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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 78,370

PATRICIA DOSDOURIAN,

Petitioner,

vs.

RICHARD PAUL CARSTEN
and CHRISTINE DEMARIO,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENTS' BRIEF ON THE MERITS

PARIENTE & SILBER, P.A.
400 Australian Avenue, South
Suite 855
West Palm Beach, FL 33401
(407) 655-6640
and
LARRY KLEIN, of
KLEIN & WALSH, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

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PREFACE

The parties will be referred to as the plaintiff and the defendants or by their proper names. The following symbol will be used:

(R) - Record on Appeal.

CERTIFIED QUESTION

IS A NON-SETTLING DEFENDANT ENTITLED TO HAVE THE JURY INFORMED OF A SETTLEMENT AGREEMENT BETWEEN THE PLAINTIFF AND ANOTHER DEFENDANT WHEREBY THE SETTLING DEFENDANT'S OBLIGATION IS FIXED BUT THE SETTLING DEFENDANT IS REQUIRED TO CONTINUE IN THE LAW SUIT?

STATEMENT OF THE CASE AND FACTS

We cannot agree with petitioner's statement of facts because it has omitted facts unfavorable to the petitioner, and has distorted both the facts of the accident and the manner in which the case was tried.

At approximately 6:00 p.m. on November 30, 1988, plaintiff, Richard Carsten, a pedestrian, was crossing Haverhill Road, west to east, just south of the Elmhurst Road intersection (R 300-01, 320, 418, 432, 437, 446, 466). Patricia Dosdourian, driving a Cutlass, and Christine DeMario, driving a red BMW, were traveling south on Haverhill Road which has two southbound lanes at that location (R 289, 334, 419, 432, 438). Dosdourian was in the lane next to the median and DeMario was in the lane next to the west curb, slightly behind Dosdourian (R 419, 438). Two witnesses,

James Cote and Lori Cataldo, testified that both vehicles went through a red light at the intersection traveling in excess of the 35 m.p.h. speed limit (R 324-25, 337, 447).

Just south of the intersection, Mr. Carsten had started across Haverhill Road with his dog and had reached the line dividing the two southbound lanes (R 433). Dosdourian testified that she saw the dog in her lane and swerved to the left to avoid hitting it (R 434, 436). The left front of DeMario's vehicle then struck Mr. Carsten, causing him to sustain serious, permanent injury to his brain, left side, right knee and degenerative arthritis (R 294-95, 406, 496, 499, 643-45, 686-87, 755). Because of his physical injuries and the permanent brain damage which caused cognitive and motor disfunction, Mr. Carsten is unable to continue his prior employment as a pipe fitter and is relegated to unskilled labor at lower pay (R 496, 602-04, 607, 612, 688, 697, 756, 759, 784-85, 792).

Mr. Carsten also suffered amnesia due to the brain injury which prevents him from remembering the collision (R 397, 806). According to the accident reconstructionist, Dr. Joseph Wattleworth, the accident occurred because Dosdourian's vehicle prevented Mr. Carsten from proceeding across Haverhill Road which resulted in his being struck by DeMario's vehicle (R 541, 545, 552).

Prior to trial, Carsten and DeMario entered into an agreement for DeMario to pay her full $100,000 policy limits, and for her to remain in the lawsuit in order to determine the proportionate share of negligence between DeMario and Dosdourian, in exchange for a full release from Carsten for any and all claims arising out of the accident (R 1081). Carsten filed a motion in limine, arguing against the admission into evidence of this agreement, on the basis that it was a release rather than a "Mary Carter agreement" and, under Section 768.041(3), Florida Statutes, should not be disclosed to the jury (R 8-18, 1079-81). The trial court agreed and ruled that the agreement would not be disclosed unless DeMario testified and her credibility and interest in the lawsuit were at issue, in which event, cross-examination as to the agreement would be allowed (R 17-18). Dosdourian's motion to mandatorily dismiss Demario from the case was denied (R 24-26).

