IN THE SUPREME COURT OF FLORIDA

ALBERT SALEEBY,

Petitioner,

vs. CASE NUMBER: SC07-2252

ROCKY ELSON CONSTRUCTION, INC.,

Respondent.
_____/

RESPONDENT, ROCKY ELSON CONSTRUCTION, INC.'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF FACTS AND CASE

Respondent accepts the statement of the case and facts of Petitioner. Reference to the Opinion of the 4th DCA shall be made by citation to *Saleeby v. Rocky Elson Construction, Inc.,* 965 So. 2d 211 (Fla. 4th DCA 2007).

SUMMARY OF ARGUMENT

The Court does not have jurisdiction over this case because there is no direct and express conflict between the Opinion of the 4th DCA and any other opinion in Florida, and no other basis has, or could be stated to sustain certiorari. The 4th DCA properly construed sections 90.408 and 768.041, Florida Statutes, in determining that Petitioner invited the circumstance of the disclosure of a settlement when he listed and called the settling defendant as an expert witness. The cases cited by Petitioner in support of a conflict actually support the holding of the 4th DCA in this matter.

The 3d DCA cases of *Ellis v. Weisbrot,* 550 So. 2d 15 (Fla. 3d DCA 1989) and *City of Coral Gables v. Jordan,* 186 So. 2d 60 (Fla. 3d DCA), *aff'd,* 191 So. 2d 38 (Fla. 1966) do not involve the plaintiff listing and calling a codefendant as an expert witness to opine on the causation of the accident to be decided by the jury. In *Ellis v. Weisbot,* 550 So. 2d 15 (Fla. 3d DCA 1989), the 3d DCA was not presented with a codefendant as expert. Instead, the nonsettling dentist's counsel asked about the settling dentist's voluntary dismissal from the case. There was no

circumstance in which the testifying witness was being asked to render expert opinions regarding the care and treatment of another. Petitioner contends that the holding in *Ellis* is in direct and express conflict because the 4th DCA held in the present case that "settlement-related evidence offered for other purposes". However, as the 4th DCA explained, the "other purposes" were to expose an expert witness's "motivation, interest and position." *Saleeby,* 965 So. 2d at 216.

Similarly, the decision in *City of Coral Gables v. Jordan,* 186 So. 2d 60 (Fla. 3d DCA), *aff'd,* 191 So. 2d 38 (Fla. 1966) cannot be in direct and express conflict with the present opinion because in *Jordan* the settling party was the plaintiff in a separate action. The effect of the disclosure to the jury that the city had settled with a separate injured plaintiff in the same accident was to alert the jury that the City admitted culpability for the accident by settling a prior lawsuit. thus, the policy of encouraging settlement was disabused.

In contrast, the 4th DCA's opinion does not discourage settlement in any way. To the extent it discourages the use of a former defendant as a plaintiff's expert witness, there is no public policy at issue, and is totally in keeping with the need for a "witness's bias or improper motive to be added to the jury's credibility determination. *Saleeby,* 965 So. 2d at 216.

Finally, Petitioner contends that there is conflict jurisdiction by virtue of *Dosdourian v. Carsten,* 624 So. 2d 241 (Fla. 1993) not because there is a direct and

express conflict between the opinion of this Court and the present Opinion, but because there has been a "misapplication" of the holding in *Dosdourian.* To the extent the court deems the parameters of conflict jurisdiction to expand to fit a misapplication, it remains true that the same reasoning and logical underpinnings which supported this Court's recognition of an exception to the exclusion of evidence of settlement and dismissal in *Dosdourian* are found in the instant case, and are in alignment with the court's previous ruling in this area.

For all of these reasons, the Court should deny Petitioner's application for certiorari.

ARGUMENT

As this Court well knows, Article V, section 3(b)(3), provides that this Court may review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court *on the same question of law." Fla. Const. art V, §3(b)3* (emphasis added). In order for this Court to exercise its conflict jurisdiction under this provision of the Florida Constitution, the conflict must be express and direct and contained within the four corners of the opinion sought to be reviewed. *See Reaves v. State*, 485 So. 2d 829 (Fla. 1986). In none of the cases cited by Petitioner do any of the courts consider the issue of whether the jury may be advised of a settlement when the party with whom the settlement is made calls that witness as an expert. Because the

presentation of the settling witness as an expert was never even considered by the other courts, there can be no direct and express conflict.

