IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2252

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

INITIAL BRIEF ON MERITS OF PETITIONER ALBERT SALEEBY

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INTRODUCTION

This Brief is filed on behalf of Petitioner Albert Saleeby ("Saleeby"), the Plaintiff and Appellant below. Saleeby seeks review of the Fourth District Court of Appeal's opinion affirming the final judgment entered against him by the trial court. As will be seen below, the Fourth District's opinion is at variance with the well established law of this state, and is incompatible with the pronouncements of this Court. As such, the Fourth District's opinion must be overturned and this case remanded to the trial court for a new trial on all issues.

STATEMENT OF THE CASE AND FACTS

A. Background Facts

1. The Accident

On Saturday, December 18, 1999, Albert Saleeby was crushed in a construction accident when a row of roof trusses he had been installing collapsed on him. Each of these trusses was 74 feet long and weighed approximately 700 pounds. (T. 216). The accident left Saleeby a paraplegic, with no feeling from his armpits to his feet. (R. 908). In addition, Saleeby suffers from neurological injuries, and his memory is impaired. (R. 937-47).

The accident occurred at the construction site of a private horse arena in Wellington ("the Dudiak arena"). Rocky Elson Construction, Inc., was responsible for installing the trusses that would form the roof of the arena.

On Friday, December 17, 1999, the day before the accident, Elson Construction was erecting these 74-foot long wood trusses atop the tie beams of the arena. (T. 182; 761). Elson's truss erection crew consisted of seven workers. (T. 292-97). Five workers were above ground working on the tie beams and trusses. The other two workers were on the ground hooking trusses to the crane, holding the "tag lines" that control the trusses as they are lifted by the crane, and tossing up temporary bracing material to the workers above. (T. 769-770).

That afternoon, Mr. Elson, owner of Elson Construction, decided the crew should work on Saturday even though it would be short two of its members – himself and another carpenter. (T. 304-06).[1]

On Saturday morning, an Elson Construction representative arrived at Labor for Hire, a contract labor company, and told its manager, Mr. Gomez, that he needed two day laborers for clean up work at a job site. (T. 305; 1209-10). Such work is classified as manual labor, and requires no skill or training. (T. 1210; 1201). Labor for Hire's workers were classified, paid, and the charges for their services were based, upon their level of experience and training. (T. 1201; 1280, 1316). Gomez testified that it was essential that the workers did not work beyond

[1] At trial, evidence would be adduced indicating that the reason Mr. Elson decided to continue work on this day was that he was behind schedule on a job for which he had underbid, and was losing money. (T. 175-177). Elson would maintain,

their level of experience, because they could be injured, and Labor for Hire would be exposed to liability if an accident occurred. (T. 1279-80). Consequently, it was essential that the workers were used only for the type of work they were specifically classified and sent out to do. (T. 1279-80; 1308).

With the understanding that they would only be used for clean up, Gomez assigned Saleeby and another man to Elson to clean up the work site. (T. 764; 1210, 1214).[2] Nevertheless Jay Brochu, Elson's foreman, put Saleeby to work assisting in the erection of the trusses, rather than the clean up responsibilities for which Saleeby had been hired. Plaintiff was told to man a tag line to assist in the process of lifting the trusses by crane up to the workers, and to throw wooden materials to the workers who were setting the trusses on the tie beams. (T. 765-769).

Brochu claimed that he called Labor for Hire on Saturday to upgrade both Saleeby's and the other man's status to that of semi-skilled workers, in order to reflect the type of work these men were performing and to increase their pay accordingly. Brochu admitted, however, that he never asked for or received authorization from Gomez to change Saleeby's work status; he simply claimed that

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however, that Mr. Elson made this decision because he wanted the opportunity to pay his workers overtime wages. (T. 115-116).

[2] It is undisputed that Saleeby had no experience as a carpenter or with truss installation. (T. 1205; 255-56).

he left a phone message at Labor for Hire's office, to which he got no response. (T. 764-65; 854).

Gomez testified that he received no such call and, if he had, he would not have agreed to allow Saleeby to work as a semi-skilled employee, due in part to the danger it presented to Plaintiff, and other workers. (T. 1214-15; 1279-80). Gomez testified that it was not until Monday that Labor for Hire was first contacted about changing Saleeby's status. (T. 1290). Gomez unequivocally testified that Labor for Hire had no contract with Elson Construction for Saleeby to do the type of work that Elson had unilaterally assigned him to do. (T. 1279).

As Saturday's workday came to a close, one of Elson Construction's workers noticed that one of the trusses that they had placed the previous day was starting to bow. Brochu and the other workers walked over to the trusses. As Mr. Brochu thought about how to add bracing to the trusses, the other workers looked on, waiting for instruction. (T. 824-25; 1727-31; 1768-70; T. 1967-69). As Brochu explained:

> . . . I walked over there. Somebody said something to me, because Jeffrey Cline's car and Chris' car were underneath the south side trusses. And I believe Jeff said to me, did you see that truss over there? It's got a little bow in it. And I said, no, which one? And I started walking over there to look at it and everybody followed me. Everybody followed me over there. And I remember glancing up at it and said, we'll throw another brace on it. And like that, I wasn't underneath there probably 10 seconds before I heard a snap. And somebody yelled, run. I couldn't tell you who yelled, run, or – but we all just took off running.

(T. 825-826). Unfortunately, Saleeby and his workmate were unable to get out from under the falling timber in time, and were crushed beneath it. (R25:826-28).

2. Evidence of Elson's Liability

Saleeby filed suit against Tektonica-USA, Inc., (the general contractor), A-1 Roof Trusses, Ltd., Co., (the manufacturer of the trusses) and Elson Construction. Ultimately, the suit proceeded to trial only against Elson. (R. 1173).

The testimony at trial established that Elson had not followed the minimum safety requirements of the applicable building codes, and indicated that this failure directly led to the collapse that rendered Saleeby a paraplegic. (T. 207; 521-523; 566-568; 580; 701-702; 714-715; 909-912; 1054-1055).

Saleeby called Mr. John Herring to testify regarding his observations at the accident site and his opinions regarding the cause of the collapse. (T. 895). Mr. Herring is CEO and president of A-1 Building Components (formerly A-1 Roof Trusses), the company that manufactured the trusses involved in the collapse. (T. 896). Mr. Herring has been involved in truss design for over twenty years and, as a board member of the National Wood Truss Association of America, he has taught extensively on the subjects of proper construction and bracing of wood trusses. (T. 906-909).

Mr. Herring testified that he had been involved in the development of the standards for bracing wood trusses during construction—later incorporated into

standard "HIB-91" and adopted into the Standard and South Florida Building Codes. (T. 910-911).

This minimum industry standard was also published to truss installers via the "Pink Sheet," a Summary Sheet of HIB-91's requirements. (A17-22; T. 912), both of which are delivered to every job with every truss package and order. (T. 909-12; 207). Proper temporary bracing was a central theme of HIB-91. (T. 528-29). HIB-91, §2.1 states that if its minimum standards are not followed "the collapse of the structure may result …which could result in loss of life." (T. 701-02).[3]

Mr. Herring testified that A-1 had fabricated the trusses used at the Dudiak arena and had been called out to examine the accident site on the day after the collapse. (T. 1001-1002). He testified that during his examination of the trusses that had not fallen, he noticed that these trusses had not been properly braced and were bowing. (T. 1007). Herring testified that he declared the remaining trusses to

[3] Plaintiff's engineering expert, Kurt Grundahl, testified that Standard Building Code §2309.2.3 required that "trusses shall be braced in accordance with the Truss Plate Institute Commentary and Recommendations for Handling, Installing and Bracing Metal Plate Connected Wood Trusses HIB-91." (T. 521-23). HIB-91 set forth the minimum industry standards for temporary bracing of trusses. (T. 657). The HIB-91 Summary Sheet "Pink Sheet," that was delivered with the trusses to the work site, also contained temporary bracing requirements for truss erection and also directed the installer to consult an engineer if trusses had spans greater than 60 feet (Id.; T. 604-08; T. 987). It contained warnings of dangers associated with

be unsafe and advised the contractor on site that workers should not go underneath them until proper bracing was put in place. (T. 1007).

