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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

REPLY BRIEF ON THE MERITS OF APPELLANT/PETITIONER

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ARGUMENT

Marina Bay's answer brief offers no justification for this Court to jettison four decades of precedent. Marina Bay rests virtually its entire argument on the proposition that civil cases should be treated differently than criminal cases in analyzing the effect of an improperly denied cause challenge on a party's available peremptory challenges. Yet even the sole amicus brief ostensibly supporting its position—from the Attorney General—flatly rejects Marina Bay's argument on this point. Thus, this Court should reaffirm its longstanding precedent and quash the First District's opinion below.

I. There is no rational reason to treat civil and criminal cases differently in analyzing errors with cause challenges

Marina Bay's argument simply echoes Judge Tanenbaum's concurring opinion on rehearing. According to Marina Bay, there is a "distinction between peremptory challenges in civil cases and those in the criminal context," so that a new trial is not required when a party is forced to use a peremptory challenge in a civil case to remove a juror the trial court should have removed for cause. Resp. Brief at 11. Like Judge Tanenbaum, Marina Bay argues this Court's decision in *Hill v. State*, 477 So. 2d 553 (Fla. 1985), and its progeny should be

limited to criminal cases because the principle underlying those rulings "has no proper application outside [the criminal law] context as historically the two are not of similar fundamental importance." *Id.* This argument is a nonstarter—as both the Attorney General and the Florida Justice Association ("FJA") agree.

First, this Court has historically applied the same standard for analyzing reversible error in criminal and civil cases. *See State v. DiGuillo*, 491 So. 2d 1129 (Fla. 1986) (articulating rule in criminal cases); *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014) (adopting the *DiGuillo* rule in civil cases "with slight modification to accommodate the civil context"). Further, the harmless-error statute this Court interpreted in both *DiGuillo* and *Special* applies equally to "any cause, civil or criminal." § 59.041, Fla. Stat. Florida law has safeguarded both property and liberty interests equally when addressing reversible error.

Second, the suggestion that courts should treat peremptory challenges differently in civil cases because their use in civil cases is a modern phenomenon is factually dubious and legally misplaced. Peremptory challenges in civil cases have been a part of Florida law from its inception, and they are now firmly rooted in the laws of all

50 states. *See Busby v. State*, 894 So. 2d 88, 98 (Fla. 2004). Regardless, Marina Bay offers no justification for treating a right differently based upon how long it has existed.

Third, it is irrelevant that peremptory challenges are codified by statute in criminal cases but are provided in civil cases only by the rules of procedure since that argument ignores the historical context for the distinction. This Court concluded more than 50 years ago that peremptory challenges in *both* criminal and civil cases were *procedural* matters exclusively within this Court's authority, so it enacted rules to provide for peremptory challenges in both types of cases. *See In re Fla. R. Crim. P.*, 196 So. 2d 124, 159 (Fla. 1967) (enacting Fla. R. Crim. P. 1.350, renumbered now as Fla. R. Crim. P. 3.350); *In re Fla. R. Civ. P.*, 253 So. 2d 404, 408 (Fla. 1971) (enacting Fla. R. Civ. P. 1.431(d)). The legislature repealed the statute authorizing peremptory challenges in civil cases in 1973, not to eliminate the right to peremptory challenges but because the statute was superseded by the procedural rule. In other words, the legislature concluded the statute was unnecessary. *See* Ch. 73-333, § 24, Laws of Fla. That the legislature has not deemed it necessary to repeal the statute authorizing peremptory challenges in criminal

cases is immaterial since the legislature cannot enact or modify procedural rules under the Florida Constitution. *See Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014).

Still, the *source* of the right to peremptory challenges is not legally relevant or dispositive. To the contrary, this Court has agreed that "peremptory challenges are not themselves constitutionally guaranteed at either the state or federal level." *Busby*, 894 So. 2d at 98. Since they are procedural, not substantive, they remain a matter of "procedural grace"—to borrow Judge Tanenbaum's phrasing—in *both* civil and criminal cases.

Peremptory challenges nonetheless remain a key to 'the effectuation of the constitutional guaranty of trial by an impartial jury.'" *Id.* (quoting *Meade v. State*, 85 So. 2d 613, 615 (Fla. 1956)). And the right to an impartial jury has always extended equally to civil trials under Florida law. *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").

II. Both Marina Bay and the First District below misstate the proper test for reversible error under these facts

Once its primary argument falls by the wayside, Marina Bay is left only to restate the First District's conclusion that the error in failing to strike Juror 16 did not result in a "miscarriage of justice." Respondent's Brief at 26. That argument misstates this Court's reversible error precedent.