In addition, the reasoning of the 4th DCA is sound and fully in keeping with the language of sections 90.408 and 768.041, Florida Statutes, and the public policy regarding the encouragement of settlements. The net result of the 4th DCA's opinion may be the discouragement of calling a settling party as an expert. However, Petitioner can cite to no public policy in favor of retaining a former party as an expert, even if the consideration of such a policy were properly before this Court.

Petitioner admits there is no overlap in the holdings of the 4th DCA in the Opinion and in opinion of this Court in *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993). Instead, Petitioner relies upon the contention the 4th DCA "misapplied" the holding of *Dosdourian. See Petitioner's Brief at 2-3.* This argument is curious since the Court held in *Dosdourian* that an agreement between the plaintiff and a settling defendant *had* to be disclosed to the jury. The instant case does not involve the review of a *Mary Carter* agreement, as was present in *Dosdourian.* However, the present case did present another instance in which there was a fundamental unfairness which resulted from keeping the biases of a testifying expert witness from the jury. In many ways, the trial court's admission of evidence that the expert had previously been named as a defendant, and

subsequently settled was in complete accord with the reasoning of the Court in *Dosdourian.* The disclosure of the settlement in *Dosdourian* was to prevent the jury from believing a defendant was actively defending and litigating when he, in fact, was not, due to a "secret settlement." Thus, the same concerns regarding the misuse of "secret settlements" existed in the present case since Petitioner's expert was placed in the vaulted stance before the jury as having the special expertise to define the cause of the trusses failure. It was in keeping with this Court's holding that a "jury [is] entitled to weigh the codefendant's actions in light of its knowledge that [a] settlement had been reached," that justified the disclosure of Petitioner's expert's settlement to the jury. *Dosdourian,* at 247, n.4.

It is therefore not a misapplication of *Dosdourian* to hold that a defendant who has been removed as a party from the litigation may be subjected to cross examination on that settlement *if called as an expert* on the key issue in the case, i.e. the cause of the truss failure. Absent the defendant's ability to examine the expert on his prejudices and preconceptions, any plaintiff would be well-advised to engage and retain settling defendants as expert witnesses in order to unnaturally curtail and truncate other defendant's challenges to the expert's opinions. This would hardly be in keeping with the Court's rationale that the "integrity of our justice system" should not be placed in question. *Dosdourian,* 624 So. 2d at 247.

In support of its holding, the 4th DCA cited Erhardt, Florida Evidence §408.1, Fla. Stat. (2003 ed.) and *Dosdourian.* As this Court has previous held, there are instances which have been previously recognized as presenting the need for exceptions to the exclusion of the evidence of a settlement, or of a witness's previous status as a party. It was the "financial stake in the matter" that created the potential for Petitioner/plaintiff's expert to have the "bias that outweighs the danger of prejudice." *See Saleeby,* 965 So. 2d at 215-6. Erhardt recognized that the 3d DCA's decision in *Ellis* preceded this Court's decision in *Dosdourian,* and therefore the 3d DCA did not have the benefit of the Court's wisdom and the decision regarding the types of exception which should be made to the exclusions of this type of evidence. As Erhardt noted, the Court's holding in *Dosdourian* was more in keeping with Federal Rule 408, after which section 90.408 was patterned, which does not require exclusion of this type of evidence when it is offered for any other purpose, such as proving bias or prejudice of the witness. *See Fed. R. Evid. 408.*; *Erhardt,§408.1* .

