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

REPLY BRIEF ON MERITS OF PETITIONER ALBERT SALEEBY

Edward G. Rubinoff, Esq.
Andrew M. Moss, Esq.
KUTNER, RUBINOFF
& MOSS, P.A.
501 N.E. 1st Ave., Ste. 300
Miami, FL 33132
Telephone: (305) 358-6200
Facsimile: (305) 577-8230

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

Counsel for Petitioner Saleeby

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

State Cases

Florida Statutes

INTRODUCTION

This Brief is filed on behalf of Petitioner Albert Saleeby ("Saleeby"), in response to the arguments raised by Respondent Rocky Elson Construction, Inc. ("Elson"). As will be demonstrated below, Elson's arguments in support of the Fourth District's opinion rest upon a series of misrepresentations of the events at trial, as well as upon fundamental misunderstanding of the legal issues involved in the instant case.[1]

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.

In support of the trial court's ruling allowing Elson to question John Herring at trial as to A-1's settlement with Mr. Saleeby, Elson relies heavily upon the wholly unsupportable sophism that Saleeby "asked those questions of Herring on direct examination which he contends now led to prejudicial error. If the jury was

---

[1] In addition to the many material misstatements discussed below is Elson's contention that after the collapse that paralyzed Mr. Saleeby "there was no incident regarding the installation of the replacement trusses *and no one suggested that they be braced differently*." (Answer Brief, pp. 8-9)(emphasis added). Elson's assertion ignores the obviously contrary testimony from Rocky Elson himself:

> 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).

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." (Answer Brief, p. 15). With this argument, Elson maintains that it was Saleeby who introduced the offending evidence, and that the error in its admission is therefore both harmless and invited. (Id.).

In reality, however, Saleeby obtained an agreed order from the trial court to the effect that the jury would not be informed of any witness' previous settlement. (App. 13-15). Further, and contrary to Elson's assertion, Saleeby's counsel did *not* question Mr. Herring on A-1's status as a former defendant until after the court issued its ruling. (T. 944; 953). Moreover, counsel ensured that the court remained steadfast in its ruling and advised the court that counsel was not waiving his objection to the court's ruling before embarking in this examination. (T. 1038-1041).

There is no question that counsel had every right to attempt to minimize the damage caused by the trial court's erroneous ruling allowing inquiry into A-1's settlement, and did not waive his right to challenge that ruling on appeal by doing so. *See, e.g. Porter v. Vista Bldg. Maintenance Services, Inc.*, 630 So. 2d 205, 206 (Fla. 3d DCA 1993)("The trial court's erroneous pretrial ruling admitting evidence of the plaintiff's alcoholism caused his attorney to mention it during opening argument, in an effort to diffuse its impact. . . . Nonetheless, plaintiff's counsel's

attempt to diminish the prejudicial impact of the damaging evidence did not, contrary to appellee's contentions, waive the error, or render the error harmless. A party cannot be penalized for his good-faith reliance on a trial court's incorrect ruling."); *John Hancock Mut. Life Ins. Co. v. Zalay*, 522 So. 2d 944, 946 (Fla. 2d DCA 1988)("A party cannot be penalized for good faith reliance on a trial court's ruling."). Thus, Plaintiff's counsel did nothing more than attempt to minimize the prejudice caused to his client by the trial court's erroneous ruling. Because the trial court made explicitly clear that it was allowing the testimony, counsel did not waive this point on appeal. (T. 1038-1041).

Next, Elson contends that this Court's decision in *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993), justifies Elson's inquiry, and attempts to argue that hiring Mr. Herring to serve as an expert witness after A-1's dismissal constitutes the same type of "collusion" that existed in *Dosdourian*. However, the policy considerations that drove this Court's *Dosdourian* decision are simply not present here. As this Court explained in *Dosdourian*, the rationale of its holding was to prevent the purposeful deception inherent in Mary Carter-type agreements:

> 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*. . . .

Id. at 243-244.

No such collusion or misrepresentations are present in the instant case. Unlike *Dosdourian,* it is beyond dispute in the present case that A-1 was dismissed from the suit prior to Mr. Herring being named an expert for Saleeby, and there has *never* been any evidence whatsoever indicating that A-1's cooperation was a condition of settlement. Thus, the concern that drove the *Dosdourian* decision are not present here.

