IN THE SUPREME COURT OF FLORIDA

ALBERT SALEEBY,

Petitioner,

vs.

ROCKY ELSON CONSTRUCTION, INC.,

Respondent.
_____/

CASE NUMBER: SC07-2252

L.T. Case No(s): 4D06-1535, 4D06-4349 4D07-5

ANSWER BRIEF ON MERITS OF RESPONDENT

KIMBERLY A. ASHBY
Florida Bar Number: 0322881
AKERMAN SENTERFITT
420 South Orange Avenue
Suite 1200
Orlando, FL 32802-0231
Telephone: (407) 423-4000
Telefax: (407) 843-6610
Attorneys for Respondent,
Rocky Elson Construction, Inc.

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STATEMENT OF THE CASE AND FACTS

Mr. Saleeby was working on a construction project as the hired temporary employee for Rocky Elson Construction, Inc. ("Elson") through a temporary help supply company, Labor For Hire, Inc. (T.78-9) Tektonica was the general contractor for the project which scope of work included the installation of trusses. (T. 170) Tektonica's subcontract with Elson was for the supply of labor only. (T. 170)

Saleeby sued Elson for negligence, alleging failure to use appropriate roof truss installation means and methods, which he contended resulted in personal injuries when roof trusses fell on him. (R. 1-9) Respondent raised workers' compensation immunity as an affirmative defense because Petitioner was employed for Elson via the use of a "help supply services company", and therefore was a borrowed servant. (R. 12-16; 370-1)

Labor For Hire, Inc., is a help supply service company as defined by section 440.11(2), Florida Statutes, which agreed to and did supply Elson with temporary employees for Elson's construction business, pursuant to a written contract. (T. 1283-93) That contract consisted of an application which was followed by work order tickets which were generated as employees were requested. (T. 1283-93)

Pursuant to its contract with Elson, Labor For Hire was required to, and did provide, as a temporary employee, Mr. Saleeby with worker's compensation insurance coverage. (T. 1300; 1308-9) On the date of the accident, Saleeby was working for Elson as a temporary employee of Labor For Hire pursuant to the contract with Elson. (T. 1318-1330)

Saleeby knew that he was an employee of a temporary employer, Elson, rather than Labor For Hire. (T. 1257-58) During his employment at Elson, the work performed by Saleeby was that of Elson's, the work was controlled and supervised by Elson. (T. 1258-62) Specifically: (1) Elson governed how many hours they would work; (2) an Elson supervisor instructed Saleeby as to what he would do on the job site; (3) Elson supervised Saleeby (T. 1258-62; 855-57)

Pursuant to the Agreement between Labor For Hire and Elson, Labor For Hire was contractually obligated to, and did provide Saleeby with worker's compensation insurance coverage during the job assignment. (T. 1308). Elson's cost of hiring Saleeby through Labor For Hire also included the payroll taxes (T. 1308) Saleeby received worker's compensation benefits by virtue of that worker's compensation insurance coverage. (T. 1301-2). Labor For Hire paid Saleeby for the work at the job site and billed Elson for those services, which billing included costs for worker's compensation insurance. (T. 1293) Elson paid the bill for the

services of Mr. Saleeby as a semi-skilled laborer and Labor For Hire accepted that payment. (T. 1290-93)

Mr. Ralph Gomez was the general manager for Labor For Hire and testified about the contractual arrangement with Elson and the different classifications of workers which were used as temporary employees. (T. 1312-14) These classes included unskilled, semiskilled, apprentice and carpenter. (T. 1312) The workers were not tested by Labor For Hire in order to classify them. (T. 1313) The only time workers needed classification was if they were carpenters, which required their own tools, or apprentices which required advanced skills (T. 1313). A semiskilled laborer such as Saleeby would be qualified to hand tools and material to others working above him. (T. 1345) Gomez had sent Saleeby out previously as a semi-skilled worker, even as an apprentice (T. 1314-15). Saleeby had been paid as semi-skilled or apprentice for the three months preceding the accident (T. 1316-17; Def. Ex 89)

Labor For Hire classified Saleeby as a general laborer who could perform semiskilled labor (T. 1314) Labor For Hire had used Saleeby previously as an apprentice, putting together showroom cabinets (T. 1256; 1315) Saleeby had worked for Labor for approximately 1 year and 3 months (T. 1263). He had been paid as much as $15 per hour on jobs for Labor before the accident (T. 1263-64). In the three months preceding the accident, Saleeby was paid an average salary of

$9 per hour, as opposed to the $5.15 minimum paid to unskilled laborers. (T. 1264). On the previous jobs, he had operated tools. (T. 1264-65). Saleeby testified that he understood if he was uncomfortable doing a job, he did not have to do it and could leave (T. 1267-68). Saleeby stayed on the ground at the Elson job at all times,and did not climb on the trusses (T. 1274). While Saleeby was holding the tag line, according to him, he had no problems (T.1274). He did not feel that he needed any special training to do what he was doing (T. 1275-6).

On the day of the accident, Elson contracted with Labor For Hire to retain two workers for that day, Saturday. (T. 1286-1294) As a result, Saleeby was billed as a semiskilled worker. (T. 1286-94; 1328-29; Def. Ex. 89, 90). Saleeby passed cleats up to workers working on the installation of trusses, passed up wood, and then held tag lines to maintain tension while the trusses were installed. (T. 1222, 1260). Saleeby testified that when he went to the jobsite, he took direction of the supervisor. (T. 1258) Saleeby hooked the ropes on the end of the trusses, and the supervisor directed the crane operator. (T. 1260) In order to "hook up the ropes to the trusses, one only had to loop it." (T. 1261) Saleeby was asked by his counsel whether it took special training or skill to be able to fly the trusses, and he replied, "It took common sense." (T. 1261) They completed the day's work without problems flying the trusses, according to Saleeby. (T. 1262) On previous jobs,

when Saleeby did not feel qualified to do a job, he called back and let Gomez know. (T. 1282) He did not refuse the work on the Elson job. (T. 1260-62)

Gomez admitted that handing up tools or material was not considered to be skilled work and would be permitted (T. 1337) He testified that the simple act of holding a rope was obviously not skilled, although he felt that there was some skill involved in manning a tag line (T. 1338) Gomez admitted that his staff member fielded the call information from Elson's foreman upgrading Saleeby to semi-skilled. (T. 1289-94) Gomez also admitted that Labor For Hire was paid for Saleeby at the semi-skilled level. (T. 1289-94)

Gomez testified he indicated that it was important for him to know and oversee the skill level for the workers due to "exposure to [his] company." (T. 1280) This was not just an unexpected comment blurted out by Gomez, the witness, but was a planned question of Petitioner's trial counsel. (T. 1280) Gomez was asked: "What about any exposure to your company for an accident of that person that you send out was doing what they were not sent out to do and perhaps cause an accident; is that a concern". (T. 1280) Gomez responded: "That is always a huge concern." (T. 1280) On cross examination, defense counsel asked what Gomez meant by exposure to his company. (T. 1294) Upon Petitioner's counsel's objection that the question might elicit workers compensation information, the trial court excused the jury and a proffer ensued. (T. 1294-97) In the proffer, Gomez

stated that his major concern was workers compensation (T. 1297) After the proffer the trial court weighed the probative value against the prejudicial effect, according to section 90.403, Florida Statutes. (T. 1304). The trial court ruled the defense could ask what Gomez meant by exposure to his company. (T. 1304)