Examining the logical flaw in Marina Bay's argument initially requires determining whether *Hill* and its progeny provide that a preserved error in a cause challenge is "per se reversible"—as Seadler argued in his initial brief—or whether it is subject to a harmless error analysis—as the amici contend. Seadler maintains that this Court's precedent renders the error per se reversible. But the result is the same under either approach.

A. Jury composition errors are per se reversible because a harmless error analysis requires pure speculation

Seadler acknowledges this Court has not expressly used the phrase "per se" reversible in its prior rulings on this issue—though the phrase appears in Justice Bell's dissent in *Busby*, 894 So. 2d at 106, and in some district court opinions applying this Court's precedent. *See, e.g.*, *Kochalka v. Bourgeois*, 162 So. 3d 1122, 1126

(Fla. 2d DCA 2015). The language this Court employed, however, demonstrates that is what the Court intended.

In *Hill*, for example, this Court held that a preserved error in failing to strike a jury for cause "cannot be harmless." *Hill*, 477 So. 2d at 556. *See also Van Poyck v. Singletary*, 715 So. 2d 930, 931 (Fla. 1998) (holding that "it is reversible error when a challenge for cause is improperly denied, and the defendant then exhausts his peremptory challenges on venirepersons who should have been dismissed for cause and a request for additional peremptory challenges is denied"); *Busby*, 894 So. 2d at 96-97 ("[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"); *Carratelli v. State*, 961 So. 2d 312, 319-20 (Fla. 2007) ("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"); *Matarranz v. State*, 133 So. 3d 473, 483 (Fla. 2013) (following *Hill* and *Busby* on this point).

This Court has repeatedly confirmed that these errors *require* reversal, so long as an objectionable juror ultimately sat on the jury.[1] Though the types of errors that are per se reversible are limited, the error here falls squarely within one category of cases where this Court has consistently applied this standard.

Just last year, this Court discussed the two types of cases which justify a per se reversible error rule. *See Davis v. State*, 347 So. 3d 315, 324 (Fla. 2022). The first are cases in which a harmless error test will always result in reversal. The second category involves "'those cases where the appellate court is unable to conduct a harmless error analysis because it would have to engage in pure speculation in order to attempt to determine the potential effect of the error on the jury.'" *Id.* (quoting *Johnson v. State*, 53 So. 3d 1003, 1007 (Fla. 2010).

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[1] A necessary corollary to this requirement is that the objectionable juror not only sat on the jury but also participated in deliberations. The FJA argues in its amicus brief that a trial court's error could be harmless if the objectionable juror was, for example, excused before deliberations. Seadler agrees reversal may not be required under that fact pattern but disagrees that this hypothetical situation mandates a harmless error analysis. A harmless error analysis focuses on the error's impact on the verdict, rather than on the steps leading up to the verdict.

This Court's decision in *Williams v. State*, 792 So. 2d 1207 (Fla. 2001), is especially instructive here. In *Williams*, a juror became "emotionally unable" to continue after deliberations had begun, so the trial court excused her and allowed an alternate juror to join the ongoing deliberations and participate in reaching a verdict. *Id.* at 1208. This Court considered whether the trial court's error was "per se" reversible or whether to apply a harmless error analysis, and agreed unanimously that this was a "per se" error. *Id.* at 1208-09. The Court explained the "difficulty" of employing a harmless error analysis to errors in the jury composition following a verdict:

> [A]ny well-intentioned questioning of the jurors, original or alternate, in a good-faith attempt to provide those safeguards recognized under such an analysis is itself fraught with potential to contaminate the jury process. The concept of a jury's sacred province, and a concomitant reluctance to invade that province, is deeply ingrained in our jurisprudence.

Id. at 1210. This Court concluded that "[i]t is thus nearly impossible to perform a harmless error analysis without breaching, in some manner, that circumspect restraint which characterizes our jury fact-finding system." *Id.*; *see also Gilliam v. State*, 514 So. 2d 1098, 1099 (Fla. 1987) (holding that a trial court's failure to allow a party

to challenge prospective jurors for cause and to use peremptory challenges before the jury was sworn constituted "per se reversible error").

This case is no different. Here, the trial court's error impacted the jury composition. That jury—with Juror 22—then deliberated and reached its verdict—a classic example of a situation in which an appellate court would need to engage in "pure speculation" to conduct a harmless error analysis. Short of invading the sanctity of jury deliberations, an appellate court has no way to determine the impact Juror 22 had on the jury's deliberations and ultimate verdict.

B. If the Court elects to employ a harmless error analysis, the First District's decision should still be quashed.

The result here is the same even under a harmless error analysis. As the FJA articulated in its amicus brief, this Court's recent decision in *Davis*—which involved an error in denying a legally sufficient motion to disqualify—provides a roadmap should the Court conclude the error here was not "per se" reversible.

