Case No. SC22-984
L.T. No. 1D19-850

IN THE SUPREME COURT OF FLORIDA

JAMES SEADLER

Appellant/Petitioner,

v.

MARINA BAY RESORT CONDOMINIUM ASSOCIATION
d/b/a MARINA BAY RESORT

Appellee/Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANT/PETITIONER

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INTRODUCTION

Nearly four decades ago, this Court held that a trial court's error in failing to strike a juror for cause could not be harmless and was per se reversible so long as the error was properly preserved, and an objectionable juror served on the jury. In the decades since, this Court has reaffirmed that rule no fewer than nine times. Every district court of appeal has followed this unbroken line of cases and repeatedly applied the same rule to civil cases. Thus, in the past 38 years, no Florida appellate court has ever found a properly preserved error denying a cause challenge to be harmless error. Until now.

Here, the trial court refused to strike a prospective juror for cause despite his statements that Seadler would likely start the trial with a "strike" against him and that he would "have a hard time giving a fair judgment" because of his strongly held views about personal injury lawsuits, 'frivolous" cases, and noneconomic damages. *Supp. R. 1334-35, 1440.* On appeal, the First District acknowledged the likely error in refusing to strike the juror, but nevertheless found the error harmless and declined to reverse, thus placing the First District at odds with this Court and every other district court on this issue of law.

This Court should quash the First District's decision below and reaffirm, yet again, the rule that has governed Florida courts—without exception—since 1985.

STATEMENT OF THE CASE AND FACTS

Because of the narrow issue presented, the relevant facts are synonymous with the course of proceedings below. The critical facts are limited to the events that transpired during jury selection.

I. Proceedings before the Circuit Court

This case arose out of injuries Seadler sustained while he was vacationing at Marina Bay in April 2015 and fell from a pool chair that collapsed when he attempted to sit down. *R. 20-23.*[1] The case was eventually tried by a jury. *R. 53-61*.

During jury selection, Seadler's counsel inquired about the prospective jurors' feelings towards personal injury lawsuits and the following exchange occurred with prospective juror 16 (Mr. Marston):

> MR. MARSTON: *I think frivolous lawsuits are a joke.* I don't want to hear about them. I don't care about either side. *I just think they're*

[1] In this brief, references to the relevant pages in the record on appeal from the circuit court will be cited as "*R.* ___," while citations to the circuit court's supplemental record on appeal will be indicated as "*Supp. R.* ___." References to the record of proceedings before the First District Court of Appeal will be cited as "*First DCA R.* ____."

> *ridiculous*. I heard you said personal injury. If it happened, it happened. *But when the judge was saying what some of the stuff is brought forward. He said that a chair was in disrepair, something like that. If that was true, I mean, if he seen it beforehand and maybe not, he chose to sat down, so …*
>
> MR. JON SIMPSON: How would you, talking about this idea of frivolous lawsuits, I think everybody can agree that they're a bad thing, they're a joke. They're out there in our society. How strong is your feeling against that?
>
> MR. MARSTON: About as high as you can get.
>
> MR. JON SIMPSON: Okay. Is it fair to say that just, you know, based on what you've heard so far, that despite your best efforts to put those feelings aside that you, *my client may have a strike against him before we even start?*
>
> MR. MARSTON: *Yes, sir*.

Supp. R. 1334-1335 (emphasis added).

Later, Marina Bay's counsel attempted to rehabilitate Juror 16, resulting in the following exchange:

> MR. MILLER: Thank you. Mr. Marston, good afternoon. I think earlier you said that you thought frivolous lawsuits were a joke?
>
> MR. MARSTON: Correct.
>
> MR. MILLER: What do you mean by that?

> MR. MARSTON: People trying to take advantage of the system over usually dumb mistakes that they made, not using commonsense in most cases, and *they're trying to put one over on people*. I think that's a little crazy.
>
> MR. MILLER: Now, if evidence was presented that a lawsuit turned out not to be a frivolous lawsuit, do you think you could --
>
> MR. MARSTON: Solid evidence, don't put any emotion behind it, I'm good.
>
> MR. MILLER: Do you think, *because of your position that you just mentioned on frivolous lawsuits, that you would have any additional difficulty following the law and the burden of proof that the Court is going to instruct you on?*
>
> MR. MARSTON: *I honestly don't know*. As long as both sides can present hard evidence, then I'm good. You know, I don't really put emotional spin on things. I like information.

Supp. R. 1406-1407 (emphasis added). By this point, Juror 16's statements caused enough concern that the parties stipulated—and the trial court agreed—that they would cease questioning him due to fear Juror 16 would taint the rest of the jury pool. *Supp. R. 1416-1417*.