Elson's project superintendent, Mr. Jay Brochu testified that Saleeby was only used as a laborer, passing up tools, wood and manning a tag line. (T. 854) According to Gomez, Labor For Hire would have had no objection to the workers working under the trusses on the job site. (T. 1341) The accident did not occur as a result of anything related to Saleeby holding a tag line. (T. 596) Saleeby was told by Labor For Hire to report to Elson and take orders from Elson. (T. 1209-10) He was looking for work on Saturday and did not object to reporting to the job site. (T. 1257)

When Saleeby was on the job site, he never told anyone that he felt uncomfortable doing the job he was asked to do. (T. 870) Gomez testified that Saleeby had called in on a previous job when he was asked to do something that he was not supposed to be doing. (T. 1282) Saleeby did not call in to Labor For Hire to report that he was being asked to do something they should not be doing (T. 1267-68) When Saleeby arrived at the job, he pulled nails out of scrap wood. He had no problem with the trusses to his recollection. (T. 870)

The accident occurred on a Saturday when some of the trusses installed on the south side of the building fell. (T. 824-27) The record showed these trusses were installed on Thursday, two days before the accident, and on the other side of the building from where Appellees were working on Saturday. (T. 824-27) When the trusses fell several workers were standing underneath them, including Saleeby, who were injured as a result. (T. 824-27) Saleeby was not working on the trusses in this area on the day of the accident. (T. 823-27) Some of the trusses remained standing after the accident, and remained installed in the finished building. (T. 841-42)

After the accident and before the reinstallation of the replacement trusses, Mr. Elson was presented with a video brought to his attention by Jeffrey McIntyre, a Tektonica employee, on the installation of trusses. (T. 849) He installed the replacement trusses using the same bracing that he used before the accident. (T. 835) This method was in accord with what was shown on the video. (T. 364-365) Elson used the same crew to install the replacement trusses. (T. 868-69) They put the replacement trusses up "the exact same way." (T. 197; 364) Elson has been installing trusses the same way before and after the accident without another incident. (T. 853)

Elson holds a journeyman carpenter's license (T. 1483). He has been setting trusses since he began work, 20 years prior to the accident. (T. 1483-89) He

previously worked for the Army Corps of Engineers installing roofing all over Miami-Dade County after Hurricane Andrew. (T. 1483) He had set trusses, wood and metal, on big barns, restaurants, and on the garage for the same project at issue here. (T. 1598-1625) He identified large homes where he installed 70 to 80 foot trusses. (T. 1596-98; 331-39) All of the permanent workers for Elson on the job had experience installing trusses and had worked for Elson before. (T. 1483-92) Elson testified that he was not on the job at the time of the accident but was called to the job shortly thereafter. (T. 311) He examined the fallen trusses and the "gusset plates" that held the trusses together. (T. 336-70) He noted that some of the gusset plates were pulled back from the wood and that soda and beer cans appeared to have been inserted between the wood and the gusset plates during manufacture. (T. 365-70) Elson testified that this could have been the cause for the truss failure (T. 365-70)

Mr. Brochu testified that he too had experience in the installation of 60 foot trusses. (T. 857-58) After the accident he was involved in the installation of the replacement trusses (T. 824) The trusses were the same as the ones which were involved in the accident and were braced in the exact same manner. (T. 848-49) The installation after the accident was done under the supervision of OSHA (T.)There was no incident regarding the installation of the replacement trusses and no

one suggested that they be braced differently. (T. 852-53) During the course of the job, Elson conducted daily safety meetings on the job. (T. 274-75)

During trial, Petitioner sought to introduce a pamphlet called HIB-91. (T. 388). This is an industry guideline, not a code provision, and it did not apply to temporary bracing, which was the challenged activity. (T. 399-401) The trial court required there first be a showing that HIB-91 applied to temporary bracing. (T. 402) Regarding the HIB-91, Petitioner's own expert Kurt Grundahl, admitted it was a guide and was not the only way to install trusses (T. 626; 538). Mr. Grundahl characterized HIB-91 as a "book just like any other theoretical book that you use as a concept." (T. 536) When Petitioner sought to introduce it, Elson's trial counsel objected because it was an attempt to use an authoritative source to bolster the expert testimony, much like admitting a treatise. (T. 542-44)

Petitioner called John Herring as an expert witness. (T. 979-1192) In the direct examination of Herring, Petitioner asked the following questions:

> Q. Let me ask you this. You this. You expressed that opinion to us for the first time at your deposition, correct?
>
> A. That's correct.
>
> Q. Okay. At the time you gave your deposition, were you, in fact, a party in this case?
>
> A. I was a party in a case.
>
> Q. In this case?

A. Right.

Q. Okay. And at some point that was resolved, correct?

A. Yes.

Q. After your deposition, somewhere down the Road.

A. Correct. (T. 1093) *Following* this direct examination, Elson's counsel followed up with questions regarding the "resolution" that Herring reached to which he referred in his direct. (T. 1060-61) When these questions were asked of the witness, no objection was made by Petitioner's counsel. (T. 1060-61; 1160-61) Petitioner states there was an agreed order in limine regarding introducing the evidence of A-1's settlement, however, the record shows that Petitioner's counsel did not argue or attempt to establish an estoppel on this basis. (T. 944-54)

SUMMARY OF ARGUMENT

There were no reversible errors in the conduct of the trial. There was no error in permitting the introduction of evidence that Petitioner's expert witness on causation was also the president of the company which was a co-defendant when he rendered his opinion and which exonerated his own company. The expert's opinion was that the manufacture of the trusses did not contribute to the accident and it must have been the means and methods of Elson's installation. Because the witness was called to render expert testimony, the context of this testimony distinguishes the present case from other cases prohibiting the introduction of settlements of fact witnesses. Petitioner called Mr. Herring to render an opinion on causation, as an expert in the construction of trusses. It would have been

fundamentally unfair, and error, to exclude from the jury's consideration the fact that at the time this expert rendered his opinion he had the motivation to exonerate his own company.

Petitioner first introduced evidence regarding the provision of workers' compensation insurance on direct examination of the help supply services company. The president of the labor supplier testified on direct examination that the exposure to his company was a great concern to him because of the provision of workers compensation. There was no testimony regarding amounts paid. The jury in this case was not asked to decide damages. Because the issue of workers compensation was first introduced by Petitioner, he cannot be heard to complain that the trial court committed reversible error by permitting Respondent to cross examine on the same topic, since the door was opened.

The trial court did not err in directing a verdict on the issue of whether Saleeby was a borrowed servant. There was no evidence to support a different conclusion on the facts. Florida's worker's compensation law extends an employer's immunity from tort liability to the work related injuries sustained by employees obtained through a "help supply services company", pursuant to section 440.11(2), Florida Statutes. No factual issues remained that Saleeby was working as a temporary employee for Labor For Hire and that Labor For Hire was a help supply services company as defined by the statute.

The contract between Elson and Labor For Hire included payment for the worker's compensation insurance for Saleeby, which was passed through as part of the cost to Elson for hiring Saleeby as a temporary employee. Petitioner was injured while performing work pursuant to the contract between Labor For Hire and Elson and thus the worker's compensation immunity applies pursuant to section 440.11(2).

There was no factual issue remaining regarding whether the contract under which Petitioner performed was modified in such a way as to prevent the application of section 440.11(2). Although the Labor For Hire representative contended after the fact that he did not understand the totality of the work which would have been performed by Saleeby on the job, he could not deny that his company accepted the payment for the labor and never attempted to rescind the contract in any way. The injuries were not sustained as a result of any of the work Petitioner did, or was asked to perform. The trusses which fell were on a portion of the building that had been installed on days before Petitioner worked. The work performed was within the types of work which were defined by the contract. The jury ultimately found there was no substantial certainty of injury or death as a result of the actions of Elson. The construction of the contract was reviewable by the trial court as a matter of law. The elements of the contract were complete: offer, and acceptance, and full performance by both parties. One party's unilateral

attempt to reject the effect of the contract after the completion by both parties to that agreement is of no effect.

