

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

Albert Saleeby v. Rocky Elson Construction, Inc.

SC07-2252

>> OUR LAST CASE FOR TODAY IS
SALEEBY VERSUS ROCKY ELSON
CONSTRUCTION.

YOU MAY PROCEED.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

MY NAME IS BRETT POWELL.

I REPRESENT MR.^SALEEBY IN THE
CASE.

I LIKE TO RESERVE TWO MINUTES
FOR REBUTTAL TIME, PLEASE.

MR.^SALEEBY, BRINGS FOUR POINTS
TO BEAR TO THIS COURT.

FIRST OCCURRED MIDWAY THROUGH
TRIAL THE COURT REVERSED AGREED

ORDER AND ALLOWED EVIDENCE
INDICATING THAT A-1 ROOF

TRUSSES, FORMER DEFENDANT IN
THE CASE, HAD BEEN IN FACT A

DEFENDANT IN THE CASE AND PAID
MONEY IN SETTLEMENT OF

MR.^SALEEBY'S CAME CLAIM AND
DISMISSED FROM THE STATUTE.

IN DIRECT CONTRAVENTION OF
FLORIDA STATUTE 768.041 --

>> WAS BROUGHT OUT BY
EXAMINATION OF THIS COMPANY?

>> YOUR HONOR, SPECIFICALLY
WHAT OCCURRED HERE, WELL, WHAT
WAS BROUGHT OUT.

FOUR TIMES THE, DEFENSE COUNSEL
ASKED, "FOR INSTANCE,

QUESTION WAS I WILL WITH ASK IT
AGAIN EITHER YOU OR SOMEONE ON

YOUR BEHALF PAID THE PLAINTIFFS
MONEY TO SETTLE THIS LAWSUIT,

CORRECT?

AFTER GIVING YOUR DEPOSITION ON
TWO OCCASIONS OFFERING YOUR

OPINIONS IN THIS CASE EITHER

YOU OR SOMEONE ON YOUR BEHALF
SETTLED THIS LAWSUIT WITH

PLAINTIFF'S COUNSEL?"

SO FORTH.

"YOUR COMPANY OR SOMEONE ON YOUR

BEHALF PAID MONEY TO GET OUT OF THIS LAWSUIT?"

>> YOU HAD OBJECTED TO THIS LINE OF CROSS-EXAMINATION?

>> IN FACT, YOUR HONOR, WE HAD FILED A MOTION IN HIM ME, WHICH -- IN LIMINE WHICH IDENTIFIED. SECTION 768.041.

SECTION 90.408 OF THE EVIDENCE CODE AND CASE LAW AND IDENTIFIED, MR.^HERRING THE PRESIDENT OF A-1 ROOF TRUSSES POTENTIAL WITNESS IN THE CASE AND OBTAINED AN AGREED ORDER IN THE TRIAL COURT WHICH THE DEFENSE AGREED TO INDICATING THIS INFORMATION WOULD NOT BE DISCLOSED TO JURY.

>> DO YOU SEE A DIFFERENCE BETWEEN, FOCUS OF THE FOURTH DISTRICT OPINION WAS, THAT, WHEN HE GAVE THIS, MR.^, WHAT IS HIS --, MR.^HERRING GAVE HIS OPINION INITIALLY HE WAS A DEFENDANT IN THE CASE? IS THAT, DIFFERENT, AND ARE YOU OBJECTING TO THAT, THAT IS THAT HE PREVIOUSLY BEEN A DEFENDANT WHEN HE GAVE HIS OPINION VERSUS, THAT HE PAID MONEY TO SETTLE?

THAT HE AGREED TO ASSIST IN THE LAWSUIT?

IN OTHER WORDS, IS THERE HAVE IS DISTINCTION BETWEEN WHETHER THERE WAS SOMETHING PERMISSIBLE OR IS IT ALL OR NOTHING IN YOUR VIEW?

>> WELL, IT'S NOT ALL OR NOTHING, YOUR HONOR, BUT THERE ARE, YOU KNOW, EACH THING WOULD HAVE BEEN ERROR IN AND OF ITSELF.

>> I THINK THERE IS A BIG DIFFERENCE.

I DON'T KNOW IF THE FOURTH DISTRICT MADE THAT DISTINCTION BETWEEN CONTINUING TO SAY, I WILL ASK YOU AGAIN ABOUT SOMEONE ON YOUR BEHALF PAID THE PLAINTIFF'S MONEY TO SETTLE THIS LAWSUIT WHICH IS DIRECTLY IN CONTRAVENTION AS YOU SAID OF STATUTES, VERSUS, WHEN YOU FORMULATED AN OPINION IN THIS

CASE, YOU ARE A DEFENDANT.
NOW. I JUST SEE THOSE AS TWO
DIFFERENT TYPES OF
CROSS-EXAMINATIONS FOR TWO
DIFFERENT POTENTIALLY TYPES OF
REASONS.

>> BUT THE INFERENCE IS
IDENTICAL EITHER WAY.
IN EITHER CASE YOU'RE
IDENTIFYING THE INDIVIDUAL AS A
FORMER DEFENDANT IN THE CASE.
THERE IS ONLY ONE WAY TO BE
FORMER DEFENDANT.

YOU'RE --

>> WHEN YOU ARE OFFERING THE
GUY AS AN EXPERT.

>> RIGHT.

>> SHOULDN'T THE JURY
KNOW SOMETHING ABOUT WHEN HE
GAVE THAT OPINION ABOUT HIS
RELATIONSHIP THAT HE IS JUST
NOT OFFERING THIS OPINION?
I THINK THAT WAS WHAT THE
JUDGE, OUT OF THE GOODNESS OF
HIS HEART?

BECAUSE HE REALLY LEGITIMATELY
THOUGHT THAT THE, THAT THE
OTHER, THE DEFENDANT WAS,
RESPONSIBLE?

I MEAN THERE ARE, SOME, FROM A
COMMON SENSE POINT OF VIEW IT
DOES SEEM TO BE THE KIND OF
THING, FOR THE JURY TO HEAR
SOMETHING ABOUT, THAT HE IS
JUST NOT, WHEN HE GAVE THAT
OPINION, JUST, GIVING IT
BECAUSE HE, LIKE ANOTHER, HE IS
NOT PAID AS ON EXPERT BUT HE
WAS A DEFENDANT?

>> WHAT THE JURY KNOWS HE WAS
EXPERT WITNESS FOR THE
PLAINTIFF.

HE WAS CALLED --

>> BUT HE GAVE HIS OPINION WHEN
HE WAS BEING SUED BY THE
PLAINTIFF.

>> BUT THE JURY DOESN'T NEED TO
KNOW THAT ALTHOUGH NEED TO
KNOW --

>> BUT ISN'T THAT HIGHLY
RELEVANT TO SHOWING BIAS ON HIS
POINT?

>> YOUR HONOR --

>> IF HIS STATUS AS, A

DEFENDANT AT THE TIME HE IS
GIVING THE TESTIMONY OBVIOUSLY
GIVES HIM MOTIVATION TO GIVE
TESTIMONY THAT ABSOLVES HIS
COMPANY OF RESPONSIBILITY?

>> YES.

THAT'S TRUE, YOUR HONOR.

>> WELL, THEN DOESN'T SEEM LIKE
THE JURY OUGHT TO BE ABLE TO
KNOW THAT THE, THE TESTIMONY IS
COMING FROM SOMEONE WHO GAVE IT
IN A DEPOSITION AT A TIME WHEN
HE HAD SUCH A MOTIVATION?

>> IF YOU'RE ASKING ME IN THE
ABSENCE OF A STATUTE EXPLICITLY
STATING THIS INFORMATION MAY
NOT BE DISCLOSED TO THE JURY, I
WOULD STILL SAY NO.

>> OKAY. PUT THE STATUTE ASIDE.

>> OKAY.

>> IF WE DIDN'T HAVE THE
STATUTE YOU WOULD ADMIT THAT'S
HIGHLY RELEVANT TO SHOW BIAS?

>> IF WE DOESN'T DIDN'T HAVE
THE STATUTE I WOULD ADMIT UNDER
90.408, WHICH ALLOWS FOR THE
OCTOBER OF THE FOURTH DCA SAID
OF PRESENTING EVIDENCE OTHER
THAN TO DEMONSTRATE, THAT THE
LIABILITY LIES WITH THE
WITNESS, I WOULD STILL ARGUE TO
YOU THAT IT'S INAPPROPRIATE IN
THIS CASE BECAUSE AS ALL THE
CASE LAW HAS STATED, ONCE YOU
MAKE THAT DETERMINATION, ONCE
YOU PUT IN FRONT OF THE JURY
THAT THE WITNESS IS A FORMER
DEFENDANT, YOU CANNOT MAKE THAT
REFERENCE WITHOUT CREATING
INFERENCE IN THE JURY'S MIND
THAT'S WHERE THE LIABILITY LAY.

