendant remains a party to the pending action without disclosing the full agreement to the non-settling parties and/or the judge and jury, absent court order; and 3) If judgment against the non-settling defendant is for more than the amount of settlement, any money collected will first offset the settlement so that the settling defendant may ultimately pay nothing.

*Id.* (citing Hackman v. Dandamudi, 733 S.W.2d 452, 455 (Mo. Ct. App. 1986)).

112. Newman v. Ford Motor Co., 975 S.W.2d 147, 150 (Mo. 1998).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 149 (explaining that "the general rule is that evidence of settlement agreements is not admissible, absent a clear and cogent reason, because they tend to be highly prejudicial").

117. *See* Newman v. Ford Motor Co., 975 S.W.2d 147, 150 (Mo. 1998) (identifying distortion of the adversarial process and undermining of the right to a fair trial as the dangers threatened by Mary Carter agreements).

118. *See* Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 176 (Mo. 1993). For example, the tendency of settling defendants to engage in collusive behavior with the plaintiff in increasing the plaintiff's recovery against any non-settling defendant

settlement agreements that potentially threaten the adversarial nature of the trial process, with the caveat that the existence and basic terms of the agreement must be disclosed to the jury, unless doing so would unduly prejudice the settling defendant.

Even though the agreement in *Newman* was not a Mary Carter agreement, the court's clarification of the *Carter* mandatory disclosure rule was needed. The court below was relying on a rule that had been overturned by *Carter* five years prior.[119] One potential problem is that *Newman* gives little guidance to parties as to what will qualify as a Mary Carter agreement, thus triggering mandatory disclosure of their settlement agreement to the other parties, the court, and the jury. However, to date, no non-settling defendant has won reversal on appeal by arguing that the trial court erred in not disclosing the existence of a Mary Carter agreement to the jury.[120]

What the *Newman* court failed to do is specify which remedial measures (reallocation of peremptory strikes, alteration of the order of closing arguments, prohibition of the settling defendant from participating in the damages hearing, or disclosure to the jury) would be proper when one or more of the features of Mary Carter agreements (for example, the settling defendant remaining a party at trial, or the settling defendant maintaining a financial interest in the amount the plaintiff recovers against any non-settling defendant) are present in a

---

119. *See* Newman v. Ford Motor Co., Nos. 20573, 20560, 1997 WL 778512, at *4 (Mo. Ct. App. Dec. 19, 1997). The Missouri Court of Appeals for the Southern District of Missouri concluded that the existence of a Mary Carter agreement should generally not be disclosed to the jury. The Southern District in *Newman* was relying on a rule articulated by the Missouri Court of Appeals for the Eastern District of Missouri in *Hackman v. Dandamudi*, 733 S.W.2d 452, 458 (Mo. Ct. App. 1986). The *Hackman* rule of general nondisclosure of Mary Carter agreements was overruled by the Missouri Supreme Court in *Carter v. Tom's Truck Repair, Inc.*, 857 S.W.2d 172, 178 (Mo. 1993) (citing Ratterree v. Bartlett, 707 P.2d 1063, 1074 (Kan. 1985)).

120. *See e.g.*, Newman v. Ford Motor Co., 975 S.W.2d 147, 151 (Mo. 1998) (holding no prejudice to the non-settling defendant by the trial court's refusal to disclose the existence of the settlement agreement to the jury where the settling defendant did not retain a financial interest in the plaintiff's recovery against the non-settling defendant, and the trial court allotted two of three peremptory strikes to the non-settling defendant); Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 179 (Mo. 1993) (holding that the trial court's failure to disclose the existence of the Mary Carter agreement to the jury during opening argument was an abuse of discretion, but the non-settling defendant was not sufficiently prejudiced to mandate reversal where the jury eventually was apprised of the existence of the agreement); Hackman v. Dandamudi, 733 S.W.2d 452, 458 (Mo. Ct. App. 1986) (holding that Mary Carter agreements should not be disclosed to the jury because settlement agreements generally are highly prejudicial); *see also* King v. Copp Trucking Inc., 853 S.W.2d 304, 306 n.1 (Mo. Ct. App. 1993) (discussing the features of Mary Carter agreements although the trial court's treatment of the agreement was not an issue on appeal).

settlement agreement. Trial courts and parties would benefit from some further clarification.

## VI. CONCLUSION

After *Newman*'s clarification of *Carter*'s mandatory disclosure rule, parties contemplating entering into a Mary Carter agreement should be aware of the likelihood that the existence and basic terms of the agreement will be disclosed to the jury at trial. If the parties desire to avoid disclosure, they should structure the agreement so that the settling defendant's financial responsibility to the plaintiff is not tied to any recovery against the non-settling defendant. Such a financial interest on the part of a settling defendant will virtually guarantee that the jury will be apprised of the fact that seeming rivals are really dance partners. However, the absence of such an interest will not guarantee that the jury will be kept in the dark about the existence of the agreement. The *Newman* court could have, but did not, give some assurance that Mary Carter agreements can be structured so as to necessarily avoid the *Carter* mandatory disclosure rule.

THOMAS G. PIRMANTGEN