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Tips for Trial Counsel on Planning, Preparation and Preservation: Combating Admission of Settlement Evidence after Saleeby

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Litigants settle lawsuits and claims every day, for a multitude of different reasons, including purely economic ones. Litigation is costly and, as a practical matter, it may be better to pay something to make a claim go away than to pay the cost of trying to defeat it, no matter how strongly you believe you would defeat it. *See, e.g.*, *Charles B. Pitts Real Estate, Inc. v. Hater*, 602 So. 2d 961, 963 (Fla. 2d DCA 1992) (noting, "there [are] many logical and practical reasons" to settle a case). But can that expedient settlement come back to haunt you in other litigation? Maybe. Although it should not be allowed into evidence to establish liability for, or the amount of, a claim. The Florida Statutes speak directly to the prohibition of evidence of a prior settlement or settlement offer at trial. Section 90.408 provides: "Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value." Fla. Stat. § 90.408. Section 768.041 provides: "The fact of such 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." Fla. Stat. § 768.041(3). The Florida Supreme Court has held that this statutory language "admits no exceptions" and that admission of evidence of a settlement, even for impeachment, constitutes *per se* reversible error requiring a new trial. *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1080 (Fla. 2009). The court emphasized that sections 90.408 and 768.041 "promote Florida's public policy favoring settlement by excluding such prejudicial evidence at trial." *Id.* at 1083. The Fifth District recently applied *Saleeby* in *Rubrecht v. Cone Distributing, Inc.*, 95 So. 3d 950, 951–52 (Fla. 5th DCA 2012), where the trial court permitted the defendant to impeach the plaintiff with a settlement offer made to a third party in connection with a separate, earlier automobile accident. In reversing for a new trial, the Fifth District noted that the prohibition of admission of evidence of settlements

"'applies to settlement offers made to third parties as well as parties to the litigation.'" *Id.* at 954 (quoting *Sea Cabin, Inc. v. Scott, Burk, Royce & Harris, P.A.*, 496 So. 2d 163, 164 (Fla. 4th DCA 1986)). "'Because parties often make offers to settle for economic reasons, an offer is not treated like an admission of liability and would be of marginal relevance to the issues at trial. This evidence is also excluded to encourage settlement discussions.'" *Id.* (quoting *Sullivan v. Galske*, 917 So. 2d 412, 414 (Fla. 2d DCA 2006)). Under *Saleeby*, admission of evidence of a settlement for purposes of proving liability or amount of damage is *per se* reversible error requiring a new trial. Pre-*Saleeby*, however, courts have allowed settlement evidence when relevant for apportionment of damages between claims, where liability for the claims at issue was undisputed. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Williams*, 943 So. 2d 997, 1000–01 (Fla. 1st DCA 2006). Evidence of settlement also has been allowed to establish authority. *See, e.g.*, *Bankers Trust Co. v. Basciano*, 960 So. 2d 773, 779–80 (Fla. 5th DCA 2007). But it should not be allowed to show a defendant was on notice of a claimed defect. *Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co.*, 48 So. 3d 976, 993–94 (Fla. 3d DCA 2010). Post-*Saleeby*, litigants should be aware that introducing evidence of settlement for purposes of establishing liability or the amount of a claim should be a free pass for a new trial. By the same token, parties entering into settlements should make every effort to insulate themselves by good drafting against the settlement's possible use as evidence in future litigation. And, litigants should make every effort both to keep such evidence out at trial and to preserve the issue for appeal if it is admitted for any purpose at all, including moving for a mistrial. Florida courts have long recognized the insidious prejudicial effect of allowing a jury to hear settlement evidence because "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." *See City of Coral Gables v. Jordan*, 186 So. 2d 60, 63 (Fla. 3d DCA 1966), *aff'd* 191 So. 2d 38. It is highly unlikely that any curative instruction can cure that prejudice, and a party should be clear on the record that it continues to object to admission of settlement evidence even with a limiting instruction by the trial court.

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