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Civil Procedure - Admissibility of Settlement Agreements - 42 Pa Cons Stat Ann § 6141 - "Mary Carter" Agreements

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CIVIL PROCEDURE—ADMISSIBILITY OF SETTLEMENT AGREEMENTS—42 PA CONS STAT ANN § 6141—"MARY CARTER" AGREEMENTS—The Pennsylvania Supreme Court has held where an agreement clearly allies two or more parties against another, such that a clear potential exists which would not otherwise be apparent to the factfinder, that part of the agreement, or at least the existence of the reason for the potential bias, must be conveyed to the factfinder.

Hatfield v Continental Imports, Inc., 530 Pa 551, 610 A2d 446 (1992).

In April, 1978, Agnes Hatfield sustained permanent injuries to her back when the chair upon which she was sitting suddenly collapsed.[1] In February, 1980, Agnes and her husband, Herbert, ("Hatfields") brought an action in the Philadelphia Court of Common Pleas against the sellers of the chair, Continental Imports, Inc. ("Continental"), Marvin Gross and Leonard Gross, individually and trading as Warehouse Imports ("Gross").[2] The complaint set forth causes of action in negligence and products liability under section 402A of the Restatement (Second) of Torts.[3] Thereafter, Continental and Gross (the "original defendants") joined as an additional defendant Talin Industria Arredamenti, S.P.A. ("Talin"), an Italian manufacturer alleged to have built the chair.[4]

On June 20, 1983, the Hatfields and Hartford Mutual Insurance Company ("Insurer"), liability insurer for the original defendants, executed an eleven page document entitled "Settlement Agreement and Release" ("Agreement").[5] The Agreement was made part

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1. *Hatfield v Continental Imports, Inc.*, 5 Pa D & C 4th 99 (1989), rev'd, 396 Pa Super 309, 578 A2d 530 (1990), rev'd, 530 Pa 551, 610 A2d 446 (1992).

2. *Hatfield*, 5 Pa D & C 4th at 100.

3. Id at 99. Section 402A reads:

> 1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if a) the seller is engaged in the business of selling such product, and b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> 2) the rule stated in Subsection (1) applies although the seller has exercised all possible care in the preparation and sale of his product, and b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1965).

4. *Hatfield*, 5 Pa D & C 4th at 100.

5. *Hatfield v Continental Imports, Inc.*, 530 Pa 551, 610 A2d 446, 448 (1992). The Agreement while providing for a structured settlement releasing the original defendants,

of the record by virtue of the original defendants' Amended Answer With New Matter which was filed after execution of the Agreement.[6]

Prior to the beginning of trial, Talin filed a motion seeking permission from the court to introduce the Agreement into evidence.[7] After reviewing the Agreement, the trial court ruled that the Agreement was admissible, accepting Talin's argument that the Agreement constituted a "Mary Carter Agreement,"[8] not a settlement agreement, and thus 42 Pa Cons Stat Ann section 6141(c) did not govern.[9] The trial court, adopting the position taken by the Florida Supreme Court in the case of *Ward v Ochoa*,[10] stated that

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also required the Hatfields to pursue an action against Talin. *Hatfield*, 5 Pa D & C 4th at 101. Specifically, the Agreement contained the following paragraph, which became the focal point of the case:

> In addition to the foregoing, the Plaintiffs also agree to pursue an action against Talin Industries Arredament (sic). If the action against Talin Industries Arredament (sic) is successful the Plaintiffs will return $50,000 to Releasees [Insurer and the original defendants] free and clear of all fees and expenses except that releasors agree to pay 50% of the expenses of the litigation against Talin Industries Arredament (sic) incurred after the signing of the release. If Releasees are able to settle their claim against Talin Industries Arredament (sic) prior to trial they will return to the Releasees $25,000 free and clear of all fees and expenses.

Id.

6. *Hatfield*, 610 A2d at 449.

7. *Hatfield*, 610 A2d at 448.