Mr. Herring's testimony described the requirements of the applicable building codes, and the various ways in which the installation of the Dudiak arena trusses was insufficient and dangerous. (T. 984-1029). To this end, Mr. Herring testified that he observed that 1x4 lengths of wood had been used in the bracing process, rather than the 2x4 braces required of the code. (T. 1011-1013). In addition, Mr. Herring testified that the trusses had been braced using "8 penny" nails, rather than longer, stronger "16 penny" nails required by the standard. (T. 1012). Consistent with his deposition testimony, Herring opined that the collapse was the result of a gross lack of bracing. (T. 1054-1055).

Contrary to the requirements of the code, Elson Construction did not consult or otherwise obtain supervision by an engineer or architect during truss erection, and did not follow HIB-91's minimum standards as to temporary bracing, all of which caused the trusses to collapse. (T. 566-68, 580).

Indeed, even Elson Construction's own expert engineer, William Pistorino, admitted that HIB-91 was the industry standard for the temporary bracing of trusses (T. 657); that Elson Construction failed to follow the requirements of HIB-

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improper bracing and each page warned: "Failure to follow these recommendations could result in severe personal injury…" (Id.).

91 and its Summary Sheet as to temporary bracing; and that "If [Elson Construction] had more closely followed the installation and the HIB-91, that would have reduced the probability of a collapse occurring." (T. 714-15). John Herring testified that the quality of Elson's bracing of these trusses was so deficient as to constitute a "zero to one" on a scale of ten. (T. 1054). As Plaintiff's expert Grundahl explained, "This was an accident just waiting to happen." (T. 568).[4]

Elson construction workers were not instructed as to how to properly brace trusses until after the accident occurred. Although Rocky Elson, owner of Elson Construction, denied that the use of improper bracing was the root cause of the accident, he acknowledged: "And the only difference that we might have done [after the accident] is we might have used 2x4s instead 1x4s at that time, because of the accident and we were advised by an engineer what to do to fix the problem, supplied by the general contractor." (T. 197).

[4] Evidence adduced at trial also indicated that Elson Construction engaged in a cover-up of the cause of the accident by adding additional bracing to the trusses after the accident, and then denying having done so. The deputy sheriff who investigated the accident testified that between first going to the scene at 3:18 p.m., and returning at 7:06 p.m., additional bracing had been added to the trusses that had not fallen, on both the north and south ends of the arena (R29:1425-28).

3. The Trial Court's Ruling Allowing Evidence of A-1's Settlement

Despite the fact that Saleeby had previously obtained an *agreed* order granting his motion in limine to exclude reference to A-1's previous settlement with Saleeby, Elson sought during trial to explore this area on cross examination of Mr. Herring. (App. 13-15; T. 944).[5]

Over Saleeby's objections, the trial court ruled that Elson could cross-examine Mr. Herring with the fact that A-1 had previously been a defendant in the case and had paid money to settle with Saleeby. The trial court ruled that this testimony was admissible as evidence of Mr. Herring's bias toward Saleeby. (T. 950-951). Central to the court's ruling was the court's belief that Mr. Herring had a "direct interest" in the case, despite the fact that A-1 had previously settled the case and retained no financial or other interest in it. (T. 951). Armed with this ruling, counsel for Elson repeatedly made the point to the jury that Mr. Herring's company had paid money to Saleeby in order to settle Saleeby's suit against it. (T. 1060-1061; 1160-1161). In this manner, defense counsel implied that A-1 must be responsible for Saleeby's injuries and that Saleeby was attempting to extract a double recovery for his injuries.

[5] The Agreed Order granting Saleeby's motion in limine was added into the appellate record pursuant to Saleeby's Motion to Supplement the Record, filed contemporaneously with Saleeby's Initial Brief, and is included in Saleeby's

4. The Trial Court's Ruling Allowing Disclosure of Worker's Compensation Benefits

As noted above, Labor for Hire's manager, Mr. Gomez, testified at trial that no contract with Elson was ever formed for Saleeby to do the type of work that Elson required of him. Mr. Gomez also testified that, had Elson properly requested that Saleeby's status be upgraded to that of a semi-skilled worker, Mr. Gomez would never have allowed this change to be made. (T. 1214-1215; 1223-1224). As Mr. Gomez explained the reasons for his position:

> Mainly, you know, if the guy's not qualified to do the work, depending on what it is, you know, you either could be injured, injure someone; that's one item. And the other item is, you know, if your plumbing backs up at the house, I can't send you know an electrician, you want a plumber. So you know, I've got to send a qualified person to do the qualified job, it can't be one thing, you know, send one skill set if the job that you're asking me for is a totally different skill set.
> Q: What about 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?
> A: That's always a huge concern.

(T. 1280). Elson argued that, based upon Mr. Gomez' acknowledgement that he was concerned over his company's liability for potential accidents, Elson was entitled to question Mr. Gomez regarding Labor for Hire's liability to provide Saleeby with worker's compensation benefits. Elson argued that this information was indicative of Mr. Gomez' bias. (T. 1295).

"Appendix to Initial Brief of Appellant." References to this Appendix are cited as

Saleeby objected to this line of questioning, explaining the rationale behind the controlling precedent excluding evidence of worker's compensation benefits:

> ... typically the reason that worker's comp is kept out is because it conveys to the jury, inappropriately, that these people or the plaintiff has received money and benefits, therefore, you know, the plaintiff has been taken care of so we don't have to, you know, do anything.

(T. 1303). The trial court rejected this argument and allowed the evidence, stating:

> ... [Y]ou can always cross examine a witness on their interest and their conduct and things like that. And frankly, I don't think worker's compensation carries that kind of – carries the impression in the mind of the public that it completely and adequately insures people when they're injured on the job. I think that it carries in the mind of the public that it falls short of completely and adequately compensating people, when they are seriously injured on the job, anyway. So I don't think the prejudice outweighs its admissibility.

(T. 1304).

Upon obtaining this ruling, Elson questioned Mr. Gomez as follows:

> Q. Mr. Gomez, I was asking you when you referred to exposure of your company, what did you mean by that?
> A: Exposure? Worker's comp exposure to our company?
>
> ***
>
> Q: Let me ask you this, how come I'm making nine bucks an hour for an employee but you're only paying him five bucks an hour, what does that four bucks go to?
> A: Profit, payroll taxes, worker's comp insurance, and any other expense that goes with running a business: Accounting, transportation, turning on the lights, computers.
> Q: So one of the benefits, if I get an employee from you, he comes over and acts as if he's my employee, but you handle all payroll, taxes, work comp and all that other good stuff?

(App. __)."

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Q: Is that right?
A: Correct.

(T. 1308-1309).

> Q: You said you have no stake except for the exposure to your company, right?
> A: If I'm not mistaken, that's been settled for years, and I have not...

(T. 1326). Defense counsel's questioning on the subject concluded with the following question:

> Q: And you had said earlier that it's very important, that one of the concerns about people not doing the job right is your exposure to worker's compensation insurance?
> A: Correct.

(T. 1355-1356). Thus, the defense repeatedly brought up the subject of worker's compensation benefits, primarily through questions unrelated to the witness' potential bias.

5. The Trial Court's Issuance of Incorrect and Misleading Jury Instructions

Finally, during the charge conference the court entertained arguments pertaining to the "substantially certain" standard of liability, as mandated by the trial court's directed verdict finding that Saleeby was a borrowed servant of Elson. (T. 1852-1923). Saleeby argued that the jury should be instructed (consistent with this Court's decision in *Travelers Indemn. Co. v. PCR, Inc.*, 889 So. 2d 779 (Fla. 2004)), that an employer is liable for injuries sustained by its employees if the

employer should have known that these injuries were substantially certain to occur (T. 1862). However, the trial court opted instead to instruct the jury that an employer may be held liable only where a reasonably prudent person *would have understood* that injury was substantially certain to occur. (T. 2041). As a result, the jury was led to believe that Elson could be held liable for Saleeby's injuries only if Elson was subjectively aware that injury would occur.

