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An Unsettling Outcome: Why the Florida Supreme Court Was Wrong to Ban All Settlement Evidence in *Saleeby v Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009)

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AN UNSETTLING OUTCOME: WHY THE FLORIDA SUPREME COURT WAS WRONG TO BAN ALL SETTLEMENT EVIDENCE IN *SALEEBY V. ROCKY ELSON CONSTRUCTION, INC.*, 3 SO. 3D 1078 (FLA. 2009)

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I. INTRODUCTION

Consider this hypothetical. Plaintiff, an avid amateur airplane pilot, miraculously survives when his rental plane crashes in the Florida Everglades. He sues Airtron, the company from which he rented the plane, and Boex, the plane's manufacturer. Prior to trial, plaintiff deposes Airtron's president, who states that her company had a difficult time maintaining the Boex plane because certain bolts routinely loosened from the stress of flight. In her opinion, this "design defect" was the sole cause of plaintiff's crash. Subsequently, plaintiff settles with Airtron. Although he had a strong case against the rental company because the plane's service records were in disarray, the settlement amount is small. (Perhaps this is because Airtron is relatively underinsured). Later, at trial against Boex, the president of Airtron testifies as plaintiff's star witness. Consistent with her deposition testimony, she states that the Boex plane's "design defect" was the sole cause of plaintiff's crash.

Counsel for Boex rises to cross-examine Airtron's president. Before he can speak, plaintiff's counsel objects pursuant to Florida Statutes Sections 90.408 and 768.041(3) and requests a hearing at sidebar. The judge asks for an offer of proof. Boex's counsel tells the judge about the earlier settlement between plaintiff and Airtron, characterizing it as a very sweet deal. "Our position, Your Honor, is that one of the terms of that settlement—unwritten to be sure—was that Airtron would point the finger at Boex during this trial to help plaintiff recover a high dollar verdict at Boex's expense. Furthermore, Airtron's president first gave her testimony when Airtron was a defendant in this case, a time when she had an obvious motivation to assign blame to an alternative defendant. Here, at trial, Airtron's president has clear incentive to not contradict her prior sworn testimony. All of this amounts to obvious bias,[1] and points to an intense motivation on the part of Airtron's

1. In this Article, we use the term "bias" as a shorthand reference for any evidence that tends to undermine the credibility of a witness based upon inferences of bias (for a party),

president to give testimony that is unfavorable to Boex. The jury must be made aware of this so that it can properly weigh the credibility of this witness."

Plaintiff responds that evidence of a prior settlement is barred by Florida Evidence Code Rule 90.408 and Florida Statutes Section 768.041(3). "These provisions are designed to protect parties who compromise and settle a claim from having that used against them at trial, Your Honor. We are simply asking for the protection afforded us by law."

To most civil litigators considering this hypothetical, at least those who practice outside the State of Florida, the common sense response of the judge would be, "Objection overruled. I will allow this line of inquiry on cross." Credibility of a witness is such a fundamental issue that the admission of bias evidence is not only routine, it usually carries the day despite claims that it negatively impacts other interests served by the Rules.[2] Furthermore, although disclosure of a prior settlement may run contrary to the public policy encouraging settlements, the public policy of fair trials and accurate verdicts typically outweighs most other considerations.[3] However, such common sense did not prevail in the Florida Supreme Court's recent decision in *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009).

II. THE *SALEEBY* DECISION

Albert Saleeby was working on a construction site when roof trusses collapsed on him.[4] The accident rendered Saleeby a paraplegic.[5] Saleeby sued the truss manufacturer, A-1 Roof Trusses, Ltd. (A1), and Rocky Elson Construction Co. (Rocky Elson), Saleeby's employer and

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prejudice (against a party), interest (in the outcome of the litigation), and corruption (due to, for example, a bribe or a very high expert fee). *See, e.g.*, CHARLES W. EHRHARDT, FLORIDA'S EVIDENCE, § 608.5 (2009) (listing numerous types of matters that demonstrate bias, including those "that relate to the interest of the witness, favoritism, and corruption").

2. *See* EHRHARDT, *supra* note 1, § 608.1:

> All witnesses who testify during a trial place their credibility in issue. Regardless of the subject matter of the witness's testimony, a party on cross-examination may inquire into matters that affect the truthfulness of the witness's testimony. . . . [T]he credibility of the witness is always a proper subject of cross-examination.

3. *See* Richard Blakely Glasgow, Comment, *A Settlement by Less than all Joint Tortfeasors: How Much Should the Jury Know? A Bright-Line Rule Outside the Scope of Arkansas Rule of Evidence 408*, 62 ARK. L. REV. 77, 98 (2009).

4. Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1080 (Fla. 2009).

5. *Id.*

the construction company that installed the trusses.[6] During discovery, Saleeby deposed John Herring, A1's president, who testified that the trusses failed due to Rocky Elson's faulty installation.[7] Saleeby subsequently settled his case against A1 and proceeded to trial against Rocky Elson.[8]

At trial, Saleeby sought to show that Rocky Elson's failure to properly install the roof trusses caused their collapse.[9] Accordingly, Saleeby called Herring to testify consistent with his deposition.[10] Over Saleeby's objection, Rocky Elson impeached Herring on cross-examination with evidence that: (1) A1 had previously been a defendant in the case; (2) A1 and Saleeby had settled prior to trial; (3) A1 paid Saleeby money to settle the suit; (4) Herring's deposition testimony, blaming Rocky Elson for the truss failure, had taken place while A1 was itself a defendant; and (5) post-settlement, Herring agreed to testify against Rocky Elson at trial.[11] The trial court ruled this testimony admissible as evidence of Herring's possible bias toward Saleeby.[12] Essential to the court's ruling was its belief that Herring, as the president of A1, had a "direct interest" in the case. Herring rendered his original opinion about the trusses' faulty installation prior to A1 settling the case with Saleeby, a time when he had a strong interest in exonerating his own company.[13] The bias theoretically continued after settlement because Herring would not want to contradict his own prior sworn testimony at trial.[14]

The trial court found that Saleeby was not entitled to recover damages.[15] Saleeby appealed to Florida's Fourth District Court of Appeal, and asserted that Florida Statutes Sections 768.041(3) and 90.408 prohibited the introduction of evidence about A1's settlement with Saleeby to impeach Herring.[16] The Fourth District Court of Appeal disagreed and affirmed the lower court's holding.[17]

On review, the Florida Supreme Court reversed.[18] It held, in a 4-3

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6. *Id.*
7. *See id.*
8. *Id.*
9. *Id.*
10. *See id.*
11. *Id.* at 1081.
12. Initial Brief on the Merits of Petitioner Albert Saleeby at 9, Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078 (Fla. 2009) (No. SC07-2252) [hereinafter Initial Brief].
13. *Id.*; Answer Brief on Merits of Respondent at 10, Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078 (Fla. 2009) (No. SC07-2252) [hereinafter Answer Brief].
14. *See Saleeby*, 3 So. 3d at 1087 (Canady, J., dissenting).
15. *Id.* at 1081 (majority opinion).
16. *Id.*
17. *Id.*
18. *Id.* at 1086.

per curiam decision, that Florida Statutes sections 768.041(3) and 90.408 categorically prohibit the admission at trial of evidence of a prior settlement or the dismissal of a defendant from the lawsuit, and that a violation of these statutes constitutes reversible error.[19]

III. BACKGROUND OF FLORIDA LAW REGARDING THE ADMISSIBILITY OF SETTLEMENT EVIDENCE

A. *Florida's Twin Prohibitions*

Two Florida statutes address the issue of whether settlement evidence regarding a previous defendant is admissible at trial.[20] Florida Evidence Code Section 90.408 excludes evidence of a settlement when it is offered "to prove liability or absence of liability for the claim or its value."[21] Florida Statute Section 768.041(3), on the other hand, prohibits disclosure to the jury of "a release or covenant not to sue" or "that any defendant has been dismissed" from a suit.[22] These two statutes generally "promote Florida's public policy favoring settlement by excluding such prejudicial evidence at trial."[23]

1. Florida Evidence Code Section 90.408 (As Interpreted Pre-*Saleeby*)

Although the Florida Supreme Court majority in *Saleeby* did not acknowledge the pertinent language, the settlement exclusion in Section 90.408 is not absolute. The plain language of the rule only forbids evidence admitted "to prove liability or absence of liability" regarding the claim being litigated.[24] As a result, Florida appellate courts have routinely held that if the evidence of settlement or compromise is offered for another relevant purpose, it is not barred by Section 90.408 and is admissible under the principle of "limited admissibility."[25] This limitation is consistent with Florida Evidence Code Section 90.107, which recognizes that evidence may be admissible for one purpose, but not another.[26]

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19. *Id.* at 1080.