Seadler's counsel eventually moved to strike Juror 16 for cause based on the reasonable doubt he had expressed in his ability to be fair in reaching a verdict. *Supp. R. 1436*. Marina Bay's counsel

objected to the cause challenge and argued that his attempted rehabilitation cured this doubt. *Supp. R. 1436*. The trial court then called Juror 16 to the bench for further inquiry:

> MR. JON SIMPSON: You expressed some very strong feelings about this type of case, sir?
>
> MR. MARSTON: Yes, sir.
>
> MR. JON SIMPSON: And you were concerned about frivolous lawsuits. *You expressed on a number of occasions that you have doubt about your ability to remain fair and impartial in this case; is that a fair statement?*
>
> MR. MARSTON: *That is a fair statement*.
>
> . . . . . .
>
> MR. MILLER: Earlier when I was asking you questions, we talked about frivolous lawsuits.
>
> MR. MARSTON: Uh-huh.
>
> MR. MILLER: And I asked you if a lawsuit wasn't frivolous did you think you could issue a verdict consistent with the facts of the law. Do you think you can do that?
>
> MR. MARSTON: Yes, I could. He asked a question, Mr. Simpson asked a question about the monetary of -- the economical part I'm okay with. *It's the non-economical part that I would have a hard time giving a fair judgment because of my feelings towards frivolous lawsuits*.
>
> . . . . . .

> THE COURT: Okay. Anything further?
>
> MR. JON SIMPSON: Because we're seeking in addition to medical expenses, we've communicated that we're seeking pain and suffering.
>
> MR. MARSTON: Correct.
>
> MR. JON SIMPSON: *And you have a philosophical concern about pain and suffering damages. When we started out with my client, in all fairness, you started out with a strike against him on that issue?*
>
> MR. MARSTON: *It would depend on how much he was looking for. That's if it was, if I felt that it was an exorbitant amount, like more than what a medical expense would be, then it would be a strike.* But if it was a reasonable amount that I felt was reasonable, *and it coincided with the medical expense or it was lower*, then I would be completely fine with that.

Supp. R. 1438-1441 (emphasis added). The trial court denied Seadler's cause challenge, forcing Seadler's counsel to use one of his three peremptory strikes on Juror 16. *Supp. R. 1443-1444*.

After exhausting the rest of his three peremptory challenges, Seadler's counsel moved for an additional peremptory challenge to use on Juror 22 (Mr. Schliter). *Supp. R. 1452-1454*. The court denied

the request for an additional peremptory challenge, so Juror 22 was seated as one of the six primary jurors. *Supp. R. 1454*, *1463*.

The trial court elected to seat two alternative jurors and provided the parties with one additional peremptory challenge to use solely on the alternates, as provided by the rules. *Supp. R. 1454-55*; see Fla. R. Civ. P. 1.431(g)(2). Seadler's counsel asserted cause challenges on two prospective alternate jurors, which the trial court granted. *Supp. R. 1455*, *1460*. He then used his sole peremptory challenge during the selection of the alternate jurors on Juror 12. *Supp. R. 1461-62*.

Seadler's counsel renewed his request for an additional peremptory challenge before the jury was sworn. *Supp. R. 1490-1491*. The court again denied this request. *Supp. R. 1494*. Seadler's counsel then specifically objected to Juror 22 serving on the jury before the jury was sworn. *Supp. R. 1494-1495*. The jury was sworn over Seadler's objection, and the trial proceeded. *Supp. R. 1531*.

Ultimately, the jury reached a verdict for Seadler but awarded him only a fraction of his past medical expenses and minimal non-economic damages. *R. 883-884*. The evidence presented showed that Seadler had incurred $154,435.04 in past medical expenses. *R. 628-*

631. However, the jury only awarded $50,000.00 to Seadler for his past medical expenses and nothing for future medical care. *R. 883-884*. Additionally, the jury gave Seadler $10,000.00 for past pain and suffering with no provision for future pain and suffering. *R. 884*. The trial court denied Seadler's motion for additur. *R. 1066-67*. After accounting for collateral source setoffs, the trial court entered a Final Judgment in Seadler's favor for $14,504.50. *R. 1258-1259*.

II. Proceedings before the First District Court of Appeal

Seadler appealed the judgment to the First District Court of Appeal raising, as his sole issue, the trial court's error in declining to strike Juror 16 for cause. *R. 1265-1268, 1269-1272*; *First DCA R. 40-66*. The First District affirmed the judgment. *First DCA R. 140-52*; *see Seadler v. Marina Bay Resort Condo. Ass'n*, 341 So. 3d 1146 (Fla. 1st DCA 2021). While the district court did not expressly decide whether the trial court erred in refusing to strike Juror 16 for cause—the opinion noted Seadler's argument was "perhaps" correct—the First District held that any error by the trial court in refusing to grant the for-cause challenge was harmless. *First DCA R. 141*.

The district court noted Seadler used one of his "alternate" peremptory challenges on Juror 12. *First DCA R. 149*. The court then

reasoned that—assuming like treatment for cause and peremptory strikes in this hypothetical scenario—Juror 12 would have moved to the main panel if Seadler had been granted another peremptory challenge to use on Juror 22. *First DCA R. 10-11.* The panel opinion assumed that Jurors 22 and 12 were equally objectionable to Seadler, though the panel acknowledged in a footnote that a party might use a different "tactical calculus" in using its peremptory challenges on the main panel as opposed to with alternates. *First DCA R. 12.*

The First District concluded:

> Any error in the trial court's refusal to strike Juror 8 [sic] for cause did not prejudice Seadler, because he would have had a subjectively objectionable principal juror sitting at his trial one way or another. In our view, there was not a miscarriage of justice under the circumstances of this case.