The jury demonstrated its confusion on this point during its deliberations, asking, "Does recklessness imply *conscious* recklessness? (R35:2251).[6]

Further, in its instructions the trial court defined the term "Substantially certain" using the criminal jury instruction on the subject rather than the civil definition provided by this Court in by *Turner v. PCR*, 754 So. 2d 683 (Fla. 2000). This further confused the jury as to the state of mind required of Elson in order to hold Elson liable for Saleeby's injuries. (T. 1899). This confusion was demonstrated by the jury's questions in this regard, which asked for definitions of the multiple terms employed by the trial court in its definition. (T. 2245; 2251; 2253; 2256).

After entry of Final Judgment in favor of Elson, Saleeby appealed. The Fourth District Court of Appeal affirmed the trial court's Final Judgment, issuing

[6] The judge advised the jury that it could not answer this question any better than the jury instructions that the jury had already been given (R35:2257-59).

an opinion directly addressing the trial court's admission of evidence of Saleeby's settlement with A-1, the court's directed verdict finding that Saleeby was a borrowed servant of Elson, and the jury instructions issue. *See Saleeby v. Rocky Elson Construction, Inc.*, 965 So. 2d 211 (Fla. 4th DCA 2007).

This Court accepted jurisdiction of the present case because 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 misapplies this Court's decision in *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993).

SUMMARY OF THE ARGUMENT

Despite the clear dictates of Sections 90.408 and 768.041(3), the trial court held that it was permissible for Elson to disclose to the jury the fact that Saleeby's witness was a former defendant in this case who had paid money to settle with Saleeby prior to trial. The trial court's ruling, and the Fourth District's opinion affirming same, are erroneous and in derogation of controlling statutory and case law. Therefore, the Fourth District's opinion must be overturned, and this case must be remanded to the trial court for a new trial on all issues.

In addition, the trial court erred in ignoring the great weight of authority that precludes admission of evidence of worker's compensation or other insurance benefits. The court's ruling allowed the defense to create the very inference sought

to be avoided by the prohibition on disclosing such testimony—that the plaintiff has already been compensated for his injury and is seeking to obtain a double recovery for it.

Next, the trial court erred in directing verdict in favor of Elson Construction on the issue of Saleeby's asserted status as a borrowed servant of Elson. In reaching its decision the trial court ignored ample evidence indicating that the contractual and factual prerequisites for making such a determination were in dispute and that, at minimum, a jury question existed on this issue.

Finally, the trial court erred in issuing two incorrect and misleading jury instructions that indicated to the jury that, in order to find Elson liable for Saleeby's injuries, the jury would have to find that Elson intentionally engaged in conduct that it knew was substantially likely to result in injury. This standard, as articulated by the court, misled the jury as to the key issue in this case.

Because of each of the trial court's errors, a new trial is warranted on all issues.

STANDARD OF REVIEW

The standard of review of a trial court's ruling on a motion for directed verdict is *de novo*. *See Ritz v. Florida Patients Compensation Fund*, 436 So. 2d 987 (Fla. 5th DCA 1983). "However, '[a]n appellate court reviewing the grant of a directed verdict must view the evidence and all inferences of fact in the light most

favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party.'" *Banco Espirito Santo Intern., Ltd. v. BDO Intern., B.V.*, 33 Fla. L. Weekly D726 (Fla. 3d DCA March 12, 2008) citing *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315, 329 (Fla. 2001). Although a trial court's ruling on admissibility of evidence is generally reviewed for abuse of discretion, where, as here, admission of that evidence violates proscriptive statutes, the standard of review is *de novo*. *See Castaneda Ex. Rel. Cardona v. Redlands Christian Migrant Ass'n.*, 884 So. 2d 1087, 1090 (Fla. 4th DCA 2004). The decision of whether to give a requested jury instruction is left to the discretion of the trial court; this decision will be overturned where the jury was misled by the failure to give the instruction. *See Goldschmidt v. Holman*, 571 So. 2d 422, 425 (Fla. 1990). A trial court's decision on whether to grant a new trial is reviewed on an abuse of discretion standard. *See Brown v. Estate of Stuckey*, 749 So. 2d 490 (Fla. 1999).

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT TO DISCLOSE THE FACT THAT A-1 HAD BEEN A DEFENDANT IN THIS SUIT, AND HAD PAID MONEY TO SETTLE SALEEBY'S CLAIM.

It is well settled under Florida law that evidence that a previous defendant has settled out of a lawsuit shall not be disclosed to the jury at trial. *See* Section 90.408, Florida Statutes ("Evidence of an offer to compromise a claim which was

disputed as to validity or amount . . . is inadmissible to prove liability or absence of liability for the claim or its value."); Section 768.041(3), Florida Statutes ("The fact . . . or that any defendant has been dismissed by order of the court shall not be made known to the jury.").

Further, Florida courts throughout the state are in agreement that a violation of this prohibition—whether direct or indirect—requires an order of new trial. *See, e.g. Ricks v. Loyola*, 822 So. 2d 502 (Fla. 2002)(new trial required where defendant implied that plaintiff had settled with other defendants, even though the term "settlement" was never used); *Muhammad v. Toys R Us, Inc.*, 668 So. 2d 254 (Fla. 1st DCA 1996)(comment to jury venire by defendant's counsel suggesting there might already have been a settlement between plaintiff and nonparty was reversible error); *Henry v. Beacon Ambulance Service, Inc.*, 424 So. 2d 914, 915 (Fla. 4th DCA 1982)("Testimony as to the fact of a settlement is inadmissible and if allowed warrants a new trial").

Indeed, at least two cases have specifically held that disclosure of a previous settlement is reversible error *even when used to demonstrate bias on the part of a testifying witness*. *See Ellis v. Weisbrot*, 550 So. 2d 15 (Fla. 3d DCA 1989)(reversible error to admit evidence that witness had been dismissed from lawsuit); *City of Coral Gables v. Jordan*, 186 So. 2d 60 (Fla. 3d DCA 1966)(evidence of settlement not admissible to rebut implication that witness had

an interest in litigation). Despite this clear proscription, the trial court denied Saleeby's motion to preclude Elson from questioning Mr. Herring on A-1's status as a former defendant in the present case.

This issue was first raised at trial when Plaintiff's counsel began his direct examination of Kurt Grundahl, an expert witness called to testify regarding the industry standards for properly bracing trusses during construction. Counsel apprised the court that he intended, in the interest of proper disclosure, to elicit the fact that Mr. Grundahl had initially been contacted by Mr. Herring on behalf of A-1 Trusses, but was concerned that delving into this subject matter might result in the court ruling that counsel had opened the door to disclosure of A-1's previous involvement in the case. Interestingly, the trial court initially recognized the prejudice that would result from such a disclosure, and correctly instructed the witness as follows:

> Let me tell Mr. Grundahl, the focus of this lawsuit is just on the parties in the lawsuit, …which is Saleeby, who got injured, and Mr. Elson. *So it's real important that we don't bring in that there was ever anybody else involved in the lawsuit because then the jury starts wondering, if they settled, how much did they settle for, if anything? That would blow the whole trial.* We're just trying to find out what their decision is regarding these parties alone. So stay away from that, unless – you're not going to be asked any specific questions that would call for them to mention that. Okay?

(T. 490-491).[7] Both the witness and trial counsel followed the court's admonition, and no improper testimony was elicited.