20. *Id.* at 1082. *See* FLA. STAT. § 90.408 (2006); FLA. STAT, § 768.041(3) (2006). Section 90.402 of Florida's Evidence Code is also used to exclude evidence of settlement if such evidence is irrelevant. There is also a confidentiality privilege for statements made during mediation. *See* FLA. STAT. § 44.403-44.406 (2006).

21. FLA. STAT. § 90.408 (2006).

22. FLA. STAT. § 768.041(3) (2006); *see Saleeby*, 3 So. 3d at 1083.

23. *Saleeby*, 3 So. 3d at 1083.

24. FLA. STAT. § 90.408 (2006).

25. *See* EHRHARDT, *supra* note 1, § 408.1; *see infra* Part III.B.2.

26. FLA. STAT. § 90.107 (2006).

The language of Section 90.408 is similar, but not identical, to Federal Rule of Evidence 408.[27] Rule 408 also prohibits admission of settlement evidence introduced to prove liability, invalidity, or the amount of a claim.[28] However, there are two significant differences between the wording of Florida's section 90.408 and that of its federal counterpart. First, the Federal Rule explicitly states that it "does not require exclusion if the evidence is offered for [a proper purpose]."[29] This language affirmatively permits the admission of settlement evidence when offered for a purpose other than to prove liability, such as to negate a contention of undue delay or to expose the alleged obstruction of a criminal investigation.[30] Second, specifically included in Federal Rule 408's list of permissible uses of settlement evidence is "proving a witness's bias or prejudice."[31] All of this language is absent from the Florida provision.

Nevertheless, the ultimate interpretations of Federal Rule 408 and Florida Evidence Code Section 90.408 are coterminous. This is because Florida Evidence Code "Section 90.107 recognizes that evidence may be inadmissible when offered for one purpose, but admissible when offered for another."[32] Furthermore, Section 90.608 provides that "[s]howing that the witness is biased" is a proper purpose for the admission of evidence.[33]

Evidence of settlement is thus admissible under both federal and Florida evidence law if it is admitted for a proper purpose—such as to show bias—and its probative value is not substantially outweighed by any prejudicial effect.[34] In addition, the party objecting to such evidence is entitled to a limiting instruction so that the jury only uses the evidence to decipher the credibility of the witness, and not as evidence of liability.[35] This is the prevailing law in not only federal[36] and Florida courts,[37] but in the courts of other states, as well.[38]

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27. EHRHARDT, *supra* note 1, § 408.1.

28. FED. R. EVID. 408(a).

29. *Id.* at 408(b).

30. *Id.*

31. *Id.*

32. EHRHARDT, *supra* note 1, § 408.1.

33. FLA. STAT. § 90.608 (2006).

34. FED. R. EVID. 403; FLA. STAT. § 90.403 (2006).

35. FED. R. EVID. 105; FLA. STAT. § 90.107 (2006).

36. *See, e.g.*, Kennon v. Slipstreamer, Inc., 794 F.2d 1070 (5th Cir. 1986) (holding that no abuse of discretion to admit evidence of settlement to avoid confusion regarding the absence of defendants.); United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir. 1984) (holding that admissions made during negotiations to settle civil claim were not excluded by Federal Rule 408 because they were not being offered to prove that a valid civil claim existed.).

37. *See, e.g.*, Charles B. Pitts Real Estate, Inc. v. Hater, 602 So. 2d 961, 963 (Fla. Dist. Ct. App. 1992) (noting that a settlement between a party and a third person may be admissible to show bias, but under the facts of the case, the settlement was not probative of the issue); State v.

2. Florida Statutes Section 768.041(3)

Florida Statutes Section 768.041(3) is part of the chapter entitled "Negligence." Section 768.041(3) provides that "[t]he fact of . . . a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury."[39] This section aims to prevent the prejudice that is likely to result from the revelation of a third-party settlement in a tort action tried before a jury.[40] Specifically, Section 768.041(3) prevents defendants from unduly influencing the amount of damages awarded (1) by showing that the plaintiff has already been adequately compensated by the settling defendant or (2) by insinuating that the settling defendant was solely to blame for the pending suit.[41] Section 768.041(3) thus protects plaintiffs from defendants' improper references to settlements, suspected settlements, or "empty chair" arguments that imply a lucrative monetary arrangement with the "real" wrongdoers.[42]

Conversely, the statute also protects defendants in tort actions from

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Castellano, 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984) (holding that threats made in course of mediation before Citizens Dispute Settlement Program and offered in criminal proceeding were not excluded by section 90.408 because the evidence was not being offered to prove liability for the matter being compromised and mediated); Mortgage Guarantee Ins. Corp. v. Stewart, 427 So. 2d 776, 780 n.2 (Fla. Dist. Ct. App. 1983) (noting that "[t]he settlement, however, may be admissible at trial for other purposes apart from an admission against interest"); *see also infra* Part III.B.1.

38. *See, e.g.*, Schafer v. RMS Realty, 741 N.E.2d 155, 192 (Ohio Ct. App. 2000) (noting that settlement evidence is admissible when offered to show witness bias); TCA Bldg. Co. v. Northwestern Ress. Co., 922 S.W.2d 629, 636 (Tex. App. 1996); Conley v. Treasurer of Mo., 999 S.W. 2d 269, 275 (Mo. Ct. App. 1999) (holding that settlement evidence is admissible to show percentage of disability from last injury); Brothers v. Pub. Sch. Emps. of Wash., 945 P.2d 208, 212 (Wash. Ct. App. 1997) (noting that settlement evidence is not excluded when offered for another purpose such as showing bias or prejudice).

39. FLA. STAT, § 768.041(3) (2006); *see* Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1083 (Fla. 2009).

40. *Saleeby*, 3 So. 3d at 1084-85.

41. State Farm Fire & Cas. Co. v. Higgins, 788 So. 2d 992, 1006-07 (Fla. Dist. Ct. App. 2001); Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 256 (Fla. Dist. Ct. App. 1996); Black v. Montgomery Elevator Co., 581 So. 2d 624, 625 (Fla. Dist. Ct. App. 1991); Rowe v. Leichter, 561 So. 2d 647, 648 (Fla. Dist. Ct. App. 1990); Ellis v. Weisbrot, D.D.S., 550 So. 2d 15, 16 (Fla. Dist. Ct. App. 1989); Charles McArthur Dairies, Inc. v. Morgan, 449 So. 2d 998, 999 (Fla. Dist. Ct. App. 1984); Webb v. Priest, 413 So. 2d 43, 46 (Fla. Dist. Ct. App. 1982).