The jury found Dosdourian 35% negligent, DeMario 55% negligent, and Carsten 10% negligent (R 1211-13). Medical and hospital expenses were assessed at $193,206.27, future medical and hospital expenses at $22,240, past lost earnings at $21,369, future lost earnings at $383,631.50, past pain and suffering at $80,000, and future pain and suffering at $1,300,000, for total damages of $2,000,446.70 (R 1211-13). Final judgment was thereafter entered for Carsten to recover from Dosdourian non-economic damages of $483,000 (35%) and economic damages of $403,641.58 (90% less $8,000 for PIP), for a total of $886,641.58 (R 1226-27). Great-West was

awarded economic damages of $146,760.27 (90%) from Dosdourian (R 1226-27).[1]

Dosdourian appealed to the Fourth District Court of Appeal which affirmed but certified the following question as one of great importance:

> IS A NON-SETTLING DEFENDANT ENTITLED TO HAVE THE JURY INFORMED OF A SETTLEMENT AGREEMENT BETWEEN THE PLAINTIFF AND ANOTHER DEFENDANT WHEREBY THE SETTLING DEFENDANT'S OBLIGATION IS FIXED BUT THE SETTLING DEFENDANT IS REQUIRED TO CONTINUE IN THE LAW SUIT?

SUMMARY OF ARGUMENT

With all due respect to the Fourth District, the certified question is too general in nature, and there is no unconditional yes or no answer which would be appropriate to all circumstances. The essence of this court's holding in Ward v. Ochoa, 284 So.2d 385, 387-388 (Fla. 1973), is that settlement agreements, if they "border on collusion", should be admitted into evidence to prevent "deception."

---

[1] The different damage awards in the final judgment result from the fact that economic damages are still awarded jointly and severally, however, here they were subject to reduction by plaintiff being 10% negligent, a collateral source payment of $8,000 for PIP and a subrogation claim of $146, 760.27 by the health insurer. Non-economic damages are not joint and several, and were awarded proportionate to the percentage of negligence of each defendant, in accordance with Section 768.81, Florida Statutes (1989).

In the present case there was no collusion, secrecy, or deception. It was plaintiff's counsel who informed the court and counsel of the settlement agreement and asked the court to determine its admissibility prior to trial. It is important to remember that Section 768.81, Florida Statutes (1990), which modified joint and several liability, applied to this case. Under that statute the settling defendant's proportion of negligence was an issue for the jury, regardless of whether the settling defendant was a named party, and regardless of whether the settling defendant had settled. The trial court properly concluded that since the settlement with the settling defendant was non-contingent on the outcome, and since the settling defendant's negligence was an issue to be decided by the jury, the settling defendant should not be dismissed.

The opinion of the Fourth District in the present case should be affirmed because there was no prejudice. This court's answer to the certified question should be that a trial court should have discretion to admit a settlement agreement in evidence in order to prevent the type of harm this court was seeking to prevent in Ward v. Ochoa, but to exclude it if there is no deception or prejudice. This is precisely what the trial court did in this case, ruling that the settlement agreement would be inadmissible unless the settling defendant testified at trial and her credibility became an issue (R 17-18). The judgment should be affirmed.

ARGUMENT

IS A NON-SETTLING DEFENDANT ENTITLED TO HAVE THE JURY INFORMED OF A SETTLEMENT AGREEMENT BETWEEN THE PLAINTIFF AND ANOTHER DEFENDANT WHEREBY THE SETTLING DEFENDANT'S OBLIGATION IS FIXED BUT THE SETTLING DEFENDANT IS REQUIRED TO CONTINUE IN THE LAW SUIT?