8. The term "Mary Carter Agreement" derives its name from the Florida decision *Booth v Mary Carter Paint Co.*, 202 S2d 8 (Fla App 1967). The term is generally used to apply to any agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants. *Maule Industries, Inc. v Rountree*, 264 S2d 445, 447 (Fla App 1972), rev'd on other grounds, 284 S2d 389 (Fla 1973). Mary Carter Agreements usually have the following features:

> (1) the agreeing defendant(s) guarantees the plaintiff a minimum payment, often the limit of defendant's liability insurance;
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> (2) the plaintiff agrees not to enforce against the agreeing defendant(s) any subsequent judgments;
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> (3) the agreement defendant(s) remains a part of the action and payments to plaintiff are reduced if money is recovered, by settlement or judgment, from the non-agreeing defendant(s); and
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> (4) the agreement is "secret" in that there is an understanding that it will not be disclosed unless required by rules of court or a court of competent jurisdiction.

Hatfield, 610 A2d at 449.

9. *Hatfield*, 5 Pa D & C 4th at 104.

10. 284 S2d 385 (Fla 1973). In *Ward* the court held that the "Mary Carter Agreement" was admissible in evidence at trial if the agreement shows that the signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants. *Ward*, 284 Sd at 387. The court stated that "secrecy is the essence of such an agreement because the court or jury as trier of fact, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendant." Id.

"these agreements tend to encourage collusion which could result in a denial of a fair trial to non-agreeing defendants."[11] The Hatfields and the original defendants then sought, and the trial court granted, permission to take an interlocutory appeal.[12]

The superior court, while reversing the trial court's holding, declined to evaluate whether this Agreement was a Mary Carter Agreement.[13] Instead, the superior court stated that even if the pertinent Agreement was a "Mary Carter Agreement," the case was nevertheless controlled by 42 Pa Cons Stat Ann section 6141(c) and, accordingly, the Agreement should not be disclosed to a jury.[14] The superior court concluded by stating that the trial court's ruling was contrary to the express mandate of section 6141(c) which prohibits admission of settlement agreements.[15]

Reversing the superior court decision, the Pennsylvania Supreme Court began its analysis by stating that while categorizing an agreement as a "Mary Carter Agreement" may be a convenient research tool, such categorization does not dispositively answer the admissibility or non-admissibility of a particular agreement.[16] Rather, the court noted that unless relevant evidence was shown to come within a rule which made it inadmissible, relevant evidence was admissible.[17] In determining the relevancy of evidence, the court, relying on precedent, held that "evidence is relevant if it tends to make a fact at issue more or less probable."[18]

Justice McDermott, writing for the majority, noted that the potential bias of the original defendants was the "fact at issue" in the appeal.[19] Remarking that the supreme court had previously permitted inquiry into the correlation between a witness' credibility and that witness' potential responsibility for reimbursement, which was dependent upon the outcome of the trial,[20] the court agreed

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11. *Hatfield*, 5 Pa D & C 4th at 102.

12. *Hatfield*, 610 A2d at 448. Interlocutory appeal is defined as "an appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits." *Black's Law Dictionary* 563 (West, abridged 6th ed 1991).

13. *Hatfield*, 578 A2d at 531. Stating that this jurisdiction has not defined what a "Mary Carter Agreement" is, the superior court explained that it would not undertake such consideration or determine the effect such an agreement would have on this action. Id.

14. Id.

15. Id.

16. *Hatfield*, 610 A2d at 449.

17. Id. See also *Clark v Essex Wire Corp.*, 361 Pa 60, 63 A2d 35 (1949).

18. *Hatfield*, 610 A2d at 449 citing *Martin v Soblotney*, 502 Pa 418, 422, 466 A2d 1022, 1024 (1983).

19. *Hatfield*, 610 A2d at 449.

