IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2511

FRANK SPECIAL, as Personal Representative of the Estate of SUSAN SPECIAL, deceased,

Petitioner,

vs.

WEST BOCA MEDICAL CENTER, INC., IVO BAUX, M.D., IVO BAUX, M.D., P.A., PINNACLE ANESTHESIA, P.L., et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
CASE NO. 4D08-2511

RESPONDENTS, IVO BAUX, M.D., IVO BAUX, M.D., PA., AND PINNACLE ANESTHESIA, P.L.'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This Brief is filed on behalf of Dr. Ivo Baux and his professional associations (collectively, "Dr. Baux"). This case is before the Court on a certified question of great public importance from the Fourth District Court of Appeal, sitting *en banc*, and Petitioner's assertions of express and direct conflict.[1]

The Fourth District determined that error is only harmless in a civil case if the beneficiary of the error proves "it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict" and unanimously concluded there was no harmful error in this case. The certified question asks whether this standard should apply.

STATEMENT OF THE CASE AND FACTS

Frank Special, as Personal Representative of the Estate of Susan Special ("Petitioner" or "Plaintiff"), filed this wrongful death action against Dr. Baux and co-defendant West Boca Medical Center, Inc. (collectively "Defendants"). The pertinent backgrounds facts are summarized from the *en banc* opinion as follows:

> Susan Special became pregnant at age 38. Five weeks before her due date, she underwent a cesarean delivery. She was wheeled into the operating room at the Center's labor and delivery suite. Dr. Baux, the anesthesiologist, administered spinal anesthesia. A moment after the placenta was removed, Susan became unresponsive, her blood pressure fell precipitately, and she went into cardiopulmonary

[1] The Court did not specify its basis for accepting jurisdiction in its June 20, 2012 Order.

> arrest. Dr. Baux and hospital staff attempted to revive her. She was temporarily resuscitated and transferred to the Intensive Care Unit, where another cardiopulmonary arrest occurred. Susan died five hours after the delivery.
>
> Susan's estate sued the defendants for negligence. The claim was that Dr. Baux and the hospital were negligent in administering anesthesia, in monitoring her system and controlling her fluids during surgery, and in responding to her cardiopulmonary arrests. The defendants denied the allegations; they alleged instead that Susan's death was caused by amniotic fluid embolus (AFE), an allergic reaction from a mother's blood mixing with amniotic fluid, sometimes causing heart-lung collapse.

(A:2).[2]

At trial, Plaintiff's anesthesiology expert opined that the decedent suffered an anesthesia-related complication that Dr. Baux failed to recognize and respond appropriately to. (T3:436-37, 453-59). He believed that certain drugs Dr. Baux administered to increase the decedent's heart rate and blood pressures should have been administered earlier, and that Dr. Baux must have delayed starting chest compressions and calling for help during the code because the chart did not indicate that the surgical drape had been ripped down and because the obstetrician was still closing the uterus when it was reported that Mrs. Special was having a seizure. (T3:461-66; 483-90).

Defense experts, on the other hand, testified that Dr. Baux acted reasonably both in administering the decedent's anesthesia and in responding to the code, that

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[2] The Fourth District's *en banc* opinion is attached as an Appendix.

there were no anesthesia-related complications, and that the death resulted from a classic case of AFE. (T8:1144; T13:1848-50, 1863-71, 1891-99, 1913).

A. Dr. Adelman's Testimony.

Dr. Adelman was a pulmonologist who briefly attended to the decedent after her arrest. (T7:1014-15). Defendants did not call Dr. Adelman as a witness at trial; Plaintiff did. When Dr. Adelman treated the decedent, his impression was that she suffered from AFE. (T7:1034-35). After calling Dr. Adelman as his witness, Plaintiff elicited testimony about off-the-cuff estimates Dr. Adelman made during his discovery deposition as to how many cases of AFE he sees a year and how many births occur each year at the hospital. He then inquired as to how Dr. Adelman's estimates compared to the national averages for AFE:

* * *

Q. . . . you testified, in your deposition, that you see how many amniotic fluid emboluses per year at West Boca Medical Center?

* * *

A. I don't know. I have to only estimate. In my deposition, I made an estimate, and estimates are often wrong.

Q. What did you testify under oath, in your deposition, was the number of amniotic fluid emboluses, per year, that you personally see at West Boca Medical Center?

A. I see about one to two a year, from what I can recall.

* * *

Q. Well, did you not testify, sir, in your deposition, that in fact amniotic fluid emboluses occur on a national level at 1 to 30,000 per year, in the national -- in the overall population, isn't that what you testified under oath? I'll give you the page.

A. If that's what you say I did, yes.

Q. All right. So in the national average, in other words everywhere in the country, there's one birth in 30,000 births where a woman actually has an amniotic fluid embolus, correct?

A. That's my understanding.

Q. Okay. And yet at West Boca Medical Center, there are one to two of these every year, right?

A. I don't know. That's why I didn't review the medical records at West Boca hospital.

(T7:1036-37, 1039).

Plaintiff's attorney then questioned Dr. Adelman on his deposition estimate of the number of births per year at the hospital, which was a grossly exaggerated overestimate by a multiple of ten. Dr. Adelman had estimated 10,000 to 20,000 births per year when there were only 2,200. (T7:1041-42, 1047-49). Plaintiff's attorney used the estimate on the number of AFE cases seen per year with the actual documented number of births per year from the hospital's interrogatory answers to establish that, if Dr. Adelman's estimate on the number of AFE cases was correct, but his estimate of the number of births was not correct, then Dr. Adelman diagnosed AFE many more times than the national average. (T7:1055).

Plaintiff did not present any evidence regarding the actual recorded rate of AFE at the hospital, nor did Plaintiff present the testimony of any other witness or evidence which agreed with Dr. Adelman's off-the-cuff deposition estimates.