The Trial Court Did Not Err In Refusing To Dismiss The Settling Defendant As A Party

Petitioner first argues that the trial court erred in refusing to dismiss the settling defendant as a party. The trial court properly refused to dismiss the settling defendant based on Whited v. Barley, 506 So.2d 445 (Fla. 1st DCA), rev. denied, 515 So.2d 230 (Fla. 1987). In that case the plaintiffs and one defendant had entered into an agreement and covenant not to enforce judgment, which the trial court found to be a release limiting the settling defendant's liability to his policy limits of $10,000. The trial court then dismissed that defendant from the lawsuit. Plaintiffs then sought to set aside the settlement agreement because it had been entered into on the basis that the settling defendant would remain as a defendant in the case. The lower court denied that motion and the plaintiffs appealed. The First District reversed, stating on page 447:

> Nevertheless, we find the trial court erred in dismissing Barley from the lawsuit. Although the settlement agreement resolved the issue of the amount of Barley's liability to plaintiffs, it did not resolve the issue of Barley's proportionate share of negligence. Therefore, we reverse the trial court's order dismissing appellee Barley as a party to this action.

Just as in Whited, supra, the proportionate share of the settling defendant's negligence was also an issue in the present case under Section 768.81, Florida Statutes, which provides in relevant part:

> (3) Apportionment of damages. In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

Since the above statute modified joint and several liability, the proportion of negligence of the settling defendant in the present case was an issue at trial, regardless of whether the settling defendant remained as a party or was dismissed. See Messmer v. Teacher's Insurance Company, 588 So.2d 610 (Fla. 5th DCA 1991), in which the Fifth District decided that the use of the word "party" in the statute would include any tortfeasor, regardless of the tortfeasor's status as an actual party in the lawsuit. Since the proportionate negligence of the settling defendant would have been an issue in this case, regardless of whether he was a party or dismissed, the trial court did not err in refusing to dismiss him. Whited, supra.

Florida Rule of Civil Procedure 1.250(b) provides that parties may be dropped by order of court "on such terms as are just." The dropping of parties has been held to be discretionary and irreversible on appeal in the absence of abuse of discretion. Nationwide Mut. Fire Ins. Co. v. Vosburgh, 480 So.2d 140 (Fla. 4th DCA 1985). The trial court did not abuse its discretion in the present case in refusing to drop the settling defendant as a party.

The Settlement Agreement Should Not Have Been Admitted In Evidence

Petitioner next argues that the trial court erred in refusing to admit the settlement agreement in evidence. The agreement provided (R 1081):

> The parties to this agreement are Richard Carsten and Christine DeMario.
>
> It is acknowledged between the parties, Richard Carsten and Christine DeMario that Richard Carsten was involved in an automobile accident on November 30, 1988. It is also acknowledged that Richard Carsten sustained very significant and permanent injuries to his brain, including permanent brain damage, to both legs, and other parts of his body. In addition, Mr. Carsten sustained a loss of earnings of approximately $20,000.00 and there is a strong likelihood that he will suffer a loss of earning capacity as a result of his injuries preventing him to perform his duties as a pipe layer. Moreover, it is acknowledged that Richard Carsten, as a result of the injuries from the automobile accident of November 30, 1988, has suffered significant pain, discomfort, mental anguish, and the loss of the capacity to enjoy life. The damages for the intangibles far exceed $10,000.00.
>
> It is agreed by both Richard Carsten and Christine DeMario, that one Patricia Dosdourian also contributed substantially to cause the

> injuries to Richard Carsten through her negligence and carelessness in the manner in which she operated her vehicle.
>
> As a result of the above, Mrs. DeMario tenders the full amount of her liability insurance policy limits of $100,000.00, and agrees that in order to determine the proportionate share of negligence between Christine DeMario and Patricia Dosdourian, Christine DeMario will remain as a party in the lawsuit entitled "Richard Paul Carsten v. Christine DeMario and Patricia Dosdourian", case number CL 89-5801 AE, until the conclusion of this case. Richard Carsten accepts the policy limits of $100,000.00 and the agreement of Christine DeMario to remain in the lawsuit.
>
> Christine DeMario represents that $100,000.00 is the total amount of insurance available to her to protect her from liability arising out of the automobile accident of 11/30/88. The acceptance by Richard Carsten constitutes a full release to Mrs. DeMario for any and all claims arising out of the automobile accident of November 30, 1988.