42. Black v. Montgomery Elevator Co., 581 So. 2d 624, 625 (Fla. Dist. Ct. App. 1991) (noting 768.041(3) "prohibits informing the jury that a settlement has been made with the 'empty chair' (a non party responsible for plaintiff's injuries) . . . or that the 'empty chair' was once a defendant in the case, or that there has been a prior action against the empty chair'"). *See also State Farm & Fire Cas. Co.*, 788 So. 2d at 1006; *Muhammad*, 668 So. 2d at 255-256; *Webb*, 413 So. 2d at 46. Note that Florida courts have recognized that although it is permissible for a defendant to point to an "empty chair," it is not permissible for a defendant to point out that the "empty chair" was once a defendant in the case. *Id.*

the improper use of prior settlement evidence offered by plaintiffs. In particular, a plaintiff might argue that the third-party settling defendant's (apparent or inferred) admission of liability (through settlement) should be taken as an admission or inference of liability on the part of the defendant at trial.[43] Even though this is not a necessary or even logical inference, Section 768.041(3) eliminates this potentially prejudicial line of argument from the case.[44] Section 768.041(3) also protects defendants from the prejudice that would result if the jury were to learn that the defendant has already settled with another injured party in the same accident.[45] Undoubtedly, if it were aware of such a settlement, the jury would be inclined to believe that where there has been payment, there must have been liability.[46] This inference could completely destroy the defendant's case. Section 768.041(3) bars this evidence.

Unlike Florida Evidence Code Section 90.408, Section 768.041(3) appears to be a categorical prohibition against the admission of the fact of settlement in all tort cases. However, this is neither a necessary nor the preferred interpretation of this provision.

B. *Florida Case Law Regarding the Admissibility of Settlement Evidence*

1. Pre-*Saleeby* Decision-Making Process: Means Determined Ends

Prior to the Florida Supreme Court's decision in *Saleeby*, no Florida court had ever considered the effect that Sections 768.041(3) and 90.408 would have if applied simultaneously to evaluate the admissibility of settlement evidence. Instead, courts would treat the admissibility question as answerable through application of either the tort statute or the evidence rule. Regardless of which provision they chose, they appeared oblivious to the other's existence. And yet, their choice of legal authority was effectively outcome-determinative. If the

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43. Glasgow, *supra* note 3, at 89 (noting that submitting evidence of a prior settlement to a jury may prejudice an unreleased defendant because "the jury might imply his negligence from the virtual admission of negligence" by the released defendant). *See also* Cynthia A. Sharo, Note, *Knowledge by the Jury of a Settlement Where a Plaintiff has Settled with One or More Defendants who are Jointly and Severally Liable*, 32 VILL. L. REV. 541, 557-58 (1987) (citing Luth v. Rogers, 507 P.2d 761 (Alaska 1973), Brewer v. Payless Stations, Inc., 316 N.W.2d 702 (1982)); Glasgow, *supra* note 3, at 97.

44. *See* Sharo, *supra* note 42, at 557-58; Glasgow, *supra* note 3, at 97.

45. City of Coral Gables v. Jordan, 186 So. 2d 60, 62 (Fla. Dist. Ct. App.), *aff'd*, 191 So. 2d 38 (Fla. 1966). The court noted that "[i]t would seem to be just as damaging to a fair trial to permit the injured party to reveal to the jury that the alleged tort feasor has settled with another injured party in the same accident." *Id. See infra* Part III.B.2.

46. *Jordan*, 186 So. 2d at 63.

court viewed the question as a matter addressed by the Evidence Code, it would traditionally exclude the settlement evidence under Section 90.408 only when it was improperly offered to prove "liability or absence of liability."[47] The court would admit such evidence if it was offered for some other proper purpose.[48] If the court viewed the question as a matter of tort law, it would categorically exclude the evidence based on Section 768.041(3).

2. Use of Florida Evidence Code Section 90.408

For example, in *Wolowitz v. Thouroughbred Motors, Inc.*,[49] Charles Wolowitz challenged the admission of pretrial settlement negotiations, claiming this evidence should have been excluded under Section 90.408.[50] The Second District Court of Appeal denied Wolowitz's claim, reasoning that Section 90.408 only excludes evidence of settlement negotiations "when the evidence is offered to prove liability, the absence of liability, or value."[51] Based on the record in the case, the court concluded that the settlement recommendations might have been admissible to establish other relevant facts.[52] Accordingly, the court remanded the case back to the trial court to determine whether the settlement evidence addressed issues other than liability and value.[53]

Similarly, in *Bankers Trust Co. v. Basciano*,[54] the Fifth District Court of Appeal explained that "[i]f the evidence is offered for another purpose [other than to prove liability or value], the evidence is not barred by Section 90.408 and will be admissible if it is relevant to prove a material fact or issue. . . ."[55] In *Bankers Trust Co.*, a hotel defaulted on a loan held by Bankers Trust.[56] Following the default, Bankers Trust

47. *See* EHRHARDT, *supra* note 1, § 408.1.

48. *Id.* (citing Charles B. Pitts Real Estate, Inc. v. Hater, 602 So. 2d 961, 963 (Fla. Dist. Ct. App. 1992) (noting that "[a] [s]ettlement between a party and a third person may be admissible to show bias, but under the facts of the case the settlement was not probative of the issue"); State v. Castellano, 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984) (noting that "threats made in course of mediation before Citizens Dispute Settlement Program and offered in criminal proceeding are not excluded by section 90.408 because "[t]he evidence was not being offered to prove liability for the matter being compromised and mediated"); Mortgage Guarantee Ins. Corp. v. Stewart, 427 So. 2d 776, 780 n.2 (Fla. Dist. Ct. App. 1983) (noting that "[t]he settlement, however, may be admissible at trial for other purposes apart from an admission against interest")).

49. 765 So. 2d 920 (Fla. Dist. Ct. App. 2000).

50. *Id.* at 925.

51. *Id.*

52. *Id.*

53. *Id.*

54. 960 So. 2d 773, 780 (Fla. Dist. Ct. App. 2007).

55. *Id.*

56. *Id.* at 775.

executed pre-negotiation agreements designed to govern any loan restructuring negotiations between Bankers Trust and the hotel.[57] At trial, the president of the hotel claimed that the pre-negotiation agreements were binding only on the hotel and not on him individually, as the hotel's representative.[58] Banker's Trust attempted to impeach the president by showing that he had represented himself as the hotel's representative in the pre-negotiation agreements.[59] The trial court did not permit Bankers Trust to introduce the agreements, concluding they were settlement proposals, excludable under Section 90.408.[60]

On appeal, the court ruled that the trial court erred in excluding the agreements.[61] The court reasoned that because Section 90.408 only excludes evidence offered to prove liability or absence thereof, the statute did not apply in this case.[62] According to the court, the letters were crucial to determining whether the hotel president was acting as a representative of the borrower, a fact that was material to resolving the dispute and therefore should not have been excluded.[63]

3. Use of Florida Tort Statute Prohibiting Settlement Evidence

By contrast, when pre-*Saleeby* Florida courts saw the matter as controlled by Section 768.041(3), they generally ruled the other way—excluding settlement evidence even when offered to demonstrate a witness's bias. In *Ellis v. Weisbrot*,[64] for example, Darryl Ellis sued Jefferson Stores, Inc., and Drs. Kirsner and Weisbrot for dental malpractice. Ellis dismissed Dr. Kirsner, but called him as a witness at trial.[65] During cross-examination, against Ellis's objection, Dr. Kirsner admitted he had previously been a defendant in the case.[66] Throughout the cross-examination, Dr. Weisbrot's attorney continuously referred to Dr. Kirsner's former status as a defendant.[67] The trial court allowed Dr. Kisner's testimony to be admitted.[68]

The Third District Court of Appeal reversed and remanded the case for a new trial.[69] The court reasoned that Florida Statutes Section

57. *Id.*
58. *Id.* at 779.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 780.
63. *Id.*
64. 550 So.2d 15, 16 (Fla. Dist. Ct. App. 1989).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

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768.041(3) "prohibits informing the jury that a witness was a prior defendant, whether the party was dismissed by release or settlement or by court order."[70] The "[a]dmission of such testimony, even to attack the former defendant's credibility, is clear error and requires reversal."[71]