First DCA R. 146.

Seadler moved for rehearing, or in the alternative, for certification, arguing that the panel's harmless error analysis was contrary to opinions from this Court and every other district court. *First DCA R. 156-69.* The First District set oral argument on the motion and asked the parties, in addition to the arguments raised by

Seadler in his motion, to be prepared to address the following two questions:

> 1. Whether the ostensibly per-se-reversible-error rule set out regarding an erroneous denial of a request to strike a juror for cause in a criminal trial, *see Matarranz v. State*, 133 So. 3d 473 (Fla. 2013); *Busby v. State*, 894 So. 2d 88 (Fla. 2004); *Busby v. State*, 894 So. 2d 88 (Fla. 2004); and *Hill v. State*, 477 So. 2d 553 (Fla. 1985); applies in a civil trial where the juror challenged for cause was nonetheless stricken and did not actually sit on the jury.
>
> 2. Whether article I, section 22, of the Florida Constitution guarantees a certain number of peremptory challenges to each party in a trial on a common-law cause of action.

First DCA R. 174.

Following argument, the panel denied rehearing without further discussion or elaboration, but certified conflict with decisions from the other four districts, all of which held that trial court errors in denying cause challenges are not subject to a harmful error analysis and, instead, require reversal. *First DCA R. 228-29*. *See Kochalka v. Bourgeois*, 162 So. 3d 1122, 1126 (Fla. 2d DCA 2015); *Tizon v. Royal Caribbean Cruise Line*, 645 So. 2d 504, 506 (Fla. 3d DCA 1994); *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 996 (Fla. 4th DCA 2004); *Gootee v. Clevinger*, 778 So. 2d 1005, 1009–10 (Fla. 5th DCA 2000). Judge Tanenbaum issued a concurring opinion—not

joined by the other two panel members—arguing that this Court's opinions holding that a properly preserved error in failing to strike a juror for cause cannot be harmless had no application to civil cases because, in civil trials, "the peremptory challenge at best is a procedural grace." *First DCA R. 229-39*.

Seadler petitioned for review in this Court, *First DCA R. 241*, and this Court accepted jurisdiction to resolve the certified conflict.

SUMMARY OF ARGUMENT

The First District's opinion below flies in the face of longstanding Florida law. The record demonstrates that Juror 16 should have been removed by the trial judge for cause given his statements that Seadler would start the trial with a "strike" against him and that he would have a hard time giving a "fair judgment" due to the prospective juror's aversion to noneconomic damages. Seadler's counsel was forced to use a peremptory strike on Juror 16, exhausted his three challenges, and requested another one to use on Juror 22, which was denied. Juror 22 then sat on the jury over Seadler's repeated objections.

Under nearly four decades of Florida law, the trial court's error cannot be harmless and requires a new trial. Beginning with its decision 38 years ago in *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985) and continuing through today, this Court has held at least nine times that an improperly denied cause challenge is per se reversible so long as the error is preserved, and an objectionable juror ultimately sat on the jury. This Court has reaffirmed the rule despite repeated challenges. And the district courts of appeal have uniformly applied the rule to both criminal and civil cases—that is until the First

District's opinion here. By certifying conflict, the First District conceded that its harmless error analysis cannot be reconciled with the decisions from the other districts courts on this point.

Nor is there any reason to recede from this rule after nearly four decades. It is a bright line rule that is easy to follow and fair to all sides. It ensures that the parties have at their disposal the full complement of peremptory challenges provided by the Rules, which this Court has recognized is "a necessary tool for achieving the constitutional right of a trial by an impartial jury." *Busby v. State*, 894 So. 2d 88, 105 (Fla. 2004). For that reason, the suggestion that the Court should employ a different standard for civil cases is a nonstarter given that the right to an impartial duty guaranteed by the Florida Constitution applies equally to civil cases.

Finally, even if the Court agrees with the First District that a harmless error analysis is appropriate in these cases—notwithstanding the precedent against it—the opinion below should still be quashed because the district court's harmless error analysis is contrary to this Court's opinion in *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). In *Special*, the Court held that, in a civil case, the burden of proof rests on the beneficiary of the error to

prove "there is no reasonable possibility that the error contributed to the verdict." Here, the First District affirmed the trial court by holding that *Seadler* failed to demonstrate that the error was *harmful*, which flips the burden of proof required by *Special*. Given that Marina Bay cannot prove the trial court's error was harmless, a new trial is required either way.

ARGUMENT

The outcome of this appeal is controlled by longstanding precedent. Because the trial court's error in failing to excuse Juror 16 for cause forced Seadler's counsel to use a peremptory challenge on a biased juror, he had no peremptory challenges left to use on Juror 22, a juror he sought to strike as objectionable. A new trial is required under these circumstances.

