

TO
THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

ABCD, INC.

Petitioner,

vs.

ACME PAINT COMPANY, INC. AND ZETA, INC.,

Respondents

APPEALED FROM THE COURT OF APPEALS, THIRTEENTH DISTRICT
AT CORPUS CHRISTI, TEXAS
No. XX-XX-XXX-CV

PETITION FOR REVIEW

Attorneys for Petitioner
ABCD Inc.

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 53.2(a), the following is a complete list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel.

STATEMENT OF THE CASE

<i>Nature of the Case</i>	This suit for breach of contract, breach of warranty, DTPA, fraud, and misrepresentation arose out of an effort to repaint Shorefront Condominiums, a 29-story high rise project.
<i>Trial Court</i>	The Honorable Judge Jane Doe, 500th District Court, Clinton County, Texas
<i>Trial Court's Disposition</i>	Final Judgment in favor of Petitioner
<i>Parties in Court of Appeals</i>	Acme Paint Company, Inc. and Zeta, Inc., Appellants; ABCD Drywall Systems, Inc., Appellee
<i>Court of Appeals' Disposition</i>	Reversed and Rendered in part, Reversed and Remanded in Part.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under Texas Government Code § 22.001(a)(2) because the Court of Appeals' decision conflicts with this Court's decisions in *International Proteins, Inc. v. Ralston-Purina Co.*, 744 S.W.2d 932 (Tex. 1988), *Elbaor v. Smith*, 845 S.W.2d 140 (Tex. 1992), and *State Farm Fire and Casualty Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996), and with decisions of the other Courts of Appeals, including *PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership*, 41 S.W.3d 270, 276 (Tex. App. – Houston [14th Dist.] 2001, n.p.h.); *Lindsay v. South San Antonio Indep. Sch. Dist.*, 983 S.W.2d 778, 780 (Tex. App. – San Antonio 1998, no writ); and *Kirby Forest Indus., Inc. v. Dobbs*, 743 S.W.2d 348, 355 (Tex. App. – Beaumont 1988, writ denied).

This Court also has jurisdiction under Texas Government Code § 22.001(a)(6), because the Court of Appeals committed errors of substantive law that are of such importance to the jurisprudence of the state that they require correction.

STATEMENT OF ISSUES

1. Under *International Proteins, Inc. v. Ralston-Purina Co.*, Shorefront's assignment of its tort claims to ABCD was valid because ABCD was not a joint tortfeasor with Acme and Zeta. The Court of Appeals created a new "joint wrongdoer" exception to free assignability of causes of action, equating ABCD's potential culpability for breach of contract with Acme and Zeta's culpability as tortfeasors, thereby barring the assignment of non-tort based claims. Should the Petition be granted to reaffirm that contract claims are freely assignable, that there is no "joint wrongdoer" exception to free assignability, and that a party who breaches a contract is not equivalent to a tortfeasor?
2. Under *Elbaor v. Smith* and *State Farm Fire and Casualty Co. v. Gandy*, where this Court defined the requisite elements of a Mary Carter agreement, the settlement agreement between Shorefront and ABCD was not a prohibited Mary Carter agreement because ABCD never paid Shorefront any money and did not guarantee Shorefront any minimum recovery as part of the settlement. The Court of Appeals ignored this element of the *Elbaor* and *Gandy* formulation, holding that the parties' settlement was a Mary Carter agreement because Shorefront assigned its claims and ABCD remained as a party prosecuting its own claims. Should the Petition be granted to reaffirm that the simple assignment of claims by a plaintiff to a defendant does not constitute a prohibited Mary Carter agreement where the Mary Carter elements are not present?
3. In addition to voiding Shorefront's assignment of its tort claims to ABCD, the Court of Appeals voided Shorefront's assignment of its breach of contract, breach of warranty, and DTPA claims to ABCD. Texas courts have previously allowed parties to freely assign contract, breach of warranty, and DTPA claims. Should the Petition be Granted to make it clear that a party may assign breach of contract, breach of warranty, and DTPA claims even when an assignment of tort claims is not permissible?