However, the trial court reached an altogether different conclusion when this issue was next raised. Plaintiff called Mr. Herring to testify regarding his observations at the accident site and his opinions regarding the cause of the collapse.[8] Mr. Herring testified that he had been involved in truss design for over twenty years and that, as a board member of the National Wood Truss Association of America, had taught extensively on the subjects of proper construction and bracing of wood trusses. (T. 906-909). Mr. Herring further testified that he had been involved in the development of the standards for bracing wood trusses during construction—later incorporated into HB-91 and adopted into the Standard and South Florida Building Codes. (T. 910-911).

With regard to the instant case, Mr. Herring testified (as previously acknowledged) that A-1 had fabricated the trusses used at the Dudiak arena and had been called out to examine the accident site after the collapse. (T. 1159-60; 1007).[9]

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[7] Unless otherwise indicated, all emphasis is supplied by the undersigned.
[8] Of course, in calling Mr. Herring, counsel was relying on the agreed order that A-1's previous involvement would not be disclosed.
[9] Mr. Herring was the only witness called at trial who had conducted an extensive post-accident investigation of the accident scene.

Mr. Herring testified that during his examination of the trusses that had not fallen, he noticed that these trusses had not been properly braced and were bowing. Mr. Herring further identified the various ways in which Elson had failed to meet code standards, and the dangers inherent in these failures. (T. 984-1029). Ultimately, Mr. Herring opined that the cause of the collapse was a gross lack of bracing, which led to the inevitable collapse of the trusses in a "domino" fashion. (T. 1054-1055).

Ignoring the fact that Saleeby had previously obtained an *agreed* order granting his motion in limine to exclude reference to A-1's previous settlement, Elson argued that it should be entitled to cross-examine Mr. Herring on this fact as probative of bias. (T. 944). Over Saleeby's objection, the trial court ruled that Elson could cross examine Mr. Herring with the fact that A-1 had previously been a defendant in the case, and had *paid money* to settle with Saleeby, in order to expose Mr. Herring's "direct interest" in the case. This, despite the fact that A-1 had previously settled the case and retained no financial or other interest in the case. (T. 950-951).

The trial court's order is directly contrary to the statutory law and controlling precedent established above. *See* Section 90.408, Florida Statutes, Section 768.041(3), *Ellis*, 550 So. 2d at 16; *Jordan*, 186 So. 2d at 63.

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.
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> ***
>
> Admission of such testimony, *even to attack the former defendant's credibility, is clear error and requires reversal.*

Id. 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" runs directly counter to the clear dictates of section 768.041, as recognized by *Ellis*. *Compare Saleeby*, 965 So. 2d at 215, with *Ellis*, 550 So. 2d at 16.

As to the trial court's belief that this line of questioning could be admissible to explore Mr. Herring's potential bias to the jury notwithstanding section 768.041(3), *Jordan* is particularly instructive. In *Jordan*, a teenaged passenger on a motor scooter was killed when the scooter on which he was riding 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. *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. The Third District directly confronted the argument that such information was admissible to show bias, explaining:

> [O]ur courts are firmly committed to the principle that offers of compromise or settlements with third persons are not admissible. Plaintiff cites authority to the contrary * * * We have examined the cases cited. All are cases where verdicts were affirmed notwithstanding the admission of such testimony; none where the exclusion of such testimony was held error. In each of these cases the courts have been careful to point out that the jury was instructed that evidence of the offer of compromise was admitted solely upon the question of the credibility of the witness and not on the question of liability. *We think, however, that such reasoning is not realistic, for, as pointed out in the cases committed to contrary doctrine, it is a practical impossibility to eradicate from the jury's minds the consideration that where there has been a payment there must have been liability. . . .*

Id. at 63, *quoting Fenberg v. Rosenthal*, 109 N.E. 2d 402 (Ill. 1952)(emphasis added). This impression—that money paid in settlement is indicative of fault on the part of the settling party—is precisely the impression defense counsel sought to create, focusing not only on the fact of A-1's previous status, but on A-1's payment of settlement dollars in return for being dropped from the suit:

> Q Okay. In any event, you were a party to a lawsuit, and either you or someone on your behalf settled, paid the plaintiffs money in order to get out of the lawsuit, correct?
> A Well, I look at it this way, that we settled at some point in time for reasonable cost, that's it. So we settled.
> Q The question was, I'll ask it again, either you or someone on your behalf paid plaintiffs money to settle this lawsuit, correct?
> A Yes.

(T. 1060-1061)

> Q And as fate would have it, you did become a defendant in this particular lawsuit?
> A Yes, sir.
> Q After giving your deposition on two occasions and offering your opinions in this case, either you or someone on your behalf settled this lawsuit with plaintiff's counsel?
> A Yes.
> Q Your company or someone on your behalf paid money to get out of this lawsuit?
> A Yes.

(T. 1160-1161).

Clearly, this exchange was intended to (and did) create the exact inference sought to be avoided by the enactment of section 90.408 and 768.041(3), and recognized by *Jordan*: that A-1's payment of money to Saleeby in settlement of his claim indicated that the fault for the collapse rested with A-1, rather than Elson. As such, the trial court's disregard of the weight of authority precluding the admission of such evidence is not only error but prejudicial as well.

Remarkably, however, the Fourth District affirmed the trial court's ruling despite the existence of the above case law directly on point. *See Saleeby*, 965 So. 2d at 215-216.

In reaching this decision, the Fourth District erroneously relied upon this Court's decision in *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993), in which this Court disallowed and required disclosure of "Mary Carter" agreements, *in*

which the settling defendant remains in the case for the purpose of cooperating with the plaintiff.[10]

As this Court explained in *Dosdourian*, the purpose of requiring such disclosure is to prevent the misrepresentation that is inherent in such agreements which are, in the best of circumstances misleading and, in the worst of circumstances fraudulent. As this Court explained:

> Unique to the scheme of Mary Carter agreements, settling defendants retain their influence upon the outcome of the lawsuit from which they settled: so-called *settling* defendants continue "defending" their case. Defendants who have allegedly settled remain parties throughout the negligence suit, even through trial. As a consequence, these defendants remain able to participate in jury selection. They present witnesses and cross-examine the witnesses of the plaintiff by leading questions. They argue to the trial court the merits and demerits of motions and evidentiary objections. Most significantly, the party status of settling defendants permits them to have their counsel argue points of influence before the jury.
>
> ***
>
> Rather than cooperating with their codefendants to minimize the culpability of all defendants and to minimize the jury's assessment of plaintiff's damages, Mary Carter defendants offer to the plaintiff their counsel's services for the purpose of persuading the jury to apportion to nonsettling defendants the greatest percentage of fault and to award the full amount of damages the plaintiff has requested. 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 nonsettling defendant. *Watson Truck & Supply Co. v. Males*, 111 N.M. 57, 801 P.2d 639, 643 (1990) (Wilson, J., specially concurring).

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

> In addition, Mary Carter agreements, by their very nature, promote unethical practices by Florida attorneys. If a case goes to trial, the judge and jury are clearly presuming that the plaintiff and the settling defendant are adversaries and that the plaintiff is truly seeking a judgment for money damages against both defendants. In order to skillfully and successfully carry out the objectives of the Mary Carter agreement, *the lawyer for the settling parties must necessarily make misrepresentations to the court and to the jury in order to maintain the charade of an adversarial relationship*. These actions fly in the face of the attorney's promise to employ "means only as are consistent with truth and honor and [to] never seek to mislead the Judge or Jury by any artifice or false statement of fact or law." Oath of Admission to The Florida Bar, *Florida Rules of Court* 977 (West 1993). . . .