Further, there was no error in the jury instruction given. Petitioner has not elucidated any semantical difference between "should have known" and "would have understood." This Court has used both phrases to describe the objective standard for "substantial certainty." If these words had the same effect, there could have been no misunderstanding by the jury.

The Final Judgment and the decision of the Fourth District should be affirmed in all respects. Alternatively, the Court should determine that there is no express and direct conflict with any other Florida case, and therefore, no jurisdiction in the Court.

ARGUMENT AND STANDARD OF REVIEW

Appellee agrees with the standards of review as recited by Appellant.

POINT I: NO ERROR WAS COMMITTED IN REFERENCING A-1 ROOF TRUSSES STATUS AS A PRIOR DEFENDANT, AND THAT A-1 HAD SETTLED SINCE PETITIONER CALLED A-1 PRESIDENT AS AN EXPERT WITNESS WHOSE OPINION WAS RENDERED WHEN A-1 WAS A PARTY DEFENDANT

Petitioner claims as error the trial court's admission of evidence that Petitioner's expert, Mr. Herring, was the president of A-1 which was a co-defendant at the time Herring rendered his expert opinion that the manufacture of the trusses was not a contributing cause of the accident. A-1 was the manufacturer

of the trusses which failed. The fact that Petitioner elected to list and call Herring as an expert is the distinguishing factor to all of the cases cited by Petitioner on this point. Additionally, Petitioner's counsel made a tactical decision to ask Herring about settlement on direct examination, and therefore waived any argument on appeal.

Expert opinions, by their very nature, carry great weight with a jury because the court instructs them that this person has been especially qualified to testify, and they are permitted to opine as to the ultimate issue as though it were true. This has the effect of diminishing the jury's role as the finder of fact. Experts are called to assist juries on particular fact issues which require a certain degree of expertise and are out of the ordinary ken of the average juror. §90.702, *Fla. Stat*.

Instead of calling an expert who was independent of the accident, Petitioner selected the president of the truss company which manufactured the trusses which were involved in the accident. Herring opined that the trusses could not have failed and that it must have been the installation means and methods that caused the accident. Herring rendered his opinion originally at a time when his company was a party defendant being sued by Petitioner, which could have easily given a reason to be biased in his conclusions regarding the manufacture versus the installation.

Invited error cannot be the basis for reversible error. *See Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1997). In this case, Petitioner's counsel asked those questions of Herring on direct examination which he contends now led to prejudicial error. If the jury was swayed by the fact that Herring's company was previously a defendant which had settled with the plaintiff, it must be due equally to Petitioner's introduction of that very evidence.

In addition, the trial court properly exercised its discretion in the admission of the evidence regarding A-1's prior position because the impeachment of the expert's credibility outweighed the prejudice that A-1 had settled with the plaintiff. *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993). In *Dosdourian*, the Court held that there are proper instances for the jury to be informed about the settlement of a co-defendant. In that case, the Court addressed the scenario of a defendant settling and continuing to defend the case. The Court expressed the concern: "Even possible collusion between the plaintiff and the settling defendant creates an inherently unfair trial setting that could lead to an inequitable attribution of guilt and damages to the non-settling defendant." *Id. at 244.*

In the same way, Petitioner's use of the codefendant as an expert *for the plaintiff* to testify as to the cause of the accident, and whether there was a substantial certainty of death or serious injury, created an unfair trial setting to Elson if not permitted to advise the jury of the expert's motivations at the time he

rendered his opinion. There is no harm or error in the cross-examination of an expert of biases such as the proclivity to testify for plaintiffs or defendants, or to statistically favor one particular final opinion. As in this case, there was no error in the exploration of the fact Herring had never once found an error in the manufacture of trusses.

One other rationale for admission of the evidence is found in *Dosdourian,* and may be found here. While it is well recognized that public policy generally favors the encouragement of settlements between parties and the avoidance of litigation, the Court reasoned that the failure to disclose certain types of settlement information to a jury may actually encourage additional litigation, and have the opposite effect than intended. 624 So. 2d at 245. In *Dosdourain,* the issue was Mary Carter agreements. The Court noted that permitting a settling defendant to remain and defend as though a true litigant, without advising the jury, would actually encourage more cases to go to trial against the nonsettling defendants, and the increased likelihood of post trial attacks on appeal. *Id.*

In *Goodyear Tire & Rubber Co., Inc. v. Ross,* 660 So. 2d 1109 (Fla. 1995), this Court held it was *error* for the trial court *to exclude* evidence of a pretrial settlement which resulted in a dismissal only at a point when it was a "tactical decision" by the plaintiff to prevent the fact of settlement from coming before the jury. The Court recognized that the non-settling defendant was so

prejudiced that a new trial was required in which the fact of settlement would be admissible. Petitioner waived his objection by the inquiry on direct examination, notwithstanding his arguments otherwise. *See §90.104(1); Sheffield v. Superior Ins. Co.,* 800 So. 2d 197 (Fla. 2001).

The cases cited by Petitioner do not involve the plaintiff listing and calling a codefendant as an expert witness to opine on the ultimate fact 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. It is unclear from the opinion what the witness testified to and whether there was any other evidentiary reason for admission of the evidence of settlement and dismissal.

City of Coral Gables v. Jordan, 186 So. 2d 60 (Fla. 3d DCA), aff'd 191 So. 2d 38 (Fla. 1966) is distinguishable from the invited error here because of the facts of the case. Plaintiff's decedent was a passenger in a motor scooter accident. Plaintiff and the driver of the scooter sued the City for negligence. In the plaintiff's case the City took the position the accident was solely the fault of the driver. The fact the City settled with the driver caused the City's defense to "evaporate", according to the 3d DCA. *Id at 63.*

In *Ricks v. Loyola,* 822 So. 2d 502 (Fla. 2002), the Court examined the parameters of the trial court's discretion in granting mistrial and new trial motion, and did not address the cross-examination of the plaintiff's expert as a former

defendant in the case. *See also Muhammad v. Toys-R-Us*, 668 So. 2d 254 (Fla. 1st DCA 1996)(defendant asked venire to consider that plaintiff may have already settled with manufacturer, which was untrue); *Henry v. Beacon Ambulance Service, Inc.*, 424 So. 2d 914, 915 (Fla. 4th DCA 1982) (disclosure of settlement of a party error when first raised in closing argument).

Fenberg v. Rosenthal, 348 Ill. App. 510, 109 N.E. 2d 402 (Ill. App. 1952), relied upon by Petitioner, highlights what the concern actually is when settlements by third parties are disclosed to the jury. It is because the settling party may be facing a separate action from another injured party and such evidence would be evidence of admission of fault, which would dissuade the party from settling. However, in the present case, A-1 faced no such separate liability and there was no threat to A-1 or the witness at all, who was being compensated to testify on the element of causation. *See also Embalmers' Supply Co. v. Giannitti*, 103 Conn. App. 20, 929 A. 2d 729 (Conn. App. 2007) (settlement of a non-party can be an exception to the exclusion of such evidence).

In *Cenvill Communities, Inc. v. Patti*, 458 So. 2d 778 (Fla. 4th DCA 1984), the Court *reversed an order granting new trial* made by the plaintiff who contended that reference to a claim made on another defendant constituted reversible error. After the jury returned a verdict in favor of the non-settling defendant, the trial court granted a new trial based on the argument that reference

to the other claim was error. The 4th DCA *reversed* the trial court's granting of new trial finding that reference to the claim had its place, and was proper, in light of the intervening cause defense brought by the defendant. According to the court, to hold otherwise would be reversible error and abuse of discretion. Thus, the trial court properly admitted the evidence here.

