

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 FIRST DISTRICT COURT OF APPEAL
L.T. CASE NO. 1D12-4874

RESPONDENT'S JURISDICTIONAL ANSWER BRIEF

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STATEMENT OF CASE AND FACTS

This case arises from disputes between multiple parties involved in construction of an airport – Respondent Panama City-Bay County Airport and Industrial District; construction manager Petitioner Kellogg Brown & Root Services, Inc. (“KBR”); project designer Atkins North America, Inc.; and prime contractor Phoenix Construction Services, Inc. (Op. 2-3) The Airport brought claims against KBR, Atkins, and Phoenix; KBR brought claims against the Airport; and Phoenix brought claims against the Airport and Atkins. (Op. 3) No claims were brought between KBR and Phoenix. (Op. 3) Many claims were settled, with only the claims between the Airport and KBR going to trial. (Op. 3)

KBR prevailed at trial after assailing the Airport’s witnesses and case on the basis of the settlement agreement the Airport entered with Phoenix. (Op. 2) In that agreement, the Airport and Phoenix fully released one another. (Op. 4) The Airport admitted liability and liquidated its damages to Phoenix in return for a share of any recovery by the Airport from KBR or Atkins. (Op. 4) They also agreed to cooperate in the continuing litigation, using a common law firm compensated by Phoenix in addition to the Airport using its existing counsel. (Op. 4) The agreement clarified that each was to retain ownership and control of its own claims and could settle its claims independently. (Op. 4) In fact, after the

Airport and Phoenix settled with one another, each also settled its claims against Atkins. (Op. 4)

Before trial, the Airport filed a motion in limine to exclude evidence of the settlement agreement, which the trial court denied. (Op. 4) At trial, the court admitted the settlement agreement over the Airport's objections. (Op. 2) Citing *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993), KBR had argued that the agreement should be admitted to impeach a witness who was a settling defendant and demonstrate the witness's bias. (Op. 8-9) Although the trial court rejected KBR's argument that the settlement agreement was a Mary Carter-type agreement requiring disclosure to the jury, the court admitted the agreement because the court was concerned about the agreement's cooperation provisions and Phoenix's potential to recover if the Airport succeeded at trial. (Op. 8) The trial court reasoned that the jury should consider these factors when assessing the credibility of the Airport's witnesses. (Op. 8)

KBR repeatedly referred to the settlement agreement during trial to discredit the Airport's case and bolster KBR's counterclaims, trying the settlement along with the merits of the pled causes of action. (Op. 4) KBR told the jury that the settlement agreement showed the Airport's case was "not about the pursuit of truth [but] of money" and amounted to Phoenix "invest[ing] in a lawsuit." (Op. 4-5) After the verdict for KBR was returned, the Airport moved for a new trial based on

the improper disclosure of the settlement agreement, among other things. (Op. 5)

The trial court denied the motion, and the Airport appealed. (Op. 5)

Guided by *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009), the First District Court of Appeal reversed and remanded for a new trial, holding that the trial court erred in admitting evidence of the settlement agreement. (Op. 9)

SUMMARY OF ARGUMENT

The First District did not misapply this Court's decisions in *Saleeby* or *Dosdourian*. The district court properly concluded that *Saleeby* – not *Dosdourian* – controls here, as the settling defendant's testimony in both cases potentially was biased due to financial interest. However, even *Dosdourian* does not permit admission of settlement evidence as KBR contends; evidence of settlement or that a defendant was dismissed is never admissible in Florida, even to show bias. The First District's decision does not conflict with *Packaging Corp. of America v. DeRycke*, 49 So. 3d 286 (Fla. 2d DCA 2010), as unlike the settling defendant here, the settling defendant in *DeRycke* was not dismissed from the case before trial. Finally, the First District's decision did not create uncertainty as this Court already has made abundantly clear that settlement evidence is always inadmissible.

ARGUMENT

I. The district court's decision does not conflict with *Saleeby*, *Dosdourian*, or *DeRycke*.

A. The district court's decision does not conflict with this Court's decisions in *Saleeby* or *Dosdourian*.

1. *Saleeby* controls here.

