IN THE SUPREME COURT OF THE STATE OF OREGON

KEVIN RAINS AND MITZI RAINS,

Plaintiffs-Respondents,
Respondents on Review,

v.

STAYTON BUILDERS MART, INC.; JOHN DOE LUMBER SUPPLIER; JOHN DOE LUMBER MILL; and FIVE STAR CONSTRUCTION, INC.,

Defendants.

STAYTON BUILDERS MART, INC.,

Third-Party Plaintiff-Respondent,
Respondent on Review,

v.

RSG FOREST PRODUCTS, INC., *et al.*,

Third-Party Defendants,

and

WEYERHAEUSER COMPANY,

Third-Party Defendant-Appellant,
Petitioner on Review.

WEYERHAEUSER COMPANY,

Fourth-Party Plaintiff,

v.

Marion County Circuit Court
Case No. 06C21040

Court of Appeals Case No.
A145916

Supreme Court Case No.
S062959

May 2015

RODRIGUEZ & RAINS CONSTRUCTION, an Oregon corporation,

Fourth-Party Defendant.

WITHERS LUMBER COMPANY,

Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC., an Oregon corporation; and WEYERHAEUSER COMPANY,

Fourth-Party Defendants.

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.,

Fourth-Party Plaintiff,

v.

BENITO RODRIGUEZ, KEVIN RAINS, and RODRIGUEZ & RAINS CONSTRUCTION,

Fourth-Party Defendants.

SELLWOOD LUMBER CO., INC., an Oregon corporation,

Fifth-Party Plaintiff,

v.

SWANSON BROS. LUMBER CO., INC., an Oregon corporation,

Fifth-Party Defendant.

AMICI CURIAE BRIEF OF ASSOCIATED OREGON INDUSTRIES AND OREGON BUSINESS ASSOCIATION IN SUPPORT OF WEYERHAEUSER COMPANY'S BRIEF ON THE MERITS

On Appeal from the Judgments and Money Awards of the
Circuit Court for Marion County,
Honorable Dennis J. Graves, Circuit Court Judge

Court of Appeals Opinion Filed: August 13, 2014
Reconsideration Denied: December 10, 2014
Author of Opinion: Ortega, P.J.
Concurring Judges: Sercombe, Hadlock, J.J.

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I. INTRODUCTION

"So basic to our jurisprudence is the right to a fair trial that it has been called 'the most fundamental of all freedoms.'" *Nebraska Press Assn. v. Stuart*, 427 US 539, 586, 96 S Ct 2791, 49 L Ed 2d 683 (1976) (Brennan, J., concurring; citation omitted). The use of Mary Carter agreements in the trial of civil cases endangers that right. As this Court has noted, those agreements have been criticized as "distorting the relationship between plaintiffs and defendants," can produce "a nonadversary and possibly collusive proceeding between the plaintiff and one defendant," and may "adversely affect the non-settling defendant's right to a fair trial." *Grillo v. Burke's Paint Company, Inc.*, 275 Or 421, 426, 551 P2d 449 (1976).

Those dangers are at their greatest when, as a result of entering into a Mary Carter agreement, a settling defendant not only loses the motivation to defend itself but also, as is the case here, affirmatively obtains a financial stake in having the jury return a large damages award for the plaintiff. The harm to the right to a fair trial that those dangers produce, moreover, becomes untenable – both for any non-settling defendant and the court system itself – when the terms of the agreement are kept from the jury, which also was the case here.

Nearly four decades after the Court's decision in *Grillo*, *amici curiae* Associated Oregon Industries (AOI) and the Oregon Business Association

(OBA) respectfully ask the Court to do two things. First, the Court should fortify its long line of precedents confirming that the judiciary of this state will entertain only justiciable controversies, those that are both real and substantial between parties with adverse legal interests. Because Mary Carter agreements by their very nature implicate that constitutional constraint, courts should subject them to close judicial scrutiny. Second, the Court should hew to that which Justice Howell wrote in *Grillo*: Mary Carter agreements – at least when they do not destroy justiciability – are "admissible in evidence." *Id.* at 427.

