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SUPREME COURT OF FLORIDA

CASE NO. SC14-1376

KELLOGG BROWN & ROOT SERVICES, INC.,

Petitioner,

vs.

PANAMA CITY-BAY COUNTY
AIRPORT AND INDUSTRIAL DISTRICT,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT
L.T. CASE NO. 1D12-4874

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner Kellogg Brown & Root Services, Inc. (“KBR”), appellee/cross-appellant below, seeks review of the decision of the District Court of Appeal, First District, in Panama City-Bay County Airport & Indus. Dist. v. Kellogg Brown & Root Servs., Inc., No. 1D12-4874, 39 Fla. L. Weekly D1296 (Fla. 1st DCA June 18, 2014) (on appellee/cross-appellant’s motion for rehearing and certification), based on express and direct conflict with two decisions from this Court and one from the District Court of Appeal, Second District. See Art. V, § 3(b)(3), Fla. Const. A copy of the district court’s slip opinion is appended to this brief which petitioner will cite by designation “A” followed by the appropriate page number.

This case arises from the construction of the Northwest Florida Beaches International Airport in Panama City which opened in 2010. (A 2). The airport’s owner, respondent Panama City-Bay County Airport and Industrial District (“Airport”), contracted with petitioner to perform construction management and oversight services. (A 2-3). The Airport hired Atkins North America, Inc. (“Atkins”), to design plans and specifications for “horizontal” construction (site preparation, drainage and paving) and awarded the prime contract for horizontal construction to Phoenix Construction Services, Inc. (“Phoenix”). (A 2-3).

Several disputes among the parties arose during construction, including a dispute over the design and construction of “Pond C,” a 50-acre storm water

retention pond on the airport site which allegedly failed after construction to comply with Florida Department of Environmental Protection regulations. (A 3). The pond ultimately was reconstructed at an additional cost of \$5.5 million. (A 3).

As noted by the district court, “[c]laims and recriminations abounded regarding Pond C and other work at the site” resulting in complex litigation summarized by the district court:

Phoenix sued the Airport for breach of contract and Atkins for professional negligence. The Airport, seeking to recover the additional \$5.5 million from Phoenix, Atkins, and/or KBR, asserted counterclaims for breach of contract, bond, and indemnity against Phoenix; crossclaims for professional negligence, breach of contract, and indemnity against Atkins; and third-party indemnity, contract, and negligence claims against KBR. In turn, KBR brought third-party counterclaims for indemnity and breach of contract against the Airport.

(A 3-4). The Airport and Phoenix ultimately settled with each other and they each settled their claims with Atkins. (A 4). Therefore, the only claims that went to jury trial were the Airport’s third-party breach of contract and professional negligence claims against KBR and KBR’s third-party counterclaim against the Airport for breach of contract and indemnity arising from unpaid invoices. (A 4).

The jurisdictional conflict issue in this case involves the admissibility of the settlement agreement between the Airport and Phoenix. Under the terms of the agreement briefly described by the district court, the Airport admitted liability to Phoenix and liquidated its damages and, in return, gave Phoenix a share of any

recovery the Airport received in its ongoing litigation against KBR. (A 4). The Airport and Phoenix agreed to cooperate in the Airport's litigation, and the Airport also agreed to use Phoenix's attorneys at Phoenix's expense. (A 4). The agreement provided that each party would retain ownership and control of its respective claims and could settle their claims independently. (A 4).

Before trial, the Airport moved in limine to exclude evidence of Phoenix's settlement offer and the Airport-Phoenix settlement agreement itself. (A 4). The trial court granted the motion as to the settlement offer but permitted disclosure of the settlement agreement to the jury. (A 4). According to the district court opinion, KBR repeatedly referred to the settlement agreement during trial to discredit the Airport's case and bolster its own counterclaim. (A 4).

The jury returned verdicts for KBR on the Airport's breach of contract and negligence claims and ruled for KBR on its counterclaim for the amount of the unpaid invoices. (A 5). After the trial court denied the Airport's motion for new trial, the Airport appealed to the District Court of Appeal, First District.