In addition to the "misapplication" claim to support conflict jurisdiction, Petitioner relies upon two cases from the 3d DCA. In the first of these cases, *Ellis v. Weisbrot,* 550 So. 2d 15 (Fla. 3d DCA 1989), petitioner must concede that there is no direct and express conflict because the facts of Ellis demonstrate that the settling party was not called as an expert witness, as here, and there were no other

"unusual circumstances" to support the admission of the witness's former status as a party. As this Court held in *Dosdourian,* the admission of evidence of the dismissal of any defendant is not always "clear error" when there exists circumstances that outweigh the perceived prejudice. In keeping with the holding in *Dosdourian*, the 4th DCA agreed with the trial court that the present case presents those unusual circumstances to justify the admission of that evidence. As an expert witness, the president of A-1 was otherwise permitted to testify in the form of an opinion which included the ultimate issue to be decided by the trier of fact. *See §90.703, Fla. Stat.* The dentist in *Ellis* was not called as an expert and therefore would not have been permitted to give an opinion on the ultimate issue, nor would he have enjoyed the endorsement of "expert" in the eyes of the jury, as recognized by the trial court.

City of Coral Gables v. Jordan, 186 So. 2d 60 (Fla. 3d DCA 1966), one of the two 3d DCA cases cited for conflict by Petitioner, highlights why the present case falls squarely within the exception to the confines of sections 90.408 and 768.041, Florida Statutes. Decided 27 years before this Court rendered the opinion in *Dosdourian, Jordan* involved the settlement by the City of one of two plaintiffs claims. It was in the trial of the claims brought by the *passenger* of a motor scooter against the city that the evidence was introduced that the City had settled the separate claims brought on behalf of the *driver* of the scooter. In light of the

fact the City's defense was the accident was caused by the driver, and not as a result of the city's negligence, that the prejudice of the evidence outweighed its probative value. There was no issue of the plaintiff calling a former defendant to testify as an expert witness. Also importantly, the scenario in *Jordan* is the one which the danger of prejudice is most evident, because the submission to the jury that the defendant has settled with one plaintiff in the accident is more easily viewed as an admission *against the defendant* of its own culpability for the damages of a second injured plaintiff in the same accident.

This scenario was also at the center of the issues in the Illinois case, cited at length by petitioner. *See Fenberg v. Rosenthal,* 109 N.E. 2d 402 (Ill. 1952); *Petitioner's Brief at 5-6.* The cases examined by the *Fenberg* court focused on evidence of settlement with a separate inured plaintiff by the defendant who is a party at trial. In *Fenberg,* the court's analysis focused on the inherent prejudice to the defendant at trial when the jury hears it has settled with another injured party in the same accident. This background and rationale are not present here because the settling defendant is no longer a party at trial, and therefore the settling defendant can suffer no prejudice. Petitioner contends that the prejudice is somehow visited on him as a plaintiff because he retained an expert who he previously sued as a defendant and dismissed. However, Petitioner cannot claim that the prospects for settlement with A-l Truss were ever impinged in any way since it was not a

requirement of settlement that the settling defendant agree to serve as an expert witness. Neither is there any mention of the inability of the Petitioner to secure other non-party experts to testify for him on the issues relating to truss manufacture. Notwithstanding Petitioner's contention that the 4th DCA cited no "unusual circumstances" to justify the admission of the evidence, the 4th DCA's opinion particularly pointed to the fact that the expert witness had a financial stake in the matter which was therefore admissible to impeach an expert witness. *See Saleeby,* at 216.

Without the ability to fully cross-examine a settling defendant as to his motives, plaintiffs would be well-advised to name settling defendants as experts, and prevent the jury form learning that at the time the expert rendered the opinion regarding the ultimate issue, he was a named party in the suit. Under these circumstances, the 4th DCA properly concluded that the application of *Dosdourian* was consistent with the affirmance of the trial court.

CONCLUSION

The Court should deny the petition for certiorari based on conflict jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 28th day of December, 2008 to: Edward G. Rubinoff,

Esquire, P.O. Box 9700, Miami, FL 33101; Diran V. Seropian, Esq., Suite 3A, Barristers Building, 1615 Forum Place, West Palm Beach, FL 33401; Christopher Wadsworth, Esq., 21 S.E. 1st Avenue, 8th Floor, Miami, FL 33131; William S. Reese, Esq., 2600 Douglas Road, Douglas Centre, Suite 304, Coral Gables, FL and Mark Hicks, Esquire, Dinah Stein, Esquire, Brett C. Powell, Esquire, Hicks & Kneale, P.A., 799 Brickell Plaza, Suite 900, Miami, FL 33131.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing Respondent's Reply Brief on Jurisdiction complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Kimberly A. Ashby, Esq.
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