I. The trial court erred in failing to strike Juror 16 for cause

Before addressing the certified conflict, Seadler begins by briefly addressing the trial court's error during jury selection, which the First District elected not to reach. Two things are readily apparent: (1) the trial court erred in failing to strike Juror 16 for cause, and (2) Seadler preserved the error.

A. There was, at a minimum, a reasonable doubt as to whether Juror 16 could render an impartial verdict

This Court has made clear that a trial court abuses its discretion when it "refuses to excuse for cause a prospective juror who responds with equivocal or conditional answers, thus raising a reasonable doubt as to whether the prospect possesses the state of mind necessary to render an impartial decision." *Brown v. State*, 728

So. 2d 758, 759 (Fla. 3d DCA 1999). Further, "[i]f a reasonable doubt exists as to whether a juror can possess an impartial state of mind in the discharge of his or her duties, that juror is incompetent to serve and must be excused for cause." *Van Poyck v. Singletary*, 715 So. 2d 930, 931 (Fla. 1998). Application of this reasonable doubt standard is the same in both civil and criminal cases. *Pacot v. Wheeler*, 758 So. 2d 1141, 1142 (Fla. 4th DCA 2000). Importantly, "[c]lose cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality" because "the impartiality of the finders of fact is an absolute prerequisite to our system of justice." *Sydleman v. Benson*, 463 So. 2d 533, 534 (Fla. 4th DCA 1985).

The trial court failed to apply these long-standing principles when it denied Seadler's challenge for cause as to Juror 16. As the transcript makes clear, Juror 16 expressed doubts about his partiality throughout the selection process both in his views towards personal injury lawsuits and non-economic damages.

First, Juror 16 indicated that, due to the nature of the case, Seadler might start out with a strike against him. *Supp. R. 1334-1335*. Juror 16 initially expressed strong feelings about what he

termed "frivolous lawsuits" that he labeled "a joke" and said that his feelings against frivolous lawsuits were "about as high as you can get." *Supp. R. 1334*. Juror 16 then expressed skepticism over the basic facts of this case as relayed by the trial judge, noting that, even if "a chair was in disrepair … if he had seen it beforehand and maybe not, he chose to sat down." *Supp. R. 1334*. As a result, he agreed with Seadler's attorney that the parties would likely not start out in his mind on even footing because Seadler "may have a strike against him before we even start." *Supp. R. 1334-35*.

"A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985); *accord Bell v. Greissman*, 902 So. 2d 846, 848 (Fla. 4th DCA 2005). Because of this, Florida courts have routinely reversed trial courts for failing to grant cause challenges directed to jurors who favor or disfavor either side enough that one starts out ahead of the other. *See*, *e.g.*, *Jaffe v. Applebaum*, 830 So. 2d 136, 138 (Fla. 4th DCA 2002) (juror who admitted that "appellants would be starting out with a half strike against them" should have been struck for cause); *Pearson v. Philip Morris USA Inc.*, 270 So. 3d 441, 443 (Fla. 2d DCA 2019) (abuse of discretion to deny a challenge for cause on a

juror who indicated that the plaintiff would begin "in the red" and "would start 'a little behind'"); *see also Pelham v. Walker*, 135 So. 3d 1114, 1116 (Fla. 2d DCA 2013); *Kochalka*, 162 So. 3d at 1125; *Weinstein*, 884 So. 2d at 995.

Second, Juror 16 also expressed an inability to be impartial in awarding non-economic damages. As Juror 16 put it, "the economical part I'm okay with. It's the non-economical part that I would have a hard time giving a fair judgment because of my feelings towards frivolous lawsuits." *Supp. R. 1440*. Juror 16 further conditioned his ability to award non-economic damages on the *amount* of damages sought, stating "It would depend on how much he was looking for. … if I felt that it was an exorbitant amount, *like more than what a medical expense would be*, then it would be a strike." *Supp. R. 1440-1441* (emphasis added). In other words, Juror 16 stated unequivocally that (1) he would hold it against Seadler if Seadler's attorney asked for more than he thought was reasonable, and (2) he believed—without hearing any evidence—that a reasonable award for non-economic should be no more than the medical expenses. That alone has been deemed sufficient to strike a juror for cause. *See Pacot v. Wheeler*, 758 So. 2d 1141, 1142 (Fla. 4th DCA 2000) (noting that

a "definite bias against awarding non-economic damages may be grounds for excusing a juror for cause"); *see also Pelham*, 135 So. 3d at 1116 (trial court erred in failing to strike juror, in part because of the juror's concern over awards for non-economic damages).

At a minimum, Juror 16's responses to those questions at least raised enough uncertainty to render this a close case, obligating the court to exercise its discretion in favor of dismissing Juror 16 for cause. *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007) ("ambiguities or uncertainties about a juror's impartiality should be resolved in favor of excusing the juror.").