4. The Court of Appeals also reversed the trial court's judgment with respect to ABCD's own claims against Zeta and Acme, asserting that the void assignment by Shorefront tainted the entire proceeding. The jury answered separate questions regarding ABCD's own claims against Zeta and Acme, and the Court of Appeals did not point to anything in the record that supported the assertion that the jury's determinations regarding ABCD's claims were affected by the assignment. Should the Petition be granted to establish that voiding an assignment of claims is not a proper basis by itself for reversing a judgment on a party's own claims? [This Issue is Unbriefed]

STATEMENT OF FACTS

After a number of years, the original paint on the Shorefront condominium building began to wear off, and Shorefront decided to repaint the entire building. (RR V16 69-72.) After soliciting some initial bids, Shorefront retained Zeta to prepare a specification for painting the building. (RR V16 73.) Zeta is an engineering firm that, among other things, specializes in paint applications and processes. (RR V16 73.) The parties later agreed that paint products produced by Acme would be used on all the building's aluminum surfaces. (RR V13 44-45.)

A. Shorefront Hired ABCD to Paint the High-Rise Building Using Zeta's Specifications and Acme Products.

Shorefront then hired ABCD to paint the building. (RR V13 44-45.) ABCD submitted a bid of \$600,000 to paint the building pursuant to the Zeta specifications. Shorefront accepted the bid, and under the terms of the contract between Shorefront and ABCD, ABCD was required to follow the Zeta specifications and use Acme paint products on the aluminum surfaces in the manner prescribed by Acme. (PX4; V13 45.) As part of its agreement with Shorefront, ABCD gave a labor-only warranty for the paint job. (PX4; V13 49.) Shorefront retained \$100,000 of the approximately \$600,000 contract price, with ABCD to be paid a portion of this retainage each year if all warranties were honored. (PX4; RR V13 55.) In accordance with the specifications, ABCD was to use Acme epoxy mastic and urethane paint on the building's aluminum surfaces. (RR V13 45.)

B. Acme and Zeta Knew That the Paint System They Designed and Provided Would Fail But Never Disclosed This Information to ABCD or Shorefront.

Unbeknownst to ABCD or Shorefront, both Acme and Zeta knew from the beginning of the project that the paint system would ultimately fail. At trial, Acme's own witness testified that Acme knew that a pretreatment was necessary, that aluminum surface corrosion would affect the paint job, and that the project was "foredoomed," but Acme never informed Shorefront or ABCD about this. (RR V14 69-70; V16 85-92; V17 131). Acme's own technical data sheets showed that the Acme epoxy mastic being applied by ABCD pursuant to the Zeta specification and Acme's direction should not be used on an aluminum surface without some sort of pretreatment to promote adhesion. (PX45-46.) Within a year of completion of the project, the paint displayed visible peeling, flaking, blistering and corrosion (RR V16 115-16.)

C. When the Paint System Began to Fail, Shorefront Sued ABCD for Breach of Contract and Breach of Warranty Based on ABCD's Refusal to Do Repair Work But Made No Tort Claims Against ABCD.

The lawsuit began when Shorefront sued ABCD for breach of contract and breach of warranty, asking, *inter alia*, for a declaratory judgment that Shorefront was not obligated to pay ABCD a \$100,000 retainage because ABCD declined to perform further maintenance work as provided in the contract under which ABCD painted the building. (CR 27.) Shorefront did not sue ABCD in tort – Shorefront sued ABCD because ABCD allegedly walked off the job and would not complete warranty maintenance work.