Id. at 243-244. This Court continued:

> We are convinced that the only effective way to eliminate the sinister influence of Mary Carter agreements is to outlaw their use. We include within our prohibition any agreement which requires the settling defendant to remain in the litigation, regardless of whether there is a specified financial incentive to do so.
>
> ***
>
> Consistent with our decision to ban all future agreements in which the settling defendant remains in the case, we believe that the same policy reasons requiring the disclosure of *secret* settlement agreements in the "Mary Carter" line of cases apply here, even though the motivations of the settling parties are not as clear. 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.* As noted by the court below, "[t]he integrity of our justice system is placed in question when a jury charged to determine the liability and damages of the parties is deprived of the knowledge that there is, in fact, no actual dispute between two out of three of the parties." *Dosdourian*, 580 So.2d at 872. Thus, we answer the certified question in the affirmative.
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> ***
>
> Thus, we declare that all Mary Carter agreements entered into after the date of this opinion are void as against public policy. We quash

> the decision below and remand the case for a new trial. The settlement agreement shall remain intact, but it shall be admitted into evidence upon the request of Dosdourian.

Id. at 246; 247-248.

Despite this Court's clearly articulated rationale and closely limited holding of *Dosdourian*, the Fourth District mischaracterized this Court's holding as follows:

> 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.").

Saleeby, 965 So. 2d at 215-216. However, as the above passage makes abundantly clear, *Dosdourian* does not stand for the general proposition that a witness' settlement may be disclosed in order to show bias, but may only be disclosed to prevent a fraud upon the court under circumstances undisputedly not at issue in the present case.

Unlike *Dosdourian*, in which the plaintiff had settled with a defendant under the express condition that the defendant remain in the case and cooperate with the plaintiff, it is beyond dispute that A-1 was dismissed from the suit, and there has *never* been any evidence whatsoever indicating that A-1's cooperation was a

condition of the settlement.[11] Thus, this issue is governed by the clear prohibition of such disclosure found in sections 90.403 and 768.041(3), and in the above cited cases. The trial court's ruling allowing the admission of this testimony (and the Fourth District's opinion affirming) are in error. A new trial is therefore required.

II. THE TRIAL COURT ERRED IN ALLOWING ELSON TO ADDUCE EVIDENCE INDICATING THAT SALEEBY HAD RECEIVED WORKER'S COMPENSATION BENEFITS FROM LABOR FOR HIRE.

A. This Court Has Jurisdiction to Rule on the Impropriety of the Trial Court's Ruling in this Regard.

This Court has already exercised its discretion to accept jurisdiction of the present case. Having done so, this Court has jurisdiction to hear all issues properly pled, and which are dispositive of the case under review. *See Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982)("We have jurisdiction, and, once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal.").

The trial court's order allowing Elson to elicit evidence indicating that Saleeby had received worker's compensation benefits constitutes reversible error

[11] Indeed, defense counsel specifically asked Mr. Herring (without any evidence or basis for the question) whether it was "part and parcel" of A-1's settlement that Mr. Herring appear to assist Saleeby in the prosecution of this case. (T. 1183).

which requires a new trial, and is therefore dispositive. Thus, this Court should exercise its discretion to review the merits of this issue as well. *See Savona v. Prudential Ins. Co. of America*, 648 So. 2d 705, 707 (Fla. 1995)("We have held that we have the authority to consider issues other than those upon which jurisdiction is based, but this authority is discretionary and should be exercised only when these other issues have been properly briefed and argued, and are dispositive of the case.").

B. The Trial Court's Ruling was in Error.

"It is a general rule that to bring before the jury information as to an injured plaintiff's right to workmen's compensation benefits constitutes prejudicial error, since such information is likely to influence the jury against the plaintiff on the issue of liability or damages." *Grossman v. Beard*, 410 So. 2d 175, 176-77 (Fla. 2d DCA 1982).

As noted above, Labor for Hire's manager, Mr. Gomez, testified during his direct examination that no contract was ever reached between Labor for Hire and Elson for Saleeby to do the type of work that Elson unilaterally required him to perform. Gomez further testified that he first learned of Saleeby's actual job duties on the Monday after the accident, when Elson called to increase Saleeby's hourly

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Mr. Herring answered in the negative. There has never been any evidence adduced to challenge the veracity of this statement.

rate. (T. 1215-1216). Finally, Mr. Gomez testified that Labor for Hire would not have agreed to the change in Saleeby's classification to a semi-skilled worker had Elson properly and timely contacted Labor for Hire and made this request. (T. 1214-1215; 1223-1224).

On cross-examination, Elson argued that it should be entitled to question Mr. Gomez as to worker's compensation benefits paid to Saleeby by Labor for Hire. Elson argued that this information was indicative of Saleeby's status as an employee of Labor for Hire, and was demonstrative of Mr. Gomez' bias. (T. 1295).

Saleeby objected to this line of questioning, arguing that it was violative of the rule excluding evidence of worker's compensation benefits from admission at trial. The trial court overruled this objection and reversed its standing Order in Limine precluding all reference to worker's compensation benefits. In reaching its decision, the trial court stated:

> ... [Y]ou can always cross examine a witness on their interest and their conduct and things like that. And frankly, I don't think worker's compensation carries that kind of – carries the impression in the mind of the public that it completely and adequately insures people when they're injured on the job. I think that it carries in the mind of the public that it falls short of completely and adequately compensating people, when they are seriously injured on the job, anyway. So I don't think the prejudice outweighs its admissibility.

(T. 1304). The trial court's pronouncement in this regard runs directly counter to all authority on this subject. *See, e.g. Clark v. Tampa Elec. Co.*, 416 So. 2d 475,

477 (Fla. 2d DCA 1982)("It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact."); *Grossman*, 410 So. 2d at 177 ("the presence of benefits inuring to the plaintiff as a result of his injuries is not a proper consideration for the jury."); *Cook v. Eney*, 277 So. 2d 848, 850 (Fla. 3d DCA 1973)(allowing defense counsel to question the plaintiff in a medical malpractice suit with respect to his receipt of social security and workers' compensation benefits was error, notwithstanding the contention that such evidence was offered for the limited purpose of rebutting or impeaching the plaintiff's earlier testimony concerning his motivation and desire to return to work); *Gormley v. GTE Prod. Corp.*, 587 So. 2d 455, 459 (Fla. 1991).

In *Gormley*, the plaintiffs' home had been destroyed in a house fire. The plaintiffs alleged that the fire was caused by a television set manufactured by the defendant, GTE. *Id.* at 457. The plaintiffs filed a $68,700.00 claim against GTE, which included both personal injury and property damage. *Id.* For purposes of impeachment as to the value of the property damage, the defense sought to introduce an insurance claim into evidence which indicated that the total amount of damages claimed by the plaintiff was only $19,823.00, a fraction of the amount sought in the plaintiffs' suit. The trial court overruled the plaintiff's objection to

the document's admission based upon the "collateral source" rule, and allowed the document to be admitted into evidence. *Id.*

On appeal of jury's verdict for the defense, the Second District reasoned, "the error of admitting the insurance document was harmless because the jury found no liability, and, therefore, the improper evidence could not have infected the jury's liability determination." *Id.* Upon review, however, this Court disagreed, noting the Second District had declined to apply its own precedent announced in *Cook* whereby it held, "the admission of evidence of a collateral source to reduce damages is reversible error *precisely because it prejudices the jury's determination of liability*." *Id.* (citing *Cook v. Eney*, 277 So. 2d at 850).

As this Court explained:

> Introduction of collateral source evidence misleads the jury on the issue of liability and, thus, subverts the jury process. Because a jury's fair assessment of liability is fundamental to justice, its verdict on liability must be free from doubt, based on conviction, and not a function of compromise. Evidence of collateral source benefits may lead the jury to believe that the plaintiff is "trying to obtain a double or triple payment for one injury," *Clark*, 416 So.2d at 476, or to believe that compensation already received is "sufficient recompense." *Kreitz*, 422 So.2d at 1052.

Id. at 458.

Defense counsel in the present case sought—and succeeded—to create the very impression warned against in *Gormley*, as counsel repeatedly returned to the

fact that Labor for Hire was responsible for maintaining worker's compensation insurance of Saleeby. (T. 1308-1309; 1326; 1355-1356).

