IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-____

L.T. No. 4D06-4349 and 4D07-5
Consolidated with: 4D06-1535

ALBERT SALEEBY,

Petitioner,

vs.

ROCKY ELSON CONSTRUCTION, INC.,

Respondent.

ON DISCRETIONARY REVIEW OF AN OPINION OF
THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

Edward G. Rubinoff, Esq.
Andrew M. Moss, Esq.
KUTNER, RUBINOFF
& BUSH, P.A.
501 NE 1st Avenue, Suite 300
Miami, FL 33132
Telephone: (305) 358-6200
Facsimile: (305) 577-8230

Mark Hicks, Esq.
Dinah Stein, Esq.
Brett C. Powell, Esq.
HICKS & KNEALE, P.A.
799 Brickell Plaza, Suite 900
Miami, FL 33131
Telephone: (305) 374-8171
Facsimile: (305) 372-8038

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

State Cases

State Statutes

STATEMENT OF THE FACTS

This Petition arises from the Fourth District Court of Appeals' affirmance of Final Judgment in favor of Defendant/Respondent Rocky Elson Construction, Inc. ("Elson"). *See Saleeby v. Rocky Elson Construction, Inc.*, 965 So. 2d 211 (Fla. 4th DCA 2007). (App. "A").

Plaintiff/Petitioner Albert Saleeby was employed by Labor for Hire, a temporary staffing company that provides laborers for construction projects. Elson contracted with Labor for Hire for day laborers to assist in the installation of roof trusses at one of Elson's construction sites. *See Id.* Saleeby was among the laborers provided to Elson for the project. *Id*. After completing the day's work, Saleeby was injured when the newly installed trusses collapsed. *Id*. Saleeby subsequently filed a negligence suit against Elson. A-1 Roof Trusses ("A-1"), the company that manufactured the trusses involved in the accident, was also a named party to the suit. *Id*. at 215. After A-1's president John Herring was deposed, A-1 settled with Saleeby. *Id*.

At the trial of Saleeby's claim against Elson, Saleeby called Herring to testify as an expert witness. *Id*. Consistent with his deposition testimony, Herring opined that the collapse was not caused by any deficiency in the design or manufacture of the trusses in question but was, rather, the result of improper installation. *Id*.

On cross examination, the trial court allowed defense counsel to question Herring regarding A-1's previous settlement with Saleeby, notwithstanding the prohibitions against such testimony found in sections 90.408 and 768.041. *See* §§ 90.408, 768.041, Fla. Stat.

After the court's entry of Final Judgment in favor of Elson, Saleeby appealed. Saleeby argued, *inter alia*, that the trial court erred in allowing Herring to be cross examined regarding A-1's settlement with Saleeby, on the grounds that the testimony was impermissible under sections 90.408 and 768.041, and was prejudicial because this information implied to the jury that A-1 bore a degree of fault for Saleeby's injuries. *Id*. The district court affirmed.

SUMMARY OF THE ARGUMENT

In reaching its opinion, the Fourth District held that, despite the clear dictates of Sections 90.408 and 768.041(3), it was permissible for Elson to disclose to the jury that Saleeby's witness was a former defendant in this case who had settled with Saleeby prior to trial. The Fourth District's opinion expressly and directly conflicts with *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 1966), *aff'd*, 191 So. 2d 38 (Fla. 1966), and jurisdiction therefore lies with this Court pursuant to art. V, section 3(b)(3), of the Florida Constitution. *See* art. V, § 3(b)(3), Fla. Const. In addition, the district court's opinion clearly misapplies this court's *Dosdourian v.*

Carsten, 624 So. 2d 241 (Fla. 1993), decision, and conflict jurisdiction therefore exists on this basis as well.

ARGUMENT

The Fourth District's erroneous affirmance of the trial court's ruling is in express and direct conflict with opinions issued on the same point of law by the Third District, and with this Court's decision in *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993). This Court therefore, has jurisdiction. Rule 9.030(a)(2)(A)(iv).