Moreover, the *Dosdourian* decision does not apply in any event, because *Dosdourian* was specifically aimed at the situation in which the defendant secretly settled with the plaintiff but *remained in the case* at trial for the purpose of cooperating with the plaintiff. This is not the situation here, where A-1 settled its dispute with Saleeby *and was dismissed from the suit* prior to the case going to trial.

Thus, this issue is governed by the clear statutory prohibition against informing the jury that a former defendant has been dismissed, rather than this Court's allowance of disclosure of the fact that a "party" to a lawsuit has settled but remains in the case. *See* Section 768.041(3), Florida Statutes (1997)("The fact

. . . that *any* defendant has been *dismissed* by order of the court *shall not* be made known to the jury.")(emphasis added).[2]

Elson correctly states that, as with any expert, there would be no error in the "exploration of the fact that Herring had never once found error in the manufacture of trusses." (Answer Brief, p. 16). Similarly, Elson could have directed its cross-examination on the fact that Herring's company manufactured the trusses used in the instant case, is actively involved in national organizations representing the interests of truss manufacturers, or that he had been involved in the development of the standards of construction at issue in the present case, in order to demonstrate a potential bias. (T. 909-911).

Rather than focusing on these legitimate areas of inquiry, however, Elson chose to seek an order of the court allowing it to *repeatedly* make the point to the jury that Herring's company had paid money to Saleeby in order to settle Saleeby's claim against it, and to indicate both that A-1 must be responsible for Saleeby's injuries and that Saleeby was attempting to extract a double recovery for those injuries. (T. 1060-1061; 1160-1161). Thus, Elson disclosed the very information prohibited under 768.041(3), in order to create the very inference sought to be

[2] Moreover, Elson's Answer Brief does not even attempt to address the dictates of section 768.041(3), or attempt to find an exception to this legislative prohibition on the type of inquiry allowed by the trial court in this case. Perhaps this is because the statute is clear on its face, and allows for no exceptions to its mandates.

avoided by the controlling case law. *See City of Coral Gables v. Jordan*, 186 So. 2d 60, 63 (Fla. 3d DCA 1966)("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.")[3]; *Ellis v. Weisbrot*, 550 So. 2d 15, 16 (Fla. 3d DCA 1989)("Admission of such testimony, even to attack the former defendant's credibility, is clear error and requires reversal."). The Legislature has made clear its intent that no former defendant's status be disclosed at trial, and the trial court's order in direct contravention of this statute cannot stand.

In short, Elson has not provided this Court with any legal justification for the trial court's disregard of the controlling case law and statutes, nor has it identified any factual support for the Fourth District's reliance on *Dosdourian*. The trial court's ruling was error, and a new trial is therefore required on all issues.

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

In its Answer Brief, Elson does not challenge the fact that it is error to allow evidence of worker's compensation benefits at trial. Instead, Elson incorrectly

[3] As in *Jordan*, the jury in the instant case was well aware that Saleeby was attempting to hold Elson liable for his injuries. Thus, the inference that A-1 was liable for these injuries destroyed Saleeby's case—which is (as indicated by *Jordan*) the inevitable result of allowing such evidence.

argues that Saleeby invited the error by questioning Labor for Hire's manager, Mr. Gomez, on the subject during direct examination.

However, the record demonstrates that Saleeby did not ask Mr. Gomez *any* questions regarding the existence of worker's compensation payments. Rather, Saleeby's questioning was limited solely to the issue of whether Labor for Hire would have agreed to send Mr. Saleeby out to the truss installation job had Labor for Hire known the true nature of the job to be performed.

Mr. Gomez testified that the reasons why he would not have sent Mr. Saleeby included the necessity of ensuring that the worker had the requisite job skills to complete the task, as well as job safety. Along these same lines, Plaintiff's counsel inquired: "What about exposure to your company for an accident if 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?" Mr. Gomez responded, "That's always a huge concern." (T. 1280).