20. Id at 450. See *Profit-Sharing Blue Stamp Co. v Urban Redevelopment Auth. of*

with Talin that the Agreement between the Hatfields and the original defendants was relevant to show the original defendants' bias.[21]

In determining whether the Agreement, though relevant, fell "within a rule which makes it inadmissible,"[22] the majority opinion embarked upon a four-part analysis of the Statutory Construction Act of 1972.[23] This analysis directed the court to ascertain the primary purpose of section 6141, the statutory proscription against the admissibility of settlement agreements.[24]

Pittsburgh, 429 Pa 396, 241 A2d 116 (1968). *Profit-Sharing* involved an eminent domain proceeding in which there was a claim by a lessee for future value of a leasehold in a building which had been condemned by the Urban Redevelopment Authority of Pittsburgh. *Profit-Sharing Blue Stamp Co.*, 241 A2d at 116. The owner of the building had been compensated for the taking but the plaintiff also claimed compensation for the value of the future interest of its leasehold. Id. The supreme court permitted the cross-examination of an officer of the owner of the building with regard to a bond given by the owner to indemnify the Authority in case the Authority was required to make payment to the tenant. Id at 118.

21. *Hatfield*, 610 A2d at 450.

22. *Clark*, 63 A2d at 38.

23. *Hatfield*, 610 A2d at 450. The Statutory Construction Act, 1972 Pa Laws 1339, Section 3 codified at 1 Pa Cons Stat Ann §§ 1901 et seq (Purdon 1992) provides in relevant part:

§ 1903. WORDS AND PHRASES.

Words and phrases shall be construed according to rules of grammar and according to their common approved usage;

. . .

1 Pa Cons Stat Ann § 1903 (Purdon 1992).

§ 1921. LEGISLATIVE INTENT CONTROLS.

(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

. . .

(4) The object to be attained.

1 Pa Cons Stat Ann § 1921 (Purdon 1992).

§ 1922. PRESUMPTIONS IN ASCERTAINING LEGISLATIVE INTENT.

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used.

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

. . .

(5) That the General Assembly intends to favor the public interest as against any private interest.

1 Pa Cons Stat Ann § 1922 (Purdon 1992).

§ 1924. CONSTRUCTION OF TITLES, PREAMBLES, PROVISOS, EXCEPTIONS AND HEADINGS.

The title and preamble of a statute may be considered in the construction thereof. . . . The headings prefixed to titles, parts, articles, chapters, sections and other divisions of a statute shall not be considered to control but may be used to aid in the construction thereof.

1 Pa Cons Stat Ann § 1924 (Purdon 1992).

24. *Hatfield*, 610 A2d at 450, 451. Section 6141 of Title 42 provides in relevant part:

§ 6141. EFFECT OF CERTAIN SETTLEMENTS.

Explaining that the determination was one of first impression for the court, the court relied on a decision from the United States District Court for the Eastern District of Pennsylvania[25] wherein that court stated that the policy underlying this statute was a means to encourage settlements.[26] Furthermore, the court's own examination found that the ancestry of the statutory section lies in the honored common rule that, on public policy grounds, offers of settlement and compromise are not generally admissible.[27]

Next, the court looked to the words of the statute, noting that section 6141 was entitled "Effect of CERTAIN Settlements".[28] The court questioned whether the Agreement at issue was in fact a "settlement" within the terms of the statute.[29] Relying on the definition of "settlement" given by Black's Law Dictionary,[30] the court concluded that the Agreement, when viewed in its entirety, could not be described as a conclusive resolution or final disposition of the matters between the plaintiffs and the original defendants.[31] Rather, the court observed that the Agreement was "merely the first act in a two-act play, and matters between them will not be conclusively resolved or finally disposed until the final curtain has come down."[32]

Third, while recognizing that the drafters of the Agreement had titled the document "Settlement Agreement and Release", the court opined that "calling a thing something does not make it so."[33] Furthermore, the court commented that considering the par-

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(A)PERSONAL INJURIES. . . .

(B) DAMAGES TO PROPERTY. . . .

(C) ADMISSIBILITY IN EVIDENCE. Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

42 Pa Cons Stat Ann § 6141 (Purdon 1982).

25. *Young v Verson Allsteel Press Co.*, 539 F Supp 193 (ED Pa 1982).

26. *Hatfield*, 610 A2d at 451.