Several other Third District Court of Appeal cases specifically held that disclosure of a previous settlement was reversible error[72] even when used to demonstrate bias on the part of a testifying witness.[73] In *Ashby Division of Consolidated Aluminum Corp. v. Dobkin*,[74] Irving Dobkin, a plumber, was injured when he fell off of a ladder manufactured by Consolidated Aluminum Corporation (Consolidated) while repairing Robert Silverman's house.[75] Dobkin sued both Consolidated and Silverman but settled with Silverman before trial.[76] At trial, Consolidated informed the jury of Silverman's settlement with Dobkin.[77] On appeal, Dobkin contended that it was error to tell the jury that Silverman had previously been a defendant in the lawsuit.[78] Relying on Section 768.041(3), the court held that the trial court did indeed err in permitting Consolidated to introduce evidence of the settlement.[79] The court noted, however, that although settlement evidence is generally not admissible, it may be introduced in unusual circumstances, but that no unusual circumstances were present in this case.[80]

Other Florida courts have protected plaintiffs from the prejudicial implication that a prior defendant who settled is solely responsible for the plaintiff's injuries.[81] In *Vucinich v. Ross*,[82] for example, the Fifth District Court of Appeal affirmed the trial court's order granting a new trial to defendants after statements were made implying a settlement had

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70. *Id.*

71. *Id.*

72. Ashby Div. of Consol. Aluminum Corp. v. Dobkin, 458 So. 2d 335, 336-37 (Fla. Dist. Ct. App. 1984); Green v. Ed Ricke & Sons, Inc., 438 So. 2d 25, 27 (Fla. Dist. Ct. App. 1983), *approved*, 468 So. 2d 908 (Fla. 1985); Webb v. Priest, 413 So. 2d 43, 46 (Fla. Dist. Ct. App. 1982); City of Coral Gables v. Jordan, 186 So. 2d 60, 62-63 (Fla. Dist. Ct. App.), *aff'd*, 191 So. 2d 38 (Fla. 1966).

73. Initial Brief, *supra* note 12, at 17.

74. 458 So. 2d 335 (Fla. Dist. Ct. App. 1984).

75. *Id.* at 336.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 337.

81. *See* Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 256 (Fla. Dist. Ct. App. 1996); Black v. Montgomery Elevator Co., 581 So. 2d 624, 625 (Fla. Dist. Ct. App. 1991); Webb v. Priest, 413 So. 2d 43, 46 (Fla. Dist. Ct. App. 1982).

82. 893 So. 2d 690 (Fla. Dist. Ct. App. 2005).

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been reached.[83] In *Vucinich*, Dudley Baringer and Janice Vucinich were sued for negligence.[84] Baringer settled prior to trial.[85] At trial, Vucinich's counsel made comments that could have implied to the jury that Baringer had settled.[86] Specifically, Vucinich asserted that "[i]t is not an issue . . . what Dr. Baringer did; whether you draw any conclusions . . . from his absence here . . . [because n]o part of the verdict will ever be paid by [him]."[87] The court concluded that these statements "not only emphasized that there was an empty chair by discussing the parties' absence, but insinuated that the plaintiff was responsible for their absence and was improperly withholding an explanation."[88] Accordingly, the court affirmed the order granting a new trial.[89]

Florida courts have also used Section 768.041(3) to protect defendants against the improper use of settlement evidence by plaintiffs. For example, in *City of Coral Gables v. Jordan*,[90] a motor scooter passenger died when the scooter collided with a vehicle at an intersection where a police officer was directing traffic.[91] The deceased's mother sued the city for damages predicated upon the negligence of the city's police officer.[92] The issue before the court was whether evidence of the city's settlement with the driver of the motor scooter was admissible at trial.[93] The court held that, pursuant to Section 768.041(3),[94] the evidence was inadmissible at trial.[95] The court reasoned that knowledge of the settlement between the driver and the city was "immediately and completely destructive to the possibility of a fair trial" for the defendant.[96] The city intended to show that the deceased died solely through the negligent acts of the driver of the motor scooter.[97] Once the jury knew the city had settled with the driver, the city's "defense that the [driver] was the sole cause of the accident

83. *Id.* at 691-92, 696.
84. *Id.* at 691.
85. *Id.*
86. *Id.* at 692.
87. *Id.*
88. *Id.* at 692-93 (citing Ricks v. Loyola, 822 So. 2d 502 (Fla. 2002)).
89. *Id.* at 696.
90. 186 So. 2d 60 (Fla. Dist. Ct. App.), *aff'd*, 191 So. 2d 38 (Fla. 1966).
91. *Id.* at 61.
92. *Id.*
93. *Id.*
94. When this case was decided, Section 768.041 was Florida Statutes Section 54.28 (1963). Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1085 n.4. (Fla. 2009).
95. City of Coral Gables v. Jordan, 186 So. 2d 60, 63 (Fla. Dist. Ct. App.), *aff'd*, 191 So. 2d 38 (Fla. 1966).
96. *Id.* at 62.
97. *Id.* at 62-63.

evaporated."[98] As a result, the court reasoned that exclusion of the evidence was "in accordance with reason and justice."[99] Although the court recognized that other courts permit such evidence as long as it goes to the witness's credibility and not to the witness's liability, the court reasoned that "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."[100] Accordingly, the court held that the rule permitting payments to a witness to be shown for the purpose of determining whether such payments affect credibility must yield to Section 768.041(3) except under unusual circumstances, such as where there is fraud or other questionable practice.[101]

C. *The "Special" Case of* Dosdourian v. Carsten

In *Dosdourian v. Carsten*,[102] the Florida Supreme Court did permit evidence of settlement to be admitted despite Section 786.041(3)'s apparent blanket prohibition against such evidence. In *Dosdourian*, Carsten sued DeMario and Dosdourian for negligence.[103] Shortly before trial, Carsten settled with DeMario but required that DeMario remain a defendant in the lawsuit.[104] The issue before the court was whether a non-settling defendant may inform the jury of a settlement agreement between the plaintiff and another defendant who was required to continue to participate in the lawsuit.[105] The agreement in *Dosdourian* closely resembled a Mary Carter Agreement, "a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants."[106]

Before addressing the issue, the Court first outlawed Mary Carter Agreements in Florida.[107] Recognizing that such agreements were legal in Florida prior to its ruling, the Court decided *Dosdourian* "upon the premise that the settlement agreement was legal."[108] The Court then considered whether DeMario's settlement agreement should have been

98. *Id.* at 63.
99. *Id.*
100. *Id.*
101. *Id.*
102. 624 So. 2d 241 (Fla. 1993).
103. *Id.* at 242; *see also* Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1084 (Fla. 2009).
104. *Dosdourian*, 624 So. 2d at 242-43; *see also Saleeby*, 3 So. 3d at 1084.
105. *Dosdourian*, 624 So. 2d; *see also Saleeby*, 3 So. 3d at 1083.
106. *Dosdourian*, 624 So. 2d at 243; *see also Saleeby*, 3 So. 3d at 1083.
107. *Dosdourian*, 624 So. 2d at 246.
108. *Id.*

disclosed to the jury.[109]

Carsten claimed his settlement agreement was protected from disclosure to the jury pursuant to 768.041(3).[110] The Court did not apply Section 768.041(3), but instead decided the case under the Mary Carter line of cases.[111] The Court reasoned that "the same policy reasons requiring the disclosure of secret settlement [agreements] in the 'Mary Carter' line of cases apply[,] . . . even though the motivations of the settling parties are not as clear."[112] The Court noted the "integrity of our justice system is placed in question when a jury charged to determine the liability and damages of the parties is deprived of the knowledge that there is, in fact, no actual dispute between two out of three of the parties."[113] Furthermore, the Court explained that "the jury was entitled to weigh the codefendant's actions in light of its knowledge that such a settlement has been reached."[114] Therefore, the Court concluded, the agreement had to be disclosed to the jury.[115]