As this exchange demonstrates, Plaintiff's counsel did not ask if Labor for Hire provided worker's compensations benefits, much less if it had paid Mr. Saleeby's claim in the present case. Nevertheless, Elson argues that this ambiguous question was sufficient to justify Elson's repeated inquiry of the fact that Labor for Hire carried worker's compensation insurance for Mr. Saleeby, including an inquiry indicating Labor for Hire's responsibility to cover Mr. Saleeby's claim. (T. 1308-

1309; 1326; 1355-1356). This disclosure was not warranted by the single, ambiguous question asked by Plaintiff's counsel in direct examination.[4]

Contrary to the trial court' pronouncement that the disclosure of worker's compensation benefits is not prejudicial in a personal injury action (T. 1304), the courts throughout Florida have unanimously held that such disclosure is prejudicial and constitutes reversible error, as discussed in Saleeby's Initial Brief on the Merits. *See, e.g. Clark v. Tampa Elec. Co.,* 416 So. 2d 475, 477 (Fla. 2d DCA 1982)*; Cook v. Eney*, 277 So. 2d 848, 850 (Fla. 3d DCA 1973); *Gormley v. GTE Prod. Corp.*, 587 So. 2d 455, 459 (Fla. 1991).

Because the trial court's ruling in this regard was error, a new trial is warranted on this basis as well.

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

Elson argues that the trial court's order directing verdict on the borrowed servant rule is unassailable, and cites the legal and policy rationale behind extending worker's compensation benefits to employers contracting with employee leasing services. Elson's argument in this regard misses the mark principally because it assumes the existence of a valid contract between Labor for Hire and

[4] As noted by Plaintiff's counsel, this question was aimed at labor for Hire's liability for damages caused by its workers, not labor for Hire's worker's

Elson, a point that Labor for Hire and Saleeby vehemently disputed, and which remained a factual dispute throughout the trial.

Indeed, Elson repeatedly relies upon blanket assertions such as "a contract for hire existed between Saleeby and Elson," and "...the contract between Labor for Hire and Elson was of such a clear nature that all parties were on notice of the arrangement." (Respondent's Answer Brief, p. 32; 35). Contrary to Elson's conclusory—and unsupported—statements, the facts adduced at trial demonstrate that no valid agreement between Labor for Hire and Elson was reached, and therefore no borrowed servant relationship could exist.[5]

The record unequivocally demonstrates that Elson's truss erection crew consisted of seven workers. (T. 292-97). Five of these workers were above ground working on the tie beams and trusses. The other two workers (Rocky Elson and another carpenter) 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). Because Mr. Elson and the other carpenter would be unavailable to work on Saturday December 18,

---

compensation liability. (T. 1302-1303).

[5] At the very least, a material question of fact existed as to whether Labor for Hire and Elson reached an agreement. Of course, the existence of this factual question was sufficient to defeat Defendant's motion for directed verdict, and the court should have submitted the question to the jury.

1999, Rocky Elson authorized the hiring of two replacement workers to serve on this truss installation crew. (T. 304-06).

It is undisputed, however, that on that Saturday morning, when the Elson representative arrived at Labor for Hire, he stated only that he needed two day laborers to clean up at the job site. (T. 305; 764; 1209-1210; 1214). Because of this request, Mr. Saleeby and another worker were sent to Elson as unskilled day laborers, at an unskilled day laborer's wages. Thus, Elson was able to obtain two workers to serve on the truss installation crew, while paying them the lower day laborer rate. (T. 1201; 1280, 1316).

Labor for Hire's manager, Mr. Gomez, testified that it was not until Monday—*after the accident*—that Labor for Hire first received notice of Elson's desire to change Saleeby's status, and this point is not in dispute. (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).

Perhaps most troubling of Elson's statements on this issue is the pronouncement that "[T]he 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." (Answer Brief, at 31). Elson's contention in this regard is unsupported by the record, and demonstrates a fundamental misunderstanding of the issue involved on this point.

First, the facts belie Elson's contention that Saleeby was hired as a semiskilled laborer. As pointed out in Petitioner's Initial Brief on the Merits, it is undisputed that Saleeby was *not* hired as a semiskilled worker but was, rather, hired merely to do clean-up work as an *un*skilled worker. (T. 305; 764-765; 854; 1209-1210; 1214; 1279).

Further, Elson's contention that Mr. Saleeby "was not involved in the preparation or installation of the trusses for the building" is simply untenable when it is remembered that Mr. Saleeby and the other worker were taking the place of Rocky Elson and another carpenter, *who were members of the crew hanging the trusses*. Specifically, Mr. Saleeby took over the responsibility of manning the tag lines, *a job that is necessary in order to prevent the trusses from swinging out of position during the truss installation process.* That Elson can contend that Mr. Saleeby was not involved in the truss installation process strains credulity.