27. Id. See also *Rochester v Machinery Corp*, 498 Pa 545, 449 A2d 1366 (1982) and *Schlosser v Weiler*, 377 Pa 582, 105 A2d 331 (1954) (settlements in matters of dispute are favored by the law). *Hatfield*, 610 A2d at 451.

28. Id at 451 n 12 (emphasis added by the court).

29. Id at 451.

30. Black's Law Dictionary defines settlement as "an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other . . ., to fix or resolve conclusively; to make or arrange for final disposition." *Black's Law Dictionary* 955 (West, abridged 6th ed 1991).

31. *Hatfield*, 610 A2d at 451.

32. Id.

33. *Hatfield*, 610 A2d at 451. See *Fidelity Title & Trust Co v Metropolitan Life Insurance Co.*, 305 Pa 296, 157 A 614 (1931).

agraph at issue in this appeal,[34] the Agreement would more accurately be described as a "Settlement and Reimbursement Agreement."[35]

Finally, the court addressed whether agreements such as these should be admitted into evidence *in toto*.[36] Providing guidance for future courts faced with this same issue, Justice McDermott stated that the court should review the agreement, balance its relevancy against the potential for prejudice, and, exercising judicial discretion, admit or exclude as much as it deems appropriate.[37] However, the court advised that if an agreement clearly joined two or more parties against another, so that clear potential for bias existed which would not otherwise be apparent to a fact finder, the fact finder must be at least informed of the existence of a reason for potential bias.[38] Hence, the court concluded that given the facts of this case the jury was entitled to be informed of the financial interests which the original defendants retained in the Hatfields' success against Talin.[39]

Justice Cappy, in a concurring opinion, agreed that the jury should be apprised of the existence of the Agreement; however, he disagreed with the majority on two points.[40] First, he disagreed with the majority's characterization that the Agreement was something other than a "Settlement Agreement" in order to admit it into evidence.[41] While agreeing that the public policy behind section 6141(c) was to encourage settlements, the concurring opinion stressed that another public policy was equally at stake in this case: the right of a party against whom a witness is called to show that such witness has an interest in or is biased as to the outcome of the trial.[42]

Justice Cappy stated that when two public policies conflict it is the responsibility of the judiciary to balance both and make a determination as to which policy is paramount.[43] Accordingly, the

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34. See note 5 for the text of the paragraph in issue.

35. *Hatfield*, 610 A2d at 452.

36. Id. Black's Law Dictionary defines "in toto" as "wholly; completely." *Black's Law Dictionary* 569 (West, abridged 6th ed 1991).

37. *Hatfield*, 610 A2d at 452.

38. Id.

39. Id.

40. Id (Cappy concurring). Justices Larsen and Papadakos joined in the concurring opinion.

41. Id. See note 30 for the definition of "settlement."

42. Id at 453.

43. Id.

concurrence balanced the policy of impeaching a witness against the administrative policy of encouraging settlements and concluded that the "danger inherent" in refusing to allow the admissibility of the Agreement during cross-examination outweighed the public policy of encouraging settlements.[44]

Secondly, the concurring opinion, while agreeing that the jury should have been instructed as to the financial interests which the original defendants retained in the Hatfields' success, nevertheless strongly asserted that the full dollar amount of the settlement should not have been introduced into evidence, as the settlement amount was not relevant to the issue of the credibility of the original defendants.[45] The concurrence concluded that introducing the total dollar settlement would unduly influence the jury and interfere with its ability to independently determine the amount of damages in the event the jury found Talin liable to the Hatfields.[46]

Pennsylvania has a strong and historical public policy establishing that a party against whom a witness is called always has the right to test the credibility of such witness during cross-examination.[47] A witness' credibility may be tested by (1) showing his or her bias or hostility, (2) proving facts which would make such feelings probable, or (3) showing the witness has an interest in the result of the trial.[48]

However, of equal strength and historical foundation is another Pennsylvania public policy which encourages settlements.[49] The General Assembly of the Commonwealth of Pennsylvania clearly had this policy in mind when it enacted section 6141(c) of Title 42, which precludes settlement agreements from being admitted in evidence except in actions in which the settlement has been offered as a complete defense.[50]

This note will examine the approach the Pennsylvania Supreme Court has taken in balancing these two policies and determining

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44. Id.