IV. *SALEEBY*'S HOLDING AND REASONING

In deciding *Saleeby*, the Florida Supreme Court found direct conflict between Florida's Fourth District Court of Appeal in *Saleeby* and Florida's Third District Court of Appeal in *Ellis* regarding the admissibility of settlement evidence to demonstrate the bias of a testifying witness.[116] The Third District Court of Appeal excluded the prior defendant's testimony as to his status as a prior defendant,[117] while the Fourth District Court of Appeal admitted such evidence to show a witness' bias, relying on *Dosdourian*.[118] In resolving the conflict, the Court rejected the Fourth District's decision in *Saleeby* and approved the Third District's decision in *Ellis*.[119]

The specific issue before the Court was whether evidence of settlement may be admitted to impeach a witness's testimony.[120] The Court ruled that the plain language of Sections 768.041(3) and 90.408

109. *Id.* at 247.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* (quoting Dosdourian v. Carsten, 580 So. 2d 869, 872 (Fla. Dist. Ct. App. 1991)).
114. *Id.* at 247 n.4.
115. *Id.* at 247.
116. Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1081-82. (Fla. 2009).
117. Ellis v. Weisbrot, 550 So. 2d 15, 16 (Fla. Dist. Ct. App. 1989).
118. Saleeby v. Rocky Elson Constr., Inc., 965 So. 2d 211, 215 (Fla. Dist. Ct. App. 2007), *rev'd*, 3 So. 3d 1078 (Fla. 2009).
119. *Saleeby*, 3 So. 3d at 1086.
120. *Id.* at 1080.

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prohibit the admission of evidence of settlement of a prior defendant or dismissal of a defendant even when such evidence is offered to show bias or prejudice.[121] In its analysis, the Court distinguished *Saleeby* from its prior decision in *Dosdourian*.[122] Unlike in *Dosdourian*, the Court reasoned, the settling defendant in *Saleeby*, A1, was dismissed from the action and did not continue to participate as a defendant in the case.[123] As a result, the Court was not concerned with the potential fraud and unseemly appearance of collusion that generally accompanies Mary Carter Agreements.[124]

The Court also noted that Sections 768.041(3) and 90.408 both promote Florida's public policy favoring settlement and excluding prejudicial evidence at trial.[125] Furthermore, the Court reasoned that neither statute contains an exception that permits settlement evidence to be used for impeachment purposes.[126] The Court thus concluded that the evidence showing Herring had entered into a settlement with Saleeby was inadmissible, even if it demonstrated Herring's bias or self-interest.[127] After deciding that the trial court admitted the evidence of settlement in direct violation of Sections 768.041(3) and 90.408, the Court found the violation to be a reversible error.[128] Accordingly, it granted Saleeby a new trial.[129]

V. ANALYSIS

A. *The Court Disregarded the Plain Language of Section 90.408, Which Does Not Expressly Prohibit the Admission of Settlement Evidence at Trial When it is Offered for a Proper Purpose*

The *Saleeby* decision prohibits a party from introducing settlement evidence to demonstrate witness bias or prejudice, yet the Court failed to provide any "rational[e] or language . . . to support that interpretation."[130] In *Saleeby*, the Court stated that the facts "fall entirely within the purview and prohibitions of Sections 786.041 and 90.408,"[131] yet it completely disregarded the plain language in

121. *Id.* at 1083, 1086.
122. *Id.* at 1084.
123. *Id.*
124. *Id.*
125. *Id.* at 1083-84.
126. *Id.* at 1086.
127. *See* EHRHARDT, *supra* note 1, § 408.1.
128. *Saleeby*, 3 So. 3d at 1086.
129. *Id.* at 1085.
130. EHRHARDT, *supra* note 1, § 408.1.
131. *Saleeby*, 3 So. 3d at 1084.

numerous provisions of Florida's Evidence Code that provide an exception for the specific situation presented in the case.

The Florida Supreme Court has repeatedly held that "the plain meaning of statutory language is the first consideration of statutory construction."[132] In reaching its conclusion in *Saleeby*, however, the Court failed to address the plain language of Section 90.408 "which bars the admissibility of the evidence only when the evidence is offered to prove 'liability or the absence of liability'" for the claim.[133] Section 90.408, by its express terms, is designed to permit the introduction of settlement evidence when offered for a proper purpose.[134] Despite this plain language, the *Saleeby* Court incorrectly stated that Section 90.408 "expressly prohibit[s] the [admission of settlement evidence] . . . from being transmitted to the jury *at all*."[135]

The *Saleeby* Court also failed to discuss the plain meaning of other critical sections of Florida's Evidence Code, including Section 90.107, which allows otherwise inadmissible evidence to be admissible if offered for a proper purpose;[136] and Section 90.608, which allows any party to attack a witness's credibility by "[s]howing that the witness is biased."[137] These statutory provisions should not have been ignored by the Court in its analysis.[138] When reading Section 90.408 in concert with the rest of Florida's Evidence Code, it is clear that settlement evidence should be admissible if it is offered for a proper purpose, which clearly includes proof of a witness's alleged bias. Such a reading is consistent with the long history of Florida case law on point.[139] Because the Court failed to discuss these previous Florida appellate decisions, *Saleeby* needlessly "casts into doubt the numerous decisions which approve the admissibility of settlements and compromises to prove other relevant facts or issues" aside from liability.[140]

Furthermore, as part of Florida's Evidence Code, Section 90.408 can

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132. Jones v. State, 813 So. 2d 22, 24 (Fla. 2002) (citing State v. Bradford, 787 So. 2d 811, 817 (Fla. 2001)).

133. *See* EHRHARDT, *supra* note 1, § 408.1 (quoting FLA. STAT. § 90.408 (2006)); *Saleeby*, 3 So. 3d at 1090 (Polston, J., dissenting).

134. *See* FLA. STAT. § 90.408 (2006).

135. *Saleeby*, 3 So. 3d at 1086 (emphasis added).

136. FLA. STAT. § 90.107 (2006).

137. *Id.* § 90.608 (2006).

138. *Saleeby*, 3 So. 3d at 1086 (Canady, J., dissenting).

139. *See* City of Coral Gables v. Jordan, 186 So. 2d 60, 64 (Fla. Dist. Ct. App.) *aff'd*, 191 So. 2d 38 (Fla. 1966) (Hendry, J., dissenting); *Saleeby*, 3 So. 3d at 1090 (Polston, J., dissenting) (quoting FLA. STAT. § 90.107 (2006)); Breedlove v. State, 413 So. 2d 1, 6 (Fla. 1982); Bankers Trust Co. v. Basciano, 960 So. 2d 773, 780 (Fla. Dist. Ct. App. 2007); Wolowitz v. Thoroughbred Motors, Inc., 765 So. 2d 920, 925 (Fla. Dist. Ct. App. 2000), Agan v. Katzman & Korr, P.A. 328 F. Supp. 2d 1363, 1371-72 (S.D. Fla. 2004)). *See also supra* Part III.B.1.

140. *See* EHRHARDT, *supra* note 1, § 408.1.

give way to other evidentiary considerations, like truth finding. The "evidence rules should set the stage for a fair trial, one in which the truth can be impartially ascertained."[141] Numerous Florida courts have held that the purpose behind the rules of evidence is to elicit and establish the truth and allow the jury to ascertain the truth.[142] The U.S. Supreme Court also recognized long ago that "[t]he fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth."[143]

Although the degree of concealed bias in *Saleeby* may not constitute outright deception of the jury, the categorical holding appears to shield all future settlement agreements from juries, no matter how collusive they are, and no matter how overwhelming and obvious the settling defendant's bias might be. Accordingly, *Saleeby* is an invitation for parties to deceive juries and hide the truth by using witnesses who may be severely biased and prejudiced due to settlement of a claim, but who are now immune from cross-examination on those grounds. As a result, the *Saleeby* Court's disregard for truth considerations contradicts the objectives of Florida's evidentiary rules by infringing on the jury's ability to ascertain the truth.