Finding that the trial court improperly allowed disclosure of the settlement agreement to the jury, the district court reversed the final judgment and remanded for new trial. (A 10). Citing section 46.015(3), Florida Statutes (2012),¹ and

¹ Section 46.015(3), Florida Statutes, provides: "The fact that a written release or covenant not to sue exists or the fact that any person has been dismissed because of such release or covenant not to sue shall not be made known to the jury."

Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078 (Fla. 2009), the district court determined that “[t]he unambiguous language of the statute admits no exceptions, and violation of the prohibition is reversible error.” (A 7) (quoting Holmes v. Area Glass, Inc., 117 So. 3d 492, 494 (Fla. 1st DCA 2013)). The district court felt constrained to follow Saleeby by finding that decision and the present case involve the “same basic scenario.” (A 8). Distinguishing Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993), the district court reasoned that after Saleeby, “Florida law has simply removed discretion from trial courts to permit the disclosure of settlement agreements under the circumstances presented here.” (A 9).

SUMMARY OF ARGUMENT

Jurisdictional conflict is created when the district court misapplies this Court’s precedents. The district court in this case misapplied this Court’s decisions in Dosdourian and Saleeby by determining that Saleeby rather than Dosdourian was controlling, concluding that Saleeby and this case involve the “same basic scenario.” Saleeby, however, involved an ordinary settlement agreement where the settling party was dismissed from the action and retained no financial interest in the continuing litigation. On the other hand, the settling party in this case, Phoenix, exerted control over the Airport’s litigation after settlement by retaining a financial stake in the outcome and requiring the Airport to use Phoenix’s attorneys.

The district court decision also conflicts with the Second District’s post-Saleeby decision in Packaging Corp. of Am. v. DeRycke, 49 So. 3d 286 (Fla. 2d DCA 2010), where the court held that a conditional settlement agreement which limited a defendant’s exposure in return for his continued participation in the litigation was akin to a Mary Carter agreement and therefore was admissible in evidence under Dosdourian.

ARGUMENT

I. The district court decision expressly and directly conflicts with this Court’s decisions in Dosdourian and Saleeby and the Second District’s decision in DeRycke.

A. The district court decision conflicts with Dosdourian and Saleeby.

The district court held that the Airport-Phoenix settlement agreement was inadmissible based on this Court’s decision in Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078 (Fla. 2009), which the district court found involved the “same basic scenario” as this case. (A 8). Petitioner suggests, however, that the district court misconstrued Saleeby and misapplied the decision to the facts of this case because Saleeby and this case do not involve the “same basic scenario.”

The facts in Saleeby show that Albert Saleeby was injured on a construction site when roofing trusses collapsed on him. He subsequently sued Rocky Elson Construction, Inc., the truss installer, and A-1 Roof Trusses Ltd., the truss manufacturer. During discovery, John Herring, A-1’s president, gave his

deposition and opined at that time that the accident was caused by Elson's faulty installation of the trusses. After Herring was deposed, A-1 settled with Saleeby and was dismissed from the action. When Saleeby subsequently called Herring as a witness at trial, Herring gave the same opinion he expressed during his earlier discovery deposition. The trial court allowed Elson to impeach Herring on cross-examination with evidence of his company's prior status as a party and A-1's settlement with Saleeby. The Fourth District affirmed. See Saleeby v. Rocky Elson Constr., Inc., 965 So. 2d 211, 216 (Fla. 4th DCA 2007).

This Court quashed the Fourth District decision and held that "the plain language of sections 768.041(3)² and 90.408 expressly prohibits the admission at trial of evidence of settlement and that a defendant has been dismissed from the suit." Saleeby, 3 So. 3d at 1086 (footnote added). In reaching this conclusion, the Court distinguished Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993), where this Court prospectively declared Mary Carter settlement agreements invalid and reaffirmed that such agreements and those akin to them are admissible in evidence because they "tend to mislead judges and juries and border on collusion." Dosdourian, 624 So. 2d at 243.