Although the petitioner has attempted to characterize the above agreement as a secret agreement or deceptive, this agreement was never a secret or deceptive. It was the plaintiff who disclosed the agreement and filed a motion in limine for the trial court to determine whether it should be admissible (R 8-18, 1079-81).

In Ward v. Ochoa, 284 So.2d 385, 387 (Fla. 1973), this court defined the type of agreement which should be admitted into evidence as follows:

> A "Mary Carter Agreement", however, is basically a contract by which one co-defendant secretly agrees with the plaintiff that, if

> such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants. Secrecy is the essence of such an arrangement, because the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants. By painting a gruesome testimonial picture of the other defendant's misconduct or, in some cases, by admissions against himself and the other defendants, he could diminish or eliminate his own liability by use of the secret "Mary Carter Agreement." (Emphasis supplied).

This court also stated in Ward v. Ochoa:

> The search for the truth, in order to give justice to the litigants, is the primary duty of the courts. Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion. To prevent such deception, we are compelled to hold that such agreements must be produced for examination before trial, when sought to be discovered under appropriate rules of procedure. If the agreement shows that the signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants, such agreement should be admitted into evidence at trial upon the request of any other defendant who may stand to lose as a result of such agreement. (Emphasis supplied). Id. at 385.

Although the petitioner has argued at length about whether the agreement in the present case was a Mary Carter agreement, the Fourth District concluded that it was not, and it clearly is not. The obligations of the settling defendant were not affected in any way by the outcome of the trial.

We cannot, in candor, argue to this court that all settlement agreements other than Mary Carter agreements should never be admitted into evidence. One reason why there should not be a hard and fast rule is because what does or does not constitute a "settlement agreement" is limited only by the imagination and ingenuity of lawyers.[2] Another problem with an inflexible rule is the different factual possibilities involving number of parties, relationships of parties, liability, vicarious liability, indemnity, contribution, etc. The only feasible answer to the certified question is that a settlement agreement should be admitted into evidence, in the discretion of the trial court, if the trial court deems it necessary to admit such agreement in order to prevent the deception this court intended to prevent in Ward v. Ochoa, supra.

The most important reason why this court should not answer the certified question by unconditionally holding that all such settlement agreements should be admitted into evidence is because such a holding would, for all intents and purposes, eliminate settlements in cases involving multiple defendants, where some defendants will not settle. Our public policy favoring settlements is so firmly established in our jurisprudence as to need little or

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[2] See for example, the description of the "high/low" agreement described in Weddle v. Voorhis, 586 So.2d 494 (Fla. 1st DCA 1991).

no discussion. Robbie v. City of Miami, 469 So.2d 1384 (Fla. 1985).

The reason that the admission into evidence of this type of settlement agreement would eliminate this type of settlement is because the evidence of such a settlement could not help but prejudice one side or the other. Depending on the relationship between two defendants, the evidence of settlement could be as prejudicial to the non-settling defendant as to the plaintiff. The landmark decision in this case explaining why evidence of settlement is inadmissible is City of Coral Gables v. Jordan, 186 So.2d 60 (Fla. 3d DCA), which was affirmed by this court at 191 So.2d 38 (Fla. 1966). In that case the trial court had admitted the evidence of a settlement by the defendant with one of two plaintiffs. In reversing, the Third District stated on pages 62 and 63:

> Upon the other hand, the knowledge of the settlement by the driver with the defendant was immediately and completely destructive to the possibility of a fair trial between the plaintiff and the defendant. Every juror knew that plaintiff's witness, Bell, was the driver of the motor scooter, and that appellant, defendant, intended to show that the deceased had met his death solely through the negligent acts of Bell. In this atmosphere, when the jury became aware that the city had settled the claims of Bell and his father, appellant's defense that Bell was the sole cause of the accident evaporated.
>
> We recognize that the decisions in our sister states are not uniform and that there is respectable authority to the contrary. However, in the absence of controlling precedent, we must adopt that rule which is in

> accordance with reason and justice. The public policy of this state favors amicable settlement of disputes and the avoidance of litigation. This policy is implemented by excluding evidence of an offer to compromise and a release or covenant not to sue tort feasors.