>> YOU HAVE 90.408 SHOULD BE NO
EVIDENCE OF OFFERED COMPROMISE.
WHEN YOU SAY THE STATUTE,
YOU'RE REALLY REFERRING TO
768. --

>> 041.

>> 041.3 THAT THE DEFENDANT WAS
DISMISSED SHALL NOT BE MADE
KNOWN.

>> SHALL NOT BE MADE KNOWN TO
THE JURY.

THERE IS NO ROOM FOR
INTERPRETATION ON THAT STATUTE.

THE STATUTE IS CLEAR ON ITS FACE AND STATUTE UNEQUIVOCALLY REQUIRES THAT THIS INFORMATION NOT BE DISCLOSED.

>> YOU SAY THAT THE LEGISLATIVE DETERMINATION BECAUSE THAT'S A LEGISLATIVE --

>> ABSOLUTELY.

>> THAT'S NOT -- YOU'RE ARGUMENT IS THAT THERE ISN'T, THERE IS NO DISCRETION INVOLVED, THAT IS AN ABSOLUTE UNCOMPROMISING MANDATE?

>> ABSOLUTELY.

THE STATUTE IS CLEAR ON ITS FACE.

>> -- FOURTH DISTRICT'S VIEW OF YOUR ARGUMENT.

>> I'M SORRY SIR, I COULDN'T HEAR YOU.

>> WHAT IS THE FOURTH DISTRICT'S VIEW?

>> THE FOURTH DISTRICT DID NOT ADDRESS THE SECTION, 768.401.

WHAT THEY DID WAS APPLY THIS COURT'S --

>> TAKE A LOOK AT THAT. I'M SOMEWHAT TROUBLED APPLYING THAT AUTHORITY UNDER THESE CIRCUMSTANCES.

CLEARLY, YOU CAN'T DECEIVE A JURY INTO THINKING THAT, A PARTY IS A PARTY WHEN THEY'RE NOT A PARTY.

THAT'S REALLY THE EVIL THAT IS CORRECTED THERE.

>> EXACTLY.

>> MY CONCERN HERE, I THINK YOU'RE RIGHT IF IT'S A WITNESS, A FACT WITNESS IN A CASE, I'M TROUBLED BY THE EXPERT WITNESS. THE PLAINTIFF MADE THE DECISION HERE TO USE THIS PERSON AS AN EXPERT.

>> YES.

>> NOT AS A FACT WITNESS IN THE CASE.

DOES THE STATUTE STILL APPLY WHEN A PLAINTIFF GOES OUT AND HIRES, OR, OBTAINS OR TRIES TO USE A WITNESS AS AN EXPERT WITNESS?

THAT TO ME IS A DIFFERENT

CATEGORY THAN JUST A FACT
WITNESS.

>> WELL, THERE ARE TWO POINTS
ON THAT, YOUR HONOR.

FIRST OF ALL THE REASON FOR
CALLING MR. HERRING, IN THIS
CASE, IS THAT AS AN EXPERT, HE
WAS UNPARALLELED.

HE HAD 20 YEARS EXPERIENCE IN
THE BUSINESS.

HE, HAD BEEN INVOLVED WITH THE
NATIONAL TRUSS ASSOCIATION.

HE TAUGHT ON THESE ISSUES.

>> THAT DOESN'T GO, THAT
DOESN'T GO TO THE ISSUE WE'RE
TALKING ABOUT.

HE COULD BE THE GREATEST EXPERT
IN THE WORLD.

>> YEAH.

>> YOU HAVE THE CHOICE OF WHICH
EXPERT YOU SELECT.

>> RIGHT, YOU DO, CERTAINLY.
SO THE QUESTION IS, WHY CALL
HIM AS AN EXPERT?

THAT --

>> THEY CALL HIM AS EXPERT
EXPECT TO NOT LET ANYONE KNOW
ABOUT HIS BACKGROUND OR
CONNECTION TO REALITY.

>> HE WAS IDENTIFIED,
PREVIOUSLY AS, A-1 ROOF TRUSSES
AS A COMPANY THAT BUILT THESE
TRUSSES AT ISSUE.

>> BUT IT SEEMS TO ME THAT'S
THE VERY PROBLEM.

AND OF WHAT THIS COURT WAS
TALKING ABOUT IN MARY CARTER
AGREEMENTS CASE, WE ARE NOT
GOING TO PERMIT THESE CASES TO
BE TRIED IN A FICTION.

THE JURY HAS A RIGHT TO HAVE
KNOW THE REALITY OF WHO IS ON
FIRST, IN THESE CASES.

AND, SO, WHEN THE YOU MAKE THE
DECISION TO USE THIS PERSON AS
AN EXPERT, THEN IT SEEMS TO ME
WOULD BE TOTALLY AGAINST THAT
PHILOSOPHY IF THEN YOU CAN HIDE
BEHIND A STATUTE SAY WE'RE NOT
GOING TO TELL THE JURY THE REAL
FACTS OF THIS GUY.

>> YOUR HONOR --

>> WITH DUE RESPECT THE
QUESTION I THINK, THE QUESTION

YOU'RE BOTH GETTING AT IS, WHY CALL THIS EXPERT AND WHAT HAPPENS WHEN YOU DO?

WELL, THE ANSWER -- THE QUESTION I WOULD ASK, WHY NOT CALL THIS EXPERT?

THE REASON WOULD BE THAT YOU'RE CONCERNED THAT THE JURY WOULD BE INFORMED THAT HE WAS A FORMER DEFENDANT IN THE CASE. THE STATUTE ABSOLUTELY CONTROLS IN THIS ISSUE.

AND, THE AGREED ORDER IN, I THINK THIS IS VERY IMPORTANT. THE AGREED ORDER ENTERED BY THE TRIAL COURT, AGREED BY THE DEFENSE THAT THIS INFORMATION WOULD NOT COME OUT, KNOWING FULL WELL THAT MR. HERRING WAS GOING TO BE A WITNESS IN THE CASE.

>> THAT IS DIFFERENT -- YOU'RE SAYING THAT THE PLAINTIFF WAS BLINDSIDED.

>> ABSOLUTELY THE PLAINTIFF WAS BLINDSIDED.

>> NOW YOU'RE GETTING IN SOMEBODY, I KNOW YOU HAVE A LOT OF ISSUES TO BRING UP HERE, BUT WE'RE HERE BECAUSE OF THE QUESTION OF WHETHER THERE IS A CONFLICT WITH THE THIRD DISTRICT ON A HARD AND FAST RULE.

AND WHAT JUSTICE LEWIS HAS ASKED YOU IS, THAT ONCE, YOU MAY SAY NO, WE GOT BLINDSIDED INTO IT, WITH YOU IF YOU MAKE AFFIRMATIVE DIVISION TO CALL SOMEBODY AS A WITNESS, AND THAT WITNESS, HAD ALREADY OFFERED HIS OPINION AT A TIME HE WAS A DEFENDANT, DOESN'T THAT THEN TAKE IT OUTSIDE OF THE STATUTE'S PROHIBITION?

>> YOUR HONOR, THERE WERE PLENTY OF REASONABLE GROUNDS UPON WHICH MR. HERRING COULD HAVE BEEN CROSS-EXAMINED. THERE WERE, THEY COULD HAVE BROUGHT OUT THE FACT HE IN FACT WAS EMPLOYED BY A-1 ROOF TRUSSES.

THAT WAS KNOWN TO THE JURY

AHEAD OF TIME.

HE COULD HAVE BROUGHT OUT THE FACT THAT HE HAD BEEN AN EXPERT, OR THAT HE HAD BEEN INVOLVED IN THE TRUSS CONSTRUCTION INDUSTRY FOR 20 YEARS.

THAT IS FERTILE GROUNDS.

>> THAT IS NOT BIAS.

THIS IS THE THING, YOU DON'T SEEM TO WANT TO DISTINGUISH BETWEEN, YOU WERE A DEFENDANT, WHICH COULD HAVE MEANT HE, THEY JUST RESOLVED IT BECAUSE THERE WAS NO LIABILITY AND THESE REPEAT THE STATEMENTS THAT MONEY WAS PAID.

AND YOU SAID TO ME, NO, THEY'RE BOTH A PROBLEM.