In reaching its opinion, the court recognized that section 90.408 excludes evidence of a settlement at trial. However, the court reasoned that "courts may, however, admit settlement-related evidence if offered for other purposes, such as proving witness bias or prejudice." *Id*. The court further stated, "Here, A-1 Roof Trusses had a financial stake in the matter which could have impacted its president's expert opinion.[1] Evidence of prior settlement was admitted to show potential bias." The court's opinion is in direct and express conflict with *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 1966).

[1] The court's stated rationale is erroneous, as the court itself recognized that A-1 had entered into a settlement with Saleeby prior to Herring's testimony. *Saleeby*, 965 So. 2d at 215. Neither the court's opinion nor any of the pleadings filed in this case indicate that this settlement was in any way contingent upon the outcome of the trial.

In *Ellis*, the plaintiff sued several defendants for dental malpractice. *Id*. at 16. On the eve of trial, the plaintiff dismissed one of these defendants, Dr. Kirsner, who was subsequently called as a witness by the plaintiff. "During cross-examination of Dr. Kirsner, counsel for Dr. Weisbrot asked the following question over Ellis's objection: 'Dr. Kirsner, isn't it true you were just dismissed as a defendant from this case yesterday by the plaintiff?' Dr. Kirsner answered, 'That is correct.' Ellis moved for a mistrial; the trial court later denied his motion." *Id*.

The Third District Court of Appeals reversed the trial court's Final Judgment in favor of the defense, holding:

> The trial court erred in admitting evidence of Dr. Kirsner's prior status as a defendant in the lawsuit and dismissal of the claim against him. "The fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury." §768.041, Florida Statutes (1987). Section 768.041 prohibits informing the jury that a witness was a prior defendant, whether the party was dismissed by release or settlement or by court order.
>
> ***
>
> Admission of such testimony, *even to attack the former defendant's credibility, is clear error and requires reversal.*

Id. (emphasis added). Thus, the Fourth District's holding in the present case that "courts may . . . admit settlement-related evidence if offered for other purposes, such as proving witness bias or prejudice" is in direct and express conflict with the Third District's previous pronouncement that "[a]dmission of such testimony, even

to attack the former defendant's credibility, is clear error and requires reversal." *Compare Saleeby*, 965 So. 2d at 215, with *Ellis*, 550 So. 2d at 16.

Similarly, in *Jordan*, a teenaged passenger on a motor scooter was killed when the scooter collided with an automobile at a busy intersection where city police were directing traffic, and the parents of the decedent filed a wrongful death suit against the city. *Jordan*, 186 So. 2d. at 60-61. At trial, the city's theory of defense was that the death was caused solely by the driver of the scooter, rather than any actions of the city. *Id*. at 61.

However, on redirect examination of the driver, plaintiff's counsel asked "Bill, at the present time, you and your father have no interest in this law suit. All claims have been settled with the City of Coral Gables?" *Id*. The driver responded in the affirmative. At this point, the defendant city requested a mistrial, which the court denied. *Id*.

In reversing the final judgment in favor of the plaintiff, the Third District explained:

> ...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.

Id. at 62-63. Quoting the Illinois Supreme Court case of *Fenberg v. Rosenthal,* 109 N.E. 2d 402 (Ill. 1952), the court continued:

> [O]ur courts are firmly committed to the principle that offers of compromise or settlements with third persons are not admissible. . . . We are of the opinion that the more substantial authority supports the conclusion that *the rule permitting payments to a witness to be shown for the purpose of determining whether such payments affect credibility must yield to the public policy inherent in the other rule that offers of compromise and settlement with third persons may not be shown except under unusual circumstances*. *Such unusual circumstances exist where some species of fraud or other questionable practice is indulged in to procure or influence such testimony.* If such claim is made the trial court should hear testimony of the alleged misconduct out of the presence of the jury and rule on a motion to strike, preliminary to the testimony being offered in evidence. However, no such unusual circumstances are found or claimed to be present in the instant case.'
>
> We hold that the trial judge erroneously held that the appellant had opened the door and rendered the evidence of settlement admissible.