The Third District cited what was then Section 54.28, Florida Statutes, which is now Section 768.041, Florida Statutes (1990), which provides that a release or covenant not to sue shall not be made known to a jury. Our public policy favoring settlements would also be thwarted by the promulgation of a rule that settling defendants have to be dismissed, because plaintiffs could not take the risk of entering into settlements under those circumstances either. The reason why the plaintiff insists, as part of the settlement, that the settling defendant remain in the case as a party, is so that the non-settling defendant cannot use the "empty chair" argument in order to convince the jury that the accident was entirely the fault of a non-party.

There Was No Deception Or Prejudice In The Present Case Which Would Justify A New Trial

In the present case the petitioner has attempted to make it appear that there was deception in the trial court which prejudiced the petitioner in the eyes of the jury. Petitioner's arguments are not supported by the record.

From a factual standpoint, although it is totally obscured in petitioner's brief, two independent eyewitnesses to the accident,

James Cote and Lori Cataldo, testified that both defendants ran the red light at the intersection just before where the accident occurred, and both defendants were traveling in excess of the 35 m.p.h. speed limit (R 324, 325, 337, 447). The jury found the settling defendant, DeMario, 55% negligent, the non-settling defendant Dosdourian (petitioner), 35% negligent, and the plaintiff, 10% negligent (R 1211).

Petitioner repeatedly complains that the settling defendant did not contest that the plaintiff was severely injured. In fact the severity of plaintiff's injuries was never an issue in this case. It was admitted by counsel for petitioner as well (R 894). Neither defendant offered any testimony to contradict the plaintiff's brain damage or orthopedic injuries. Nor did they present testimony to rebut plaintiff's accident reconstruction expert or his vocational rehabilitation expert.

None of the comments petitioner complains about were inaccurate, deceptive or prejudicial. Petitioner argues on page 6 that there was something wrong with the settling defendant's counsel telling the jury that the "only" issue was the negligence of the two defendants. All this counsel said in this regard was, on voir dire, that the jury would be asked to decide the negligence by either or both of the defendants (R 234). Since both of the defendants had run a red light and were traveling in excess of the speed limit, this statement was not deceptive.

Petitioner complains on page 11 that the settling defendant's counsel did not cross-examine witnesses on damages, but admits that her counsel did not cross-examine all of those witnesses either. Petitioner has demonstrated no prejudice in that regard. Nor is there any merit to petitioner's argument on page 12 that plaintiff's counsel argued to the jury that petitioner was more responsible than the settling defendant for the accident. Nor was there anything wrong with the settling defendant's counsel arguing that petitioner was 100% at fault since any defendant in the same position, whether he had settled or not, would do likewise.

The Fourth District could not find any prejudice as to the petitioner and stated on pages 871-872 of its opinion:

> We find it difficult to identify actual prejudice resulting from the nondisclosure of the agreement or the continued participation of DeMario in the action. The appellee claims there is none because the settling defendant, having limited her liability already, did not have the same motivation as the settling defendant did in Mary Carter. The appellant, on the other hand, cites numerous instances at trial in which she claims DeMario's counsel openly supported the case for the plaintiff and against appellant. We are unable to conclude with any certainty that such was the case. (Emphasis added)

Dosdourian v. Carsten, 580 So.2d 869 (Fla. 4th DCA 1991).

The jury verdict further refutes petitioner's claim of prejudice, since the jury found petitioner only 35% at fault and found the settling defendant 55% at fault. There was no prejudice

answers the certified question, the judgment in the present case should be affirmed.

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO REDUCE THE JUDGMENT AGAINST DOSDOURIAN BY THE AMOUNT OF THE CARSTEN SETTLEMENT WITH DEMARIO.

Petitioner is not entitled to a set-off. Notwithstanding the fact that the Fourth District, in footnote 1 on page 2 of its opinion, stated that the petitioner could seek a set-off in the trial court on remand, the Fourth District noted that the petitioner made no request for a set-off in the trial court. Since a set-off is clearly not the type of fundamental error which can be raised for the first time on appeal, there should be no remand for a set-off.