By confirming and applying those principles, the Court will go a long way toward ensuring that, when Mary Carter agreements are in play, the fundamental right to a fair trial – one that belongs to every party before the tribunal – is secured.[1]

II. DISCUSSION

A. Mary Carter Agreements Can Destroy Justiciability.

Oregon courts are permitted to decide only justiciable controversies. *See, e.g., Cummings Construction Co. v. School Dist. No. 9, Coos County*, 242 Or

[1] In their brief in support of Weyerhaeuser's petition for review, AOI and OBA indicated that they may elect to participate on the merits of issues presented in both petitions. With respect to the other issues that Weyerhaeuser's petition presents, *amici* offer their general support for Weyerhaeuser's positions. However, AOI and OBA have decided to limit their merits analysis to the important questions about Mary Carter agreements this case has generated.

106, 109, 408 P2d 80 (1965) ("courts do not have jurisdiction * * * unless there is a 'justiciable controversy' between the parties" (citations omitted)). To be justiciable, a controversy must be both "real and substantial." *Id.* at 110 (internal quotations and citations omitted). A controversy is real and substantial when the parties' interests are adverse and the court's decision will have some practical effect on the rights of the parties. *Weems v. Board of Parole and Post-Prison Supervision*, 347 Or 586, 594 n 7, 227 P3d 671 (2010).

Adversity and practical effect – whether a controversy is both "real and substantial" – is for the court to ascertain and not for the parties to seek to manufacture. *See Cummings Construction Co.*, 242 Or at 110 ("Neither can the parties confer jurisdiction upon the courts by stipulation in the absence of a justiciable controversy."). And that is an issue this case squarely presents: did plaintiffs Kevin and Mitzi Rains and defendant Stayton Builders Mart, Inc., through their Mary Carter agreement, seek to engineer the appearance of continued adversity, "adversity" requiring a decision that would have a practical effect, when in fact the agreement had destroyed either or both of those required elements?

In assisting the Court in answering that question, *amici* begin by recounting the most in-depth Oregon analysis of Mary Carter agreements generally, that provided by then-judge Landau in *Bocci v. Key Pharmaceuticals*,

Inc., 158 Or App 521, 548-64 974 P2d 758 (1999) (Landau, J., dissenting, joined by Deits, C.J., and Warren, J.), *vacated on other grounds*, 332 Or 39, 22 P3d 758 (2001). His observations about those agreements 16 years ago strike with the same resonance today as the echo of this Court's similar statements from *Grillo* 25 years earlier:

> "From the beginning, they have been subject to criticism that they are champertous, that they mislead juries, promote unethical collusion, and create the potential for an allocation of a larger share of liability to less culpable – but deeper pocketed – defendants, thus frustrating the operation of equitable contribution laws. In particular, courts and commentators around the nation have expressed concerns about the effect of Mary Carter agreements on the integrity of the adversarial process."

Bocci, 158 Or App at 549 974 P2d 758 (1999) (footnote omitted); *see also id.* at 553 ("My point in setting forth a summary of the case law is this: It is well-nigh universally recognized that Mary Carter agreements are dangerous.").

They are dangerous because they create "a substantial incentive for the settling defendant to cooperate fully with the plaintiff to shift liability to the remaining defendants, all the while appearing to the jury as a codefendant." *Id.* at 550. When that happens, the position of the plaintiff and the settling defendant is no longer, "in any sense of the term, adverse, and their alignment as plaintiff and defendant [becomes] completely illusory." *Id.* at 556 (bracketed text added). And, with adversity destroyed, the claims of the plaintiff against the settling defendant should be dismissed under this Court's

well-established precedents "on the ground that they no longer present a justiciable controversy." *Id.* at 556; *see also id.* at 551 (noting that "[o]ther courts have concluded that Mary Carter agreements are void unless the settling defendant is dismissed from the lawsuit or realigned as a plaintiff").