D. ABCD Filed Cross-Claims Against Zeta and Acme Based on Their Fraud and Deception.

In March of 1996, ABCD filed cross-claims, including tort claims, against Zeta and Acme as third-party defendants, based on Acme and Zeta's fraud and deception in recommending paint for the project that they both knew would not work. (CR 163.) In December of 1996, Shorefront amended its pleadings to assert causes of action against Acme and Zeta based on Zeta's incorrect job specifications and inadequate supervision and Acme's faulty products and breach of warranty. At this point in the litigation, Shorefront had not asserted clear tort claims against Acme or Zeta. Shorefront never asserted any tort claims against ABCD, only contract-based claims. (CR 27, 356, 411, 534, 740, 863, 1042.)

E. Shorefront and ABCD Settled Their Contractual Disputes, Shorefront Paid ABCD \$100,000, and Shorefront Assigned Any Claims It Had Against Acme and Zeta to ABCD.

Shorefront and ABCD settled their contract and warranty dispute on October 12, 1997. Shorefront paid ABCD the \$100,000 retainage under the contract and assigned its contract-based claims against Zeta and Acme to ABCD. Shorefront kept no interest in the case, ABCD did not guarantee any recovery to Shorefront, nor did Shorefront guarantee any recovery to ABCD. (CR 1075-78.) The trial court granted ABCD's request to realign the parties. (CR 820.)

F. ABCD, As Assignee of Shorefront, Asserted Tort Claims Against Zeta and Acme, and the Jury Awarded Damages to ABCD and ABCD as Assignee.

ABCD, on its on behalf and in its capacity as assignee of Shorefront, filed a Sixth Amended Petition adding tort claims based on the discovery of Zeta and Acme's misrepresentations, fraud, and deceptive conduct in the choice and recommendation of paint for the job. (CR 1042.) Rejecting Acme and Zeta's affirmative defenses, the jury also determined that ABCD was 0% responsible for Shorefront's damages. (CR 1362-65.)

ARGUMENT AND AUTHORITIES

Under this Court's decisions in *International Proteins*, *Elbaor*, and *Gandy*, Shorefront's assignment of its claims to ABCD was valid. While purporting to rely on these cases, the Court of Appeals rewrote Texas law to create new exceptions to the rule of free assignability of claims. The Court of Appeals

- construed this Court's "joint tortfeasor" exception in *International Proteins* as actually applying to "joint wrongdoers, regardless of whether the claim sounds in tort or contract theories." (Opinion at 6.)
- changed the definition of a prohibited Mary Carter agreement, whereby under this new rule, which claims to be based on *Elbaor*, any assignment of claims by a plaintiff to a defendant constitutes a Mary Carter agreement if the defendant stays in the case regardless of whether the plaintiff received any money or any guarantee of recovery. (Opinion at 7-8.)

- voided Shorefront’s assignment of its breach of contract, breach of warranty, and DTPA claims, contrary to clear precedent.
- reversed the trial court judgment on ABCD’s own claims against Zeta and Acme.

The Petition should be granted to protect the assignability of claims in Texas. Under this new “joint wrongdoer” exception, the Court of Appeals has eliminated the long-standing culpability distinction between claims based on contract and tort and called into question whether contract-based claims may ever be assigned when multiple defendants are involved. The Petition should also be granted to reaffirm the definition of a Mary Carter agreement set forth in *Elbaor* and to make clear that a plaintiff’s assignment of claims to a defendant does not constitute a Mary Carter agreement simply because the defendant remains in the case.

POINT I THE PETITION SHOULD BE GRANTED TO REAFFIRM THAT CONTRACT CLAIMS ARE FREELY ASSIGNABLE, THAT THERE IS NO “JOINT WRONGDOER” EXCEPTION, AND THAT A PARTY WHO BREACHES A CONTRACT IS NOT THE EQUIVALENT OF A TORTFEASOR.