Id. at 63 (emphasis added). In direct conflict with *Jordan*, the Fourth District held that it is permissible to disclose to the jury the existence of a witness' previous settlement with the plaintiff, even though the court identified no "unusual circumstances" existing in the present case. *Saleeby*, 965 So. 2d at 215-216. Thus, the Fourth District's opinion sits in direct and express conflict with the Third District's *Jordan* opinion.

Finally, the appellate court's opinion conflicts with this Court's holding in *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993), because it misapplies

Dosdourian's holding to the instant facts. *See Aguilera v. Inservice Inc.*, 905 So. 2d 84 (Fla. 2005).

In *Aguilera*, this Court found that conflict jurisdiction existed where the district court misinterpreted this Court's previous holding in *Sibley v. Adjustco, Inc.*, 596 So. 2d 1048 (Fla.1992). In *Sibley*, this Court had held that a claimant may maintain a tort action against his worker's compensation carrier for abuses the carrier commits during the claims administration process, without the precondition of a criminal adjudication of guilt. *Id*.

However, in a subsequent case the Third District misapplied *Sibley*, reading that opinion to allow claims against worker's compensation carriers only where the allegedly tortious conduct occurs *independently* of the claims handling process. *See Inservices, Inc. v. Aguilera*, 837 So. 2d 464, 466 (Fla. 3d DCA 2002).

As this Court explained upon certiorari review of the Third District's *Aguilera* opinion:

> In this case, the Third District has interpreted *Sibley* to hold that an independent action against an insurance carrier is only available when the intentional tort occurs totally *independent* of the handling or processing of a workers' compensation claim. . . . The Third District should not have limited itself to considering whether Aguilera's allegations involved wrongdoing totally separate and independent of the workers' compensation claim process itself. *See id.* Pursuant to *Sibley*, if an insurance carrier engages in outrageous actions and conduct that constitutes an intentional tortious act while processing the claim beyond mere short delays in payment and simple bad faith, the carrier is not cloaked with a shield of immunity flowing from the workers' compensation provisions.

Aguilera, 905 So. 2d at 94. (emphasis in original).

As this Court further explained, "[t]he Third District referred to *Sibley* but incorrectly analyzed its impact and misapplied its holding." *Id*. at 93. Thus, the district court's misinterpretation created a conflict with this Court's holding despite the fact that it did not voice an express or direct conflict with this Court's opinion. *Id*. at 86.

Such is the case here, where the Fourth District's holding is premised upon a misreading of this Court's *Dosdourian* decision, identifying an exception to the clear requirements of Section 90.408 which this Court never created nor identified. The Fourth District demonstrated this misinterpretation, stating:

> Section 90.408 excludes evidence of a settlement to prove liability; courts may, however, admit settlement-related evidence if offered for other purposes, such as proving witness bias or prejudice. *See Dosdourian v. Carsten*, 624 So.2d 241, 247 n. 4 (Fla.1993) (evidence of a settlement with a codefendant *who remained in the case* was admissible since "the jury was entitled to weigh the codefendant's actions [at trial] in light of its knowledge that such a settlement has been reached.").

Sibley, 965 So. 2d at 215-216 (emphasis supplied). However, a proper reading of *Dosdourian* demonstrates that this Court's opinion was specifically limited to situations in which a defendant enters into a form of "Mary Carter"[2] agreement with the plaintiff whereby the defendant agrees to pay a specified sum to the

[2] *See Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. 2d DCA 1967).

plaintiff and remain in the case in order to advocate the remaining defendant's liability. *See Dosdourian*, at 242-243. As this Court explained:

> Turning to the certified question, Carsten argues that his was not a true Mary Carter agreement because it did not provide that DeMario could reduce her liability by staying in the litigation. Thus, he asserts that the agreement was more in the nature of a release or covenant not to sue which was protected from disclosure to the jury by the provisions of section 768.041(3), Florida Statutes (1989). *Dosdourian argues, however, that the jury was still misled by not knowing that Carsten had settled his claim against DeMario while DeMario remained in the litigation. . . .*
>
> ***
>
> *While Carsten's agreement with DeMario was not the usual Mary Carter agreement, we believe that it falls within the scope of secret settlement agreements which are subject to disclosure to the trier of fact under the principles of Ward v. Ochoa.*

Id. at 247 (emphasis added). As this passage demonstrates, the issue before this Court in *Dosdourian* concerned the possibility of the jury being misled as a result of the defendant secretly aligning with the plaintiff at trial. While this Court explicitly recognized that evidence of a settlement is otherwise inadmissible, it carved a narrow exception to this rule in order to prevent the settling parties from misleading the jury by entering into a secret alliance at trial.