45. Id at 454. Justice Cappy stated that what the majority has left unsaid, but which follows from his analysis "is that the full dollar amount of the settlement should not be introduced in evidence." Id.

46. Id.

47. *Commonwealth v Williams*, 524 Pa 218, 570 A2d 75 (1990); *Downey v Weston*, 451 Pa 259, 301 A2d 635 (1973).

48. See *Williams*, 570 A2d at 75; *Commonwealth v Collins*, 519 Pa 58, 545 A2d 882 (1988); and *Downey*, 301 A2d at 635.

49. *Muhammad v Strassburger*, 526 Pa 541, 587 A2d 1346, 1349 (1991).

50. Act of July 9, 1976, 1976 Pa Laws 586 § 2, effective June 27, 1978 codified at 42 Pa Cons Stat Ann § 6141 (Purdon 1982).

whether "Mary Carter"[51] agreements are admissible into evidence for the purpose of cross-examining the settling defendant as to any interest, bias or motive such party may have in the case. In order to understand the court's reasoning, it is necessary to review the development of the law, first as it pertains to impeachment of witnesses and, secondly, as it pertains to the admissibility of settlement agreements.

In *Profit-Sharing Blue Stamp Co. v Urban Redevelopment Auth.*,[52] an eminent domain proceeding brought by a lessee for future value of its leasehold, the owner of the building had given a $5,000 bond to the Urban Redevelopment Authority ("URA") to reimburse it in case the URA had to make payment to the plaintiff-tenant.[53] An officer of the corporation which owned the building was cross-examined with regard to the bond given by the corporation to the URA and the corporation's potential responsibility for reimbursement, which responsibility was dependent upon the outcome of the trial.[54] The supreme court held that such inquiry was proper as bearing on the witness' credibility, especially since the corporation, in which the witness was an officer, was obligated to indemnify the URA if it was required to make payment to the tenant.[55]

In 1973, the supreme court, in *Downey v Weston*, verified that the purpose of all impeachment was to affect the credibility of a witness.[56] At issue in the *Downey* appeal was whether it was proper cross-examination to inquire into the close social relationship be-

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51. See note 14 for the characteristics of a Mary Carter Agreement.

52. 429 Pa 396, 241 A2d 116 (1968).

53. *Profit-Sharing Blue Stamp Co.*, 241 A2d at 117. The owner had previously been compensated for the taking of its fee. Id.

54. Id.

55. Id at 118.

56. *Downey*, 301 A2d at 639. In *Downey*, the plaintiff brought an action seeking to recover damages for a rare neurological disorder he developed allegedly caused by the trauma he received in an automobile accident with the defendant. Id at 637. On cross-examination of defendant's medical expert witness, the plaintiff's counsel established (1) that a close social and professional relationship existed between the witness and the defendant's attorney and (2) that the defendant's attorney had allowed the expert to examine Downey's medical records without first obtaining permission from the plaintiff. Id at 638.

The plaintiff's counsel then attempted to show by way of further cross-examination of the witness that such a disclosure of the plaintiff's medical records violated the Hippocratic Oath and Principles of Medical Ethics of the American Medical Association. Id. However, the trial court barred this line of cross-examination. Id at 639. On appeal, the Supreme Court of Pennsylvania held that the interest in or bias of a witness towards either party in a lawsuit may be exposed upon cross-examination, and in some instances blocking of such a line of attack may constitute reversible error. Id.

tween an expert witness and the co-defendant's attorney.[57] The court, citing *Price v Yellow Cab Co. of Philadelphia*,[58] held that "it is beyond question that the interest or bias of a witness towards either side of a lawsuit may be exposed upon cross-examination."[59]

The scope of permissible testing of a witness' credibility under Pennsylvania law has remained quite stable. The law has consistently established that any witness bias, or at least the existence of the reason for the potential bias, may be used to impeach a witness.[60]