This Court has carefully established a framework for determining the validity of assignments. Under this framework, Shorefront, which sued ABCD for breach of contract based on ABCD allegedly walking off the job before warranty maintenance work was completed, could assign its tort claims against Zeta and Acme based on their misrepresentations, fraud, and deceptive practices. The Court of Appeals decision, by equating tort and contract claims, radically alters this Court’s assignment jurisprudence. Because Shorefront had a contractual dispute with ABCD arising out of the painting of the

building, it was barred from assigning any claims related to the paint job to ABCD. If the Court of Appeals' "joint wrongdoer" exception is allowed to stand, no plaintiff will ever be able to assign claims to a defendant when more than one defendant has been sued in relation to a transaction because all the defendants are "joint wrongdoers" regardless of whether they have been sued in tort or contract.

A. Causes of Action are Generally Assignable, With Only Limited Exceptions.

This Court has recognized only five exceptions to the general rule of free assignability: (1) assignment of a cause of action that works to collude against an insurance carrier; (2) legal malpractice claims; (3) Mary Carter agreements; (4) a joint tortfeasor profiting by its own wrongdoing through the assignment of a plaintiff's claim against another joint tortfeasor for the same misconduct; and (5) assignment of interests in an estate. *State Farm Fire and Casualty Co. v. Gandy*, 925 S.W.2d 696, 708-12 (Tex. 1996). This case does not involve an insurance carrier, legal malpractice claims, or interests in an estate. Here, the Court of Appeals concluded that the assignment fell within the joint-tortfeasor exception even though ABCD was not a joint tortfeasor. (Opinion at 6-8.)

B. The Court of Appeals Held That *International Proteins* Bars Assignment of Claims Involving "Joint Wrongdoers" Even Though *International Papers* Says No Such Thing.

The Court of Appeals' decision creates an entirely-new exception to the general rule of free assignability – the "joint wrongdoer" exception. In reaching its decision, the Court of Appeals recognized that ABCD was not a joint tortfeasor with Acme and Zeta and therefore did not fall under the explicit language of *International Proteins* barring a "joint

tortfeasor” from purchasing a cause of action from a plaintiff “to whose injury the tortfeasor contributed.” (Opinion at 6.) Joint tortfeasors are defined as

two or more persons jointly or severally liable in tort for the same injury to person or property. Those persons who have acted in concert in their tortious conduct and are, accordingly, jointly and severally liable. Those who act together in committing wrong, or whose acts if independent of each other, unite in causing single injury.

Black’s Law Dictionary 839 (6th Ed. 1990) (citations omitted). Shorefront’s original claims against ABCD for breach of ABCD’s contract and warranty with Shorefront, based on ABCD’s discontinuation of maintenance work, did not sound in tort. At no time did Shorefront seek recovery from ABCD for fraud, misrepresentations, malfeasance under the DTPA, or any other tort theory. (CR 27, 356, 411, 534, 740, 863, 1042.) After realignment of the parties and the discovery of Acme and Zeta’s deception regarding the proper paint for the project, ABCD sought to recover under the assigned claims for fraud, misrepresentation, and DTPA violations from Zeta and Acme. (CR 740-54.) These were the causes of action that were the basis for the judgment entered in this case. The jury also found that ABCD’s conduct was not a proximate cause of any of Shorefront’s damages, specifically finding that ABCD was 0% responsible for Shorefront’s damages, and this finding has not been challenged. (CR 1362-65.) It is clear that there is no joint tortfeasor relationship between ABCD, Acme, and Zeta, and therefore under *International Proteins*, the assignment should have been valid.

Instead, the Court of Appeals simply rewrote the rule. “We construe the rule in *International Proteins* to apply not solely to joint ‘tort feasons,’ but also to joint wrongdoers,

regardless of whether the claim sounds in tort or contract theories, if the parties are alleged to have caused one indivisible injury to the plaintiff.” (Opinion at 6.) No authority is cited for this radical change in Texas law, and such an interpretation certainly has no basis in this Court’s previous cases.

C. The Court of Appeals’ Decision Bars Assignments When There are Multiple Defendants, Regardless of Whether the Plaintiff Has Any Tort Claims Against the Assignee.