Petitioner argues that he relied on the in limine ruling of the trial court when he elected to call Herring as his expert witness on causation. However, Florida law provides that all non-final orders may be revisited by the trial court until the final order is entered. *See Commercial Garden Mall v. Success Academy, Inc.*, 453 So. 2d 934 (Fla. 4th DCA 1984). Additionally, Petitioner did not make the argument that an estoppel should apply when the trial court considered the introduction of evidence at trial. Also, this was at a point after the Petitioner had asked on direct about A-1's status in the case, and therefore opened the door to cross-examination. Petitioner was on early notice that Respondent sought to introduce the fact that his expert was a defendant who was facing its own liability at the time he formed his expert opinion.

The policy consideration in this case is not whether settlements between parties will be discouraged due to disclosure to a jury. The only foreseeable consequence is that plaintiffs will be discouraged from using former defendants as their testifying experts. Since there is no paucity of experts to draw from, even in

the area of failing roof trusses, there is no breach of a policy to rightly inform a jury of the prejudices that may have attended the expert at the time he was forming his opinion on the cause of the accident.

Numerous jurisdictions recognize that there are valid instances when the evidence of the settlement of a party should be introduced, either as impeachment or for other reasons. *See Bankers Trust Co. v. Basciano,* 960 So. 2d 773 (Fla. 5th DCA 2007)(settlement discussion were between two other parties, and admitted to show plaintiff's intent); *Schafer v. RMS Realty,*138 Ohio App. 3d 244, 295, 741 N.E. 2d 155, 192 (Ohio App. 2000) (settlement evidence admissible when offered to show witness bias); *TCA Building Co. v. Northwestern Resources Co.,* 922 S. W. 2d 629, 636 (Tex. App. 1996); *Conley v. Treasurer of Mo.,* 999 S.W. 2d 269, 275 (Mo. App. 1999) (settlement evidence admissible to show percentage of disability from last injury); *Brothers v. Public Sch. Employees of Wash.,* 88 Wash. App. 398, 406, 945 P. 2d 208, 212 (Wash. App. 1997) (settlement evidence no excluded when offered for another purpose such as showing bias or prejudice).

For all of these reasons, the trial court properly permitted the inquiry of the expert's potential biases as part of the cross-examination by the Respondent.

POINT II: PETITIONER INVITED INQUIRY AS TO LABOR FOR HIRE'S PROVISION OF WORKERS COMPENSATION BENEFITS WHEN PETITIONER SPECIFICALLY INQUIRED ABOUT CONCERN FOR THE COMPANY'S EXPOSURE

During trial, on direct examination, Petitioner's counsel specifically inquired of Gomez: Q. "What about any exposure to your company for an accident of that person that you send out was doing what they were not sent out to do and perhaps cause an accident; is that a concern" (T. 1280). Gomez responded: A. "That is always a huge concern." (T. 1280). On cross examination, defense counsel asked what exposure caused the great concern for Gomez.

It is inescapable that Petitioner's counsel invited the Respondent's inquiry by expressly inquiring of Gomez on direct examination whether he was concerned about exposure to his company, and to which Gomez responded that such was of huge concern. It not only was not error to allow cross examination on the issue of the "exposure" of great concern, but it would have been highly prejudicial and error to have prohibited such a cross–examination. Petitioner sought to leave the jury with the impression that Labor For Hire had a "great concern" for exposure. As the employer to Petitioner, that exposure would normally be through a workers compensation claim. Under the circumstances, Elson was left with no reasonable choice but to follow up with inquiry regarding the nature of the concern. For these reasons the cases cited by Petitioner do not apply to this case.

In *Cook v. Eney,* 277 So. 2d 848 (Fla. 3d DCA 1973), there was no instance of invited inquiry by plaintiff's counsel. It is also important to note that the primary concern in *Cook* was that the jury may have decided the plaintiff was

already taken care of due to the payment of workers compensation benefits. Here there was no damages decision to be made by the jury. Also, there was no discussion of the nature of the specific benefits paid, or any other indication the jury was swayed by the discussion of "exposure" to Labor For Hire, invited error or otherwise.

In light of Petitioner's contention of the volatility of evidence of workers compensation coverage, and the claim for prejudice arising from such a discussion, it is curious why Petitioner chose to raise it on direct with Gomez in such a way as to make his response designed to address it. None of the other cases presented by Petitioner contain a record where such an invitation to the very evidence objected to is made by the appealing party. *See Grossman v. Beard,* 410 So. 2d 175 (Fla. 2d DCA 1982) (workers compensation benefits excluded when introduced to show malingering). Similarly, in *Gormley v. GTE Products Corp.*, 587 So. 2d 455 (Fla. 1991), the Court did not address a record in which the party claiming error as a result of admission of evidence of benefits had first introduced the very evidence sought to be excluded. Petitioner made his status as an employee of a help supply services company pursuant to section 440.11(2), Florida Statutes. The fact that the wage load expenses were borne by Labor For Hire was also relevant to this issue.

The trial court did not abuse its discretion in permitting the cross-examination on an issue first introduced by Petitioner. None of the cases cited by

Petitioner stand for the proposition that an plaintiff can open the door to the presence of workers compensation benefits by asking the direct question, and later complain the trial court erred in permitting such evidence to go to the jury. There is no means for determining prejudice to the jury from such evidence since the jury would have to distinguish the testimony received on direct examination from that of cross examination. Indeed, it may have had larger effect because it was first introduced by Petitioner, giving it more emphasis to the jury. In such a circumstance, the trial court acted properly.

POINT III: THE TRIAL COURT PROPERLY ENTERED A DIRECTED VERDICT ON THE ISSUE OF PETITIONER'S STATUS AS A BORROWED SERVANT PURSUANT TO SECTION 440.11(2), FLORIDA STATUTES BECAUSE THERE WAS NO EVIDENCE TO DISPUTE THAT PETITIONER WAS AN EMPLOYEE OF A "HELP SUPPLY SERVICES COMPANY", PROVIDED SERVICES UNDER THAT CONTRACT FOR WHICH PAYMENT WAS MADE AND THEREFORE THE CONTRACT WAS FULLY PERFORMED

Florida's worker's compensation law provides immunity to an employer from tort liability for the work related injuries sustained by employees obtained through a "help supply services company." §440.11(2), Fla. Stat. The statute treats the employee as a "borrowed employee" of the employer when payment of worker's compensation has been secured by the help supply services company. The statute provides in pertinent part:

> (1) The liability of an employer described in s.410.10 shall be exclusive and in place of all other liability of such employer to any third party tortfeasor and to the employee, ...

> (2) The immunity from liability described in section (1) shall extend to an employer and to each employee of the employer which utilizes the services of the employees of a help supply services company, as set forth in Standard Industry Code Industry Number 7363, when such employees, whether management or staff, are acting in furtherance of the employer's business. An employee so engaged by the employer shall be considered a borrowed employee of the employer, and, for the purposes of this section, shall be treated as any other employee of the employer. The employer shall be liable for and shall the payment of compensation to all such borrowed employees as required in s.440.10, except when such payment has been secured by the help supply services company.