B. Seadler's counsel preserved the error for appeal

Seadler's counsel unequivocally preserved the error for review. To preserve error over a denied cause challenge, the aggrieved party must (1) move to strike the juror for cause; (2) use a peremptory challenge on the objectionable juror; (3) exhaust all peremptory challenges; (4) request an additional peremptory challenge to replace the one used on the legally objectionable juror; (5) identify a specific juror that the party would use the additional peremptory challenge to remove; and (6) renew the objection before the jury is sworn. *See*

Cozzie v. State, 225 So. 3d 717, 726 (Fla. 2017); *Matarranz*, 133 So. 3d at 482.

Here, Seadler's counsel checked each of these boxes. He moved to strike Juror 16 for cause with a detailed argument explaining why he should be removed for cause. *Supp. R. 1436.* He used his first peremptory on Juror 16 and then exhausted his remaining peremptory challenges. *Supp. R. 1444*, *1452*. He requested an additional peremptory challenge to use on Juror 22. *Supp. 1452-54*. And he renewed that request and specifically objected to Juror 22 sitting on the jury before the jury was sworn. *Supp. R. 1490-1491*, 1494-95. Nothing more was required to preserve the error for appeal.

II. The First District's opinion conflicts with decisions from this Court and the other district courts requiring reversal

A. Under this Court's precedent, a preserved error to a cause challenge cannot be harmless error

This Court's precedent is clear and consistent: it is per se reversible error to require a party to expend peremptory challenges on prospective jurors who should have been excluded for cause where the party runs out of peremptory challenges, is denied an additional peremptory challenge to use on an objectionable juror, and the objectional juror is empaneled. Prior to the First District's opinion

here, Seadler is not aware of any Florida case holding otherwise in the past 38 years.

The starting point for analysis of this issue is this Court's seminal opinion in *Hill*. In *Hill*, this Court held that an error in failing to strike a jury for cause "*cannot be harmless* because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available to him." *Hill*, 477 So. 2d at 556 (emphasis added). The Court added that "Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." *Id*.

Five years later in *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990), this Court clarified that reversal is required under *Hill* when an individual "actually sat on the jury" whom the aggrieved party "either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted." *See also Van Poyck v. Singletary*, 715 So. 2d 930, 931

(Fla. 1998); *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995); *Moore v. State*, 525 So. 2d 870, 873 (Fla. 1988).

This Court revisited the issue in depth in *Busby*. In *Busby*, the Court reaffirmed the rule stated in *Hill* and *Trotter*, holding that "[i]n the State of Florida, expenditure of a peremptory challenge to cure the trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury." *Busby*, 894 So. 2d at 96-97.

Notably, this Court in *Busby* considered, and expressly rejected, the dissenting justices' suggestion that the Court abandon the *Trotter* standard and require the defendant to show "actual harm" for reversal. *See id.* at 97. The Court began by noting the historical importance of peremptory challenges and that "the entitlement to peremptory challenges preceded Florida's statehood." *Id.* at 98. While observing that peremptory challenges themselves are not guaranteed by the federal or state constitutions, the Court reiterated that "the very purpose of peremptory challenges is 'the effectuation of the constitutional guaranty of trial by an impartial jury.'" *Id.* at 98 (quoting *Meade v. State*, 85 So. 2d 613, 615 (Fla. 1956)).

The Court then emphasized the importance of peremptory challenges in achieving an impartial jury. As the Court noted, "[t]he value of peremptory challenges is that they are intended and can be used when defense counsel cannot surmount the standard for a cause challenge." *Id.* at 100. Thus, the benefit of the *Hill* and *Trotter* rule is that "a defendant can obtain relief for the erroneously forced expenditure of a peremptory by showing the same type of harm such challenges are intended to cure—the seating of a juror whom the defendant suspects, but cannot prove, is biased." *Id.* at 100-101. To hold otherwise, as the dissent suggested, would force a party "into the impossible situation of protecting his or her entitlement to peremptory challenges by proving harm under the for-cause standard." *Id.* at 101.

Finally, the Court in *Busby* rejected the suggestion that Florida should abandon *Hill* and *Trotter* in favor of the federal rule, which does not require a party to use peremptory challenges to preserve error in the denial of a cause challenge, finding that this solution would not "serve the ends of justice." *Id.* at 104. Instead, this Court reiterated that "[a]s the arbiters of the meaning and extent of the safeguards provided under Florida's Constitution, we reiterate that

the ability to exercise peremptory challenges as provided under Florida law is an essential component to achieving Florida's constitutional guaranty of trial by an impartial jury." *Id.* at 102.

This Court reaffirmed the holding in *Busby* twice in 2007. In *Carratelli v. State*, 961 So. 2d 312, 319-20 (Fla. 2007), the Court cited *Busby* and noted that "the standard for obtaining a reversal upon the erroneous denial of a cause challenge is relatively lenient: a defendant need only show that an objectionable juror—whether or not actually biased—sat on the jury." *See also Kopsho v. State*, 959 So. 2d 168, 173 (Fla. 2007) (applying *Busby* standard and reversing conviction).