I'M GIVING YOU AT LEAST, YOU KNOW, A DISTINCTION BETWEEN SAYING, YOU WERE A DEFENDANT, WEREN'T YOU, VERSUS, AND YOUR COMPANY PAID MONEY TO GET OUT OF THIS CASE WHICH IS CLEARLY, TO ME, IT GOES WAY BEYOND WHAT WOULD BE PROPER.

BUT YOU SEEM TO GO, NO, YOU CAN'T EVEN ASK WHETHER HE WAS A DEFENDANT WHEN HE MADE THESE STATEMENTS.

>> YOUR HONOR, WITH DUE RESPECT I DON'T SAY THAT THE THIRD DCA SAYS THAT.

IN THE CASE OF CITY OF CORAL GABLES VERSUS JORDAN, THE QUESTION AS, ASKED, ALL THE CLAIMS HAVE BEEN SETTLED BY THE CITY OF CORAL GABLES WITHOUT ANY REFERENCE TO MONEY.

THE THIRD DCA SAID, QUOTE, 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.

>> THAT'S NOT WHAT I'VE SAID. WITH ALL DUE RESPECT TO THE THIRD DISTRICT, TO YOU, ME SAYING YOU HAD BEEN A DEFENDANT IN THIS CASE.

NOW, WHY THEY GOT OUT MAYBE THERE WAS A SUMMARY JUDGMENT AGAINST THEM.

THAT'S DIFFERENT THAN SAYING
THERE'S BEEN A SETTLEMENT.
I DIDN'T HEAR FROM WHAT YOU
SAID OF THE THIRD DISTRICT'S
OPINION THEY TALKED ABOUT
SOMEONE HAVING BEEN A
DEFENDANT.

YOU COULD HAVE SAID, WE DON'T
KNOW WHY HE WAS A DEFENDANT.
WHY HE IS NO LONGER A
DEFENDANT.

MAYBE THE JUDGE GRANTED SUMMARY
JUDGMENT IN HIS FAVOR.

MAYBE THEY WERE DISMISSED
WITHOUT PAYING A CENT.

>> WITH DUE RESPECT, YOUR HONOR
I THINK THE REASON WE'RE HAVING
THIS MISCOMMUNICATION THOSE
AREN'T THE QUESTIONS THAT WERE
ASKED.

THE QUESTION WASN'T WERE YOU A
DEFENDANT DEFENDANT IN THE
CASE? QUESTION WAS YOU OR
SOMEONE ON YOUR BEHALF PAID
MONEY TO GET OUT OF THIS
LAWSUIT.

THAT IS SPECIFICALLY CONTROLLED
BY THE STATUTE, 768.041.

>> LET ME SEE IF I CAN APPROACH
IT A DIFFERENT WAY AS FAR AS
WHAT YOU WOULD AGREE THAT THIS
WITNESS COULD BE CROSS-EXAMINED
ABOUT.

FOR INSTANCE, COULD THE WITNESS
BE ASKED, SINCE YOU ARE
ASSOCIATED WITH THIS TRUSS
COMPANY ISN'T IT TRUE YOUR
OPINION IS INFLUENCED BY THE
FACT IF IT WAS CONTRARY THAT
THE TRUSS COMPANY, COULD BE
HELD RESPONSIBLE.

>> ABSOLUTELY.

>> FOR THIS ACCIDENT?

>> ABSOLUTELY, YOUR HONOR.

>> WOULD YOU AGREE THAT WOULD
BE APPROPRIATE
CROSS-EXAMINATION?

>> NO QUESTION.

>> THAT IS GOING BACK TO
MOTIVATION THAT HIS CONNECTION
TO THE COMPANY, IN ESSENCE
GIVING TESTIMONY EXONERATING
THE COMPANY, IS OBVIOUSLY
INFLUENCED BY HIS CONNECTION,

AND, NOT WANTING HIS COMPANY TO BE HELD RESPONSIBLE.

>> SIR, YOU'VE BEEN HIRED, YOU'VE BEEN HIRED BY THE PLAINTIFF IN THIS CASE, IS THAT BE CORRECT?

YOU ACTUALLY OWN THE COMPANY OR PRESIDENT OF THE COMPANY THAT BUILT THESE PARTICULAR TRUSSES, CORRECT?

YOU'VE BEEN DOING THIS YOUR WHOLE LIFE, ISN'T THAT RIGHT? ALL THIS IS FERTILE GROUND FOR CROSS-EXAMINATION.

AS THE, THE CASE LAW MAKES CLEAR, THE ONE AREA YOU CAN'T GO TO IS, YOU WERE DISMISSED FROM THIS SUIT BECAUSE YOU PAID MONEY TO GET OUT.

>> YOU AGREE HIS CONNECTION WITH THE COMPANY, THE BIAS THAT GROWS OUT OF HIS CONNECTION WITH THE COMPANY, AND THE POTENTIAL FOR THE COMPANY BEING HELD RESPONSIBLE FOR THE ACCIDENT, BECAUSE OF THE POTENTIALLY DEFECTIVE TRUSSES, IS, ARE AREAS THAT COULD BE EXPLORED.

>> ALL OF THAT COULD HAVE BEEN BROUGHT OUT.

ONE AREA YOU COULDN'T GO TO IS THE ONE HE REPEATED OVER AND OVER AGAIN MAKING THAT RECOGNIZE YOU PAID MONEY TO GET OUT OF THE SUIT.

INFERENCE YOU PAID MONEY BECAUSE YOU'RE LIABLE, NOT ELSON CONSTRUCTION.

MAYBE INFERENCE THAT ELSON CAN'T BE LIABLE WE ALREADY HAVE THE LIABLE PARTY THAT PAID TO GET OUT OF THE LAWSUIT.

>> WHAT WAS THE AGREED LANGUAGE TO GET LIMITATION.

>> AGREED TO ORDER?

>> DID YOU KNOW THIS WAS IN THE AGREED ORDER --

>> YES, YOUR HONOR.

>> NOT TO GO INTO THIS AREA OF THE SETTLEMENT?

>> THAT IS ON PAGE OF 16 OF THE SUPPLEMENT THAT WAS SUBMITTED TO THE FOURTH DCA.

AND IT'S ALSO INCLUDED IN OUR SUPPLEMENT TOP THIS COURT. IT STATES, AN AGREED ORDER AT THE TOP.

THIS CAUSE HAVING COME BEFORE THE COURT UPON PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR SETTLEMENTS, SETTLEMENT AMOUNTS THAT A-1 ROOF TRUSSES OR TEKTONICA, INC. CORP HAD BEEN PREVIOUSLY DEFENDANTS IN THIS LITIGATION. UPON AGREEMENT OF THE PARTIES IT IS HEREBY ORDERED AND AJUDGED.

PLAINTIFFS MOTION TO EXCLUDE SETTLEMENTS, ET CETERA, PREVIOUSLY HAD BEEN DEFENDANTS IN THIS LITIGATION IS HEREBY GRANTED THERE SHALL BE NO DISCUSSION BY COUNSEL OR WITNESSES EITHER DIRECTLY OR INFERENTIALLY RELATED TO THESE MATTERS.

EACH PARTY SHALL BE RESPONSIBLE FOR ADVISING ITS WITNESSES OF THIS ORDER.

>> WHEN THE JUDGE ALLOWED THE QUESTIONING WAS THERE SOME DISCUSSION OR EXPLANATION EXPLANATION BY THE TRIAL COURT JUDGE AS TO.

>> WHY HE OR SHE WAS DEVIATING FROM THAT?

>> ABSOLUTELY, YOUR HONOR. THIS IS THE, THIS IS THE POINT THAT I WAS GETTING AT EARLIER IS THAT, WE OBTAINED THE AGREED ORDER AFTER HAVING FILED A MOTION IN LIMINE WHICH INDICATED THAT MR. HERRING WAS THE PRESIDENT OF THIS CORPORATION, AND WAS A POTENTIAL WITNESS IN THE CASE. AND CITING 768.041, 90.408 AND THE CASE LAW.

THERE WAS AGREED ORDER ON THAT BASIS THERE WOULD BE NO DISCLOSURE.

NEVERTHELESS, AFTER PLAINTIFF HERRING TESTIFIED, THE DEFENSE THEN ARGUED THAT WELL, SINCE HE TESTIFIED HE PUT HIS CREDIBILITY AT ISSUE.

THEY KNEW THIS WAS GOING TO HAPPEN FROM WHEN THE ORDER WAS FILED.

SO, THEY CAN'T SAY, WELL, CIRCUMSTANCES CHANGED AND NOW THEREFORE WE HAVE A RIGHT TO CROSS-EXAMINE HIM.