Finally, Elson's contention that Mr. Saleeby was "not injured as a result of the performance of his own work" is both unsupported in the record and irrelevant to the question of whether Mr. Saleeby was a borrowed servant.

It is undisputed—in fact, it was established by Elson's foreman Jay Brochu—that Mr. Saleeby and the rest of the truss installation crew were waiting for instructions as to how to properly brace the sagging trusses when the trusses collapsed. (T. 825-826). Thus, by Mr. Brochu's own testimony, Mr. Saleeby was functioning as a member of the work crew when the cave-in occurred, crushing him under the weight of the trusses. (*See also* T. 826-828; 1727-31; 1768-70; T. 1967-69).

Further, whether Mr. Saleeby was injured while performing the uncontracted-for tasks is irrelevant to the question of whether Mr. Saleeby was a borrowed servant. As pointed out in Saleeby's Initial Brief, it is the *nature of the relationship*, not the specific task being performed at the instant of injury, which is determinative of the existence of an employment relationship for worker's compensation purposes. *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).

As Elson itself acknowledges, in order to establish a borrowed servant relationship, Elson was required to demonstrate the existence of a "clear and definite arrangement between employers, and with the borrowed servant's

knowledge." (Answer Brief at 31). *See Lund v. General Crane, Inc.*, 638 So. 2d 146 (Fla. 4th DCA), *rev. den*., 649 So. 2d 233 (Fla. 1994).

Because Labor for Hire specifically denied the existence of a "clear and definite arrangement," and the facts adduced at trial demonstrate that no such relationship existed prior to the accident, the trial court erred in directing verdict in favor of Elson. *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."); *DeBolt v. Department of Health and Rehabilitative Servs.*, 427 So. 2d 221 (Fla. 1st DCA 1983)(existence *vel non* of employee/employer relationship is best left for the jury).

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

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:

> …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.
> ***

> *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 783; 788. In the present case, the trial court erred when it instructed the jury that:

> 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 indicated, contrary to Florida law, 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, and that these workers' willingness to work on the trusses themselves demonstrated that they did not subjectively know that they were engaging in that an activity substantially certain to cause injury. (T. 2146; 2159-61).

Notwithstanding Elson's arguments to the contrary, the confusion created by the court's use of this subjective standard is manifest in the jury's questions on this issue:

> 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?"
> ***
> Does recklessness imply conscious recklessness?

(T. 2245; 2251).

Because of the trial court's improper instruction, the jury never understood 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. Therefore, the trial court failed in its responsibility to properly instruct the jury on this key point of law, and its failure to do so resulted in the jury being misled on this seminal point. *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,

Edward G. Rubinoff, Esq.
Andrew M. Moss, Esq.
KUTNER, RUBINOFF
& MOSS, P.A.
501 N.E. 1st Ave., Ste. 300
Miami, FL 33132

HICKS & KNEALE, P.A.
799 Brickell Plaza, Ste. 900
Miami, FL 33131
Tel: (305) 374-8171
Fax: (305) 372-8038
Co-counsel for Petitioner Saleeby

BY: /s/ Brett C. Powell
MARK HICKS
Fla. Bar No.: 142436
DINAH STEIN
Fla. Bar No.: 98272
BRETT C. POWELL
Fla. Bar No.: 610917

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this **2nd** day of **July, 2008**, to: Edna L. Caruso, Esq., Edna L. Caruso, P.A., *Counsel for Plaintiff/Appellant/Petitioner*, Barristers Building, Ste. 3A, 1615 Forum Place, West Palm Beach, FL 33401; Christopher W. Wadsworth, Esq., Wadsworth King & Huott, LLP, *Counsel for Defendant/Appellee/Respondent*, 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/Respondent*, Douglas Centre, Ste. 304, 2600 S. Douglas Road, Coral Gables, FL 33134; and Kimberly A. Ashby, Esq., Ackerman Senterfitt, *Co-counsel for Defendant/Appellee/Respondent*, CNL Centre II at City Commons, 420 S Orange Ave., Ste. 1200, Orlando, FL 32801.

BY: /s/ Brett C. Powell

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
BRETT C. POWELL
Fla. Bar No.: 610917