The First District properly applied *Saleeby* when it held that the trial court erred in admitting the settlement agreement. In *Saleeby*, the construction worker plaintiff sued a roof truss manufacturer (A-1) and the company that installed the trusses (Elson), seeking compensation for injuries the plaintiff suffered when the trusses collapsed on him at the job site. *See Saleeby*, 3 So. 3d at 1080. The plaintiff settled with and dismissed A-1 before trial, then during trial called A-1's president as a witness. *See id.* At trial, A-1's president gave the same testimony he gave in his deposition – testimony formulated before the settlement, when his company was still a defendant: that the collapse was due to Elson's faulty installation, not A-1's faulty manufacturing. *See id.* at 1080-81. Over the plaintiff's objection, the trial court permitted Elson, the nonsettling defendant, to impeach A-1's president with evidence that A-1 previously was a defendant and settled with the plaintiff. *Id.* at 1081. Although the plaintiff pointed out that sections 90.408 and 768.041, Florida Statutes, prohibit admission of settlement

evidence, the trial court reasoned that such evidence was admissible as it went to the witness's bias.¹ *See id.*

The Fourth District agreed with the trial court, particularly as the witness first opined as to the cause of the collapse when his company was a defendant and he had a financial interest in the case. *See id.* Acknowledging sections 90.408 and 768.041, the Fourth District nonetheless decreed that settlement evidence is admissible when it “goes to a witness’s motivation, interest, and position.” *Id.* (internal quotation marks and brackets omitted, citation omitted).

This Court expressly rejected the exception carved out by the Fourth District, *id.* at 1086, and, looking to the statutes’ plain language, undertook a statutory construction analysis, *id.* at 1082. Significantly, the Court refused to read into the statutes any exception to show bias or interest: “We hold that the unambiguous language of these statutes admits **no exceptions**” *Id.* at 1080 (emphasis added); *see also id.* at 1086 (“These statutes do not contain an implicit exception permitting [settlement] evidence to be used for impeachment purposes”).

The First District properly found that *Saleeby* controls here as the relevant facts here parallel those present in *Saleeby*. In both cases a defendant settled and was dismissed before trial. In both cases the settling defendant was called by the

¹ Section 46.015(3), Florida Statutes, virtually mirrors section 768.041 and was applied by the First District here.

plaintiff as a witness at trial. In both cases the settling witness's testimony was formulated when the witness potentially had a financial interest in the outcome of the case.

KBR attempts to distinguish *Saleeby* on the grounds that the *Saleeby* witness no longer held a financial stake in the case's outcome when he testified at trial. But KBR fails to mention that the *Saleeby* witness's trial testimony was consistent with the testimony he gave in his deposition – again, before the settlement, when his company was still a defendant. *See id.* at 1081; *id.* at 1087 (Canady, J., dissenting) (“At the time of his deposition testimony, [the witness] had an obvious motivation to give testimony assigning blame to a defendant other than [his company]. And he also had a clear motivation when testifying at the trial not to forswear his prior sworn deposition testimony.”). Thus, KBR's only basis for distinguishing *Saleeby* is unfounded.²

2. *Dosdourian* does not control here.

KBR also is mistaken in its contention that *Dosdourian*, 624 So. 2d at 241, controls. *Dosdourian* does not control here as the Airport-Phoenix settlement

² It is worth noting that if a defendant was deposed before trial, then settled and gave different testimony as a nonparty witness at trial, the witness could be impeached with the prior sworn testimony. There is no need to admit evidence of settlement and that the witness formerly was a defendant, which foils one purpose of settlements in multiparty litigation – particularly a complex construction case such as this one.

agreement was not a “Mary Carter” or Mary Carter-type agreement and Phoenix did not remain a party after settlement.

While Mary Carter agreements may come in many incarnations, all have in common that the settling defendant is not dismissed, but remains a party – possibly even being presented to the jury as a party at trial. That an agreement grants a settling defendant a financial interest is not what makes it a Mary Carter agreement. *See id.* at 246. Per *Dosdourian*, what makes an agreement a Mary Carter agreement is that the settling defendant remains a full-fledged party – for example, arguing the merits of motions and evidentiary objections and, at trial, selecting jurors and using peremptory challenges to aid the plaintiff in jury selection, calling and cross-examining witnesses, asking leading questions of the plaintiff’s witnesses, and arguing points of influence before the jury. *Id.* at 244.

These misleading actions are what this Court referred to when it declared that Mary Carter agreements undermine the judicial system. *See id.* at 247 (noting that such agreements threaten our justice system’s integrity because they deprive the jury of the knowledge that there is in fact no actual dispute between two of the three parties (citation omitted)). These actions also are what this Court referred to when it condemned the misrepresentations counsel necessarily makes at trial due to a Mary Carter agreement – to “maintain the charade of an adversarial relationship.” *See id.* at 244.