In the underlying record, there is no dispute that Labor For Hire was a "help supply services company." There is no dispute that Saleeby went to Labor For Hire seeking employment, and that he went willingly to the jobsite and worked the entire day for Elson, performing the labor tasks of holding a tag line, handing up tools and lumber, and cleaning up. There was no dispute that nothing Saleeby worked on contributed to the collapse of the trusses, which fell on the other side of the project erected on a day earlier than the day Saleeby worked. There was no dispute that Labor For Hire was paid by Elson for Saleeby's work as a semi-skilled labor. There is no dispute that Labor For Hire carried workers compensation insurance which applied to Saleeby, he received benefits according to that insurance coverage, and Elson's payment for the labor that included the labor burden, the workers compensation, payroll taxes, and other overhead attributable to his employment.

This Court has interpreted section 440.11(2) to provide immunity from tort liability to companies hiring workers through temporary employment agencies, as Elson did in this case. *See Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000). An examination of the history of this exception further shows why the application is appropriate here. Prior to the enactment of section 440.11(2), the Court created a similar exception to this legislation in *Booher v. Pepperidge Farm, Inc.*, 468 So.2d 985 (Fla. 1985). In *Booher*, Pepperidge Farm employed Dixie Driving Service which provided truck drivers on a temporary basis. The plaintiff was employed by Booher but driving exclusively for Pepperidge Farm when he suffered a work related injury at a Pepperidge Farm warehouse. The Court held that the "actual employment relationship" should control in any determination of whether a special employee may sue the special employer for work related injuries. Because this case predated the statute, the Court voiced the need for the exception for circumstances where the employee was actually employed as a "special employee" as employed by one firm, but contractually employed for a temporary labor service.

The cases cited by Petitioner are not instances in which the plaintiff was employed by a temporary labor service, and therefore do not apply, nor are they governed by section 440.11(2). This is important because the special legislation applicable to the temporary labor companies specifies what qualifies the hiring

employer for immunity, and all of those elements are present in this record. Therefore, a directed verdict was appropriately granted.

In *Fleming Companies, Inc. v. Moreira*, 690 So. 2d 1367 (Fla. 3d DCA 1997), the 3d DCA reversed and remanded for entry of summary judgment on nearly identical facts present in this case. Regency Staffing was a temporary labor supply company who referred Moreira to Fleming. *Id.* at 1368. Fleming was charged a fee by Regency for leasing temporary employees which included payment and worker's compensation insurance. *Id.* Regency also contractually surrendered all control regarding the details of the temporary worker's employment to Fleming. *Id.* While working at the Fleming plant, Moreira was injured by a forklift. He collected worker's compensation benefits and then filed a complaint seeking damages from Fleming. *Id.* Fleming asserted that the worker's compensation statute barred the action and both parties moved for summary judgment on the issue of immunity. *Id.*

In denying both motions, the trial court found Fleming was not entitled to civil suit immunity because there remained genuine issues of material fact pertaining to the borrowed servant/worker's compensation defense. Citing *Sagarino v. Marriott Corp.*, 644 So. 2d 162 (Fla. 4th DCA 1994), the court recognized Regency as a business of supplying temporary help and which provided worker's compensation coverage, which clearly fell under the terminology of

section 440.11(2). *Id.* The court also noted that the actual employment relationship showed Moreira consented to Fleming's control and that he used Fleming's equipment, accepted Fleming's orders over how and where to work, all of which was in furtherance of Fleming's business and exclusively for Fleming after being assigned there. *Id.* Regency had relinquished all control over Moreira's work while he was at Fleming. Thus, Moreira was, for all intents and purposes, a Fleming employee, and the court held he should be treated as such under the statute. *Id.* (citing *Rumsey v. Eastern Distribution, Inc.*, 445 So.2d 1085 (Fla. 1st DCA), *rev. den.* 451 So.2d 850 (Fla. 1984)).

Importantly, the court examined the legislative intent and rationale for extending the immunity to Fleming. Noting that if Fleming was exposed to tort liability, it belied the legislative intent in extending worker's compensation to special employers, and would discourage special employers from hiring temporary workers. This would be fundamentally unfair to the permanent employees of companies like Fleming where a temporary employee, working in the same plant, over the same hours, with the same equipment, wearing the same uniform, and performing the same job as a permanent employee, would have greater rights because of a separate civil lawsuit in addition to the recognized worker's compensation benefits available to all of the employees equally. *Id.* at 1368-1369.

Although not separately expressed in the *Fleming* opinion, the expanded immunity recognizes the value that temporary labor services have to the marketplace, especially for smaller businesses like Elson Construction. The construction industry, as many others, experiences ebbs and flows in volume of work which may be available during a given economic cycle. The use of temporary employees on an hourly basis allows the smaller businesses to have available sufficient numbers of workers when work flows exceed its own employee base, without having to suffer the negative financial repercussions from having to fire or lay off employees as business expands and contracts.

It also has value to the employees because they can maintain a steady stream of income and more guaranteed consistent employment, and recovery of their hourly wage, when a variety of employers can call on them to do various construction tasks. Larger businesses, because of a larger volume of work, have the option of spreading out its labor force to different projects which may be ongoing at the same time. Smaller construction companies do not have the luxury of moving employees from one job to another if the work is not present.

Florida's district courts of appeal have recognized special employer immunity in substantially similar factual circumstances. In *Caramico v. Artcraft Industries, Inc.*, 727 So. 2d 348 (Fla. 5th DCA 1999), the court held that an employer was immune from suit because of its use of services of a help supply

company and the provisions of the worker's compensation law. Caramico was injured while working on Artcraft's premises while hired by Administaff, Inc., a licensed employee leasing company which had been leased to Artcraft to make cabinets. Caramico had signed a contract with Administaff evidencing the employment relationship and his assignment to Artcraft, and Administaff and Artcraft had an agreement between themselves providing that Administaff would provide worker's compensation coverage for the employees leased to Artcraft. *Id.* at 348. Caramico sought and received worker's compensation benefits from Administaff, and then he sued Artcraft for negligence on a premises liability theory.

Reciting section 440.11, Florida Statutes, the court noted its alignment with the 2d DCA in *Maxson Construction Co., Inc. v. Welch*, 720 So.2d 588 (Fla. 2d DCA 1998) and held that Artcraft was immune from suit because of its use of the services of a help supply services company and the provision of worker's compensation benefits by Administaff. *Id.* at 349.

The 2d DCA in *Maxson* held the trial court erred in denying Maxson's motions for summary judgment on the issue of who Welch's employer was because Welch received worker's compensation benefits pursuant to a stipulation which listed AMA Staff Leasing as his employer. The court noted that section 468.529(1) provides that: "[a] licensed leasing company is the employer of

the leased employees . . . and shall be responsible for providing compensation coverage pursuant to Chapter 440." Also, the court held that employers such as Maxson which use employee leasing companies are immune from suit pursuant to section 440.11(2). Maxson insured that Welch had worker's compensation coverage by paying a fee to an employee leasing company to provide that coverage. Welch received worker's compensation benefits for his injuries and thus the purpose of the worker's compensation law was served in accordance with statutory requirements. *Id.* at 590. The 2d DCA concluded that Welch was not entitled to a "second bite at the apple by suing Maxson in tort." *Id.*

In *B.E.T. Plant Services, Inc. v. Dyer*, 678 So. 2d 841 (Fla. 3d DCA 1996), the 3d DCA reversed orders determining that B.E.T. Plant Services was not entitled to worker's compensation immunity as a matter of law. B.E.T. hired Dyer through a temporary help agency. B.E.T. was a statutory employer of the plaintiff pursuant to section 440.11(2). Dyer was hired to perform manual labor that was required on one of B.E.T.'s jobs at Miami International Airport. Dyer reported to work at the B.E.T. job site. *Id.* While still at the Miami International site, Dyer fell from B.E.T.'s truck and was injured. The court noted the work site was within the security area and the accident occurred within that area after Dyer had "clocked out" and was in the process of leaving the work site. Based on all of these facts,

the 3d DCA concluded that the employer was entitled to worker's compensation immunity. *Id.* at 842.