Moreover, as the transcript reveals, three of the four questions asked of Mr. Gomez did not (as contended by defense counsel) indicate any bias on the part of Mr. Gomez, but were merely an attempt to remind the jury that Saleeby was, in fact, covered by worker's compensation insurance. (T. 1308-1309; 1355-1356). For example, defense counsel's question "So one of the benefits, if I get an employee from you, he comes over and acts as if he's my employee, but you handle all payroll, taxes, work comp and all that other good stuff" can hardly be said to be an inquiry into Mr. Gomez' credibility or bias as a witness. (T. 1309).

This is especially true given the fact that Labor for Hire's worker's compensation carrier had already paid Saleeby's benefits, and Labor for Hire had nothing to gain by assisting Saleeby in a recovery from Elson. Thus, Elson's line of inquiry was not justified as an attempt at displaying any bias, and was calculated to elicit prejudice against Saleeby on the liability issue. *See Gormley*, 587 at 458. ("Despite assertions that collateral source evidence is needed to rebut or impeach, 'there generally will be other evidence having more probative value and involving less likelihood of prejudice than the victim's receipt of insurance-type benefits.'"). *See also Williams v. Pincombe*, 309 So. 2d 10 (Fla. 4th DCA 1975)(same).

Thus, notwithstanding the trial court's subjective opinion regarding the impact of admission of worker's compensation benefits, this Court has unequivocally stated that the admission of such testimony is indeed harmful. The trial court's ruling flies in the face of this Court's *Gormley* opinion, and is not justified under the theory that the inquiry was necessary for impeachment, the trial court ruling was patently prejudicial to the plaintiff for the very reasons articulated in *Gormley*, *Grossman*, *Clark* and *Cook*, and should not have been allowed to stand by the Fourth District. A new trial is justified on this basis as well.

III. THE TRIAL COURT ERRED IN DIRECTING A VERDICT TO THE EFFECT THAT SALEEBY WAS ELSON'S "BORROWED SERVANT."[12]

The question of whether there exists an employer/servant relationship is normally an issue for the jury to determine. *See Rogers v. Barrett*, 46 So. 2d 490 (Fla. 1950). This is especially true where disputed issues of fact exist. *See DeBolt v. Department of Health and Rehabilitative Servs.*, 427 So. 2d 221 (Fla. 1st DCA 1983). In the present case, the trial court erred in directing a verdict in favor of Elson Construction finding that Saleeby was Elson's borrowed servant, because questions of fact remained on this issue. This error was particularly harmful to

[12] As noted above, because this Court has accepted jurisdiction on the basis of conflict, this Court has jurisdiction to address the trial court's erroneous order directing verdict for Elson. The court's error in this regard requires a new trial, and is therefore dispositive. *See Savona*, 648 So. 2d at 707 (Fla. 1995), *supra*.

Saleeby, because the finding of a borrowed servant relationship had the legal effect of finding that Elson enjoyed worker's compensation immunity, and required Saleeby to demonstrate that Elson had acted with "reckless disregard" of his safety.

First, it is well settled that there is a presumption that an employee is not a borrowed servant, but instead continues to work for and be an employee of the general employer. *See Shelby Mut. Ins. Co. v. Aetna Ins. Co*., 246 So. 2d 98 (Fla. 1971); *Lund v. General Crane, Inc.*, 638 So. 2d 146, 148 (Fla. 4th DCA), *rev. den*., 649 So. 2d 233 (Fla. 1994)("There is a presumption of continued employment with the general employer. A party alleging special employment has a substantial burden to overcome that presumption in a negligence action against a separate employer."); *Sherrill v. Corbett Crane Services, Inc*., 656 So. 2d 181, 185-186 (Fla. 5th DCA 1995). Further, this presumption can only be overcome where all three of the following elements are shown: 1) the existence of a contract for hire, either express or implied, between the special employer and the employee; that the work being done at the time of the injury was essentially that of the special employer; and 3) the power to control the details of the work resided with the special employer. *See Shelby*, 246 So. 2d at 101. Thus, it is incumbent upon the party seeking to establish the existence of a borrowed servant relationship to definitively establish each of these elements.

Here, it cannot be said that these three elements were established so as to warrant a directed verdict for Elson, especially given the fact that all facts established on the record and all inferences thereon must be viewed in light of Saleeby. *See Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315, 329 (Fla. 2001)("An appellate court reviewing the grant of a directed verdict must view the evidence and all inferences of fact in the light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party."); *Sagarino v. Marriott Corp.*, 644 So. 2d 162, 165 (Fla. 4th DCA 1994)(issues of fact remained as to whether plaintiff was a borrowed servant of the defendant).

In *Sagarino*, a valet parking attendant working at a Marriott hotel pursuant to a contract between the hotel and a valet services company was injured when he slipped in the hotel's parking lot. *Sagarino*, 644 So. 2d at 163. The valet brought a premises liability suit against the hotel. The hotel moved for summary judgment on the ground that the valet was a borrowed servant of the hotel, and that the hotel had worker's compensation immunity. *Id*. The trial court ruled that the plaintiff was a borrowed servant of the hotel, and that worker's compensation immunity applied.

As to the first element of the special employer/employee analysis (that a contract for hire exists between the employee and employer), the *Sagarino* court

noted that "Marriott [like Elson] asserts the first element is satisfied here because there was an express contract for hire between it and FLT [the valet services company]." The *Sagarino* court rejected this argument, explaining:

> Significantly, however, *Shelby* interpreted this element to require not only the contract's existence, but also a showing by the alleged special employer 'of a deliberate and informed consent by the employee' before the new employment will be held to be a bar to an action for common law negligence. *Id.* This court has held that a 'definite arrangement between the general and special employer *and the employee's knowledge thereof*' must be shown.

Id. at 165, citing to *Shelby*, 246 So. 2d 98 (Fla. 1971), and *Pepperidge Farm, Inc. v. Booher*, 446 So. 2d 1132, 1132 (Fla. 4th DCA 1984)(emphasis provided by the court). The court ruled that the hotel had been unable to carry its burden to prove this element. *Id*. at 165.

Of course, Elson was unable to make this showing as well, given the conflicting testimony as to the existence of a contract between Labor for Hire and Elson. Labor for Hire's manager, Mr. Gomez specifically testified that Labor for Hire had contracted to provide Saleeby to Elson only as an unskilled laborer for the express purpose of cleaning up the job site around the construction, not as a semi-skilled or skilled worker engaged in the actual construction of the project.[13] (T.

[13] Indeed, it is undisputed that the Elson employee who actually went to Labor for Hire to pick up workers for the day specifically asked for laborers to do clean-up work. While it remains a point of dispute as to when Elson called Labor for Hire to change Saleeby's status, it is undisputed that the Elson employee who made this

1209-1210). Further, Mr. Gomez testified that he never received a call seeking to change Saleeby's status and, if he had, he would not have agreed. (T. 1214-1215; 1223-1224).

Further, Mr. Gomez clearly testified that employees are sent from his company who match the skill and experience level requested by the hiring company, and that these employees' wages are priced accordingly. (T. 1201-1202). Thus, Labor for Hire would not agree to allow an unskilled laborer to perform duties that would properly belong to a different classification of employee, as Labor for Hire would not be getting its proper payment for supplying those employees.

Under these circumstances, it cannot logically be said that "a definite arrangement between the general and special employer" existed. *A fortiori,* it cannot be said that Saleeby had knowledge of this non-existent agreement or that he had formed any "deliberate and informed consent" to such an agreement. Thus, at the very least, a jury question remained as to whether Saleeby was, in fact, a borrowed servant of Elson Construction, and the trial court erred in directing a verdict in this issue. *See also Lund v. General Crane, Inc.*, 638 So. 2d 146 (Fla. 4th DCA), *rev. den.*, 649 So. 2d 233 (Fla. 1994)("The presence of a *definite*

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call did not speak to anyone at Labor for Hire, but merely left a message on the company's answering machine.

arrangement between the general and special employers, *and the employee's knowledge thereof*, is crucial to determining whether an employee is a borrowed servant.").