Those general comments, *amici* believe, warrant a deeper analysis. For example, it cannot be that the mere loss or limitation of a settling defendant's potential financial liability – as would be the case with a simple covenant not to execute – should be sufficient to trigger serious justiciability concerns. If that is all that is at issue, then "the question of * * * liability remains an open one." *Dew v. City of Scappoose,* 208 Or App 121, 143, 145 P3d 198 (2006). And, a determination of liability – with or without out-of-pocket losses – undeniably can have significant direct and collateral consequences on a party. Moreover, if that were the standard, then "anyone with sufficient liability insurance would be essentially immune from suit." *Id.*

As the Illinois Court of Appeals noted in a case involving a simple limit of exposure to the settling defendant's $50,000 insurance policy limit:

> "[N]othing has deprived [the non-settling defendant] of the ability to mount a vigorous defense through the direct examination or the cross-examination of witnesses. And despite the agreement, [the settling defendant] still maintains an interest in minimizing any finding of liability, so as to reduce the potential for damages against him from a maximum of $50,000 to zero. And, while [he] maintains an interest in placing blame on [the non-settling

> defendant] for causing the accident, he has no additional incentive to increase the amount of any verdict against [the non-settling defendant], because that would not decrease the amount of money he may owe to [the plaintiff]. Both defendants still have an interest in minimizing the amount of damages and a finding of no liability."

Simpson v. Matthews, 339 Ill App 3d 322, 332-33, 790 NE 2d 401 (5th Dist), *app den*, 205 Ill 2d 647 (2003). Likewise, that the happenstances of litigation cause one defendant to point its finger at another – a regular occurrence – also should fail to register markedly on a court's constitutional radar. *See, e.g., Simpson*, 339 Ill App 3d at 332 ("In a case such as this one, the realistic focus for both defendants is not as much on defeating the claim (which they have little likelihood of accomplishing) but, rather, on attempting to place the blame on each other.").

Justiciability concerns, however, do arise when, because of the parties' agreement, the settling defendant no longer has any motivation to act as a defendant but, instead, an affirmative incentive to aid the plaintiff. In other words, courts must be particularly vigilant when such agreements "provide ulterior financial incentives for parties to take positions they otherwise would not take and thus unfairly distort litigation." *Mallios v.* Baker, 11 SW 3d 157, 160 (Tex 2000) (Hecht, J., concurring). As Justice Hecht went on to observe:

> "There is nothing wrong with one defendant siding with the plaintiff against another defendant; the one defendant may believe the other to be liable. The vice is not in the unusual alignment of

> the parties, but in the financial incentives that encourage the alignment."

Id.

It is the potential for those financial incentives, and the ulterior motives they produce, that provides the impetus for close judicial examination of Mary Carter agreements to ensure that the settling parties are not, in fact, presenting the jury with disguised adversity. And the parties to such agreements undeniably attempt to avoid such scrutiny. They call their bargains "loan-receipt agreements," or "covenants not to execute," *Moore v. Subaru of America*, 891 F2d 1445, 1451 (10th Cir 1989), or "sliding scale agreements," *Hess v. St. Francis Regional Medical Center*, 245 Kan 715, 722, 869 P2d 598, (Kan 1994). They vary the terms so that it will appear that a trial will be meaningful. S*ee, e.g., Newman v. Ford Motor Co.*, 975 SW2d 147, 151 (Mo 1998) ("agreements to settle claims between parties who nevertheless remain at trial are virtually limitless in their possible permutations"); *General Motors Corp. v. Lahocki*, 286 Md 714, 720, 410 A2d 1039 (Md 1980) ("It is probably safe to say that no two pacts dubbed 'Mary Carter Agreement' have been alike").