No such situation existed in the instant case, as no Mary Carter agreement was entered into, nor was there any quid pro quo agreement in which Herring agreed to give favorable testimony in return for settlement. Herring was simply a former party to the case, who testified at trial in a manner completely consistent with the testimony he offered at deposition prior to settlement. *See Saleeby*, 965

So. 2d at 215. As this Court recognized in *Dosdourian*, the fact of A-1 Roof Trusses' settlement with Saleeby was protected from disclosure to the jury by the provisions of Sections 768.041 and 90.408, Florida Statutes. *See Dosdourian* at 247.

However, the Fourth District misapplied this Court's narrowly crafted exception to allow admission of such evidence at any time, so long as it is "offered [to prove] witness bias or prejudice." *Saleeby*, at 215. Thus, the Fourth District's opinion misapplies the *Dosdourian* holding to the instant facts, and conflict jurisdiction therefore exists on this basis as well. *See also See Knowles v. State*, 848 So. 2d 1055, 1056 (Fla. 2003)(misapplication of supreme court decision creates conflict jurisdiction); *Health Trust of Dade County v. Menendez*, 584 So. 2d 567, 569 (Fla. 1991)(same).

CONCLUSION

Wherefore, based upon the above facts and authorities, Petitioner Albert Saleeby submits that this Court has jurisdiction and requests this Court accept review.

Respectfully submitted,

s// Brett C. Powell
MARK HICKS
Fla. Bar No.: 142436
DINAH STEIN
Fla. Bar No.: 98272
BRETT C. POWELL

Fla. Bar No.: 610917
HICKS & KNEALE, P.A.
799 Brickell Plaza
Ninth Floor
Miami, FL 33131
Tel: (305) 374-8171
Fax: (305) 372-8038
-and-
KUTNER, RUBINOFF
& BUSH, P.A.
501 NE 1st Avenue, Suite 300
Miami, FL 33132
Tel: (305) 358-6200
Fax: (305) 577-8230
Counsel for Petitioner

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this **4th** day of **December, 2007**, to:

Edna L. Caruso, Esq.
Edna L. Caruso, P.A.
Barristers Building, Suite 3A
1615 Forum Place
West Palm Beach, FL 33401
Tel: (561) 686-8010
Fax: (561) 686-8663
Counsel for Plaintiff/Appellant

Christopher W. Wadsworth, Esq.
Wadsworth King & Huott, LLP
200 SE 1st Street, Suite 1100
Miami, FL 33131
Tel: (305) 777-1000
Fax: (305) 777-1001
Counsel for Defendant/Appellee

William S. Reese, Esq.
Lane Reese Aulick Summers & Ennis, PA
Douglas Centre, Suite 304
2600 S Douglas Road
Coral Gables, FL 33134
Tel: (305) 444-4418
Fax: (305) 444-5504
Co-counsel for Defendant/Appellee

Kimberly A. Ashby, Esq.
Ackerman Senterfitt
CNL Centre II at City Commons
420 S Orange Avenue, Suite 1200
Orlando, FL 32801
Tel: (407) 423-4000
Fax: (407) 843-6610
Co-counsel for Defendant/Appellee

s// Brett C. Powell
BRETT C. POWELL
Fla. Bar No.: 610917

CERTIFICATE OF COMPLIANCE

This brief complies with this Court's font requirements. It is typed in Times New Roman 14 point proportional font and is double-spaced.

s// Brett C. Powell
BRETT C. POWELL
Fla. Bar No.: 610917

INDEX TO APPENDIX