Nor would petitioner be entitled to a set-off on the merits. Section 768.041, relied on by Dosdourian as authority that there should have been a set-off, by its terms, only applies to tortfeasors who are jointly liable for the same damages. In Ellingson v. Willis, 170 So.2d 311 (Fla. 1st DCA 1964), the court stated on page 316:

> ...the purpose and intent of the legislature in enacting the statute was to allow the one tort feasor to have the benefit of payment made by any other party who might be jointly liable. (Emphasis added)

This statutory right to a set-off, however, does not apply where a jury could apportion damages for which each defendant is solely responsible. Lapidus v. Citizens Federal Sav. and Loan Ass'n., 389 So.2d 1057 (Fla. 3d DCA 1980); Insurance Co. of North America v. Edmondson, 354 So.2d 887 (Fla. 1st DCA 1977). In the present case the two defendants were not jointly liable for the damages because of Section 768.81, Florida Statutes (1979), set forth on page 15 of this brief, which eliminated joint and several liability for non-economic damages. In the present case, 65% of this $2,000,000 verdict, or $1,300,000, was for non-economic damages, for which there is no joint and several liability. Because of the abrogation of joint and several liability in Section 768.81, Florida Statutes, the responsibility of the two defendants for the non-economic award is completely separate and distinct. Consequently, no set-off is required since there is no duplication of damages.

The obvious purpose of Section 768.041 is to prevent a double recovery by a plaintiff for the same damages. Since the plaintiff in the present case was unable to recover $1,300,000 of his $2,000,000 in damages against both defendants, there is no risk of a double recovery, and there is no reason for Dosdourian to receive a set-off.

CONCLUSION

This court should answer the certified question by giving trial courts discretion to decide on the admission into evidence of settlement agreements in circumstances where the harm envisioned by this court in Ward v. Ochoa is a real possibility. There was no such harm or prejudice to petitioner in the present case, and this jury verdict should be affirmed.

PARIENTE & SILBER, P.A.
400 Australian Avenue, South
Suite 855
West Palm Beach, FL 33401
(407) 659-6640

and LARRY KLEIN, of
KLEIN & WALSH, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

By: _____
LARRY KLEIN
Florida Bar No. 043381

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 14th day of February, 1992, to:

ELLIOT R. BROOKS
350 Australian Avenue S.
Suite 1400
West Palm Beach, FL 33401

JOHN VanLANINGHAM
STEEL, HECTOR & DAVIS
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, FL 33401-4307

JOHN PATRICK JOY
WALTON, LANTAFF, et al.
One Biscayne Tower, 25th Floor
2 South Biscayne Blvd.
Miami, FL 33131

WILLIAM E. HOEY
VERNIS & BOWLING, P.A.
204 River Plaza
900 South U.S. Highway 1
Jupiter, FL 33477

By: _____
LARRY KLEIN
Florida Bar No. 043381

AMENDED
CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 18th day of February, 1992, to:

ELLIOT R. BROOKS
350 Australian Avenue S.
Suite 1400
West Palm Beach, FL 33401

JOHN VanLANINGHAM
STEEL, HECTOR & DAVIS
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, FL 33401-4307

JOHN PATRICK JOY
WALTON, LANTAFF, et al.
One Biscayne Tower, 25th Floor
2 South Biscayne Blvd.
Miami, FL 33131

WILLIAM E. HOEY
VERNIS & BOWLING, P.A.
204 River Plaza
900 South U.S. Highway 1
Jupiter, FL 33477

MARGUERITE H. DAVIS,
Amicus Curiae for American Ins. Association
215 S. Monroe Street, Ste 400
Tallahassee, FL 32301

CLIFFORD M. MILLER,
Amicus Curiae for Academy of Florida Trial Lawyers
601 - 21st Street
Barnett Bank Bldg., Ste 408
Vero Beach, FL 32960

By: _____
LARRY KLEIN
Florida Bar No. 043381