Parties do those things – naturally – in an effort to maximize their shared interests (enhancing the plaintiff's recovery; setting, limiting, or eliminating the

settling defendant's exposure) while simultaneously seeking to minimize their risks (a determination of nonjusticiability; having the jury learn of the agreement's terms). But labels are not controlling. Rather, it is the terms of the agreement and the conduct of the parties to which courts do and should continue to look in deciding whether a real and substantial controversy exists and how to protect the right of a non-settling defendant to a fair trial.

In that regard, Judge Landau's dissenting opinion in *Bocci* is instructive. There, the settling defendant paid the plaintiff $200,000 and loaned him another $800,000. The plaintiff agreed not to enforce any judgment against the settling defendant and to repay the loan in full if he recovered more than $3 million from the non-settling defendant (in part if the recovery was less). *See Bocci*, 158 Or App at 548 (Landau, J., dissenting). The conduct of the settling defendant at trial left no doubt that he "participated as a 'stealth plaintiff.'" *Id.* at 555 (describing that conduct, much of which is similar to plaintiff's here). In light of those terms and that conduct, Judge Landau would have concluded that, even if there was a hypothetical possibility that a judgment could have some practical effect on the settling defendant – which, of course, did not come to fruition there (or here) – there was no real and substantial controversy:

> "We do not have to resolve that matter, however, because the two requirements of justiciability are conjunctive. Thus, whether or not a jury verdict hypothetically could have affected Edward's [the

> settling defendant's] liability, the fact remains that plaintiff and Edwards were not adverse, and the justiciability of plaintiff's claims against Edwards fail on that ground alone."

Id. at 557 (bracketed text added); *see also id.* (stating that "it is debatable whether such a hypothetical contingency is sufficient to satisfy the requirements of justiciability").

Moreover, resting a justiciable controversy on such speculation is not generally, and was not there, harmless:

> "The concurrence misses the point as to the nature of the harm that flowed from failing to dismiss the claim against Edwards. The point is not that Edwards remained in the trial, but that remained in the trial *as a defendant*, with all the advantageous consequences as to tactics, *voir dire*, witness examination, and argument that such alignment affords."

Id. at 558 (emphasis and italics in original). Add to that the harm to the judiciary by making it an active, albeit involuntary, participant in putting before the jury claims between parties for decision when, in fact, those claims no longer exist; indeed, when the settling defendant is infected with the skewed financial interest of not only having the plaintiff win, but having the plaintiff obtain a substantial damages award.

In those regards, the unmistakably guarded way in which the Court of Appeals chose to justify its conclusion below that, "in the circumstances of this case, adversity remained between Stayton and plaintiffs" is both hard to ignore and difficult to square with this Court's precedents:

- the agreement "did not foreclose **all** the adversity between plaintiffs and Stayton;"

- the court "[could] not say that Stayton had **nothing at stake** in the outcome of the case;"

- the agreement did not establish Stayton's financial exposure "**absolutely**;"

- "**at least on some level**," there remained adversity between the parties.

Rains v. Stayton Builders Mart, Inc., 264 Or App 636, 647-48, 336 P3d 483 (2014) (emphasis added). Those qualified statements present with the same speculation and hypotheticality that would have led Judge Landau to conclude that the Mary Carter agreement in *Bocci* destroyed adversity. So too does the fact that, even though the trigger under the parties' agreement here was only $2 million, plaintiffs (with Stayton's assistance) ultimately were able to obtain a judgment for more than $7 million. *Id.* at 640-42.

That assistance, moreover, was not insubstantial. As Weyerhaeuser noted in its petition for review, Stayton (among other things): (1) made no attempt at trial to defend itself or limit its liability; (2) declined to cross-examine five of plaintiffs' expert witnesses; (3) withdrew an objection to the tape of a sixth expert; (4) used its examination of defense witnesses to advance plaintiffs' theory of the case; (5) told the jury in closing argument to hold both it and Weyerhaeuser liable; (6) argued that Rains should not be faulted for

failing to wear fall protection; and (7) encouraged a large damages award because it and Weyerhaeuser could recoup the judgment from their pricing structures and continuing operations. (Weyerhaeuser Petition at 8-10.) And yet Stayton, perhaps plaintiffs' strongest advocate, was permitted to go to judgment as a named defendant.