Although the Airport-Phoenix settlement agreement described in the district court opinion was not a true Mary Carter agreement, it includes two provisions

² Section 768.041(3), Florida Statutes, is the tort action counterpart to section 46.015(3), Florida Statutes.

which create the same “sort of ‘charade’ . . . that alarmed the court in Dosdourian.” (A 8). First, the settling party, Phoenix, retained a financial stake in the Airport’s post-settlement claims against KBR that were presented to the jury. (A 4). This provision is typical of proscribed Mary Carter agreements. See Dosdourian, 624 So. 2d at 244 (“By virtue of a Mary Carter agreement, settling defendants often acquire a substantial financial interest in a trial’s outcome should the jury rule favorably for the plaintiff.”). In Saleeby, although the settling party’s president held a financial stake in the litigation when he gave his pretrial deposition, he no longer held that financial stake when he testified at trial before the jury.³

Second, the Dosdourian court extended its holding to “any agreement which requires the settling defendant to remain in the litigation, regardless of whether there is a specified financial incentive to do so.” Id. at 246. In this case, although Phoenix was dismissed as a party after settling with the Airport, it “remained in the litigation” and continued to participate as a de facto party because it exerted

³ Although Herring’s company no longer held a financial stake in the litigation after settling with Saleeby, the district court below stated that when Herring subsequently testified at trial, his “prior-defendant status conveyed ‘an obvious [and] intense motivation . . . to give testimony that was unfavorable to [the defendant].’” (A 9) (quoting Saleeby, 3 So. 3d at 1087 (Canady, J. dissenting)). The district court, however, took Justice Canady’s comments out of context. Justice Canady stated that “[a]t the time of his deposition testimony, Herring had an obvious motivation to give testimony assigning blame to a defendant other than A-1.” Id. (emphasis supplied).

influence over the Airport's litigation by retaining a financial stake in the outcome and requiring the Airport to use its lawyers.

Conflict jurisdiction is created when the district court misapplies Supreme Court precedent. See, e.g., Nordelo v. State, 93 So. 3d 178, 180 (Fla. 2012). By determining Saleeby rather than Dosdourian was controlling under the facts of this case, the district court misapplied both decisions creating jurisdictional conflict. Further, the misapplication of Supreme Court precedent that creates jurisdictional conflict “occurs when a court relies on a decision that involves a situation materially at variance with the one under review.” Advanced Chiropractic & Rehab. Ctr., Corp. v. United Auto. Ins. Co., No. SC13-153, 39 Fla. L. Weekly S360, S361 (Fla. May 29, 2014). In this case, the district relied on Saleeby to reverse the final judgment, erroneously concluding this case involves the “same basic scenario” as Saleeby. (A 8). Because Saleeby “involves a situation materially at variance with the one under review,” the district court misapplied Saleeby creating jurisdictional conflict.

B. The district court decision conflicts with DeRycke.

Citing Saleeby and section 46.015(3), Florida Statutes, the district court determined that “[t]he unambiguous language of the statute admits no exceptions, and violation of the prohibition is reversible error.” (A 7) (quoting Holmes v. Area Glass, Inc., 117 So. 3d 492, 494 (Fla. 1st DCA 2013)). This statement is derived

from Saleeby where this Court held under the facts of that case that neither sections 768.041(3) nor 90.408, Florida Statutes, “contain an implicit exception permitting such evidence to be used for impeachment purposes” Saleeby, 3 So. 3d at 1086. Nevertheless, the Second District’s post-Saleeby decision in Packaging Corp. of Am. v. DeRycke, 49 So. 3d 286 (Fla. 2d DCA 2010), followed Dosdourian rather than Saleeby to hold that a “conditional” settlement agreement was admissible in evidence. See DeRycke, 49 So. 3d at 292 (“As with the agreement in Dosdourian, the agreement between Mrs. DeRycke and Mr. Knight limits his exposure in return for his continued participation in the litigation and various concessions on liability and damages.”).

Contrary to the First District decision below, DeRycke indicates that settlement agreements of the type decried by the Dosdourian court remain admissible under Florida law even after Saleeby. See, e.g. State Farm Mut. Auto. Ins. Co. v. Thorne, 110 So. 3d 66, 73-74 (Fla. 2d DCA 2013) (following Dosdourian to hold that the trial court erred by failing to disclose a high-low settlement agreement to the jury). The district court decision therefore conflicts with DeRycke.