>> IN OTHER WORDS HE WAS DECLARED AS A WITNESS.

IT WAS KNOWN THAT HE WAS --

>> WELL AHEAD OF TIME.

>> FOR THE PLAINTIFF.

>> WELL AHEAD OF TIME -- I'M SORRY.

I DIDN'T MEAN TO STEP ON YOU.

WELL AHEAD OF TIME AND THE DEFENSE AGREED WE'RE STILL NOT GOING TO --

>> HE WAS LISTED BY YOU AS AN EXPERT AT THAT TIME?

>> HE WAS LISTED AS POTENTIAL WITNESS?

>> NO, SIR.

WAS HE LISTED AS EXPERT.

>> AS AN EXPERT?

I BELIEVE THAT'S CORRECT, YOUR HONOR.

>> THE REASON WHETHER THAT IS IMPORTANT OR NOT, I THOUGHT YOU MIGHT SAY HE WAS ALSO A FACT WITNESS.

HE WAS CALLED OUT TO EXAMINE THE ACCIDENT SITE AFTER THE COLLAPSE, WASN'T HE?

>> YES HE WAS.

>> SO HE COULD HAVE BEEN LISTED JUST AS A WITNESS.

SO, ARE YOU, REPRESENTING THAT HE WAS BOTH LISTED AS A WITNESS AND AN EXPERT WITNESS?

>> YES, YOUR HONOR, THAT'S CORRECT.

AND THERE WAS NO QUESTION THAT HE WAS BEING PRESENTED AS AN EXPERT WITNESS AT TRIAL.

HE WAS GIVING EXPERT OPINIONS OF THE THING.

>> YOU'RE SAYING IF YOU HAD KNOWN, IF YOU LOST THAT MOTION IN LIMINE THAT -- THIS SEEMS TO ME WE'RE GOING FAR AFIELD WHAT THE CONFLICT IS.

BUT YOU'RE AT LEAST SAYING THIS IS A REASON WHY WE

AFFIRMATIVELY CALLED HIM
BECAUSE WE BELIEVE THAT WE WERE
PROTECTED ON THAT ISSUE?

>> ABSOLUTELY.

>> YOU'RE NOT ARGUING IF THERE
IS CONFLICT WITHIN THE STATUTES
THEMSELVES, ARE YOU?

>> NO, YOUR HONOR.

JUST BETWEEN THE, BETWEEN THE
STATUTES THEMSELVES YOU MEAN --

>> YEAH, THERE ARE TWO DIFFERENT
STATUTES.

THIRD DCA ADDRESSED ONE
STATUTE.

THE FOURTH DCA ADDRESSED A
ENTIRELY DIFFERENT ONE, RIGHT?

>> YEAH, THAT'S CORRECT.

WE'RE NOT ARGUING THERE IS
CONFLICT BETWEEN.

90.408 AND 768 --

>> CAN THEY COEXIST?

>> WHAT?

>> CAN THEY COEXIST?

>> YEAH.

90.408 IS MUCH BROADER AND DEALS
WITH ISSUES NOT NECESSARILY
PRESENTED BY 768.

IT'S SPECIFIC AS TO THIS EXACT
TYPE OF EVIDENCE.

>> I'M HAVING TROUBLE
SEEING, DIFFICULT
TIME IN THE THIRD DCA ACTUAL
BIAS OR PREJUDICE THESE
WITNESSES MAY HAVE?

>> I'M SORRY?

>> IN THE ELLIS CASE AND OTHER
CASE, JORDAN CASE, I'M HAVING A
DIFFICULT TIME SEEING WHAT
THOSE WITNESSES POTENTIAL
WITNESS WERE?

>> IN ELLIS THE DISMISSED
WITNESS WAS DEFENDANT IN THE
SUIT.

HE WAS ANOTHER ONE OF DOCTORS
BEING SUED AT THE TIME.

>> WHAT WAS TERMS OF THAT
DISMISSAL?

>> I'M SORRY?

>> WHAT WAS THE TERMS OF THAT
DISMISSAL?

>> I BELIEVE HE SETTLED HIS
CLAIM YOUR HONOR, IF I'M NOT
MISTAKEN.

>> DIDN'T HE SETTLE HIS CLAIM

FOR AGREEMENT WAIVING FEES AND COSTS?

>> I BELIEVE THAT'S RIGHT.

>> HE SHOULDN'T HAVE BEEN IN THE SUIT TO START WITH, RIGHT?

>> WE DON'T KNOW THAT.

HE MAY HAVE --

>> THAT WOULD HAVE BEEN THE PLAINTIFFS TO DISMISS HIM ON THOSE TERMS?

>> COULD BE.

COULD BE.

>> I'M HAVING A DIFFICULT TIME SEEING THE CORRELATION OF FINANCIAL INTEREST OR BIAS OR PREJUDICE,

IN THAT CIRCUMSTANCE.

>> WITH DUE RESPECT, YOUR

HONOR, I DON'T THINK THE ANALYSIS IS PROPER AS TO WHAT THE INDIVIDUAL'S BIAS MAY HAVE BEEN WHO WAS TESTIFYING.

BUT THE IMPACT IT HAS ON THE JURY IS WHAT IS RELEVANT.

THE QUESTION WHEN YOU ASKED, WHEN YOU ASK A WITNESS ON THE STAND, YOU SETTLED MONEY TO GET OUT OF THIS CASE.

YOU WERE DISMISSED FROM THIS CASE BY PAYING MONEY TO THE PLAINTIFF.

YOU'RE TELLING THE JURY, THIS IS THE GUY THAT IS LIABLE FOR THIS MAN'S INJURY, NOT MY CLIENT.

THAT IS THE --

>> WHAT DOES ALL THAT HAVE TO DO WITH THE ULTIMATE DISPOSITIVE ISSUE HERE WHETHER THERE WAS SUBSTANTIAL --

>> I'M SORRY, YOUR HONOR?

>> ISN'T THE ULTIMATE DISPOSITIVE ISSUE HERE WHETHER THERE WAS A SUBSTANTIAL CERTAINTY OF INJURY? THAT IS YOUR OTHER POINT?

>> THAT IS ONE OF THE OTHER POINTS.

>> THAT'S WHAT IT ALL COMES DOWN TO, RIGHT?

>> NOT NECESSARILY, YOUR HONOR. WE WILL ARGUE, IF WE NEED TO ARGUE THAT THERE IS A, THE TRIAL COURT ERRED IN DIRECTING

A VERDICT --

>> IF YOU GET PAST THAT, IF YOU GET PAST THAT WHEN IT GETS TO THE JURY, THAT'S THE ULTIMATE QUESTION THEY HAVE GOT TO DETERMINE.

I'M HAVING TROUBLE SEEING HOW ALL OF THIS REALLY HAS A GREAT BEARING ON THAT DETERMINATION?

>> YOU'VE TAINTED THE JURY POOL.

YOU TAINTED THE JURY --

>> THIS WOULD NOT BE SUBJECT TO HARMLESS ERROR ANALYSIS IN ANY CIRCUMSTANCES.

>> ABSOLUTELY NOT.

>> AUTOMATIC, YOU TAINT.

>> YOU TAINTED JURY TELLING THEM THERE IS ANOTHER PARTY WHO ALREADY ADMITTED THEY'RE THE ONES WHO ARE ACTUALLY AT FAULT IN THIS PARTICULAR CASE AND NOT THE DEFENDANT'S THAT IS ON TRIAL.

WHETHER YOU LOOK AT MEANT NEGLIGENT STANDARD WHICH IS APPROPRIATE STANDARD BECAUSE THE TRIAL COURT SHOULD NOT HAVE DIRECTED A VERDICT GIVEN EVIDENCE IN THIS CASE OR LOOKING AT SUBSTANTIAL CERTAINTY STANDARD.

BECAUSE ONCE THE INFERENCE IS MADE TO THE JURY, THE JURY DOESN'T SEE EVEN NEGLIGENCE ANYMORE.

THE QUESTION EVEN AS TO NEGLIGENCE HAS BEEN TAINTED.

THE HIGHER STANDARD IS TO SUBSTANTIALLY CERTAIN.

THERE IS PLENTY OF EVIDENCE IN THE RECORD THAT THEY WERE SUBSTANTIALLY CERTAIN THAT CAUSED THIS INJURY BY THEIR RECKLESS INDIFFERENCE.

>> MR. ^POWELL, YOU HAVE GONE WELL BEYOND YOUR TIME, AND ALSO USED YOUR REBUTTAL TIME.

MAKE A STATEMENT TO SUM UP.

>> I APOLOGIZE, YOUR HONOR.