The Court of Appeals’ decision has profound implications for Texas jurisprudence. In using the term “wrongdoer,” the Court of Appeals equates a party who breaches a contract with a tortfeasor, a dangerous break with hundreds of years of the common law. This Court has stated that “a party to a contract is free to pursue its own interests, even if it results in a breach of that contract, without incurring tort liability.” *Crim Truck & Tractor Co. v. Navistar Int’l Trans. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992), *citing Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981); *see also Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991) (discussion of the difference between tort and contract claims). Under the Court of Appeals’ decision, the distinction between tortfeasors and parties who breach a contract has been eliminated.

By creating and applying its unique “joint wrongdoer” exception to the rule of general assignability, the Court of Appeals also reached the unprecedented result of voiding Shorefront’s assignment of its contract, breach of warranty, and DTPA claims to ABCD. Under Texas law prior to this decision, if there were no tort claims involved, there would be no issue of the validity of the assignment because it is undisputed that causes of action based

on breach of contract, breach of implied or express warranty, and the Deceptive Trade Practices Act are assignable. *PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership*, 41 S.W.3d 270, 276 (Tex. App. – Houston [14th Dist.] 2001, n.p.h.) (contract, breach of warranty, and DTPA claims assignable); *Lindsay v. South San Antonio Indep. Sch. Dist.*, 983 S.W.2d 778, 780 (Tex. App. – San Antonio 1998, no writ) (at common law, breach of contract claims assignable); *Kirby Forest Indus., Inc. v. Dobbs*, 743 S.W.2d 348, 355 (Tex. App. – Beaumont 1988, writ denied) (“causes of action arising under contracts based on a theory of breach of warranty are assignable); Tex. Bus. & Com. Code § 2.210(b) (“right to damages for breach of the whole contract or a right arising out of the assignor’s due performance of his entire obligation can be assigned despite agreement otherwise”). But the Court of Appeals’ new rule invalidates *any* assignment by a plaintiff to a defendant where the plaintiff has a contractual dispute with that defendant, regardless of whether that defendant, or any other defendant, is a tortfeasor.

The implications of the Court of Appeals’ decision are disturbing. Under this new “joint wrongdoer” exception, Shorefront’s assignment to ABCD was declared invalid essentially because ABCD was not the sole defendant. The Court of Appeals’ qualified its “joint wrongdoer” exception by asserting that ABCD could be seen as equally culpable because ABCD, Zeta, and Acme were jointly responsible for a single indivisible injury to Shorefront. But the facts of this case establish that the “joint wrongdoer” rule applies to any situation where a plaintiff is injured. Here, there were two different injuries based on two different transactions occurring in different times and places. Shorefront’s tort claims

against Zeta and Acme were based on fraud, misrepresentations, and deceptive practices that occurred at the inception of the painting project when Zeta and Acme deceived Shorefront and ABCD into using the wrong paint system. Shorefront sought compensation for the damages attributable to these deceptions. Completely separate from these claims based on deception at the beginning of the project, Shorefront sued ABCD based on ABCD's agreement to perform maintenance work for five years after completion of the project in return for a \$25,000 annual payment. (V13 49, 51-54; PX4; RR V13 55.) The jury found that ABCD's conduct was not a proximate cause of any of Shorefront's damages. (CR 1362-65.) Apparently, because all the alleged "injuries" were generally related to the same painting project, even though the jury found that ABCD was not responsible for any of the "injuries," this was sufficient under the new exception for the Court of Appeals to declare ABCD a joint wrongdoer. With such a broad definition of "single injury," this limitation on the new rule is no limitation at all.

If more than one defendant arguably contributed to the plaintiff's injury, even where that injury arose due to a breach of a contractual obligation, the plaintiff is now barred from assigning its causes of action to any of the defendants. For example, under this rule,

- when there are multiple parties to a contract, there can be no assignment of claims among those parties.
- an insurer who is sued by a policyholder for breach of an insurance agreement relating to an injury to the policy holder could no longer be assigned the

policyholder's claims against other defendants who allegedly injured the policyholder.