In 1990, the Pennsylvania Supreme Court in *Commonwealth v Williams* further reinforced this policy of testing a witness' credibility by cross-examination.[61] In *Williams*, the defendant appealed his conviction alleging that the trial court erred when it permitted the prosecution, on cross-examination of a defense witness, to impeach the witness by inquiring into unsentenced convictions of the witness.[62] The supreme court, in upholding the conviction, explained that while it is a general rule that unsentenced convictions may not be used to impeach a witness, it is "equally true that a party against whom a witness is called ALWAYS has the right to show by cross-examination that a witness is biased or HAS AN INTEREST IN THE RESULT OF THE TRIAL."[63]

The Pennsylvania policy which excludes settlement agreements from evidence is based on the premise that such a policy encourages settlements and reduces the stress and negativity associated

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57. Id at 638.

58. 443 Pa 56, 278 A2d 161 (1971). In *Price*, an infant and her parents brought an action against a taxicab company and an automobile driver for birth defects and related expenses allegedly caused by injuries sustained by the infant's pregnant mother in an automobile-taxicab collision. *Price*, 278 A2d at 161. On direct examination, the mother's obstetrician linked the collision with the plaintiff's birth defects. Id at 165. In an attempt to demonstrate possible motive or bias of the obstetrician, the defendant's attorney sought to introduce into evidence correspondence between the obstetrician and his professional insurance carrier in which he notified the carrier of the possibility that a malpractice claim might be filed against him. The court permitted the correspondence to be entered into evidence explaining that a party is allowed to cross-examine a witness as to any interest, bias or motive such witness may have. Id.

59. *Downey*, 301 A2d at 639.

60. See *Collins*, 545 A2d at 882; *Commonwealth v Gwaltney*, 497 Pa 505, 442 A2d 236 (1982); *Commonwealth v Hamm*, 474 Pa 487, 378 A2d 1219 (1977); and *Commonwealth v Cheatham*, 429 Pa 198, 239 A2d 293 (1968).

61. *Williams*, 570 A2d at 75.

62. Id at 80. The defendant had been convicted of first-degree murder, criminal conspiracy and robbery. Id.

63. Id. (emphasis added)

with protracted litigation.[64] As early as 1954, the supreme court stated that settlements in matters of dispute are favored by law.[65]

Contemporaneous with the enactment of the Pennsylvania Comparative Negligence Law,[66] the General Assembly enacted 42 Pa Cons Stat Ann section 6141, a seemingly inflexible proscription against the introduction at trial of evidence of settlement agreements.[67] Furthermore, a review of the case law confirms that unless a settlement has been offered as a complete defense, Pennsylvania courts have consistently ruled that settlement agreements cannot be introduced into evidence.[68]

In 1984, the Superior Court of Pennsylvania in *Weingrad v Philadelphia Electric Co.* held that not only were settlement agreements not admissible, but any mention of settlement agreements between the parties was also inadmissible.[69] Following the mandate of section 6141(c), the superior court opined that the lower court had committed error by informing the jury that the plaintiff had settled with one of the defendants prior to trial.[70] Nevertheless, the superior court held that since the jury had not found the co-defendant negligent, reversible error had not been committed.[71] Interestingly, the court also indicated, in dictum, that the public pol-

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64. *Muhammad*, 587 A2d at 1350.

65. *Schlosser v Weiler*, 377 Pa 582, 105 A2d 331 (1954). The plaintiff in *Schlosser* brought suit to set aside a settlement agreement on grounds of fraud. The court, finding no factual situation to support a finding of fraud, sustained the agreement holding that settlements are favored in law. *Schlosser*, 105 A2d at 333.

66. Act of July 9, 1976, 1976 Pa Laws 586, codified in 42 Pa Cons Stat Ann § 7102 (Purdon 1982). Under comparative negligence statutes, negligence is measured in terms of percentage, and any damages allowed shall be diminished in proportion to amount of negligence attributable to the person for whose injury, damage or death recovery is sought. *Black's Law Dictionary* 193 (West, abridged 6th ed 1991).