THE PETITION, ALBERT SALEEBY RESPECTFULLY REQUESTS THAT THIS COURT OVERRULE THE FOURTH DCA'S OPINION IN THIS CASE AND

REVERSE THIS CASE, REMAND IT FOR A FULL TRIAL ON ALL ISSUES, THANK YOU.

>> MISS ASHBY.

>> MAY IT PLEASE THE COURT.

MY NAME IS KIMBERLY ASHBY.

AND I REPRESENT THE RESPONDENT.

ROCKY ELSON CONSTRUCTION, INC.

>> MISS ASHBY, THIS STATUTE AND PEOPLE LITIGATING THESE KINDS OF CASE, TORT CASES FOR YEARS AND YEARS, KNOW THAT YOU CAN'T PUT IN EVIDENCE OF A SETTLEMENT INTO, INTO EVIDENCE.

DO YOU AGREE WITH THAT?

THAT PRINCIPLE OF LAW, STATUTE?

THE LEGISLATURE TOLD US THAT DOESN'T COME IN.

>> IF THERE ARE OTHER REASONS TO PUT IT IN --

>> WHAT DOES THE STATUTE SAY THAT, IF THERE AREN'T OTHER REASONS TO PUT IT IN?

>> IF IT'S RELEVANT TO ISSUES IN THE CASE --

>> THE STATUTE SAYS THAT?

>> IF YOU HAVE A CASE THAT IS ACTUALLY AN ENFORCEMENT OF AN A SETTLEMENT AGREEMENT IT WOULD BE RELEVANT IN THE CASE.

>> I AM TALKING ABOUT THE COURT CASE.

YOU AND I UNDERSTANDING IN A TORT CASE.

>> YES, SIR.

>> DOES THE STATUTE GIVE ANY EXCEPTIONS?

>> THE STATUTE WITHIN THE LANGUAGE AND TEXT OF THE STATUTE IT DOES NOT.

>> OKAY.

MY CONCERN IS, AND I'M CONFIDENT THAT THE LAW HAS BEEN, AND I HAVE DONE THESE CASES FOR 30 YEARS, THAT IF IT'S JUST A REGULAR WITNESS THAT CAN'T COME IN.

SO MY CONCERN IS, DOES THE EXPERT STATUS CHANGE THIS AND IF SO, WHY SO AND WHAT IS YOUR AUTHORITY FOR IT?

>> WE RELIED AT THE FOURTH DCA WE RELIED ON THE DOSDOURIAN BECAUSE DOSDOURIAN TOOK FROM

CONTEXT OF THOSE CASES AND OVERLAIDED PRINCIPLE EXPRESSED BY THIS COURT IN OCHOA, THAT TRIALS ARE SEARCH FOR THE TRUTH.

>> THAT IS NOT REALLY PRINCIPLE IN MY VIEW RESPECTFULLY. WHAT I'M SAYING IS YOU CAN'T FOOL THE JURY AND PRETEND SOMEBODY IS PARTY WHEN THEY'RE NOT.

THAT'S WHAT THE DOSDOURIAN CASE.

IF DOSDOURIAN DOES NOT APPLY, FRAUD ON JURY KIND OF THING WE PROTECT AGAINST, I THINK IT'S TOTALLY CORRECT, IS THERE ANOTHER CASE OR ANOTHER REASON AN EXPERT OUGHT TO BE TREATED DIFFERENTLY?

PEOPLE ARE GOING TO BE WITNESS, WHOEVER HAS BEEN INVOLVED IN A CASE, IT'S ABSURD TO THINK THAT THEY'RE NOT GOING TO BE WITNESSES BECAUSE THEY HAVE SOME KNOWLEDGE ABOUT IT.

THEY HAVE BEEN SUED BECAUSE OF IT.

SO IS THERE SOME OTHER AUTHORITY OR REASON THAT AN EXPERT OUGHT TO BE TREATED DIFFERENTLY THAN OTHER WITNESSES, FACT WITNESSES?

>> THERE IS NO OTHER FLORIDA CASE AS AUTHORITY BUT THERE ARE CERTAINLY OTHER REASONS.

>> WHAT ARE THOSE?

>> THE REASONS, AS BEEN EXPRESSED BY MEMBERS OF THE PANEL TODAY, WHEN YOU HAVE, DISTINCTION BETWEEN CALLING SOMEONE AS A FACT WITNESS, WE WOULD TOTALLY AGREE THAT A FACT WITNESSES COULDN'T SETTLE WITHOUT, SETTLEMENT COMING IN, THEN THE PLAINTIFF HAS A REAL HOBSON'S CHOICE WHO YOU'RE GOING TO CALL.

>> SO IN THIS CASE YOU DO AGREE IF THIS PERSON WERE NOT AN EXPERT STATUTE WOULD PRECLUDE THAT EVIDENCE?

>> ABSOLUTELY.

>> OKAY.

KEEP GOING, PLEASE.

>> YES, SIR.

WHEN THE PLAINTIFF ELECTED TO CALL MR. HERRING AS AN EXPERT WITNESS, EXPERT WITNESSES BY THEIR VERY NATURE ARE GIVING OPINION TESTIMONY, OPINION TESTIMONY BY ITS VERY NATURE IS SUBJECTIVE.

I CAN'T NECESSARILY EVER PROVE THROUGH EMPIRICAL DATA THAT YOUR OPINION IS WRONG AND FALSE BECAUSE IT'S YOUR OPINION. AND SO THE ONLY THING I CAN DO IS TO CHALLENGE YOUR OPINION THROUGH VARIOUS WAYS OF SHOWING BIAS.

>> GIVE US THE DYNAMICS WHAT HAPPENED HERE.

YOUR OPPONENT HAS ARGUED THAT THERE WAS AN AGREED UPON ORDER THAT THE FACT OF THE SETTLEMENT WOULD NOT COME INTO EVIDENCE. NOW, TAKE US THROUGH THAT.

>> YES, SIR.

>> TO WHAT HAPPENED AS TO OVERCOME THAT AGREED UPON ORDER, ACCORDING TO YOUR --

>> IF YOU LOOK AT THE PLAINTIFF'S MOTION IN LIMINE ON THIS ISSUE AND THE ORDER, NOWHERE IN EITHER OF THE MOTION OR THE ORDER DOES IT SAY EXPERT WITNESS.

IT TALKS ABOUT WITNESSES. AND THIS IS AN ORDER IN LIMINE ORDER YOU CAN WALK THROUGH AND --

>> HADN'T THIS WITNESS THOUGH ALREADY TESTIFIED BY DEPOSITION, GIVEN EXPERT OPINION TESTIMONY IN DEPOSITION?

WHEN THAT AGREED UPON ORDER WAS ENTERED?

>> I DON'T KNOW THAT THAT'S ACCURATE, YOUR HONOR --

>> PARDON?

>> I DON'T THINK THAT'S ACCURATE.

>> TELL ME WHAT IS ACCURATE. I'M ASKING YOU THE QUESTION BECAUSE THERE HAS BEEN REFERENCE, TO THE WITNESS

GIVING A DEPOSITION, DID THE DEPOSITION OCCUR BEFORE THE --

>> YES, SIR.

>> -- MOTION IN LIMINE?

>> YES, SIR.

>> DID HE TESTIFY DURING THE DEPOSITION AS AN EXPERT OR RENDER HIS OPINIONS?

>> TO THE EXTENT HE WAS ASKED AND ANSWERED THE QUESTION, WHAT DO YOU THINK CAUSED THE ACCIDENT?

THEN, YES, I WOULD AGREE WITH YOU THAT HE IS EXPRESSING OPINIONS ABOUT WHAT HE THOUGHT CAUSED THE ACCIDENT.

AFTER ALL THE FACT WITNESSES.

>> HE DID THERE AT THE DEPOSITION --

>> YES, SIR.

>> BEFORE THERE WAS THIS AGREED UPON ORDER, IS THAT CORRECT?

>> YES, SIR.

>> DO YOU KNOW HOW LONG BEFORE, OR WHAT THE SEQUENCE WAS EXACTLY?

>> I REALLY DON'T.

SEVERAL --

>> BUT IT WAS BEFORE.

>> ABSOLUTELY, RIGHT.

>> DID HE GIVE DIFFERENT TESTIMONY AT TRIAL, THEN HE GAVE IN HIS DEPOSITION?

>> SOMEWHAT BUT NOT, PROBABLY TO THE POINT THAT I THINK YOU'RE TRYING TO MAKE.

>> I HAVE A QUESTION.