The Court of Appeals' decision eviscerates Texas assignability law, turning this Court's joint tortfeasor exception into a rule that bars nearly all assignments of claims when more than one defendant is involved. The Petition should be granted to restore the law of assignments enunciated by this Court.

POINT II THE PETITION SHOULD BE GRANTED TO REAFFIRM THAT THE SIMPLE ASSIGNMENT OF CLAIMS BY A PLAINTIFF TO A DEFENDANT DOES NOT CONSTITUTE A PROHIBITED MARY CARTER AGREEMENT WHERE THE MARY CARTER ELEMENTS ARE NOT PRESENT.

There is no Mary Carter agreement at issue in this case. Indeed Acme's counsel, the former Chief Justice of the Corpus Christi Court of Appeals, admitted in his brief that the "settlement agreement at issue here does not strictly qualify as a 'Mary Carter' agreement." (Acme Opening Brief at 12.) While Shorefront, the original plaintiff, did assign its claims to ABCD, an original defendant,

- Shorefront was not paid for the assignment and, in fact, paid ABCD \$100,000 in settlement of the two parties' contractual dispute
- Shorefront was not guaranteed any recovery and had no further financial interest in the case

Shorefront simply assigned its claims to ABCD, raising none of the policy implications that caused this Court to invalidate Mary Carter agreements in *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992). The Court of Appeals rewrote this Court's definition of a Mary Carter

agreement – under this new rule, any assignment of claims by a plaintiff to a defendant is invalid if the defendant stays in the case.

In *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992), this Court defined Mary Carter agreements in Texas. “A Mary Carter agreement exists when the settling defendant retains a financial stake in the plaintiff’s recovery and remains a party at the trial of the case.” *Id.* at 247. The definition is very specific and strict:

a Mary Carter agreement exists, under our definition, when the plaintiff enters into a settlement agreement with one defendant and goes to trial against the remaining defendant(s). The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgment recovered at trial.

Id. at 247. In *Gandy*, this Court was equally explicit:

A Mary Carter agreement is any settlement arrangement between the plaintiff and some of the defendants in a case by which the settling defendants agree to pay the plaintiff a certain amount of money and to participate in the trial against the nonsettling defendants, and the plaintiff agrees to release the settling defendants from liability and, if the judgment against a nonsettling defendant is large enough, to repay the settlement amount.

Gandy, 925 S.W.2d at 709. The agreement between ABCD and Shorefront does not fall within that definition.

ABCD was originally a defendant and settled with Shorefront, which was originally the plaintiff. (Opinion at 7.) Otherwise, the other requisites for a Mary Carter agreement have not been met.

- After the settlement agreement was finalized, Shorefront had no remaining financial interest in the outcome of the case. Shorefront was not a participant

in the trial, and in the pleadings that went to the jury, Shorefront's claims were designated as being assigned to ABCD. (CR 1042.)

- It is undisputed that Shorefront was not entitled under the parties' settlement agreement to any further compensation based on ABCD's recovery against Acme and Zeta and had no incentive to help increase ABCD's recovery.
- There was no "minimum payment" to the plaintiff – in fact, the only money that changed hands was Shorefront's payment to ABCD of \$100,000 representing the retainage money Shorefront owed ABCD under their five-year maintenance contract. (CR 1075-78.)

Under the Court of Appeals' new definition of a Mary Carter agreement, any assignment of claims by a plaintiff to a co-defendant is invalid. The decision stems, in part, from the Court of Appeals' apparent confusion as to the procedural posture of Shorefront and ABCD. Shorefront was the original plaintiff and ABCD was the first defendant sued. Hence, the Court of Appeals concluded that the plaintiff settled with the defendant and the defendant remained in the case, which, under the Court of Appeals' new rule, constituted a Mary Carter Agreement. (Opinion at 7-8.) These labels make sense in the context of most Mary Carter agreements, where one of the culpable tort defendants settles with the plaintiff, turns on the others, and actively participates in the trial to promote the plaintiff's recovery, thereby distorting the proceedings. *Elbaor*, 845 S.W.2d at 257. That did not happen here. ABCD was never a co-defendant with Zeta and Acme on Shorefront's fraud and deceptive-practices claims. Once ABCD and Shorefront settled their contract dispute, the