67. See note 24 for text of 42 Pa Cons Stat Ann § 6141.

68. See *Young v Verson Allsteel Press Co.*, 539 F Supp 193 (ED Pa 1982); *Rochester Machine Corp. v Mulach Steel*, 498 Pa 545, 449 A2d 1366 (1982); and *Schlosser v Weiler*, 377 Pa 582, 105 A2d 331 (1954).

69. *Weingrad v Philadelphia Electric Co.*, 324 Pa Super 16, 471 A2d 100 (1984). The decedent, a flight instructor, was administering a bi-annual flight review of the owner/pilot of an aircraft when the plane hit a utility pole owned by Philadelphia Electric Co., resulting in the death of the flight instructor. *Weingrad*, 471 A2d at 101. The Administratrix of the decedent's estate brought an action against the owner/pilot and the electric company. Id. Before any testimony was given at trial, the court informed the jury that the plaintiff had settled with the owner/pilot. Id. The jury subsequently found that both defendants were not negligent, but that the deceased was negligent in that he failed to exercise reasonable care for his own safety and that such negligence was a substantial factor in causing his own death. Id at 103. The plaintiff appealed contending that the trial court erred in disclosing to the jury that defendant Lippy had settled. Id at 102.

70. Id at 100.

71. Id at 103.

icy of promoting settlements would not be frustrated by a law which permitted the admission of evidence of settlements when offered to prove bias or prejudice of a witness.[72]

Currently, there is a wide discrepancy in the way various jurisdictions handle "Mary Carter Agreements."[73] In most jurisdictions, such agreements are accepted; however, at least one jurisdiction has completely voided the Agreements stating that they are contrary to public policy.[74]

Notwithstanding this fact, most jurisdictions that accept Mary Carter Agreements have allowed them into evidence when used to impeach the testimony of the settling defendant.[75] An influential early Florida Supreme Court case involving the admissibility of a Mary Carter Agreement, *Ward v Ochoa*,[76] stated that "the search

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72. Id at 102 n 3.

73. See *Firestone Tire & Rubber Co. v Little*, 276 Ark 511, 639 SW2d 726 (1982) (The agreement must be disclosed to court and counsel and may be admitted into evidence.), rev'd on other grounds sub nom; *State v Ingram*, 399 NE2d 808 (Ind App 1980) (The jury should be made aware of the agreement to judge credibility of witnesses, but should not see the agreement because of likely prejudice on issues of liability and amount of damages.), aff'd, 427 NE2d 444 (Ind 1981); *General Motors Corp. v Lahocki*, 286 Md 715, 410 A2d 1039 (1980) (Mary Carter agreement must be disclosed to court and opposing counsel, even without a discovery request to produce.); *Hegarty v Campbell Soup Co.*, 214 Neb 716, 335 NW2d 758 (1983) (The entire agreement should be admitted into evidence.); *Taylor v DiRico*, 124 Ariz 513, 606 P2d 3 (1980) (Where the court finds that the agreement does not sufficiently prejudice the nonsettling defendant, it may not require disclosure).

74. *Lum v Stinnett*, 87 Nev 402, 499 P2d 347 (1971). The Nevada Supreme Court ruled that Mary Carter Agreements, even where not secret, constitute maintenance and champerty, contravene legal ethics, and prejudice nonsettling defendants. *Lum*, 499 P2d at 350-52.

The Wisconsin Supreme Court ruled similarly in *Trampe v Wisconsin Tel. Co.*, 214 Wis 210, 252 NW 675 (1934), although the decision could be read to prohibit only secret agreements.

"Maintenance" is an expression for a third party's meddling in a lawsuit by encouraging, assisting or maintaining a party, either with money or otherwise, to prosecute or defend the litigation. *Black's Law Dictionary* 658 (West, abridged 6th ed 1991). "Champerty" is maintenance with a financial motive, such as the financial support of a third party's lawsuit in consideration of receiving part of any judgment proceeds. *Black's Law Dictionary* 157 (West, abridged 6th ed 1991).