B. *The Court Failed to Adequately Analyze the Purpose and Function of Florida Statutes, Sections 90.408 and 786.041(3)*

1. Purposes of the Two Provisions

Sections 768.041(3) and 90.408 serve two very different functions. Nevertheless, the *Saleeby* Court lumped the two statutes together and proffered a broad policy to explain them both: the promotion of Florida's public policy favoring settlement and excluding prejudicial evidence at trial.[144] This superficial explanation for Sections 786.041(3) and 90.408 fails to account for the real and specific purposes motivating these statutory provisions. A more exacting examination of this issue helps one to understand when they can and should give way to other considerations.

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141. James B. Dolan, Jr., *Crediting Payments by Concurring Tortfeasors: the Decline and Fall of the Jury Rule?*, 65 DEF. COUNS. J. 389, 398 (1998).

142. *See* Amos v. Gunn, 94 So. 615, 649 (Fla. 1922) (Browne, C.J., concurring in part & dissenting in part); Westerheide v. State, 831 So. 2d 93, 102 (Fla. 2002); Atlantic Coast Line R.R. Co. v. Campbell, 139 So. 886, 890 (Fla. 1932); Ulrich v. Coast Dental Servs., Inc., 739 So. 2d 142, 143 (Fla. Dist. Ct. App. 1999).

143. Swidler & Berlin v. United States, 524 U.S 399, 411 (1998) (O'Connor, J., dissenting) (quoting Funk v. United States, 290 U.S. 371, 381 (1933)).

144. *Saleeby*, 3 So. 3d at 1082-83.

Similar to its federal counterpart, the function of Florida Rule of Evidence Section 90.408 is to create a protected environment to encourage private settlements.[145] By permitting parties to openly engage in settlement negotiations without fear that their statements will be admitted into evidence as an admission of liability, the rule advances the judicial preference and public policy of reducing lawsuits and promoting private settlements.[146] Moreover, because the provision ensures that statements cannot later be used to prove liability, Section 90.408 improves communication and understanding between the parties during settlement discussions. With this statutory protection, parties are more apt to talk with one another and seek a mutually beneficial resolution to their dispute through frank and honest discourse.

On the other hand, the purpose of Section 768.041(3) is significantly different. Most crucially, Section 768.041(3) is not a rule of evidence. Rather, it appears in the portion of the Florida Statutes governing negligence actions; it strictly pertains to the revelation of third-party settlements to juries in this context. Section 786.041(3) is designed to protect parties in tort cases from the prejudice that would result from allowing either a plaintiff or a defendant to use evidence of an absent party's settlement as a way to infer liability or lack thereof.[147]

In *Saleeby*, the Court quoted with approval the Third District Court of Appeal's decision in *Jordan*, stating "[it] is a practical impossibility to eradicate from the jury's minds the considerations that where there has been a payment there must have been liability."[148] In essence, the jury may treat a prior settlement as an admission of liability by the settling defendant and, depending on which party is offering the evidence at trial, infer that the non-settling defendant is either not liable (because the real wrongdoer has fully compensated plaintiff) or is liable

145. Fed. R. Evid. 408 advisory committee's note. "The purpose of this rule is to encourage [private] settlements which would be discouraged if such evidence were admissible." *Id.*

146. *See* City of Coral Gables v. Jordan, 186 So. 2d 60, 63 (Fla. Dist. Ct. App. 1966) *aff'd*, 191 So. 2d 38 (Fla. 1966). ("The public policy of this state favors amicable settlement of disputes and the avoidance of litigation.").

147. Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 256 (Fla. Dist. Ct. App. 1996) (holding that defense counsel's comments suggesting the possibility of a settlement between the plaintiff and a prior defendant were "patently prejudicial [to plaintiff] and may have influenced the jury to return a verdict in favor of [defendant]); Ellis v. Weisbrot, D.D.S., 550 So. 2d 15, 16 (Fla. Dist. Ct. App. 1989) (defendant's continual references to Dr. Kirsner's former status as a defendant was prohibited under Section 768.041); Charles McArthur Dairies, Inc. v. Morgan, 449 So. 2d 998, 999 (Fla. Dist. Ct. App. 1984) (holding that a "settlement amount with any one party should not be announced to the jury, as it may unduly influence them as to the amount of damages"); City of Coral Gables v. Jordan, 186 So. 2d 60, 62, 64 (Fla. Dist. Ct. App.), *aff'd*, 191 So. 2d 38 (Fla. 1966) (holding that a plaintiff's reference to a defendant's settlement with the other injured party was so prejudicial to the defendant as to require a mistrial).

148. *Saleeby*, 3. So. 3d at 1085 (citing *Jordan*, 186 So. 2d at 63).

(just like the wrongdoer who admitted to it).[149] In either case, the settlement evidence is prejudicial as it raises unfair and potentially irrational inferences.

Although both parties may abuse settlement evidence, typically plaintiffs are more likely to be harmed than helped by it.[150] As one commentator noted, plaintiffs

> usually display fear and loathing at the prospect of settlement evidence being disclosed to the jury . . . [b]ecause . . . [t]hey know that one of the best ways to create sympathy for a seriously injured plaintiff is to make the jury believe that prevailing against the defendant at the trial is the plaintiff's only chance for compensation.[151]

By the same token, "[t]he converse is also true. One of the best ways to defeat sympathy and focus the jury on the merits is to show that the plaintiff has already been paid."[152]

Therefore, although the *Saleeby* Court was correct in stating that the overall public policy behind Section 768.041(3) is to encourage settlements, the Court failed to notice a more critical point: the statute's more specific aim is to protect parties in a tort suit from the misuse of settlement evidence by its opponent at trial.

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149. *See* Sharo, *supra* note 42, at 556-58 (discussing cases where courts have found that settlement evidence is prejudicial to both the plaintiff and the defendant) (citing Luth v. Rogers, 507 P.2d 761, 768 (Alaska 1973); Brewer v. Payless Stations, Inc., 316 N.W.2d 702 (Mich. 1982). The *Luth* court stated that the jury's knowledge of the prior settlement can prejudice the plaintiff and the defendant. *Luth*, 507 P.2d at 768. The non-settling defendant is prejudiced if the jury imputes his negligence by what the jury believes is a virtual admission of negligence by the settling defendant. *Id.* To the contrary, the plaintiff may be prejudiced if the jury believes the settlement is evidence of the settling defendant's complete liability and the defendant's freedom from liability. *Id.* In *Brewer*, the plaintiff argued that if the jury believes the settlement is as an admission of liability by the settling defendant, the jury may find the responsible party has settled and the plaintiff is not entitled to further relief. *Brewer*, 316 N.W.2d at 704. On the other hand, the court reasoned that the jury might infer the plaintiff's settlement with the settling defendant suggests the non-settling defendant is responsible as well. *Id.* at 705.

150. Seemingly most of the Florida district court cases excluding evidence pursuant to Section 768.041(3) do so on grounds that it is prejudicial to the plaintiff. *See, e.g.*, Vucinich v. Ross, 893 So. 2d 690, 694 (Fla. Dist. Ct. App. 2005); State Farm Fire & Cas. Co. v. Higgins, 788 So. 2d 992, 1007 (Fla. Dist. Ct. App. 2001); Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 256 (Fla. Dist. Ct. App. 1996); Ellis v. Weisbrot, 550 So. 2d 15, 16 (Fla. Dist. Ct. App. 1989); Webb v. Priest, 413 So. 2d 43, 46 (Fla. Dist. Ct. App. 1982).