YOU SAID THAT IF YOU WERE A FACT WITNESS THIS WOULD BE DIFFERENT BUT WITH AN EXPERT WITNESS YOU GOT TO GO TO OTHER, YOU KNOW, OTHER TYPES OF CROSS-EXAMINATION.

WELL, FIRST OF ALL RESPECTFULLY I DON'T AGREE WITH THAT.

THERE IS LOT OF THINGS CAN YOU CROSS-EXAMINE AN EXPERT ABOUT, ESPECIALLY THE BASIS OF HIS OR HER OPINION.

IN THIS SITUATION,

MR. HERRING WAS CALLED OUT TO EXAMINE THE ACCIDENT AFTER THE COLLAPSE.

IN TERMS OF, YES HE WAS GIVING

EXPERT TESTIMONY, BUT IN A WAY
WASN'T HE ALSO A FACT WITNESS
BECAUSE HE WAS, YOU KNOW, THAT
IS PRETTY, IT'S NOT, JUST LIKE,
SAYING I'M GOING TO FIND TRUSS
EXPERT IN THE UNITED STATES OR
THIS COUNTRY, I MEAN IN THIS
COUNTRY OR IN THE WORLD.
BUT WHEN YOU'VE GOT SOMETHING
UNIQUE, WHICH IS A WITNESS WHO
HAS COME OUT RIGHT AFTERWARDS,
AND EVERYONE KNEW AT THAT TIME,
THAT'S WHAT HE WAS TESTIFYING
TO.

SO I'M HAVING TROUBLE
UNDERSTAND HOW THE FACT THAT,
QUOTE, HE IS AN EXPERT WITNESS,
THEN, ALL OF SUDDEN GIVES US A
BASIS TO IGNORE THE LANGUAGE OF
768.041.3.

WHICH IS, THAT THE FACT THAT
THE DEFENDANT BEEN DISMISSED
SHALL NOT BE MADE TO THE JURY?
I'M JUST, HELP ME AGAIN WITH
HOW THOSE TWO THINGS GO
TOGETHER.

IT FEELS LIKE WE'RE MAKING THIS
UP AS WE'RE GOING ALONG RATHER
THAN TRYING TO STICK TO THE
STATUTE AND TO THE LAW?

>> WELL, IF I MAY, THIS GOES
EXACTLY TO THE REASON WHY IT'S
SO CRITICAL TO BE ABLE TO TELL
A JURY THAT THIS, THIS IS A
FORMER DEFENDANT IN THIS CASE
BECAUSE, MR. HERRING IS BEING
ASKED QUESTIONS AT TRIAL THAT
GO BEYOND WHAT HE WOULD HAVE
BEEN ABLE TO TESTIFY AS A FACT
WITNESS.

HE COMES IN AFTER THE FACT.
HE SAYS, WHEN YOU HAVE A TRUSS
FAILURE AND THE PIECES AND
PARTS ARE LAYING ON THE GROUND,
YOU DON'T KNOW WHAT CAUSED IT.
SO HE HAS TO MOVE INTO THE
REALM OF EXPERT WITNESS.
HERE IS WHAT I BELIEVE CAUSED
IT BASED ON MY BACKGROUND AND
MY EXPERIENCE IN THE TRUSS
MANUFACTURING INDUSTRY.
SO HE WOULD HAVE NOT BEEN
QUALIFIED OR COMPETENT TO
TESTIFY AS TO THOSE ITEMS WHICH

WENT TO THE CRUX OF THIS CASE.

>> BUT NOW, YOU HAVE FLIPPED BETWEEN THE FACT THAT HE WAS A DEFENDANT AT THE TIME HE GAVE HIS OPINION.

VERSUS, THAT, THEY PAID MONEY TO SETTLE THE CASE.

DO YOU SEE THAT ITSELF AS A DISTINCTION AND ISN'T THE FACT THAT IN THE CROSS-EXAMINATION, THERE WAS REPEATED QUESTIONS ABOUT YOU OR SOMEONE ON YOUR BEHALF SETTLED, PAY THE PLAINTIFFS MONEY IN ORDER TO GET OUT OF THE LAWSUIT?

TO ME THAT IS, NOW YOU'VE GONE FROM, ONE LEVEL, WHICH MAYBE YOU SAY LISTEN I SHOULD BE AT LEAST BE ABLE TO SAY HE IS A DEFENDANT WHEN HE MADE THESE COMMENTS, TO, YOU'RE PAYING MONEY TO SETTLE THE CASE, YOU AGREED TO ASSIST, ALL THESE OTHER THINGS THAT GO WAY BEYOND ANY LEGITIMATE INQUIRY UNDER THE STATUTES AND UNDER THE LAW. SO YOU MAKE A DISTINCTION BETWEEN MAYBE SOMEONE WENT TOO FAR IN THIS CASE AS FAR AS WHAT WAS BEING ASKED?

>> NO.

AND IF I MAY TELL YOU WHY. BECAUSE IF YOU'RE ALLOWED TO ASK OF AN EXPERT WITNESS, ISN'T IT TRUE, MR. HERRING, THAT YOU WERE A PARTY DEFENDANT TO THIS CASE AT THE TIME YOU RENDERED THIS OPINION?

ANSWER, YES.

END OF INQUIRY.

OF WHAT DOES THAT LEAVE THE JURY TO HAVE SURMISE?

HE IS OUT.

HE IS EXONERATED.

THAT IS --

>> BUT THE ADDITIONAL FACT OF THE PAYMENT OF MONEY WAS IS ADDED TO AND, --

[INAUDIBLE]

IF HE COULD EXPLAIN WHAT THAT HAS GOT TO DO WITH ANYTHING, TO SHOW BIAS?

I MEAN, WE COULD MAYBE ACCEPT OR, THE POINT ABOUT, THE FIRST

STEP OF THIS, HIS STATUS AS A PARTY DEFENDANT.

AND CIRCUMSTANCE THAT HE'S OUT BUT THE PAYMENT OF MONEY, THAT IS JUST, WHAT THAT'S GOT TO DO WITH ANYTHING?

>> HOW ELSE DO YOU --

>> HE HAS THE SAME BIAS WHETHER OR NOT HE PAID ANY MONEY.

IN FACT AT THE TIME HE IS TESTIFYING AT TRIAL, THE FACT HE SETTLED OUT HE HAS REALLY NO INTEREST IN WHAT IS GOING ON ANYMORE BECAUSE HE IS OFF THE HOOK ENTIRELY?

>> IF THE JURY IS LEFT TO ASSUME THAT HE WAS IN AND NOW HE'S OUT AND THERE IS NOTHING FURTHER TO THAT, THAT NOW HE'S OUT BECAUSE THERE WEREN'T ANY PROBLEMS OR DEFECTS WITH THE A-1 TRUSS.

AND THAT LEADS THEM TO BELIEVE, BECAUSE WE'VE GOT A SITUATION WHERE IT'S AN INSTALLATION OR IT'S A MANUFACTURING ISSUE AND THAT'S WHAT THE EXPERTS ARE SAYING --

>> HOLD THE THING.

NOW WHAT YOU'RE SAYING WHICH IS AT LEAST GETTING TO WHAT THE CRUX OF THIS IS, THE JURY NEEDED TO KNOW ABOUT A SETTLEMENT BECAUSE THEY COME SEE THEN THAT A-1 MUST HAVE THOUGHT THEY WERE LIABLE.

SO IF THAT IS THE CASE, SHOULDN'T THE SURE JURY KNOW HOW MUCH WAS PAID OR TEN MILLION DOLLARS?

THIS MAN WAS A PARAPLEGIC.

IF WE'RE GOING TO GET DOWN TO WHAT THE JURY NEEDED TO KNOW, TO DECIDE WHETHER SOMEONE ELSE WAS LIABLE WHICH IS PAID UNDER SETTLEMENT WHICH IS NOT ALLOWED TO COME IN UNDER FLORIDA LAW, IT COULD WOULD SEEM TO ME WE WOULD ALL KNOW WHAT HOW MUCH WAS PAID. IF HE PAID A SMALL AMOUNT, THEN THEY MUST HAVE THOUGHT THEY WERE VERY LIABLE. IF THEY PAID A LOT OF MONEY, MUST HAVE THOUGHT HE WAS REALLY

LIABLE.

WHEREAS ALL OF US WHO HAVE BEEN LAWYERS KNOW, WHEN YOU HAVE A PARAPLEGIC, AND HE IS A, HE, THERE IS MANUFACTURER, PAY MONEY BECAUSE THE CHANCE ON THE UPSIDE COULD BE, YOU KNOW, \$50 MILLION, AND SO IF YOU PAY 500 OR A MILLION, WHATEVER MIGHT HAVE BEEN PAID, IT'S A COMPROMISE.