C. The district court decision has created uncertainty.

By holding that the settlement agreement in this case is inadmissible, the district court decision below has created uncertainty in this area of Florida law. On

the one hand, ordinary settlement agreements like the one reviewed in Saleeby clearly are not admissible in evidence for any purpose. On the other hand, settlement agreements like the ones considered in Dosdourian, DeRycke and Thorne which embody some characteristics typical of Mary Carter agreements are admissible in evidence. Accepting jurisdiction in this case will give the Court the opportunity to clarify which settlement agreements, if any, remain admissible in evidence after Saleeby, particularly those settlement agreements where, as here, the settling party, although dismissed from the action, retains a financial stake in the ongoing litigation.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction based on express and direct conflict of decisions. See Art. V, § 3(b)(3), Fla. Const.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the below-named attorneys for respondent by e-mail this 21st day of July, 2014.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a 14-point Times New Roman font in accordance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Louis K. Rosenbloum
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APPENDIX

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PANAMA CITY-BAY COUNTY
AIRPORT AND INDUSTRIAL
DISTRICT,

Appellant/Cross-Appellee, CASE NO. 1D12-4874

v.

KELLOGG BROWN & ROOT
SERVICES, INC.,

Appellee/Cross-Appellant.

Opinion filed June 18, 2014.

An appeal from the Circuit Court for Bay County.
James B. Fensom, Judge.

W. Robert Vezina, III, Bradley S. Copenhaver, and Megan S. Reynolds of Vezina, Lawrence, & Piscitelli, Tallahassee for Appellant.

David L. Mcgee of Beggs & Lane, and Louis K. Rosenbloum, Pensacola for Appellee.

ON APPELLEE/CROSS-APPELLANT'S MOTION
FOR REHEARING AND CERTIFICATION

We deny Appellee/Cross-Appellant's Motion for Rehearing and Certification. But for purposes of clarification, we withdraw our previous opinion filed on April 25, 2014, and substitute the following in its place.

OSTERHAUS, J.

This case arises from the construction of the new airport that opened in Panama City in 2010. After the airport was in operation, a stormwater retention pond had to be reconstructed at a cost of millions of additional dollars because improper-sized sand was installed in the pond. Legal claims multiplied between those with a hand in the project—the airport district, its construction management contractor, the pond’s designer, and the construction company—involving the pond and other drainage, grassing, and sodding work. And though much was settled short of trial, the Panama City-Bay County Airport and Industrial District (“Airport”) and construction management contractor Kellogg Brown & Root Services, Inc. (“KBR”), ultimately went to trial. KBR prevailed after assailing the Airport’s witnesses and case at trial on the basis of a settlement agreement the Airport had entered with the construction company. The Airport objected below to having its settlement agreement made known to the jury and now makes a convincing argument on appeal for reversal, remand, and a new trial because the agreement should not have been disclosed.

I.

In 2007, the Airport entered into contracts for the design, oversight, and construction of the Northwest Florida Beaches International Airport in Panama City. The Airport hired Atkins North America, Inc. (“Atkins”) to design plans and

specifications for construction of the “horizontal” works of the airport (site preparation, drainage, and paving); contracted with Appellee KBR to perform construction and program management and oversight services; and awarded the prime construction contract to Phoenix Construction Services, Inc. (“Phoenix”).

This appeal mainly involves the construction of a retention pond at the airport site. Plans called for the construction of “Pond C,” an approximately 50-acre stormwater pond that collected and treated water draining from over 1000 acres of the airport site. The pond’s ability to drain water, its permeability, was a critical performance metric dictated by long-standing Florida Department of Environmental Protection (“DEP”) regulations. DEP required that sands installed in the pond be certified as meeting a minimum grain size. But in the course of construction, noncompliant, small-sized sand was installed in the pond. For this reason, the pond had to be reconstructed at an additional cost of over \$5.5 million.

Claims and recriminations abounded regarding Pond C and other work at the site. Phoenix sued the Airport for breach of contract and Atkins for professional negligence. The Airport, seeking to recover the additional \$5.5 million from Phoenix, Atkins, and/or KBR, asserted counterclaims for breach of contract, bond, and indemnity against Phoenix; crossclaims for professional negligence, breach of contract, and indemnity against Atkins; and third-party indemnity, contract, and

negligence claims against KBR. In turn, KBR brought third-party counterclaims for indemnity and breach of contract against the Airport.