In the present case, Petitioner argues there was no contract between Elson and Labor For Hire because the type of work he performed was not within the descriptions given, and without a meeting of the minds, there can be no immunity for a personal injury suit. The argument was premised upon the negation of the contractual relationship because, he argues, the work performed was outside the scope of what was ordered. There are several reasons why this argument does not defeat the application of immunity. First, the tasks assigned to Saleeby did fall within the semiskilled labor class under which he was hired, which included handing up tools and material, and manning a tag line. Saleeby was not involved in the preparation or installation of the trusses for the building, and was not injured as a result of the performance of his own work.

Second, the descriptions of the labor classifications, and the tasks performed do not give rise to a negation of the contract for labor. Florida law does not support such a theory. Instead, the showing was of a "clear and definite arrangement between the employers, and with the borrowed servant's knowledge." *See Smith v. Greg's Crane Service, Inc.*, 576 So. 2d 814 (Fla. 4th DCA 1991). Unlike other cases which have found a remaining factual issue regarding the employers' agreement, there were clear agreements between Elson and Labor For Hire for

Saleeby's employment, to which Saleeby willingly and knowingly agreed, under which he performed, and for which Labor For Hire accepted payment. It is useful to compare the case principally relied upon by Petitioner in the trial court, *Lund v. General Crane, Inc.*, 638 So. 2d 146 (Fla. 4th DCA 1994), *Lund v. General Crane, Inc.*, 638 So. 2d 146 (Fla. 4th DCA 1994) because the holding in *Lund* was based on completely different facts as it related to the employers' agreement.

In *Lund,* the Court noted there was a lack of evidence as it related to the employers' agreement to lend the use of a crane and the crane operator. To begin with, the case did *not* involve a temporary labor service, such as Labor For Hire. The Court noted "there is little or no evidence concerning the relationship between appellant and the owner of the crane." *Id.* Although the opinion does not specify, it seems clear that the "special employer" who had borrowed the crane and operator had not paid for the labor, or for the labor burden which would have included the workers' compensation premiums. There is no indication that the employee was even aware of the "borrowing" arrangement. In addition, the Court was not construing section 440.11(2) at all.

In contrast, the contract between Labor For Hire and Elson was of such a clear nature that all parties were on notice of the arrangement. Saleeby started the process when he sought to be employed as temporary help through Labor For Hire. Labor For Hire billed and collected for the work from Elson. Saleeby volitionally

participated in the activities he was called on to perform. Petitioner was not injured as a result of performing a task for which he was allegedly unqualified. Gomez acknowledged that he approved Saleeby's performance of tasks under the trusses which is where they were standing when the accident occurred. There was nothing about the tasks Saleeby was given which caused or contributed to the accident, since the falling trusses occurred on the other side of the building from where he had worked.

This is not a situation where Saleeby was assigned tasks which had nothing to do with the construction, or were well outside his skill level. Holding a line, handing out tools and other general clean up were the contemplated duties. Saleeby was not asked to run errands or perform work off the job site. If the special employer must defend every personal injury lawsuit notwithstanding the immunity which has been legislated, the statute's purpose will completely negated.

Labor For Hire admitted the receipt of the request from Elson to upgrade the level of skill for Petitioner and paid for that upgraded level, which Labor accepted and for which it was paid by Elson. To the extent there is a misconception regarding the work Saleeby was performing, it should be clarified that he was not "flying" trusses by operating a crane, setting the trusses, climbing on them, securing them, or anything other then looping a rope on the ground or holding a tag

line at the direction of another Elson employee. His handing up lumber and tools did not involve any skill in the installation of trusses.

Examination of the facts in *Coleman v. Mini-Mac Maint. Srv., Inc.*, 706 So. 2d 393 (Fla. 1st DCA 1998) demonstrate a substantially different factual scenario which is not instructive to the issues presented here. In *Coleman*, the plaintiff was a stock clerk for Food Fair. While he was stocking shelves, a bottle of salad dressing broke on the floor. Mini-Mac, the cleaning service company which was at the store at the time, undertook to clean up the spill while mopping the floors. The plaintiff slipped in the area of the spill and sued Mini-Mac for negligence in causing the floor to be slippery due to the salad dressing on the floor. *Id* at 394. Mini-Mac argued that its employee who mopped the floor was a "borrowed servant" of Food Fair when the mopper cleaned the spill, and was therefore entitled to workers compensation immunity. *Id.* at 394-5.

The 1st DCA concluded that such a defense would require a showing the a contract of hire, express or implied, must exist between the employee and the special employer. This was *not* an instance of the employee working for a temporary help service, as is present here. Also, there was no evidence of the special employer, Food Fair, exercising any control over the details of the work. In fact, according to the opinion, it was not evident that Food Fair even requested the mopper to clean up the spill since it was outside the regular duties of Mini-Mac.

A comparison of these facts only endorses the directed verdict against Appellant on the borrowed servant issue. In the instant case, Elson was a special employer who had the right, and exercised it, to control the details of the work. All of the work performed by Saleeby was that of Elson. A contract for hire existed between Saleeby and Elson. In *Coleman*, no such contract existed: the mopper's was not responsible for mopping up the spill, and was not paid to do so. Food Fair's management was apparently not even aware that the mopper had done so. *Id* at 395. This case does not stand for the proposition that an existing help supply contract may be negated by alleged changes in the scope of work.

Doctor's Business Serv. Inc. v. Clark, 498 So.2d 659 (Fla. 1st DCA 1986) was a workers compensation case that dealt with the "going and coming" rule for injuries sustained at the lunch hour. It did not concern any issue of borrowed servant. This is also true of *Vigiotti v. K-Mart Corp.*, 680 So.2d 466 (Fla. 1st DCA 1996).

Petitioner's argument is essentially that there was no contract of employment because Gomez testified that he did not learn of the request to upgrade Saleeby's classification to semi-skilled until after the accident. No authority is cited to support a legal conclusion that Gomez could, or did, attempt to void the contact for hire of Saleeby. There are no legal citations to support the theory that Gomez's after-the-fact objections to the work performed could have any effect on the

contract for employment in light of the fact that he was paid for the work, did not refund the money or otherwise attempt to contemporaneously refute the contract. There was no factual dispute that Elson paid for Gomez at the semi-skilled labor rate, and that such payment was accepted by Labor For Hire. The contract was fully performed. In such a case, it would be illogical and inequitable to permit one party to the contract to negate the contract in its entirety once it was fully performed. *See Keith, Mack, Lewis & Allison v. Boraks,* 483 So. 2d 560 (Fla. 4th DCA 1986)(no rescission without offering to put other party in status quo); *Hartnett v. Fowler,* 94 So. 2d 724, 725 (Fla. 1957)(directed verdict is appropriate when the evidence considered in its entirety and the reasonable inferences to be drawn fail to prove plaintiff's case under the issues made by the pleadings).