THE JURY, YOU KNOW, CAN'T KNOW IT.

WOULD YOU SAY THAT THE AMOUNT OF THE SETTLEMENT SHOULD HAVE COME IN?

>> NO, YOUR HONOR.

>> SO ISN'T THE IMPLICATION, YOU PAID MONEY AND THE JURY'S THINKING, THERE, HOW MUCH MONEY DID THEY PAY?

SHOULDN'T WE FIND THAT OUT?

>> YOU'RE, THE CHALLENGE, THE INQUIRY IS OF AN EXPERT WITNESS AND THE POTENTIAL BIAS FOR THAT WITNESS'S OPINION.

>> WHAT ABOUT WHAT JUSTICE CANADY SAID?

AT THE TIME HE TESTIFIED HE HAD NO MORE INTEREST BECAUSE THEY WERE OUT?

>> IS, WHEN HE WAS OPINING, HE WAS FACING THE LIABILITY OF THE LAWSUIT.

>> THAT WAS BEFORE THE SETTLEMENT.

>> RIGHT.

>> WELL, IF YOU, MAYBE FREEZE IT IN TIME, AT THE TIME OF THE DEPOSITION AND SHOW THAT HE HAD A BIAS AT THAT POINT.

THEN YOU WANT TO ADD ONTO THAT BIAS SOME EVIDENCE OF BIAS ABOUT, I STILL DON'T SEE HOW THE FACT THAT HE PAID A SETTLEMENT SHOWS ANY BIAS. YOU WANT TO ADD THAT IN, SO JUST KIND OF HAVE IT ALL KIND OF STACKED UP THERE.

WHAT I HAVE TROUBLE UNDERSTANDING IS WHY, THE PAYMENT OF THE SETTLEMENT SHOWS BIAS ON THE PART OF THE TESTIFYING WITNESS?

>> BECAUSE IF YOU LEAVE IT WITH JUST, I WAS ONCE A DEFENDANT, NOW I'M NOT, OR I WAS ONCE A DEFENDANT, NOW I'VE BEEN DISMISSED, WE DON'T KNOW, -->> THERE ARE LOTS OF THINGS JURIES DON'T KNOW. IF YOU WANT TO GIVE THEM, YOU DON'T WANT TO GIVE THEM ALL THE INFORMATION.

YOU WANT TO GIVE THEM PART OF IT, BECAUSE YOU'VE ALREADY SAID YOU DON'T THINK THE AMOUNT SHOULD COME IN.

>> WELL --

>> WELL THE INFERENCES THEY WILL DRAW FROM THAT MAY BE TOTALLY UNJUSTIFIED.

THAT IS THE PROBLEM WITH IT.

>> I APOLOGIZE IF I MISLED THE COURT.

I WASN'T SUGGESTING THAT THE SETTLEMENT AMOUNT WOULDN'T EVER BE RELEVANT.

THIS WAS A CASE ON LIABILITY ONLY.

SO THAT'S ONE.

REASONS WHY IT WOULDN'T BE RELEVANT TO COME IN.

AND, THE INQUIRY, AND CHALLENGE OF THE BIAS OF AN EXPERT IS A DECISION HOW FAR DO YOU PUSH THAT?

IF I'VE ESTABLISHED THAT WHEN THIS OPINION WAS RENDERED, THAT THIS WITNESS, THIS EXPERT WITNESS, THAT HAS BEEN TENDERED BY THE PLAINTIFF HAD A REASON TO SAY WHAT HE SAID, WHICH WAS, WHICH IS, SHOWING THE BIAS, AND IN THE SUBJECTIVE OPINION, THAT'S, THAT'S WHAT THE GOAL IS THAT YOU'RE TRYING TO ACHIEVE.

>> WHICH BRINGS ME BACK TO, I WOULD LIKE TO GO BACK TO MY QUESTION.

>> YES, SIR.

>> -- INFERENCE --

[INAUDIBLE]

THAT WAS, THE CONTEXT IN WHICH THIS CAME.

>> YES, SIR.

>> AGREED UPON ORDER.

>> YES, SIR.

I WOULD REFER THE COURT TO THE TRANSCRIPT, STARTING AT PAGE 924.

WHEN THE MR.^HERRING WAS CALLED AS A WITNESS, IF YOU LOOK AT THE MOTION IN LIMINE AND THE ORDER, IT REFERS TO THE WITNESSES, IT DOESN'T REFER TO EXPERT WITNESSES.

IT CERTAINLY DOES REFERENCE -->> BUT THAT REFERENCE DOESN'T EXCLUDE EXPERT WITNESSES.

>> CORRECT.

>> IT JUST SAYS WITNESSES.

>> CORRECT.

>> AND THIS PERSON WAS IN FACT A WITNESS.

>> CORRECT.

BUT THE AT TIME, TRIAL COUNSEL, INDICATES DURING TRIAL AND SHOWS, HOW SURPRISED THEY WERE THAT THEY WERE THEN TRYING TO ELICIT EXPERT TESTIMONY FOR MR.^HERRING.

THEY ALREADY CALLED

MR.^GRUNDAHL AS AN EXPERT.

>> WAS THERE OBJECTION MADE TO HIM BEING AN EXPERT WITNESS.

>> YES.

AT PAGE --

>> OBVIOUSLY THE TRIAL JUDGE OVERRULED THAT OBJECTION.

>> YES.

AND THAT IS AT PAGE 925 THE OBJECTION WAS RAISED AS TO WAIT MINUTE, YOU'RE ABOUT TO CROSS THE PLAIN, CROSSING THE PLAIN INTO ASKING THE QUESTION OF MR.^HERRING AS A FACT WITNESS AND TRIAL COUNSEL SAID, IT'S MY UNDERSTANDING IN THE PRIOR RULINGS THAT MR.^HER SOMETHING BEING OFFERED AS A FACTUAL WITNESS AND THAT HE CAN GIVE OPINIONS AS TO WITH WHAT HE SAW WHEN HE WAS THERE, HOW THAT, HOW THAT, HOW THAT CAN BE CONVEYED TO THE JURY BUT THEY HAD STARTED DOWN A PATH TO AS A RESULT OF WHAT YOU SAW WHAT WOULD YOU SURPRISED, -- SURMISED AS WHAT IS YOUR OPINION AS TO THE CAUSES OF THE ACCIDENT?

THAT'S WHEN THE OBJECTION CAME.
AT THAT TIME-TRIAL COUNSEL FOR
THE PLAINTIFF SAID,
NOTWITHSTANDING FACT WE CALLED
MR.^GRUNDAHL, WE WANT TO CALL
MR.^HERRING AS WELL ON THESE
ISSUES, THE JUDGE OVERRULED THE
OBJECTION.

SO THE DIRECT PROCEEDED OF
MR.^HERRING DOWN A FULL COURSE
OF OPINIONS ON WHAT HE HAD TO
SAY ABOUT WHY THE TRUSSES
FAILED AND BASED ON HIS VAST
EXPERIENCE IN THE TRUSS
MANUFACTURING INDUSTRY.

>> IS THERE ANY EVIDENCE OF --
[INAUDIBLE]

>> ON CROSS-EXAMINATION, THEY
HAD ALSO HAD A DISCUSSION, WELL
NOW, THAT THIS IS, NOW THAT HE
HAS BEEN EXAMINED AS AN EXPERT
AND TENDERED AS AN EXPERT
WITNESS BEFORE THEY BROUGHT
THIS OUT, BEFORE THEY
BROUGHT THE JURY IN HE SAYS I
THINK I'M ENTITLED TO ASK, TO,
TO INQUIRE AS TO THE
SETTLEMENT.

BECAUSE THERE WAS THE IN LIMINE
ORDER.

DISCUSSION WAS HAD ABOUT WITH
MEMOS TO THE TRIAL JUDGE ABOUT
WITH THIS SHOULD COME IN.

AND THE TRIAL JUDGE SAID, JUDGE
FINE SAID, I THINK YOU MIGHT
EVEN HAVE A CONSTITUTIONAL
ISSUE BECAUSE YOU'RE NOT GOING
TO BE ABLE TO CROSS-EXAMINE AND
DUE PROCESS WON'T BE ACCORDED
IF YOU'RE CALLING AN EXPERT AND
EXALTING THAT PERSON AS AN
EXPERT IN THE INDUSTRY AND
ALLOWING THAT WITNESS TO
TESTIFY AS TO ULTIMATE ISSUES
IN THE CASE, AND, HIDING FROM
THE JURY THE FACT THAT AT THE
TIME OF THE HE RENDERED THOSE
OPINIONS, THAT A-1, HIS
COMPANY, WAS THE DEFENDANT IN
THE CASE FACING LIABILITY.