151. Dolan, *supra* note 137, at 397.

152. *Id.*

2. Once a Party Uses the Settlement Evidence Protection as a Sword, It can no Longer use it as a Shield

Here is the critical point missed by the Florida Supreme Court in its interpretation of Section 768.041(3): *because that provision is designed to protect a tort litigant from the misuse of settlement evidence by its opponent, the protection should lose its categorical nature when the litigant decides to make the credibility of a settling defendant an issue in the case by calling the settling defendant as a witness.* In other words, a party should not be permitted to use the 768.041(3) shield as a sword against a disarmed opponent. By calling the settling defendant to the stand, the sponsoring party has put that defendant's credibility into play. Central to our system of justice is the notion that a jury should be permitted to evaluate each and every witness for potential problems of bias, interest, prejudice, and corruption.[153] The fact that the witness was once a defendant who settled pretrial or was otherwise dismissed from the lawsuit might very well impact his credibility, perhaps in a significant way. Of course, given Section 768.041(3)'s prohibition, inquiry on cross-examination about these matters should not be automatic. Rather, whether to admit this evidence should be a discretionary call that the judge makes under Section 90.403.[154] At a minimum, however—and contrary to the *Saleeby* holding—a trial judge should have the discretion to allow cross-examination about the prior

153. *See* EHRHARDT, *supra* note 1, § 608.1:

> All witnesses who testify during a trial place their credibility in issue. Regardless of the subject matter of the witness's testimony, a party on cross-examination may inquire into matters that affect the truthfulness of the witness's testimony [because] the credibility of the witness is always a proper subject of cross-examination.

See also Minus v. State, 901 So. 2d 344, 348 (Fla. Dist. Ct. App. 2005) (noting that the "'exposure of a witness' motivation in testifying is a proper and important function . . . of cross-examination'") (citing Davis v. Alaska, 415 U.S. 308, 316 (1974)); Russ v. City of Jacksonville, 734 So. 2d 508, 511 (Fla. Dist. Ct. App. 1999) (noting that "the credibility, bias or prejudice of witnesses who testify in a case, as well as the weight to be given their testimony, are a matter for the consideration of and determination by the jury").

154. *See* Saleeby v. Rocky Elson Constr. Co., 3 So. 3d 1078, 1987 (Canady, J., dissenting) (noting that "[a] reasonable judge could decide that the 'probative value' of the evidence of A-1's prior status as a defendant was not 'substantially outweighed by the danger of unfair prejudice'") (quoting § 90.403, FLA. STAT. (2006)); Caruso v. State, 645 So. 2d 389, 394-95 (Fla. 1994) (noting that "the evidence [of bias] is subject to exclusion if its probative value is substantially outweighed by the danger of confusing the issues, unfair prejudice, misleading the jury, or needless presentation of cumulative evidence"); Lee v. State, 422 So. 2d 928, 931 (Fla. Dist. Ct. App. 1982), *petition for review denied*, 431 So. 2d 989 (Fla. 1983) (noting "evidence of bias may be inadmissible when it creates a danger of unfair prejudice, confusion of the issues, misleading of the jury, or results in a needless presentation of cumulative evidence").

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settlement if the circumstances warrant it.[155]

What gives the trial judge the power to ignore the plain language and apparent categorical prohibition of Section 768.041(3)? First, there is the simple principle of waiver. Though Section 768.041(3) is written as an absolute rule, fair play dictates that a party calling a prior defendant as a witness waives any argument that it is unduly harmed by an examination into the motivations of the very witness it brought to the stand, if the probative value of the credibility evidence outweighs the unfair prejudice of the jury hearing about the settlement. Another way of considering the issue is through the common notion in the law of evidence of "door opening." Under the rules of evidence, there are many situations in which a party, initially protected by an exclusionary rule, is deemed to have "opened the door" to otherwise inadmissible evidence by choosing to introduce evidence of a certain type. One example is character evidence in a criminal case. Florida Evidence Code Section 90.404(1)(a) bars the prosecution from offering evidence pertaining to the character of the accused, unless and until the defendant opens the door to the same.[156]

Indeed, there are numerous instances in the law where a categorical statutory prohibition gives way to other considerations under particular circumstances. A significant example of this is the doctrine of necessity in the criminal arena.[157] Although a defendant's behavior might otherwise contravene an express and facially absolute provision of criminal law, he may nonetheless be found not guilty because, in light of the peculiar facts of his case, the judge or jury determines that his actions constituted the lesser of two evils.[158] The necessity doctrine was born out of notions of common sense and fundamental fairness.[159] The

155. *See* EHRHARDT, *supra* note 1, § 608.5 (noting that "[t]he decision whether a particular question properly goes to interest, bias, or prejudice lies within the discretion of the trial judge").

156. FLA. STAT. § 90.404(1)(a) (2006).

157. Both Old English and modern American federal court cases recognize the necessity defense in criminal cases. Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 291-93 (1974). Two famous cases address the doctrine in detail. *See* United States v. Holmes, 26 F. Cas. 360, 363-69 (No. 15, 383) (C.C.E.D. Pa. 1842); The Queen v. Dudley & Stephens, [1884] 14 Q.B.D. 273 at 275-88.

158. United States v. Bailey, 444 U.S. 394, 410 (1980). As an example of the necessity defense, the Supreme Court stated that if: "[a person] destroyed the dike in order to protect more valuable property from flooding, [that person] could claim a defense of necessity." *Id. See* Arnolds & Garland, *supra* note 153, at 294.

159. United States v. Bailey, 585 F.2d 1087, 1098 (D.C. Cir. 1978), *rev'd*, 444 U.S. 394 (1980) (noting the necessity defense "justifies the defendant's action: the defendant did the [r]ight thing, because 'public policy favors the commission of a lesser harm (the commission of what would otherwise be a crime) when this would avoid a greater harm.'" *See also* Arnolds & Garland, *supra* note 153, at 290 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK

same could be said for situations in which an extremely suspect settlement has taken place and the settling defendant testifies for the implicated party. Common sense and fairness dictate that, to reach a proper verdict, the jury must be advised of this fact.

Significantly, the Florida Supreme Court has already recognized that, in certain situations, the seemingly blanket prohibition of Section 768.041(3) should give way to more important considerations.[160] In *Dosdourian,* the Court decided that the jury was entitled to hear about the settlement between a plaintiff and a defendant who remained at counsel's table despite the rule of exclusion in Section 768.041(3).[161] Moreover, even in cases in which Florida's district courts excluded evidence of prior settlement pursuant to Section 768.041(3), many have noted in *dicta* that, in certain unusual circumstances, Section 768.041(3) might need to yield to other important policy considerations.[162] The Court's fundamental mistake in *Saleeby* was its failure to provide a mechanism for the admission of settlement evidence in future cases like *Dosdourian*—where the failure to admit such evidence would lead to an unfair result.

C. Saleeby

In *Saleeby*, the fact that Saleeby elected to call Herring as a witness and ask his opinion about the cause of the accident—as opposed to calling a qualified expert—is a critical factor the Florida Supreme Court inexplicably failed to address.[163] Under the analysis proposed herein, by

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ON CRIMINAL LAW 378 (1972)).

160. Saleeby v. Rocky Elston Constr. Co., Inc., 3 So. 3d 1078, 1086, 3 So. 3d at 1086 (Canady, J., dissenting) (noting that *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993) "clearly established the point that the rule of exclusion in Section 768.041(3) is not invariably applied in derogation of other applicable rules or principles of law")).