In *Davis*, this Court once again reaffirmed the proper test for harmless error in a criminal case is the test articulated in *DiGuillo*: "[t]he harmless error test focuses on the effect of the error on the trier

of fact and 'places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" *Davis*, 347 So. 3d at 323 (quoting *DiGuillo*, 491 So. 2d at 1135). The Court in *Davis* expressly rejected any argument that it should recede from *DiGuillo* after nearly 40 years.

Just as this Court recently reaffirmed the harmless error test in *DiGuillo* for criminal cases, it should continue to apply the harmless error test in *Special* to the same errors in civil cases, particularly given that the Court expressly based the test in *Special* on *DiGuillo*. *See Special*, 160 So. 3d at 1256. As in criminal cases, the harmless error test in *Special* places the burden squarely on the beneficiary of the error—in this case, Marina Bay: "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*.

Importantly, Seadler argued in his initial brief that the First District's opinion—by placing the burden on *Seadler* to prove harm*ful* error—was contrary not only to *Hill* and its progeny, but also to

Special. Initial Brief at 37-39. Yet, Marina Bay made no effort to defend the First District's analysis on this point in its brief—indeed, Marina Bay never cites *Special* at all. Marina Bay's silence is telling.

Marina Bay cannot demonstrate that the trial court's error in failing to remove Juror 16 for cause—which, in turn, permitted Juror 22 to serve on the jury over Seadler's objections—did not contribute to the verdict awarding less than Seadler's documented medical expenses. Juror 22 altered the composition of the jury, undeniably changing the tenor of the deliberations since "'[t]he change of a single juror in the composition of the jury could change the result.'" *Jones v. State*, 229 So. 3d 834, 835 (Fla. 4th DCA 2017) (Klingensmith, J., concurring specially) (quoting *Ter Keurst v. Miami Elevator Co.*, 486 So. 2d 547, 551 (Fla. 1986) (Adkins, J., dissenting)). For the same reason, Marina Bay cannot demonstrate that a hypothetical jury with Juror 12 instead of Juror 22—using the First District's game-theory analysis—would have rendered the same verdict.

In short, whether this Court finds the trial court's error per se reversible or applies its established harmless error test under *Special*, the result is the same: Seadler is entitled to a new trial.

III. Marina Bay does not ask this Court to recede from four decades of precedent, nor should it

Nowhere in its answer brief does Marina Bay ask this Court to recede from *Hill* and its progeny. Instead, it argues only that those cases should be limited to the criminal law context. Thus, there is no reason for this Court to consider a sweeping change to Florida law simply because the Attorney General has argued for that change in an amicus brief. *See Westphal v. City of St. Petersburg*, 194 So. 3d 311, 315 n.2 (Fla. 2016) ("we do not consider arguments raised by amici curiae that were not raised by the parties"). As the Florida Public Defender Association ("FPDA") has argued in its amicus brief, this Court should "exercise restraint" in resolving this case. FPDA Brief at 17. That is especially true here, in a civil case, when the organization representing the interests of trial attorneys for both plaintiffs *and* defendants advocates for maintaining the status quo. *See* FLABOTA Brief at 8-10.

Still, the Attorney General offers no cogent justification for abandoning settled law. Instead, the Attorney General's primary complaint is that the rule announced in *Hill* (and reaffirmed nine different times by this Court) has resulted in some 200 reversals in

criminal cases and approximately 36 civil cases. Those numbers may seem large until one considers that they encompass more than 50 years of decisions—indeed one civil case cited by the Attorney General dates to 1963. That an average of roughly 4 to 6 cases per year are reversed on this basis statewide—out of tens of thousands of cases—is hardly surprising or alarming. If anything, the relative paucity of cases reversed on this basis suggests the current standard is working as intended. As FLABOTA observed in its amicus brief, the existing standard causes trial courts "to err on the side of caution," while "[w]atering down the existing standard would also cause the error rate to increase." FLABOTA Brief at 9.

Contrary to the Attorney General's argument, the standard first articulated by this Court in *Hill* has stood the test of time for a reason: it protects the right to an impartial jury guaranteed by the Florida Constitution since "the very purpose of peremptory challenges is 'the effectuation of the constitutional guaranty of trial by an impartial jury.'" *Busby*, 894 So. 2d at 98 (quoting *Meade*, 85 So. 2d at 615). The benefit of the rule announced in *Hill* 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." *Busby*, 894 So. 2d at 100-101. In the end, "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.

CONCLUSION

For the foregoing reasons, as well as those stated in Seadler's initial brief on the merits, the First District's decision should be quashed, and the case remanded to the trial court for a new trial.

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 2,848 words.

Dated: May 17, 2023

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