Further, as the *Sagarino* court noted, "Sagarino filed an affidavit in opposition to the motion for summary judgment that asserts facts that would, when viewed in the light most favorable to him, be sufficient to create a factual issue on the question of whether he was Marriott's borrowed employee." *Id*. at 165. This affidavit contained facts similar to those presented to the jury in the present case. First, as in *Sagarino*, Saleeby applied for employment with Labor for Hire, not Elson. Second, Saleeby was interviewed and hired exclusively by Labor for Hire. While Saleeby took direction from Elson managers and foremen, the evidence established that Labor for Hire's employees, like Saleeby, reported directly to and were answerable to Labor for Hire. As in *Sagarino*, all hiring and firing in the instant case was done by Saleeby's general employer, Labor for Hire. Thus, as in *Sagarino*, the facts did not conclusively show that Saleeby was a borrowed servant, but rather established that a jury question remained on this point. Therefore, just as the trial court in *Sagarino* was in error in granting summary judgment, here too the trial court was in error in directing a verdict in favor of Elson. *See also Coleman v. Mini-Mac Maintenance Svc., Inc.*, 706 So. 2d 393 (Fla. 1st DCA 1998).

In *Coleman*, a maintenance company was contracted to perform scheduled cleaning at a grocery store. *Id*. at 394. While conducting this scheduled cleaning, a maintenance company employee noticed a puddle of salad oil in an aisle of the store, and mopped up the spill. Shortly afterward, a grocery store employee was injured when he slipped in the residual oil left after the attempted clean-up. *Id*. The injured employee sued the maintenance company, which defended on the basis that its employee was functioning as a borrowed servant of the grocery and that it was therefore entitled to worker's compensation immunity. *Id*. at 395.

The trial court granted summary judgment for the defense, finding no negligence on the part of the maintenance company, and the plaintiff appealed. The maintenance company cross-appealed the court's denial of its motion for summary judgment on the borrowed servant issue. *Id*. at 394. The First District, *inter alia*, affirmed the trial court's denial of summary judgment. *Id*. In so doing, the First District relied on the fact that there was no express or implied contract between the maintenance company and the grocery to clean up incidental spills, although a contract to perform regularly scheduled clean-up services undisputedly existed. *Id*. at 395. Further, the court noted that there was no evidence that the grocery management was aware that the employee had cleaned the particular spill at issue. *Id*. Thus, because no express contract existed for this particular function, and because one of the contracting parties was unaware that the employee was

performing this function, the court ruled that no borrowed servant relationship existed. *Id*.

Such is the case here, where Labor for Hire and Elson had a contract to provide job site clean-up services, rather than providing workers to assist and participate in the installation of trusses, and one party to this contract (Labor for Hire) was unaware that Saleeby would be performing tasks outside that job description. Thus, if the clean-up of an incidental spill by an employee contracted only to do scheduled cleanup is so far afield from the contracted for duties that it defeats the employee's status as a borrowed servant, Saleeby cannot be considered a borrowed servant where the duties he actually performed were much more attenuated (indeed, entirely unrelated) to the job for which he was contracted. Further, because one of the contracting parties (Labor for Hire) was unaware that these services were even being performed, there can be no "definite agreement" between the contracting parties on this point and, as in *Coleman*, no borrowed servant relationship exists for this reason as well.

Nevertheless, the trial court in the present case directed verdict for Elson on this issue. The court reasoned that, had Saleeby been injured while performing tasks outside the scope of his contracted-for duties, this might defeat his status as a borrowed servant, and therefore worker's compensation immunity would not apply.

The court further reasoned, however, that this fact was irrelevant because work on the arena had finished for the day and the workers had begun to put away their equipment when the accident occurred. Thus, the trial court ruled, the fact that Saleeby had been used to perform tasks outside the scope of his contract was irrelevant, apparently believing that Saleeby's status returned to that of a borrowed servant upon completion of the unauthorized duties.

The court's reasoning is incorrect, however, because an individual's status as an employee/servant is defined by the nature of the working relationship, not whether the employee/servant is actively engaged in the performance of his duties. *See, e.g. Doctor's Business Serv. Inc. v. Clark*, 498 So. 2d 659, 662 (Fla. 1st DCA 1986)(course of employment extends to any injury which occurred at a point where the employee was within the range of normal dangers associated with the employment).

Indeed, following the trial court's logic, all employee/servants would lose their employee/servant status any time they were not actively engaged in their duties, and worker's compensation benefits would be unavailable for any workplace injuries that occur during the employee/servant's breaks, while at lunch or while returning to their cars after the completion of the day's responsibilities. Of course, this is not the case. *See Vigiotti v. K-Mart Corp.*, 680 So. 2d 466 (Fla. 1st DCA 1996)(worker injured on premises of employer after completion of work

duties covered by worker's compensation insurance. Injury arose out of employment even though she had "clocked out" prior to accident.). Thus, it is of no moment that Saleeby had completed his unauthorized duties for the day because, once Elson had Saleeby perform tasks for which he was not contracted, Saleeby's status as a borrowed servant was lost.[14]

For the reasons stated above there was, at minimum, sufficient evidence from which the jury could have found that Saleeby was not a borrowed servant of Elson. The trial court's order directing a verdict in favor of Elson is untenable as a matter of law, and a new trial is warranted on this basis as well.

IV. THE TRIAL COURT ERRED IN ISSUING AN IMPROPER AND MISLEADING JURY INSTRUCTION REGARDING THE "SUBSTANTIALLY CERTAIN" STANDARD OF PROOF.[15]

This Court clearly established in *Travelers Indemn. Co. v. PCR, Inc.*, 889 So. 2d 779 (Fla. 2004), that an employer is liable for injury to his employees if the employer *should have known* that these injuries were substantially certain to occur. As this Court explained:

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[14] The trial court's reasoning also ignores the fact that Saleeby and the other workers were awaiting instructions from Jay Brochu as to how to brace the bowing trusses at the time of the collapse.

[15] As with issues II and III above, this Court has jurisdiction to entertain this issue, because the trial court's actions in this regard constitute reversible error which require a new trial, and the issue would therefore be dispositive of the instant case. *See Savona*, 648 So. 2d at 707 (Fla. 1995) *supra*.

> …the relevant question is not whether the employer *actually knew* that its conduct was substantially certain to result in injury or death but, rather, whether the employer *should have known* that its conduct was substantially certain to result in injury or death. 754 So. 2d at 688. Accordingly, we held that under the substantial-certainty method of satisfying the intentional-tort exception, "the employer's actual intent is not controlling." *Id*. Rather, this method requires a court to look to the totality of the circumstances "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."

Id. at 783.

> …*the employer need not have known* that its conduct was substantially certain to cause injury; the fact that it *should have known of the substantial certainty of injury would be sufficient*. *Id*. at 788.

> To satisfy the objectively-substantially-certain standard of *Turner*, …an injured employee need not prove that his or her employer actually expected that its conduct would result in injury. Rather, under *Turner*, an injured employee *only needs to demonstrate that his or her employer should have expected* that injury would result.

Id. 790-91.

> *Turner* simply held that the Workers' Compensation Law did not preclude …an injured employee from suing his employer in tort if his injuries were caused by employer conduct *that the employer should have known* was substantially certain to cause injury.

Id. at 795.