Labor For Hire, and all other help supply companies, are in the business of furnishing borrowed servants. It is fundamental that in such labor contracts the contracting employer, such as Elson, will have the right to control the activities of the employee. As this Court has held, "The determinative issue is normally the right to control the alleged employee." *Sagarino v. Marriott Corp.*, 644 So. 2d 162, 164 (Fla. 4th DCA 1994)(citing *Kane Furniture Corp. v. Miranda,* 506 So. 2d 1061, 1064 (Fla. 2d DCA 1987). In *Sagarino,* the plaintiff was a valet parking attendant employed by Fort Lauderdale transportation, which had a written contractual agreement with Marriott to park cars. The plaintiff fell in the Marriott

garage. It is compelling to note that the written agreement between Marriott and FLT specifically provided that the plaintiff was *not* an employee of Marriott. This is undoubtedly because Marriott was not providing workers compensation benefits, and wanted the shield from any liability for not doing so. Comparing this scenario to the present one, Elson and Labor For Hire specifically provided in the contract that Saleeby would be subject to the control of Elson, and it was undisputed that Elson paid for the workers compensation benefits as part of the labor charge paid to Labor. While in *Sagarino* the plaintiff stated that he was not aware of any arrangement between FLT and Marriott that he would be controlled by Marriott; if he had had the opportunity to review the contract between FLT and Marriott, this would have even confirmed this.

The 2d DCA's decision in *Horn v. Tandem Health Care of Florida*, 862 So. 2d 938 (Fla. 2d DCA 2004) highlights the reason why the cases involving employment through a help supply company, with immunity pursuant to section 440.11(2), cannot be compared to cases in which the special employer is other than a help supply services company. In *Horn*, the 2d DCA considered the application of immunity to the slip and fall claim of a respiratory therapist against a nursing home. The plaintiff's employer had an agreement with the nursing home to provide therapists to the nursing home residents when ordered by the physician. Judge Northcutt opined for the Court and held the first factor to be considered, that

there was a contract *for hire* between the special employer and the employee, is the critical factor. *Id* at 940. The other factors to be considered are an indicia of such a contract. *Id.* In such circumstances the contract creating special employment must be a clear demonstration of deliberate and informed consent *by the employee. Id*. Petitioner's argument is focused on the perceived lack of consent to the work by Gomez, not Saleeby. There was no evidence controverting Saleeby's deliberate and informed consent to do the work which Elson directed him to do.

Petitioner's reference to *Shelby Mutual Ins. Co. v. Aetna Ins. Co.,* 246 So. 2d 98 (Fla. 1971) and the presumption of "continued employment" has no application to a case such as this one, in which the plaintiff is engaged from a help supply company. In *Shelby*, as well as the cases cited which rely upon *Shelby*, the courts were examining whether the plaintiff had a "continuing general employment" in the context of a traditional "borrowed servant", not with the use of a help supply company. For example, in *Sherrill v. Corbett Cranes Services, Inc.*, 656 So. 2d 181 (Fla. 5th DCA 1995), the 5th DCA addressed the issue of borrowed servant as applied to an employee of a general contractor who was directed for a short period by the operator of a subcontractor crane company. Importantly, the Court in *Sherill*, examined the relevant testimony regarding the borrowed servant issue and clarified the question as to whether the employee was acting on behalf of the general employer of the special employer which had "borrowed" him. *Sherill*,

at 185. This had the effect of breaking down the employee's actions undertaken as either for one employer or the other. In this context, Petitioner could have only been working for Elson since everything he did in his employment was under the direction and control of Elson.

It cannot be overlooked that *Shelby* and its progeny do not address, and largely predate, the addition to the workers compensation immunity of section 440.11(2), recognizing the need for express immunity to companies who utilize help supply companies. Because help supply companies have been specifically identified by the Florida Legislature as components to the "borrowed servant" formula, the Court should honor that distinction, and dismiss application of those cases which deal with factual disputes of general/special employment where there is no use of a "help supply company" as defined by section 440.11(2).

For all of these reasons, the trial court properly ruled there was no evidence for the jury to decide on the borrowed servant issue. Thus, there is no reversible error regarding this ruling.

POINT IV: THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE "SUBSTANTIALLY CERTAIN" ISSUE USING THE OBJECTIVE TEST HOLDING OF THE FLORIDA SUPREME COURT IN *TURNER V. PCR, INC.,* 754 SO. 2D 683 (FLA. 2000)

The jury instruction given by the trial court was entirely consistent with the Court's holding on the issue of the "substantial certainty" exception to workers compensation immunity. *Travelers Indemnity Co. v. PCR, Inc.*, 889 So. 2d 779

(Fla. 2004); *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000). In *Turner*, the Court held:

> Under an objective test for the substantial certainty standard, an analysis of the circumstances in a case would be required to determine *whether a reasonable person would understand* that the employer's conduct was 'substantially certain' to result in injury or death to the employee. (emphasis added).

The jury instruction is consistent with these holdings. The standard given to the jury was not a subjective one, i.e. what Elson would have known, but instead what a reasonably prudent person would understand about the employer's conduct. None of the cases cited by Petitioner stand for the proposition that jury instruction given varies in any material, reversible way from the holdings of the Florida Supreme Court in *Travelers* and *Turner*. The fact the Court used "should have known" and "would understand" interchangeably in *Turner* and *Travelers* would indicate that the Court felt they had the same meaning; the trial court utilized the language of both of these cases in ruling on the proper jury instruction. The Florida District Courts of Appeal have also interchanged the language. *See Patrick v. Palm Beach Cty Sch. Bd.*, 927 So. 2d 973, 974 (Fla. 4th DCA 2006)(citing *Travelers*);

McClanahan v. State, 854 So. 2d 793, 795 (Fla. 2d DCA 2003)(citing *Turner*); *Sierra v. Associated Marine Institutes,* 850 So. 2d 582, 587 (Fla. 2d DCA 2003) (citing *Turner*); *EAC USA, Inc. v. Kawa,* 805 So. 2d 1, 4 (Fla. 2d DCA 2001)(citing *Turner*); *See also Glasspoole v. Konover Construction Corp. South,* 787 So. 2d 937 (Fla. 4th DCA 2001)(summary judgment affirmed in favor of employer because no evidence of knowledge or understanding under either objective or subjective standard); *Pendergrass v. R.D. Michael's, Inc.* 936 So. 2d 684 (Fla. 4th DCA 2006)(summary judgment for defendant affirmed because no prior accidents from the failure to brace an eight foot wall); *Casas v. Siemens Energy & Automation, Inc.*, 927 So. 2d 922 (Fla. 3d DCA 2006)(no "substantial certainty" from injury from a press operated for 20 years without incident) *FCCI Insurance Co. v. Horne,* 890 So. 2d 1141 (Fla. 5th DCA 2004) (employer's liability carrier owed duty to defend - no application of intentional acts exclusion). In *Pendergrass,* this Court also interchanged the language used for the objective standard. Citing to *Turner,* the 4th DCA held:

> The supreme court determined that the evidence was sufficient to present material issues of fact supporting the objective test that a reasonable employer *would know* that its intentional conduct was substantially certain to result in injury or death. (emphasis supplied). 936 So. 2d at 691.

The Florida Legislature has effectively overruled *Turner* by amending section 440.11 to require a showing of a "virtual certainty" for matters accruing in 2003 and thereafter. *See* 440.11, Fla. Stat. (2003); *Pendergrass,* 936 So. 2d 689, n.1.

The "substantial certainty" exception is a court-created exclusion which applies if an employee can establish, using an objective standard, the employer should have known that the conduct complained of was substantially certain to result in injury or death. *See Turner v. PCR, Inc.*, 754 So. 2d 683, 686-88 (Fla. 2000). In *Turner*, the employer had experienced three uncontrolled explosions as a result of the transport of a chemicals which are "highly reactive ". *Id.* at 685. The Court was influenced by the fact the employer had superior knowledge from the manufacturers of the explosive qualities of this chemical, had experienced three prior explosions, and continued to use the explosives yet failed to advise the employees which were injured as a result.