161. Dosdourian v. Carsten, 624 So. 2d 241, 247 (Fla. 1993).

162. *See, e.g.*, City of Coral Gables v. Jordan, 186 So. 2d 60, 63 (Fla. Dist. Ct. App.), *aff'd*, 191 So. 2d 38 (Fla. 1966) ("We are of the opinion that the more substantial authority supports the conclusion that the rule permitting payments to a witness to be shown for the purpose of determining whether such payments affect credibility must yield to . . . [Section 768.041(3)] . . . *except under unusual circumstances.*") (emphasis added); Ashby Div. of Consol. Aluminum Corp. v. Dobkin, 458 So. 2d 335, 337 (Fla. Dist. Ct. App. 1984) (noting that that although settlement evidence is generally not admissible under 768.041(3), it may be introduced in unusual circumstances, but that no unusual circumstances were present in the case).

163. Interestingly, the trial court permitted Herring to provide his opinion on causation despite the fact that he was never formally tendered as an expert. *See Saleeby*, 3 So. 3d at 1080-81. The *Saleeby* majority thus treats Herring as a routine fact witness in its analysis, while the dissent argues that he was, in effect, testifying as an expert—which added to the overall prejudice. *Id.* at 1086 (noting that "[i]n this case, Herring was called as a fact witness"); *cf. Saleeby*, 3 So. 3d at 1087 (Canady, J., dissenting) (noting that "prior status as a defendant was highly probative on the issue of Herring's credibility as an *expert witness* on causation") (emphasis added).

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making the tactical decision to bring Herring to the stand and ask him for his opinion about the remaining defendants' liability, Saleeby waived any argument that Section 768.041(3) categorically protected him from revealing any evidence of settlement.[164] "All witnesses who testify during a trial place their credibility at issue, . . . [and as a result,] . . . the credibility of the witness is always a proper subject of cross-examination."[165] As Justice Canady stated in dissent, Saleeby unilaterally chose to use Herring as a witness.[166] "[A] party who chooses to present the . . . testimony of a witness whose credibility is subject to impeachment for bias should not be permitted to use Section 768.041(3) as a cloak to hide from the jury facts relevant to the bias of that witness."[167]

A1's status as a prior defendant was highly probative on the issue of Herring's credibility by showing that Al was biased.[168] Herring's statement was first given during a deposition when he was still a defendant in the case; a time when he "had an obvious motivation to give testimony assigning blame to a defendant other than [A1]."[169] When Herring rendered his opinion, "he had the motivation to exonerate his own company" and to point to Rocky Elson as the cause of the accident.[170] Later, while testifying at trial, he had a strong interest in not contradicting his prior sworn deposition testimony.[171]

Additionally, the fact that Saleeby elected to list and call Herring, in lieu of expert testimony, further distinguishes *Saleeby* from all prior cases that prohibited the revelation of a witnesses' prior status as a defendant.[172] Saleeby used Herring for his opinion that the manufacture of the trusses was not a contributing cause of the accident.[173] "Expert opinions, by their very nature, carry great weight with a jury because the court instructs them that this person has been especially qualified to testify, and they are permitted to opine as to the ultimate issue as though it were true."[174] Herring's status as a prior defendant could have easily given him a reason to be biased in his conclusions regarding the cause of the accident. Therefore, the jury had even more of a reason to be informed of his status.[175]

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164. *See* Answer Brief, *supra* note 13, at 14.
165. EHRHARDT, *supra* note 1, § 608.1.
166. *Saleeby*, 3 So. 3d at 1087 (Canady, J., dissenting).
167. *Id.* at 1087.
168. *Id.*
169. *Id.*
170. Answer Brief, *supra* note 13, at 11; *Saleeby*, 3 So. 3d at 1087 (Canady, J., dissenting).
171. *Saleeby*, 3 So. 3d at 1087 (Canady, J., dissenting).
172. Answer Brief, *supra* note 13, at 13-14.
173. *Id.*
174. *Id.* at 14.
175. *See id.*

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The Florida Supreme Court failed to adequately address these issues because its analysis omitted a thorough discussion of the purpose and function of Sections 768.041(3) and 90.408. Although evidence of settlement may not be initially admissible under Section 768.041(3), once a party chooses to use the prior defendant as a witness, the party potentially opens the door to cross-examination concerning the prior defendant's interest or involvement in the litigation. When a plaintiff like Saleeby chooses to use the prohibition of settlement evidence as a sword instead of a shield, he should bear the risk that the armor will be stripped from him, lest it be used to skew the outcome.

D. *A Court Should Still Analyze the Prejudicial Effect of the Settlement Evidence*

In sum, if a party chooses to call a prior defendant as a witness, Sections 90.408 and 768.041(3) should not be read to prohibit a trial court from permitting the opposing party to reveal the prior defendant's own stake and involvement in the ongoing litigation if such action is warranted. It is worth emphasizing, however, that determining that a trial judge *may* admit such evidence does not mean that the court *should* do so. Section 90.403 states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[176] A court should admit evidence regarding a witness's prior position in the litigation only if the value of this information for impeachment purposes is not substantially outweighed by the prejudice that will result from the jury learning that the witness has settled with the plaintiff.[177]

It may very well be that the admission of such evidence will rarely be regarded as appropriate. In many cases, for instance, the settling defendant will have paid the plaintiff—who has subpoenaed him to the witness stand—a large sum of money. As a result, the settling defendant might be in no mood to help the plaintiff when testifying. Moreover, when the Third District Court of Appeal confronted the argument in *Jordan* that evidence of settlement was admissible to show bias, it explained that although courts often instruct juries that evidence of settlement is admissible on the question of credibility of the witness and not on the question of liability, "such reasoning is not realistic, for, . . . 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

176. FLA. STAT. § 90.403.

177. MICHAEL H. GRAHAM, *Compromise and Offers to Compromise*, § 408:1 (2009). In reaching this determination, a court must also consider the probable effectiveness of a limiting instruction under Rule 105. Fed. R. Evid. 105.

liability."[178] Nevertheless, the Florida Supreme Court went a step too far in *Saleeby* in concluding that the admission of settlement evidence is *never* appropriate.

Finally, not only should Florida courts be permitted to undertake the Section 90.403 analysis, but courts must also have the discretion to consider other policy reasons that may warrant disclosure of a settlement, such as the integrity of our judicial system, judicial fairness, truth finding, and the potential for misleading juries.[179]

VI. CONCLUSION

In *Saleeby*, the Florida Supreme Court arrived at a simple, but incorrect, reading of the law. It melded Florida Statutes Sections 768.041(3) and 90.408 together to conclude categorically that these provisions "expressly prohibit[] the admission at trial of evidence of settlement."[180] The Court's reading of these provisions, which failed to account for their specific underlying purposes, caused it to err. Flatly outlawing the use of settlement evidence to show the bias of a witness, much less a witness permitted to render opinions, can lead to an unjustified outcome in the extreme case.

Sections 768.041(3) and 90.408 do not automatically prohibit the admission of settlement evidence at trial. First, Section 90.408 and other provisions of Florida's Evidence Code specifically treat evidence of settlement to be admissible for proper purposes, such as showing that the witness is biased. Second, Section 768.041(3) does not preclude defendants from offering evidence concerning the bias of plaintiff's witnesses. Because Section 768.041(3) is designed to protect tort parties from prejudicial arguments, it should give way to a Section 90.403 analysis when a party chooses to build its own case on the credibility of a settling defendant's testimony.

The *Saleeby* decision sets a troubling precedent for Florida courts and will likely create more confusion in Florida evidence law than it resolved. The Court, or if necessary, the Florida Legislature, should attend to this problem before another miscarriage of justice results.

178. City of Coral Gables v. Jordan, 186 So. 2d 60, 63 (Fla. Dist. Ct. App. 1966). Courts should not rely on the assumption that evidence of settlement is automatically unfairly prejudicial to plaintiffs. Dolan, *supra* note 137, at 397-98.

179. *See* Dosdourian v. Carsten, 624 So. 2d 241, 244-46 (Fla. 1993).

180. Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1978, 1986 (Fla. 2009).

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