More recently, the Court once more reaffirmed this rule in *Matarranz v. State*, 133 So. 3d 473, 483 (Fla. 2013). There, the Court again noted that Florida follows the "general rule" requiring reversal when a cause challenge is erroneously denied, the error is preserved, and an objectionable juror sits on the jury. *See id.* The Court also confirmed the "value" of peremptory challenges in selecting an impartial jury and held that "[t]his value is destroyed if counsel is forced to use a peremptory challenge on a juror who should have been removed for cause." *Id.*

Altogether, this Court has reaffirmed that a trial court's erroneous denial of a cause challenge cannot be harmless no fewer than nine times over the past four decades, so long as the error was properly preserved and an objectionable juror sat on the jury. The Court has upheld this rule despite forceful arguments that it should be abandoned. Indeed, there are few rules more firmly established under Florida law.

B. Florida courts have consistently applied the same rule to civil cases for three decades

This Court has apparently not had occasion to address this rule in the context of civil cases. But the district courts of appeal have applied this rule uniformly to civil cases, recognizing that the right to an impartial jury applies equally to civil and criminal cases. The First District panel below conceded that it alone held to the contrary when it certified conflict with opinions from each of the other four districts.

For example, in *Kochalka,* the Second District addressed an error in a denied cause challenge in an automobile negligence case. There, the district court held that errors in removing a potential juror for cause are "per se errors" that "are not subject to any harmful error

analysis and instead require a new trial whenever there is a showing that an error occurred." *Kochalka*, 162 So. 3d at 1126.

The Third District reached the same conclusion in *Tizon*, a civil case arising out of injuries incurred on a cruise ship. After concluding that the trial court abused its discretion in failing to strike a questionable juror for case, the court held:

> It is reversible error to deny a challenge for cause, thereby forcing a party to 'waste' a peremptory challenge to remove an objectionable juror and forcing him to keep another objectionable juror on the panel because all of the challenges were used.

Tizon, 645 So. 2d at 506.

The Fourth District also declined to engage in a harmless error analysis in *Weinstein*, a misappropriation claim brought by a professional baseball player. The district court agreed with the plaintiff that the trial court had erred in failing to strike a prospective juror for cause, thus forcing the plaintiff to use a peremptory challenge on the objectionable juror. The Fourth District held that, "'[i]f, because of an erroneous denial of a challenge for cause, a party is forced to exhaust his or her peremptory challenges and, subsequently makes a request for additional peremptory challenges

which is denied … an appellate court will reverse and grant a new trial.'" *Weinstein*, 884 So. 2d at 996 (quoting *Imbimbo v. State,* 555 So. 2d 954, 955 (Fla. 4th DCA 1990)). The district court concluded that "it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges." *Id*. at 996.

Similarly, the Fifth District held in *Gootee* that reversal is mandatory when the trial court commits error by denying a cause challenge in a case alleging wrongful death. There, the district court agreed:

> It is reversible error to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied.

Gootee, 778 So. 2d at 1009-10.

All four of the conflict cases unequivocally held that a trial court's error in denying a challenge for cause—when properly preserved—requires reversal in civil cases without the need to further establish the error as harmful. And while the First District below

certified conflict with these four cases, there are numerous other cases from the same four district courts following the exact same rule in civil cases. *See*, *e.g.*, *Pearson*, 270 So. 3d at 441; *Rivas v. Sandoval*, 319 So. 3d 744, 747 (Fla. 3d DCA 2021); *Bell v. Greissman*, 902 So. 2d 846, 848 (Fla. 4th DCA 2005); *Somerville v. Ahuja*, 902 So. 2d 930 (Fla. 5th DCA 2005).

Prior to this case, even the First District appeared to follow the same rule. In *Live Oak v. Townsend*, 567 So. 2d 926, 928 (Fla. 1st DCA 1990), the First District held that the trial court erred in denying several cause challenges during jury selection, which raised "more than a reasonable doubt about the impartiality of the challenged prospective jurors." The court added that "[s]uch doubt was manifest and harmful to appellant" because it forced the appellant to use its remaining peremptory challenges on the jurors who should have been removed for cause." *Id.* Thus, while the court found the error "harmful" it was the doubt *alone* that made it so. *See also Sanchez v. GEICO Indem. Co.*, 278 So. 3d 157, 164 (Fla. 1st DCA 2019) (following *Live Oak* and holding that error in denying a cause challenge raised doubt that was harmful to the appellant).

Thus, the First District's decision below marks an abrupt departure from established law. By engaging in a lengthy and detailed harmful error analysis—and, ultimately, finding any error here to be harmless—the First District, for the first time in Florida law stretching back decades, held that an improperly denied cause challenge does *not* require reversal, even when the appellant is forced to use a peremptory challenge on a juror who should have been removed for cause and an objectionable juror sat on the jury through deliberations.