IN ACATION WHERE THEY COULD
HAVE CALLED DOZENS OR HUNDREDS
OF OTHER EXPERTS.

IN FACT THIS CASE HAD ALREADY

CALLED ANOTHER EXPERT.

>> THERE WAS NOTHING IN ANY OF THE SETTLEMENT DOCUMENTATION THAT, I MEAN THAT I'VE SEEN, YOU CORRECT ME IF I'M WRONG, THAT REQUIRED THIS PERSON TO TESTIFY AND GIVE ANY PARTICULAR OPINION WAS THERE?

>> THERE IS NO RECORD EVIDENCE THERE WAS A TRADE-OFF, NO.

>> YOU DON'T HAVE THAT AT ALL INVOLVED?

>> NO.

BUT, WE'RE GOING BACK TO, WHEN THE OPINIONS CAME OUT DURING DEPOSITION, THAT, AT THE TIME, HE IS RENDERING HIS OPINION.

AND GOING BACK TO YOUR QUESTION, JUSTICE ANSTEAD, PEOPLE ARE ASKED THEIR OPINIONS IN DEPOSITIONS ALL THE TIME.

EVERY SINGLE PERSON, EVERY WORKER ON THIS JOB WAS ASKED, WHAT DO YOU THINK CAUSED IT? WHAT DO YOU THINK CAUSED IT? BECAUSE YOU'RE GATHERING FACTS.

AND SO THIS IS, THIS ISN'T SOME ACKNOWLEDGEMENT THAT ALL THESE PEOPLE WILL BE LATER CALLED AS EXPERT WITNESSES.

SO I DON'T THINK THIS CHANGES WHAT THE SURPRISE WAS TO THE DEFENDANTS WHEN HE WAS BEING TENDERED AS AN EXPERT.

>> ISN'T THE ANSWER TO THAT QUESTION, THAT IS, IF THEY IMPROPERLY TRIED TO CONVERT A CONDITIONS WITNESS FROM A FACT WITNESS FROM A OPINION WITNESS THE JUDGE SHOULD HAVE EXCLUDED THE TESTIMONY OR EVIDENCE?

IT HAS NOTHING TO DO WITH THE LATER ISSUE ABOUT THE STATUTE OR, THE SETTLEMENT?

ISN'T THAT THE ANSWER TO THAT?

>> IF YOU READ THE TRANSCRIPT, TRIAL SOMETIMES GO CHOP, CHOP.

>> ARE YOU CLAIMING THE JUDGE WAS IN ERROR

>> NO.

>> -- ALLOWING THIS WITNESS TO TESTIFY AS AN EXPERT?

>> WELL, WE'RE NOT THERE.

IF WE WERE --

>> I THOUGHT YOU WERE THERE?
I THOUGHT YOU WERE SAYING THAT
THE JUDGE IMPROPERLY ALLOWED
THIS WITNESS TO TESTIFY AS AN
EXPERT BECAUSE THEY FOOLED YOU
INTO THINKING HE WAS JUST GOING
TO BE A FACT WITNESS?

>> ON TOP OF THE FACT THAT IT
WAS DUPLICATE TO WHAT THEIR
OTHER EXPERT SAID.

SO YES, I'LL AGREE WITH YOU,
THAT THAT, IT WASN'T A POINT ON
APPEAL BECAUSE --

>> WHAT CASE IS THERE OUT THERE
THOUGH THAT SAYS THAT, WELL,
THE STATUTE DOESN'T APPLY IF
YOU CALL A WITNESS AS AN
EXPERT?

>> THE ONLY CASE THAT WE RELIED
ON IN THE FOURTH DCA WAS
DOSDOURIAN BECAUSE IT WAS ABOUT
THE OBFUSCATION OF THE TRUTH?

>> DOSDOURIAN WAS ALL ABOUT
PULLING A FRAUD ON THE JURY.
THERE WAS DEAL MADE THAT KEPT
THE DEFENDANT IN THE CASE EVEN
THOUGH THERE WAS SETTLEMENT
WITH THE DEFENDANT.

NOW THE DEFENDANT WAS AGREEING
TO STAY IN THE CASE AND HELP THE
PLAINTIFF. ALL THEY COULD.

THAT WAS THE FRAUD THAT BOTH WE
TALKED ABOUT THAT. I'M FAMILIAR
WITH DOSDOURIAN, BECAUSE I
WROTE THE OPINION AND FOURTH
DISTRICT INVITED SUPREME COURT
TO REJECT THAT KIND OF FRAUD.
AND THIS COURT AGREED.

WE'RE NOT GOING TO HAVE THAT
KIND OF DECEPTION FOR THE JURY.
THAT'S TOTALLY DISTINGUISHABLE
FROM THE SITUATION WE HAVE
HERE, IS IT NOT?

>> YOUR HONOR, --

>> IS IT NOT?

>> IT IS NOT --

>> IT'S NOT?

>> I'M NOT GOING TO SUGGEST --

>> I THOUGHT YOU AGREED WITH
JUSTICE LEWIS ALSO WE DON'T
EVEN HAVE TO HEAR SOME KIND OF
SURREPTITIOUS AGREEMENT THAT
REQUIRES THE DEFENDANT TO

PARTICIPATE IN THE CASE AND
HELP THE PLAINTIFF OUT?
DIDN'T YOU SAY THAT? WE DON'T
HAVE THE DOCUMENTS HERE,
SETTLEMENT DOCUMENTS?

>> NO, WE DON'T.

IF THEY, PLAINTIFFS CAN, LIST
FACT WITNESSES AS THEIR
EXPERTS, I'M NOT TALKING ABOUT
AUTO ACCIDENTS WHERE TYPICALLY
WE DON'T HAVE TWO DRIVERS THAT
ARE EXPERTS.

BUT IN THE CONSTRUCTION FIELD,
IN THE HEALTHCARE FIELD, WHERE
YOU'VE GOT PEOPLE WHO HAVE ARE
BY DEFINITION EXPERTS IN THEIR
FIELD --

>> THAT HAS TO DO, AGAIN, DOES
IT NOT, WITH THE RULING OF THE
TRIAL COURT THAT APPARENTLY YOU
OBJECTED TO, OF ALLOWING THIS
WITNESS TO GO ON AND OFFER
OPINIONS?

THAT'S A TOTALLY DIFFERENT
ISSUE THAN THE ISSUE THAT WE'RE
FACING TODAY, CORRECT?

>> IT IS.

WE WOULDN'T BE HERE ON THE
ISSUE BECAUSE THE GENTLEMAN
WOULDN'T HAVE TESTIFIED AS AN
EXPERT.

AND THE EVIDENCE WOULDN'T HAVE
COME IN.

>> I SEE THAT FINISHED YOUR
TIME.

IF YOU JUST LIKE TO SUM UP FOR
US?

>> YES, I WOULD.

THANK YOU.

IF THE COURT THE DETERMINES
THAT PLAINTIFFS CAN CALL
FACT WITNESSES OR, FORMER
DEFENDANTS, PARDON ME, FORMER
DEFENDANTS AS EXPERTS ACROSS
THE BOARD, AND DEFENDANTS CANNOT
CROSS-EXAMINE TO TELL, SO THAT
A JURY UNDERSTANDS AT THE TIME
THAT OPINION WAS RENDERED THAT
THAT PERSON WAS FACING
LIABILITY IN THE CASE, THEN,
THAT WILL BE THE NEW MODE OF
OPERATION FOR PLAINTIFFS
BECAUSE WHY WOULDN'T YOU GO TO
THE PERSON WHO WAS FACTUALLY ON

THE SCENE, AT THE HOSPITAL, ON THE CONSTRUCTION SITE, WHO IS NUMBER ONE, GOING TO KNOW MUCH MORE THAN SOMEBODY YOU FLY IN FROM SAN FRANCISCO AND IS GOING TO BE VERY COMPELLING TESTIMONY, AND THE JURY IS NOT GOING TO BE ADVISED AS TO THE CIRCUMSTANCES OF THAT PERSON GIVING AN OPINION.

IT'S A VERY DANGEROUS RESULT. WE WOULD ASK THAT THAT THE COURT FIND THAT THERE IS NO JURISDICTION IN THIS CASE AND OTHERWISE AFFIRM THE FOURTH DCA.

THANK YOU.

>> THANK YOU VERY MUCH FOR YOUR ARGUMENTS, BOTH PARTIES.

THE COURT WILL NOW BE IN RECESS UNTIL TOMORROW MORNING.

>> PLEASE RISE.