In contrast, there was no record evidence that Elson had ever experienced a roof truss collapse, or that as the employer it had superior knowledge of the prospect of a truss collapse which it withheld from its employees. Further, it could not be shown that the installation of the roof trusses was so inherently dangerous that superior knowledge was implied. In fact, some of the trusses which were installed by Elson on this project, using the same method and materials, were left in the ultimate installation of the building. In addition, the reinstallation of

replacement trusses was made using the same means and methods without incident. Therefore, there could be no "objective" finding that Elson had subjected the employees to a job site that was designed to fail and would create a situation which was substantially certain to cause personal injury or death. *See Garrick v. Publix Super Markets, Inc.*, 798 So. 2d 875,879 (Fla. 4th DCA 2001)(affirmed the dismissal of the action because the security guards injured failed to allege sufficient facts to show that their employer, Brinks, engaged in conduct substantially certain to result in injury to the employees. The complaint alleged that Brinks knew, and deliberately withheld, information that a robbery was going to occur at one of two supermarket locations on an unspecified date at an unspecified time on an unspecified date.); *Wilks v. Boston Whaler, Inc.*, 691 So. 2d 629 (Fla. 5th DCA 1997)(affirmed summary judgment in favor of the employer who was accused of conduct which was substantially certain to cause injury through the inhalation exposure of TDI during the "foaming" process of boat manufacture.). In *Wilks*, the court examined the facts most favorably for the plaintiff which showed he was not provided a copy of the Material Safety Data Sheet on TDI and was not given a copy of the warning label on TDI packaging. TDI was not a substance which is so well known to be dangerous when inhaled that it could not have been implied that the employee was subjecting himself to dangerous chemicals when

inhaled. These facts did *not* negate the application of workers' compensation immunity.

In *Tinoco v. Resol*, 783 So. 2d 309 (Fla. 3d DCA 2001), the employer had prior knowledge that every time a machine was turned on it lurched three feet. This occurred 26 times before the accident which occurred when the machine lurched over the plaintiff's foot and crushed it. The Court held that the employer's conduct did *not* exempt it from workers' compensation immunity. Similarly, in *Pacheco v. Florida Power & Light Co.,* 784 So. 2d 1159 (Fla. 3d DCA 2001), workers' compensation immunity applied notwithstanding an employee's injury from a line which was not de-energized, even though the employer did not warn the employee prior to the contact. The court held the conduct did not "involve a degree of deliberate or willful indifference to employee safety" necessary to vitiate the immunity.

The 3d DCA upheld immunity in *Subileau v. Southern Forming, Inc.*, 664 So. 2d 11 (Fla. 3d DCA 1995) because the potential danger or hazard of working on an elevated worksite without guardrails or safety devices was known and obvious to the employees. This Court affirmed summary judgment for an employer in a tort action brought by an employee even though the employer was cited by OSHA for failure to install hand rails which caused the injury. *Hidvegi v. Patriot Secialized Construction, Inc.*, 808 So. 2d 1262 (Fla. 4th DCA 2002). *But see*

Splainer v. City of West Palm Beach, 768 So.2d 1183 (Fla. 4th DCA 2000) (summary judgment reversed when tower fell on which employee was working because employer had been previously cited twice for violations which resulted in workmen's death).

"Substantial certainty" is worthy of definitional study as those words have been chosen by the Court to apply to the conduct of the employer to determine if the legislative immunity should be stripped away. "Substantial" has been defined to mean: "of ample or considerable amount, quantity, size, etc.; of solid character or quality." Random House Dictionary of the English Language, p. 1310(ed. 1968). "Certainty" carries this definition: "the state of being certain; something certain, an assured fact". Random House Dictionary of the English Language, p. 220 (ed. 1968). Thus, there must be considerable evidence the accident was an assured fact, it was inevitable and the employer knew it was inevitable.

A review of the record shows that the accident was far from an assured fact. Elson, and his supervisor were both journeymen carpenters. Mr. Elson had over 20 years' experience in the erection of trusses, and had prior experience with the span of the trusses used on this project. He had never had an accident where the trusses fell before. His supervisor also had prior experience erecting trusses and had worked for Elson in the erection of trusses on a previous job. Mr. Elson described several jobs where the erection of similar trusses was completed by his company

without incident. Therefore, there was no prior history of similar accidents and injuries to workers as was the case in *Turner*.

To the extent deficiencies were present in the materials manufactured by A-1, Elson did not supply the materials; his contract was for the supply of labor only. Neither did he design the trusses. A-1 Truss designed and manufactured the trusses.

Claims were made about the negligence of the temporary bracing that was used. Mr. Elson testified at length about the type and manner of the bracing, which he had used successfully on numerous other jobs with similar truss installation. The fact that he had used these bracing methods successfully in the past proves as a matter of law that the accident here was not an inevitable, assured fact, as would be required for a finding of substantial certainty.

It is inescapable that Elson was appropriately licensed to perform the work, that he and his supervisor had performed the same type of work before, and did so successfully. Part of the roof which was installed did not fall down, and was used in the completed structure. It must have therefore passed the inspections required in Palm Beach County. One would imagine the scrutiny for the remaining installation must have been intense after the accident as well.

Gathering all of these unassailable facts, no reasonable view of those facts can lead to the conclusion that there was a substantial certainty Petitioner would be

injured on the job. If injuries in the workplace were not a fact of life there would be no purpose for a workers' compensation system. The exclusion of "substantial certainty" exists only to reserve a common law cause of action when the employer's conduct has been so intentionally egregious with respect to the employee's safety, that a second "bite" of the apple is justified. As is noted in *Turner*, when the employer's knowledge of the significant danger in the workplace is kept secret from the employee, so he may not make a conscious choice about exposure to the harm, the exception may apply. Those facts do not exist here.

To the extent Petitioner contends there was error as a result of the closing argument remarks, such an argument fails because: 1) the closing argument was perfectly consistent with the law; and 2) Petitioner failed to object to the comments and has not shown, nor can he, that there was fundamental error, and any such objections are waived. *See Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970) (fundamental error goes to the foundation of the case).

CONCLUSION

The Court should affirm the Final Judgment and the decision of the 4th DCA in all respects. Alternatively, the Court should determine that jurisdiction does not exist because there is no express and direct conflict between the decision of the 4th DCA and this Court or any other district court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail this 16th day of June, 2008 to Edward G. Rubinoff, Esquire, Andrew M. Moss, Esquire, Kutner, Rubinoff & Bush, P.A., 501 N.E. 1st Avenue, Suite 300, Miami, FL 33132; Edna L. Caruso, Esquire, Edna L. Caruso, P.A.,Barristers Building, 1615 Forum Place, Suite 3A, West Palm Beach, FL 33401; Christopher W. Wadsworth, Esquire, Wadsworth & King, LLP, 200 S. E. 1st Street, Suite 1100, Miami, FL 33131 and William S. Reese, Esquire, Lane Reese Aulick Summers & Ennis, P.A., 2600 Douglas Road, Douglas Centre, Suite 304, Coral Gables, FL and Mark Hicks, Esquire, Dinah Stein, Esquire and Brett C. Powell, Esquire, Hicks & Kneale P.A., 799 Brickell Plaza, Suite 900, Miami Florida 33131.

/s/ Kimberly A. Ashby
Kimberly A. Ashby, Esquire
Florida Bar No. 322881
AKERMAN SENTERFITT
CNL Center II, 12th Floor
420 South Orange Avenue
Post Office Box 231
Orlando, Florida 32802
Phone: 407-423-4000
Fax: 407-843-6610
Attorneys for Respondent,
Rocky Elson Construction, Inc.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Answer Brief complies with the requirements of Rule 9.210, Fla. R. App. P., and is printed in Times New Roman 14-point font.

/s/ Kimberly A. Ashby
Kimberly A. Ashby