Thus, in the present context, what Elson subjectively knew or did not know (or would have understood) is irrelevant; it is what Elson *should have known* that is controlling. *See also Patrick v. P.B. City. School Bd.*, 927 So. 2d 973, 974 (Fla. 4th DCA 2006)("[T]he latter method of satisfying the intentional-tort exception,

the substantial-certainty method, calls for an objective inquiry: the relevant question is not whether the employer actually knew that its conduct was substantially certain to result in injury or death but, rather, whether the employer should have known that its conduct was substantially certain to result in injury or death."); *McClanahan v. State*, 854 So. 2d 793 (Fla. 2d DCA 2003)(To satisfy the "substantial certainty of injury" standard for establishing the intentional tort exception to workers' compensation immunity, the plaintiff need not show that the employer actually knew that its conduct was substantially certain to cause an injury; rather, the employer may be held liable if it should have known that the conduct complained of was substantially certain to result in injury or death); *EAC USA, Inc. v. Kawa*, 805 So. 2d 1 (Fla. 2d DCA 2001)(employee or third party must establish that employer should have known that its conduct was substantially certain to result in injury; actual intent by employer to cause injury does not have to be proven); *Glasspoole v. Konover Constr. Corp. South*, 787 So. 2d 937 (Fla. 4th DCA 2001)(For purposes of intentional tort exception to workers' compensation immunity, there are two alternative bases for an employee to prove an intentional tort action against an employer: the employer exhibited a deliberate intent to injure or engaged in conduct which is substantially certain to result in injury or death.).

However, the trial court erred when it instructed the jury, over Saleeby's objection (T. 1875), as follows:

> The issue for your determination on the claim of Albert Saleeby against defendant, Rocky Elson Construction, Inc. is whether the greater weight of the evidence supports the claim that the conduct of the defendant, Rocky Elson Construction, Inc. was substantially certain to cause injury.
>
> The test for substantially certain is, given the totality of the circumstances, whether a reasonably prudent person *would have understood that* the conduct of Rocky Elson Construction, Inc. was substantially certain to result in injury to Albert Saleeby.

(T. 2041). This instruction is erroneous, because it indicates precisely the opposite of what the law requires: that for Elson to be liable, it would have to understand—i.e., have actual knowledge—that its actions were substantially certain to result in Saleeby's injury. Thus, the jury was led to believe that Elson Construction's liability was dependent upon a subjective standard taken from the employer's point of view (i.e., "what Elson and its employees would have understood").

The trial court's error in this regard allowed defense counsel to argue, during closing argument, that the issue for the jury to determine was whether Elson Construction's employees had "understood" or "thought" that their conduct was substantially certain to result in injury:

> So these guys *would have had to have known, they would have had to have understood* that their conduct was substantially certain to result in injury. And *if they had understood that*, they wouldn't have been climbing on the trusses, they all testified to that. . . . Why would anyone, reasonably or otherwise, go up in something that they thought

> was substantially certain to fall down? No way. No way. Alan Bauman said it perfectly. I have two children to go home to. I'm not going up there and risking my life for twenty bucks an hour or whatever he was getting paid, it's not happening.
>
> ***
>
> As Jeff Cline put it, his life was in those men's hands, those men's lives were in his hands. And *if he didn't think* he was doing it right, he'd have fixed it. And *if he thought* this thing was substantially certain to fall, he'd have got off of it, and he certainly wouldn't have thought about going back up in it to fix it.
>
> Each one of them said I wouldn't have been up there *if I had thought* it was going to fall. Each one of them seemed pretty reasonable, each one of them said hey listen, if I thought that thing was going to fall, I'd get down.

(T. 2146; 2159-61).

As established by *Travelers*, however, whether Elson Construction's employees "understood" or "thought" that their conduct was substantially certain to result in injury was simply not the issue. The issue was whether they *should have* known that their conduct was substantially certain to result in injury.

In addition, the trial court compounded its error by turning to the criminal jury instruction to define the term "substantially certain," rather than relying upon this Court's guidance as to the correct definition of the term provided by *Turner v. PCR*, 754 So. 2d 683 (Fla. 2000). The instruction issued by the trial court is as follows:

> Conduct substantially certain to cause injury is more than a failure to use ordinary care towards others, it must be gross and flagrant. It is a course of conduct showing reckless disregard of the safety of persons exposed to its dangerous effects, or such an entire want of care as to

> raise a presumption of conscious indifference to the consequences, or which shows wantonness or recklessness or grossly careless disregard for the safety and welfare of employees.

(T. 2042). As argued to the trial court, this definition is at variance with the standard explained by this Court in *Turner*, which described the term "substantially certain" as being so foreseeable as to require an element of "reckless indifference" or "grossly careless disregard" for the safety of the injured employee in order for the employer to have engaged in the conduct. *See Turner*, 754 So. 2d at 687-688, fn. 3 & 5. Once again, the court's incorrect jury instruction failed to adequately apprise the jury of the issues before it, and left the jury confused in this key element of the allegation against Elson.

This confusion is demonstrated by the fact that the jury, while deliberating, asked the following questions:

> Can we be given additional legal clarification regarding the following terms: Gross and flagrant, substantially certain, reckless disregard, wantonness or reckless, grossly careless disregard? *Is malice or intent needed to meet any of these standards?"*

(T. 2245). As to the first question, the judge advised the jury that "There is no legal clarification for these terms other than the instructions you have." (T. 2253, 2256). As to the second question, the judge advised the jury "actual malice or intent is not needed." (T. 2251).

In addition, the jury sought clarification as to what *mens rea* Saleeby was required to prove in order for the jury to find liability, asking, "Does recklessness imply conscious recklessness?" (T. 2251).

The judge advised the jury that it could not answer this question any better than the jury instructions that the jury had already been given. (T. 2257-59). Therefore, the jury was never told, as it should have been, that Saleeby was not required to show consciousness (knowledge), but only that Elson should have known that its conduct was likely to result in injury. As the trial court acknowledged, because it chose not to answer the jury's question, the jury could conclude that consciousness either was, or was not, required. (T. 2252). Therefore, the jury's interpretation of the erroneous jury instruction would determine whether the jury did or did not find in favor of Plaintiff.

However, the jury should not have been left to guess whether consciousness was required, and Saleeby should not have had his fate contingent upon whether the jury resolved its confusion over the instructions given.

The trial court had the responsibility to properly instruct the jury on this key point of law. Its failure to do so caused the jury to be misled on this seminal point. *See Liggett Group Inc. v. Engle*, 853 So. 2d 434, 469 (Fla. 3d DCA 2003)("Although a trial court generally has broad discretion in formulating jury instructions, a defendant is entitled to have the jury instructed "on the law

applicable to the issues raised by the evidence."). Because the trial court's instruction was misleading in nature, and the record affirmatively reflects that the jury was, in fact, confused as a result, the trial court reversibly erred in issuing the instruction, and a new trial is warranted. *See Cruz v. Plasencia*, 778 So. 2d 458 (Fla. 3d DCA 2001)(new trial warranted where record shows evidence of juror confusion on key legal issue); *Adkins v. Seaboard Coastline R.R. Co.*, 351 So. 2d 1088 (Fla. 2d DCA 1977)(When reviewing court is of opinion that jury instructions may have misled or confused jury, cause must be remanded for new trial).

CONCLUSION

WHEREFORE, based upon the above cited facts and authorities, Petitioner Albert Saleeby respectfully requests this Court quash the Fourth District Court of Appeal's opinion in this matter and remand the instant case to the trial court for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this **22nd** day of **May, 2008**, to: Edna L. Caruso, Esq., Edna L. Caruso, P.A., *Counsel for Plaintiff/Appellant*, Barristers Building, Ste. 3A, 1615 Forum Place, West Palm Beach, FL 33401; Christopher W. Wadsworth, Esq., Wadsworth King & Huott, LLP, *Counsel for Defendant/Appellee*, 200 S.E. 1st Street, Ste. 1100, Miami, FL 33131; William S. Reese, Esq., Lane Reese Aulick Summers & Ennis, P.A., *Co-counsel for Defendant/Appellee*, Douglas Centre, Ste. 304, 2600 S. Douglas Road, Coral Gables, FL 33134; and Kimberly A. Ashby, Esq., Ackerman Senterfitt, *Co-counsel for Defendant/Appellee*, CNL Centre II at City Commons, 420 S Orange Ave., Ste. 1200, Orlando, FL 32801.

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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.

BY: /s/ Brett C. Powell
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