75. See *Sequoia Manufacturing Co. v Halec Construction Co.*, 117 Ariz 11, 570 P2d 782 (Ariz Ct App 1977); *Pellet v Sonotone Corp.*, 26 Cal 2d 705, 160 P2d 783 (1945); *Ward v Ochoa*, 284 S2d 385 (Fla 1973); *Gatto v Walgreen*, 61 Ill 2d 513, 337 NE2d 23 (1975); *Burkett v Crulo Trucking Co.*, 171 Ind App 166, 355 NE2d 253 (1976); *General Motors Corp. v Lahocki*, 286 Md 714, 410 A2d 1039 (1980); *Grillo v Burke's Paint Co.*, 275 Or 421, 551 P2d 449 (1976); and *General Motors Corp. v Simmons*, 558 SW2d 855 (Tex 1977).

76. 284 S2d 385 (Fla 1973). In *Ward*, the parents of a minor decedent brought a wrongful death action against bus owner, bus driver and motorist. The Florida Supreme Court held that the trial court had erred in denying the non-settling defendant's motion for an order requiring plaintiffs to produce for inspection and copying a "Mary Carter Agreement" and thus the non-settling defendants were entitled to a new trial. *Ward*, 284 S2d at

for the truth, in order to give justice to the litigants, is the primary duty of the courts."[77] Accordingly, the court held that Mary Carter Agreements were admissible because the court or jury as trier of fact would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendant if not apprised of the Agreement.[78]

This type of judicial solution, however, faces a potential barrier in jurisdictions like Pennsylvania, which have statutes proscribing the admissibility of settlement agreements.[79] By determining that the agreement in *Hatfield* was not a final settlement agreement as the statute intended, the majority's decision cleverly avoided any statutory barrier to the agreement's admissibility into evidence.[80]

The concurring opinion in *Hatfield* also attempted to avoid the statutory barrier to the admissibility of the agreement. However, instead of engaging in a lengthy statutory interpretation analysis to determine if the agreement was a final settlement, Justice Cappy employed a balancing test between the two competing interests at issue: the right to impeach a witness and the policy of encouraging settlements by disallowing settlement agreements into evidence.[81] After weighing these interests, it was Justice Cappy's opinion that the danger inherent in not allowing a party to impeach the credibility of a witness far outweighed the administrative policy of encouraging settlements.[82]

Although the majority decision, focusing on a statutory interpretation analysis, was sound, it does not resolve the admissibility issue as expeditiously as does the concurring opinion. Nonetheless, neither the majority nor concurring opinion clearly eliminates the potential statutory barriers imposed by section 6141.[83]

The plain language of this statute seems to prohibit the admissibility of any settlement agreement, even on cross-examination of a witness for purpose of showing bias. It is likely, however, that this

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388.

77. Id at 387.

78. Id.

79. See Minn Stat Ann § 604.01(4) (West 1988)("Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivision 2 and 3 shall be inadmissible in evidence on the trial of any legal action."); Wis Stat Ann § 885.285(2) (West Supp 1992) ("Any settlement or payment under sub. (1) is not admissible in any legal action unless pleaded as a defense.")

80. *Hatfield*, 610 A2d at 452.

81. Id at 453 (Cappy concurring).

82. Id.

83. 42 Pa Cons Stat Ann § 6141 (Purdon 1982).

statute was never meant to apply to the impeachment of a witness pertaining to the bias that results from the witness' entry into a settlement agreement.[84]

In sum, to avoid future confusion and disagreement over the admissibility of certain settlement agreements, especially those agreements similar to the *Hatfield* agreement, the General Assembly of the Commonwealth of Pennsylvania should amend section 6141. The statute, as amended, should specifically permit the admission of evidence of settlement agreements when offered to prove bias or prejudice of a witness. Such a revision would clearly be consistent with Pennsylvania's strong public policy of a party's right to test the credibility of a witness during cross-examination as well as the strong public policy which encourages settlements by precluding settlement agreements from being admissible into evidence.

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84. Compare Federal Rule of Evidence 408, which prohibits admission of compromises and offers to compromise to prove or disprove liability, but which adds, "This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness. . . ." FRE 408.