As noted in their motion for leave to appear as *amici*, AOI is committed to supporting private property rights and legal and political regulation that is justifiable, cooperative, appropriate, and fact-based; one of OBA's stated goals is to sustain and enhance the trust that the large majority of Oregonians have in their political institutions and the outcomes those institutions produce. (AOI/OBA Motion for Leave at 1-2.) *Amici* here strongly question whether the outcome here was justifiable, fact-based, or of the type that will instill confidence and trust in our state's government.

Again, the businesses that *amici* represent find themselves in court under myriad circumstances: plaintiff, defendant, deep pocket, shallow pocket, no pocket, voluntarily, and involuntarily. An important component of their continued prosperity, and of the state as a whole as well, is the ability to have their disputes resolved in a forum that provides a fair trial to all the litigants. Trials are not fair when some of the parties are able to masquerade as something they are not. Justiciability is for the courts as a matter of law, not the

litigants as a matter of careful drafting, to determine. This Court should so hold.

B. Mary Carter Agreements Should Remain Admissible in Evidence.

This Court in *Grillo* could not have been more clear: "upon request * * * [the Mary Carter agreement] would have been admissible in evidence." 275 Or at 427 (bracketed text added; footnote omitted). (That assumes, of course, that the agreement did not operate to deprive the court of a justiciable controversy between the settling parties.) The question before the Court now is whether it said what it meant and meant what it said in 1976.

Some of the judges of the Court of Appeals say no; there is "tension" resulting from a later decision, and *Grillo* should not be read "expansively." *Bocci*, 158 Or App at 534-36 (Riggs, J., *pro tempore*). Judge Landau saw things differently:

> "*Grillo* plainly requires the admission of the agreement itself. The Supreme Court clearly held that the agreement 'is admissible in evidence." * * * A blenderized summary of such agreement is not something that may be admitted 'in evidence."

Id. at 559 (citation omitted).

With respect, Judge Landau got it right. Courts and parties already ask much from jurors. Juries as the arbiters of fact should not be compelled as well to speculate about shifting alliances based upon summary and argument alone

when the terms of the settlement agreement usually speak for themselves and provide the best evidence of the parties' true intent.

In their brief in support of Weyerhaeuser's petition for review, AOI and OBA laid out in some detail why the serious threat that Mary Carter agreements present to a non-settling defendant's fundamental right to a fair trial militate strongly in favor of this Court's and Judge Landau's earlier stated understanding of the law of evidence in this context. (AOI/OBA Brief in Support of Petition for Review at 11-14.) Rather than saddle the justices with repetitive advocacy, *amici* instead respectfully ask the Court to refer to those pages of their brief. And, suffice it to say, they believe that is much easier to see things how they really are in the sunlight than the shadows.

III. CONCLUSION

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial." *Estes v. Texas*, 381 US 532, 540, 85 S Ct 1628, 14 L Ed 2d 543 (1965). That cannot happen when, through the agreement of some of the parties, a justiciable controversy no longer exists between them. That cannot happen when the factfinder is blinded to the true interests of the litigants before it. That is what this Court should hold.

DATED: May 21, 2015.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that: (1) this brief complies with the word-count limitation in ORAP 9.10(3); and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 3,109.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING & SERVICE

I certify that on May 21, 2015, I caused the foregoing AMICI CURIAE BRIEF OF ASSOCIATED OREGON INDUSTRIES AND OREGON BUSINESS ASSOCIATION IN SUPPORT OF WEYERHAEUSER COMPANY'S BRIEF ON THE MERITS to be electronically filed with the Supreme Court Administrator through the eFiling system and served on the following attorneys for the parties via regular mail or the court's electronic filing system, if currently enrolled:

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