As the litigation progressed, the parties resolved a great deal short of trial. In January 2012, the Airport and Phoenix entered a settlement agreement fully releasing one another. Among other things, the Airport admitted liability and liquidated its damages to Phoenix in return for a share of any recovery from the continuing litigation. They also agreed to cooperate in the remaining litigation using a common law firm compensated by Phoenix in addition to the Airport's own counsel. But they clarified that each was to retain ownership and control of its own claims and could settle its claims independently. In fact, after the Airport and Phoenix settled, each also settled their claims with Atkins.

The only claims remaining by the time of trial were the Airport's third-party breach of contract and professional negligence claims against KBR; and KBR's third-party counterclaim for breach of contract and indemnity arising from unpaid invoices. Before trial, the Airport filed a motion in limine to exclude evidence of Phoenix's settlement offer and of the Airport-Phoenix settlement agreement itself. The trial court granted the motion as to the terms of the settlement offer, but allowed the settlement agreement to be disclosed to the jury. KBR made the settlement agreement known to the jury and referred to it repeatedly to discredit the Airport's case and to bolster its own counterclaims. The views KBR expressed at

trial were that the settlement agreement showed the Airport's case to be "not about the pursuit of truth [but] of money," and amounted to Phoenix "invest[ing] in a lawsuit."

The jury returned verdicts for KBR, both rejecting the Airport's breach of contract and negligence claims and ruling for KBR on its counterclaim and assessing damages at more than \$360,000, the amount of the unpaid invoices. The Airport moved for a new trial citing the improper disclosure of its settlement agreement (among other things); but its motion was denied. It then timely appealed, but did not appeal the judgment on KBR's crossclaims. KBR also cross-appealed.

II.

A.

As a threshold matter, we must address the mootness issue that KBR has raised which implicates this court's jurisdiction. KBR argues that the Airport's appeal is moot because it has failed to appeal the judgment on KBR's counterclaim. The essence of KBR's argument is that the jury *de facto* decided the Airport's direct claims by rejecting similar-sounding affirmative defenses that the Airport raised in defense of KBR's counterclaim.

It is true that "[a]n issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." Carlin v. State,

939 So. 2d 245, 247 (Fla. 1st DCA 2006). But, here, we find little merit to KBR's mootness argument because the jury's consideration involved only whether the Airport's affirmative defenses barred KBR from recovering on particular invoices. This disposition did not, however, implicate the merits of the Airport's much broader breach of contract and negligence claims. In fact, the trial court specifically instructed the jury to separately consider the Airport's claims from KBR's counterclaim. And so, the jury's ruling that certain invoices should be paid, did not preclude the Airport from prevailing on its separate claims.

B.

The Airport's main argument is that the trial court committed reversible error by allowing KBR to disclose its settlement agreement with Phoenix to the jury, which it then used to discredit the Airport's case.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. Hendricks v. State, 34 So. 3d 819, 822 (Fla. 1st DCA 2010). Its discretion, however, "is limited by the evidence code and the applicable case law, and its interpretation of those authorities is subject to de novo review." Id. Where a settlement agreement is involved, the law is particularly clear: "The fact that a written release or covenant not to sue exists or the fact that any person has been dismissed because of such release or covenant not to sue *shall not be made known* to the jury." § 46.015(3), Fla. Stat. (2012) (emphasis added); see also id.

§ 768.041(3) (applying the same prohibition to tort claims). Moreover, this Court has characterized the law in this area in absolute terms: “The unambiguous language of the statute admits no exceptions, and violation of the prohibition is reversible error.” Holmes v. Area Glass, Inc., 117 So. 3d 492, 494 (Fla. 1st DCA 2013) (citing Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1080 (Fla. 2009)). We emphasized:

Even a reference to settlement by counsel during voir dire or arguments necessitates a new trial. In other words, disclosure of the fact of settlement or dismissal is prohibited regardless of whether it is presented to the jury through evidence or through some other means.

Id. at 494–95 (citations omitted); see also Saleeby, 3 So. 3d at 1085; Morgan v. Decker, 23 So. 3d 201 (Fla. 1st DCA 2009).