C. The First District's opinion below is contrary to *Hill* and its progeny and should be quashed

Put simply, there is no way to reconcile the First District's opinion below with *Hill*, *Busby*, or *Matarranz*, much less the countless opinions from the other district courts of appeal following those decisions in both civil and criminal cases. Seadler demonstrated that the trial court erred in failing to dismiss Juror 16 for cause. He preserved the error and specifically objected to Juror 22 sitting on the jury. Because a juror who was objectionable to Seadler served on the jury and helped render a verdict that he

considers inadequate, a new trial is required. No other result can be reconciled with the precedent discussed above.

III. There is no reason for this Court to abandon a rule established four decades ago and repeatedly reaffirmed

Because the First District's opinion cannot be squared with established Florida law, Seadler anticipates that Marina Bay may ask the Court to recede from *Hill* and its progeny. The Court should decline that invitation.

Under Florida law, "the presumption in favor of *stare decisis* is strong." *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 637-638 (Fla. 2003). The doctrine "is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries." *Id.* This Court has, of course, cautioned that its "adherence to *stare decisis* ... is not unwavering." *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012) (quoting *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002)). And the Court may—but is certainly not required to—depart from established precedent when there has been a significant change in circumstances or an erroneous legal analysis. *See Brown*, 84 So. 3d at 309.

Still, departing from established precedent is rare and for good reason:

> It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty. A conclusion that the earlier Court erred must be based on a searching inquiry, conducted with minds open to the possibility of reasonable differences of opinion.

State v. Poole, 292 So. 3d 694, 712 (Fla. 2020).

Thus, this Court has historically avoided overruling precedent—especially long-established precedent—simply because of a difference of opinion over interpreting law. Instead, the Court has set guidelines to use in determining whether the Court should undergo the extraordinary step of changing a firm principle of law:

> Before overruling a prior decision of this Court, we traditionally have asked several questions, including the following. (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

N. Fla. Women's Health, 866 So. 2d at 637. Applying these questions here, there is no reason to rewrite Florida law on this issue.

First, the rule has not proven "unworkable." Far from it. The rule is a "bright line" rule easy to enforce and understand. It applies equally to both plaintiffs and defendants in the civil context, as a review of the civil cases cited above demonstrates. *See*, *e.g.*, *Kochalka*, 162 So. 2d at 1122 (judgment for plaintiff reversed); *Pearson*, 270 So. 3d at 441 (judgment for defendant reversed). Perhaps not surprisingly, neither the plaintiffs' bar nor the defense bar has advocated for abandoning it.

Further, it avoids placing appellate courts in the difficult, if not impossible, position of having to divine whether the presence of a particular juror on a jury caused (or would have caused) manifest harm to the aggrieved party. This case proves the latter point: the panel simply assumed that Juror 12—whom Seadler's counsel removed peremptorily *as an alternate*—was equally objectionable to him as Juror 22, who ultimately served on the jury over Seadler's objection. But that assumption ignores that the use of peremptory challenges when selecting alternate jurors is essentially an "either or" proposition. That Seadler's counsel may have used his one

peremptory during the alternate selection on Juror 12 does not mean he found Juror 12 objectionable—only that he may have preferred the next juror in line over Juror 12 for the alternate spot.

Moreover, changing the law would place trial counsel in the untenable position of having to choose between protecting their clients' interests by using peremptory challenges and potentially waiving a trial court's error denying a cause challenge by doing so. Consider this case. Seadler's trial counsel tried unsuccessfully to remove Juror 22 from the jury with an extra peremptory challenge, thus preserving reversible error under *Hill*. But by serving his client's interests and exercising a peremptory challenge to prevent Juror 12 from serving as an *alternate* juror—as was his right under the Rules—the First District concluded that he essentially waived the trial court's prior error by rendering it harmless. That is the very definition of an "unworkable" rule—the polar opposite of *Hill* and its progeny.

Finally, the rule is fair because it places the parties on equal footing. When a party has to use one of its limited peremptory challenges to overcome a trial court's error, that party has, by definition, one fewer peremptory challenge than the other side to use at its discretion. Here, for example, after using one of his challenges

on Juror 16—who should have been removed for cause—Seadler was left with two peremptory challenges to use on the venire, while Marina Bay had three. In cases where the trial court has made two or more errors with cause challenges, the disparity would be even more stark.

Second, changing the rule now would prejudice those—like Seadler's counsel—who relied upon this long-established law while selecting juries. Here, for example, Seadler's attorney did precisely what Florida law required of him to preserve the error and what the Rules permitted him to do with his decision to use his peremptory challenge on the slate of alternates. He undoubtedly would *not* have removed Juror 12 had he known that doing so would eliminate his client's potential appeal. In short, Seadler's counsel reasonably relied upon four decades of settled law when he selected the jury below.

Third, there have been no changes in the "factual premises" underlying the rule. To the contrary, neither the right to an impartial jury nor the right to use peremptory challenges have changed at all in the past decades. This Court's detailed analysis in *Busby* remains equally viable today, as does the Court's conclusion: "[w]hile not expressly provided for in Florida's Constitution, peremptory

challenges are a necessary tool for achieving the constitutional right of a trial by an impartial jury." *Busby*, 894 So. 2d at 105.