Thus, when this Court in *Saleeby* said “none of the concerns of fraud and unethical conduct propagated by Mary Carter agreements were present” in that case, the Court was referring to instances where the settling defendant remains in the case and is presented at trial as a party, allowing the settling defendant to participate in jury selection, witness examination and cross-examination, and substantive argument. *See Saleeby* 3 So. 3d at 1084; *see also id.* at 1087-88 (Canady, J., dissenting) (agreeing with majority that *Dosdourian* was distinguishable as *Saleeby*’s settling defendant was dismissed from case and did not participate at trial as defendant, but as witness). Here, none of those concerns are present, and *Saleeby* applies.

It is also worth noting that even *Dosdourian* does not mandate disclosing the settlement agreement; KBR’s reading of that decision as holding Mary Carter agreements to be admissible is fundamentally incorrect. Quite the contrary, in *Dosdourian* this Court held that any agreement entered after August 26, 1993, that requires a settling defendant to remain in the litigation is void as against public policy. *Dosdourian*, 624 So. 2d at 246, 247-48. In no way did *Dosdourian* hold that such agreements were admissible as KBR maintains. The only reason the *Dosdourian* Court allowed the Mary Carter-type agreement at issue in that case to be disclosed to the jury was to avoid voiding an agreement that was legal when entered. *Id.* at 246. Years later, the *Saleeby* Court confirmed that its *Dosdourian*

decision did not support – much less mandate – admitting evidence of settlement, even to show bias. *See Saleeby*, 3 So. 3d at 104 (“[O]ur decision requiring admission of settlement evidence in *Dosdourian* in no way permits the evidence of settlement to be entered in this case.”). So even if Phoenix had remained a party through trial, the settlement agreement would not be admissible, even to show bias.

B. The district court’s decision does not conflict with the Second District’s decision in *DeRycke*.

The First District’s decision does not conflict with *DeRycke*, 49 So. 3d at 286, as *DeRycke* involved facts distinguishable from the facts here. In *DeRycke*, the settling defendant remained a party to the litigation and was not dismissed, while here the settling defendant was dismissed and fully released and in no way participated as a party at trial.

This is same reason this Court in *Saleeby* declared that the *Dosdourian* decision addressed an entirely different situation than that presented in *Saleeby*. *Saleeby*, 3 So. 3d at 1084 (“In the case on review, the settling defendant was dismissed from the case and did not continue to participate **as a defendant** in the case.”; *see also id.* at 1087 (Canady, J., dissenting) (“And the holding in *Dosdourian* provides no support for the admission of the settlement agreement. The basis for the decision in *Dosdourian* was the fact that the settling defendant had remained in the lawsuit.”). Here, the First District properly followed the factually similar *Saleeby*, and there is no conflict for this Court to review.

C. The district court’s decision did not create uncertainty.

The law on this issue is clear. In Florida, evidence of settlement or that a defendant was dismissed cannot be disclosed to a jury under any circumstances – KBR’s fundamentally incorrect interpretation of *Dosdourian* as allowing admission notwithstanding. The law unequivocally prohibits introduction of such evidence, even to show financial interest or other bias. *See* §§ 46.015(3), 90.408, Fla. Stat. (2011); *Saleeby* 3 So. 3d at 1086.

This Court has determined that public policy encouraging settlement trumps any evidence rules permitting evidence of bias or interest. *See Saleeby*, 3 So. 3d at 1083; *see also id.* at 1086-87 (Canady, J., dissenting). The Court has refused to read any exception into the statutes to show bias or interest, including the nonexistent exception that KBR contends is set forth in *Dosdourian*: “We hold that the unambiguous language of these statutes admits **no exceptions**” *Id.* at 1080 (majority op.) (emphasis added); *see also id.* at 1086. Despite KBR’s assertions, there is no need for the Court to “clarify” what the Court already has made abundantly clear.

CONCLUSION

For the reasons set forth above, this Court should decline to exercise jurisdiction. *See* Art. V, § 3(b)(3), Fla. Const.

CERTIFICATE OF SERVICE

I certify that the foregoing was served on this 8th day of August 2014 by electronic mail to:

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), I
certify that the font style and size in this brief is Times New Roman 14-point font.

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