In this case, KBR argues that the unambiguous law doesn’t apply because the Airport-Phoenix settlement agreement constitutes a “Mary Carter-style” agreement. In Dosdourian v. Carsten, the Florida Supreme Court permitted disclosure of a Mary Carter-style settlement agreement—one in which a party plaintiff and party defendant agreed to work together secretly at trial to the detriment of a nonsettling defendant (see Booth v. Mary Carter Paint Co., 202 So. 2d 8, 11 (Fla. 2d DCA 1967))—because it viewed such agreements as antithetical to the trial process. 624 So. 2d 241, 244 (Fla. 1993). It viewed these sorts of agreements as fostering “misrepresentations to the court and to the jury in order to maintain the charade of an adversarial relationship.” Id. To eliminate their “sinister

influence” and the “sham of adversity” they presented, the court outlawed the use of “any agreement which requires the settling defendant to remain in the litigation, regardless of whether there is a specified financial incentive to do so.” Id. at 246.

Here, KBR claims that this case too involves a prohibited Mary Carter-style agreement which was rightly disclosed to the jury. The trial court considered the issue below and found that the Airport-Phoenix settlement agreement did not constitute a Mary Carter-style agreement. And we agree with this conclusion. Unlike the agreement in Dosdourian, and real Mary Carter agreements, Phoenix did *not* agree to remain a party to the trial below; and it did not so remain. Because Phoenix wasn’t a party, the trial in this case did not present to the jury the sort of “charade” or “sham of adversity” that alarmed the court in Dosdourian. Rather, the only parties to the trial in this case—the Airport and KBR—were truly adverse.

Even though the trial court did not find the Airport-Phoenix settlement agreement to constitute a Mary Carter agreement, it nonetheless permitted its disclosure to the jury. What concerned the trial court were the agreement’s cooperation provisions and Phoenix’s potential to recover if the Airport’s case succeeded, which the court considered impediments to the jury’s ability to assess the credibility of the Airport’s witnesses. The Florida Supreme Court faced this same basic scenario in Saleeby. In Saleeby, the plaintiff settled with one of the defendants with a financial stake in the case, whose president subsequently

testified in support of the plaintiff's case at trial and whose prior-defendant status conveyed "an obvious [and] intense motivation . . . to give testimony that was unfavorable to [the defendant]." 3 So. 3d at 1087 (Canady, J. dissenting). As in this case, the remaining defendant in the case cited Dosdourian and argued that the settlement agreement should be admitted to impeach the witness and demonstrate bias. But the Supreme Court disagreed, stating:

[T]he plain language of sections 768.041(3) and 90.408 expressly prohibits the admission at trial of evidence of settlement and that a defendant has been dismissed from the suit. These statutes do not contain an implicit exception permitting such evidence to be used for impeachment purposes, and the district court erroneously relied on our opinion in Dosdourian in finding one.

Id. at 1086. See also Holmes, 117 So. 3d at 494–95; Morgan, 23 So. 3d 201.

Guided by Saleeby, we likewise cannot construe Dosdourian as validating the settlement agreement's disclosure in this case. Florida law has simply removed discretion from trial courts to permit the disclosure of settlement agreements under the circumstances presented here. Because the trial court improperly allowed the Airport-Phoenix settlement agreement to be made known to the jury, a new trial is warranted.¹

¹ Because a new trial is necessary, we need not address the Airport's other claim that the trial court improperly excluded a key witness from the previous trial.

C.

Finally, KBR's cross-appeal argues that the Airport's complaint must be dismissed altogether because the Airport-Phoenix settlement agreement violated the anti-assignment clause in KBR's contract with the Airport. Specifically, KBR argues that the Airport improperly assigned the KBR-Airport contract by relinquishing control of its legal claims and part of the potential recovery to Phoenix. But, like the trial court, we think the very terms of the Airport and Phoenix's settlement belie KBR's assignment argument. The Airport's agreement with Phoenix states clearly that: "The [Airport] does not intend by the Agreement to assign any right, claim or interest to Phoenix in [Airport's] Third Party Claims or under the [Airport's contract] with . . . KBR." Furthermore, as the trial court noted below, the Airport remains free to settle any of its claims independently and without Phoenix's approval. We thus affirm the trial court's summary judgment order on the assignment issue.

III.

For the foregoing reasons, the final judgment is vacated, the trial court's order denying the Airport's motion for new trial is reversed, and this cause is remanded for a new trial. We affirm, however, the trial court's summary judgment order on the assignment issue raised by the cross-appeal.

AFFIRMED in part; REVERSED in part; and REMANDED for a new trial.

ROBERTS and WETHERELL, JJ., CONCUR.