IV. There is no reason to establish a different rule for civil cases

Judge Tanenbaum below argued in his concurring opinion that the First District's ruling was correct because the rule in *Hill* and its progeny "has no application outside the context of the criminal trial." *First DCA R. 238-39*. He argued that the other district courts have been wrong repeatedly over the past three decades by applying the rule to civil cases because peremptory challenges in civil cases lack "the same historical roots" and "no similar right exists [to peremptory challenges] for civil trials." *First DCA R. 231*. Respectfully, Judge Tanenbaum's analysis is flawed.

First, whether or not the use of peremptory challenges in civil cases existed at English common law, their use in civil trials in this country—and in this state—is longstanding. The United States Supreme Court has noted that "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986). As this Court observed in

Busby, "[t]oday every state provides peremptory challenges to both parties in criminal and civil cases." *Busby*, 894 So. 2d at 98; *see also Swain*, 380 So. 2d at 217. More specifically, *Busby* noted that "the entitlement to peremptory challenges preceded Florida's statehood" and applied to "'the trial of *all causes* brought to the superior or county courts.'" *Id.* (quoting Act of Nov. 23, 1828, § 48, 1839 Compilation of the Public Acts of the Legislative Council of the Territory of Florida 89, 99) (emphasis added). Thus, the suggestion that peremptory challenges in civil cases lack "historical roots" is simply incorrect.

Second, Judge Tanenbaum's argument that there is no substantive right to peremptory challenges in civil cases misses the mark. As this Court explained in *Busby*, the Court did not establish the rule in *Hill* because the parties had a *right* to peremptory challenges themselves. To the contrary, the Court agreed that "peremptory challenges are not themselves constitutionally guaranteed at either the state or federal level." *Busby*, 894 So. 2d at 98. Instead, the Court based its holding on an entirely separate right: the right to an impartial jury. *See id.* ("the very purpose of peremptory challenges is 'the effectuation of the constitutional guaranty of trial

by an impartial jury'") (quoting *Meade v. State*, 85 So. 2d 613, 615 (Fla. 1956)). And the right to an impartial jury extends equally to civil trials. *See State v. Silva*, 259 So. 2d 153, 160 (Fla. 1972) ("[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community"); *see also Timmel v. Phillips*, 799 F.2d 1083, 1086 n.5 (5th Cir. 1986) ("[t]he tradition of trial by an impartial jury drawn from a cross-section of the community applies to both civil and criminal proceedings").

Thus, whether peremptory challenges are provided by statute (as in criminal cases) or rule (as in civil cases) is irrelevant. Either way, peremptory challenges remain "a necessary tool for achieving the constitutional right of a trial by an impartial jury." *Busby*, 894 So. 2d at 105. There is no logical reason to treat this "necessary tool" differently in civil cases, as every other district court has concluded.

V. In the event the Court recedes from *Hill*, it should still require the beneficiary of the error to prove it was harmless

The First District's opinion is not only contrary to *Hill* and the legion of cases following it. It is also contrary to this Court's opinion in *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251 (Fla. 2014). So, if the

Court elects to recede from *Hill*—which it should not—it should still quash the First District's decision since the district court's opinion below improperly reverses the burden of proving whether the error was harmless.

In *Special*, this Court established the test for determining harmless error in civil cases:

> To test for harmless error, the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict.

Id. at 1256. Thus, even assuming a harmless error analysis is proper here in the first place, it was not Seadler's burden to prove the trial court's error in failing to remove Juror 16 was *harmful*; instead, the burden was on Marina Bay to prove that it was *harmless*.

Yet, the First District's opinion turned the test on its head. The district court affirmed the judgment expressly because of "the absence of a demonstration *by Seadler* that a miscarriage of justice" occurred. *First DCA R. 151* (emphasis added); *see also First DCA R. 141* (holding that "Seadler fails to demonstrate any miscarriage of justice that ensued from the remainder of the jury selection process").

Marina Bay made no effort below to demonstrate that the error was harmless, nor could it. (Indeed, Marina Bay never argued in its answer brief for a harmless error standard at all. *First DCA R. 71-102.* The First District arrived at its result on its own). Juror 22—a juror Seadler found objectionable—served on the jury, and Marina Bay cannot demonstrate that "there is no reasonable possibility" the verdict would have been the same if Juror 22 had *not* served, much less if Juror 12 had served in Juror 22's place.[2]

In short, whether the Court reaffirms that the rule in *Hill* applies here or recedes from *Hill*, the result would be the same under *Special*: Seadler is entitled to a new trial.

CONCLUSION

The First District's decision is irreconcilable with longstanding Florida law. Thus, this Court should quash the decision and remand the case to the trial court for a new trial.

[2] If anything, the difficult, if not impossible, task of proving harmless error in this situation provides further support for following Hill's pronouncement that these errors "*cannot be harmless.*" *Hill*, 477 So. 2d at 556.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements established by Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2). The brief is in Bookman Old Style 14-point font and contains 7,924 words.

Dated: January 23, 2023

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