trial court realigned the parties to reflect the reality of the situation, that both Shorefront and ABCD, the building owner and the job contractor, were defrauded by Zeta and Acme. The trial court recognized the real situation in this case, that the conduct of Zeta and Acme injured both Shorefront and ABCD in a far different way than any injury that may have arisen from ABCD's alleged breach of its contractual obligations to do warranty maintenance work. The Court of Appeals did not acknowledge this reality and, instead, concluded that the simple assignment of claims, in the absence of any financial guarantees or payments, was in actuality a prohibited Mary Carter agreement.

The Court of Appeals' decision cannot stand. This new sweeping definition of a Mary Carter agreement covers assignments that do not have any of the policy implications raised by the Mary Carter agreements addressed in *Elbaor* and *Gandy*. This case did not "present to the jury a sham of adversity between the plaintiff and one co-defendant . . ." *Id.* at 249. ABCD and Shorefront pursued tort and contract claims against Acme and Zeta, both of which were wrongdoers as to ABCD and Shorefront. Under this Court's precedents, the settlement here is not any form of Mary Carter agreement. The Petition should be granted to reaffirm the definition of a Mary Carter agreement and protect the assignability of claims.

POINT III THE PETITION SHOULD BE GRANTED TO MAKE IT CLEAR THAT A PARTY MAY ASSIGN BREACH OF CONTRACT, BREACH OF WARRANTY, AND DTPA CLAIMS EVEN WHEN AN ASSIGNMENT OF TORT CLAIMS IS NOT PERMISSIBLE.

The Petition should also be granted to reaffirm that breach of contract, breach of warranty, and DTPA claims are assignable even where a court voids an assignment of tort claims. By creating and applying its unique "joint wrongdoer" exception to the rule of

general assignability, the Court of Appeals also reached the unprecedented result of voiding Shorefront's assignment of its contract claims to ABCD. To the extent that the Court of Appeals meant to use its new "joint wrongdoer" exception to bar the assignment of Shorefront's tort claims, the rationale behind such an exception has no applicability to Shorefront's assignment of its contract, warranty, and DTPA claims to ABCD. Shorefront assigned these claims to ABCD, and the jury made findings in ABCD's favor on these claims. ABCD opted to have a judgment entered based on the jury's findings on the tort claims. (CR 1531; RR V23 at 24.) With respect to these contract-based claims, none of the joint tortfeasor or Mary Carter considerations apply, and they are freely assignable. *See Lindsay*, 983 S.W.2d at 780. There is no legal precedent in Texas jurisprudence for holding that the assignment of contract claims is against public policy. ABCD could have obtained a judgment in the trial court, as assignee of the contract and warranty claims, but chose to obtain a judgment on the tort claims in order to achieve the greatest theory of recovery. (CR 1356.) The Petition should be granted to establish that even where assignments of tort claims are voided, a party is still free to assign contract, warranty, and DTPA claims.

POINT IV THE PETITION SHOULD BE GRANTED TO ESTABLISH THAT VOIDING AN ASSIGNMENT OF CLAIMS IS NOT A PROPER BASIS BY ITSELF FOR REVERSING A JUDGMENT ON A PARTY'S OWN CLAIMS.

ABCD reserves briefing on Point IV, and all other points raised, to its brief on the merits under Tex. R. App. P. 53.2(I).

PRAYER

For all of the foregoing reasons, ABCD respectfully requests that this Court grant the Petition, reverse the judgment of the court of appeals, affirm the judgment of the trial court, and grant ABCD such other and further relief to which it may be justly entitled.

Respectfully submitted,
Law Offices of Jane Doe and Associates

By: _____
Jane Doe, of counsel