B. Defendants' Expert Testimony Regarding AFE.

At trial, Defendants did not offer the expert opinions of any physicians who treated Mrs. Special after her cardiopulmonary arrest. They presented the opinion testimony of expert witnesses, including Dr. Gary Dildy, an obstetrician gynecologist and maternal-fetal medicine expert, who opined Mrs. Special suffered from AFE. (T8:1111-12; T13:1820, 1848; T16:2279, 2298-99). None of Defendants' experts undertook any statistical analysis of the rate of occurrence or diagnosis of AFE at the hospital. Nor did they base their opinions on the fact that any physician who attended the decedent diagnosed AFE. Rather, they based their opinions on the clinical facts. (T8:1144-67, T13:1847-50, T16:2298-2304).

The classic presentation of AFE occurs when the mother has a sudden cardiac collapse, her blood pressure drops, she has extremely low oxygen in her bloodstream, and subsequently develops DIC (a coagulation problem causing the patient to hemorrhage). (T8:1130). Dr. Dildy was an active participant in analyzing the data from an AFE study, the results of which were published in a major obstetrical journal in 1995. (T8:1133-34). Dr. Dildy based his opinion that the decedent suffered from AFE on the following facts: she was in the process of having her first delivery, she had an uneventful placement of her anesthetic, she became unresponsive, her blood pressure dropped suddenly, she had a cardiopulmonary arrest, blood gas studies showed severe low oxygen content in

her bloodstream, she subsequently developed DIC, her autopsy did not show any other cause of death, and the baby's APGAR score was average for a healthy baby. (T8:1144-47). Also, she had a seizure at the time she became unresponsive, which is very commonly seen in AFE. (T8:1156).

C. Excluded Proffer of Defense Expert Dr. Dildy.

Dr. Dildy testified before the jury to the national statistical rate of AFE occurrence. (T8:1210-11). During cross-examination, Plaintiff sought to impeach Dr. Adelman's diagnosis of AFE (an opinion Defendants did not present) by questioning Dr. Dildy about Dr. Adelman's admittedly speculative testimony about his rate of AFE diagnosis compared to the national average. (T8:1212, 1216). The trial judge ruled that whether the hospital and Dr. Adelman misdiagnosed AFE in other cases was collateral, but permitted this testimony to be proffered. (T8:1228).

During the proffer, Dr. Dildy simply reiterated the national statistics that were already in evidence and opined that, if there was strong data to suggest that AFE were occurring at a rate of one per 1,000 over a long period of time, and if there was a documented recorded incidence rate of AFE of one or two out of 2,000 births -- as opposed to someone's recollection -- then he would be concerned that the hospital might be overdiagnosing AFE:

> Q. Dr. Dildy, if, in fact, there are one to two amniotic fluid emboluses diagnosed per year at West Boca Medical Center every year, and there are, in fact, 2,200 births per year . . . what does that tell you about West Boca Medical Center?

A. Well, under those assumptions, there's about one per thousand, that would be higher than the generally quoted rates in the literature. On the one hand, over a short period of time, it's certainly possible that things can occur in clusters. Over the long term, if there were strong data to suggest that amniotic fluid embolism were occurring at that rate over a period -- over many years, then I would probably have to say that it's being overdiagnosed.[3]

* * *

Q. If there is 1 in 2,000 births a year, that's approximately ten times what you told us is a fair national average, correct?

A. Either ten times or five times, depending upon how you do the math, right?

Q. The math that you gave us was, that you believe is a reasonable number, that 1 in 20,000 patients have AFE, correct?

A. That's one number I offered. It could be 1 in 8,000.

Q. It could be 1 in 80,000?

A. It could be 1 in 80,000.

Q. So if there is one a year in West Boca Medical Center, that would be 1 in 2,000 as opposed to 1 in 20,000, that's ten times the national average.

A. That would be a higher rate, correct.

Q. If it's 1 in 80,000, it would be 40 times the national average, right?

A. Correct.

* * *

Q. . . . If there are two AFEs a year at West Boca Medical Center, and the national average is 1 in 80,000 say, okay, and there's 2

[3] All emphasis by underline herein is supplied unless otherwise noted.

per 2,000 at West Boca Medical Center, just doing the math, that would be 80 times the national average?

A. Under those assumptions, right.

Q. Under those assumptions, what would that tell you about AFE and West Boca Medical Center?

A. I would be very concerned that if this is actually a recorded incidence, as opposed to somebody's recollection. Because if you ask me, what's the incidence of this or that, I could give you a number which is going to be a pretty ballpark number. If that's a documented incidence, I would be concerned that the rate is probably inflated.

(T8:1231-36).

Dr. Dildy further testified in the proffer that he could not render an opinion on whether or not AFE was being over-diagnosed, misdiagnosed or correctly diagnosed at the hospital without a formal review of all of the cases. (T8:1237). Regardless, Dr. Dildy testified in the proffer: "But this case here, we're talking about, it doesn't matter what all these other cases are, this case is this case, and this case is an amniotic fluid embolism." (T8:1236).

During his cross-examination of Dr. Dildy, Plaintiff introduced the issue of the diagnoses of the doctors who attended Mrs. Special, asking whether they had the autopsy results available to them (they obviously did not), whether they read the anesthesia record (which Dr. Dildy did not know), and about their experience (T9:1253, 1255-56, 1258), and attempted to use this as a predicate to inquire into

Dr. Adelman's diagnosis of AFE in other cases. (T9:1258-59). The trial court sustained the defense's objection to this renewed attempt. (T9:1260).

D. Plaintiff's Closing Argument.

During closing argument, Plaintiff's attorney again played the videotaped deposition of Dr. Adelman with his gross overestimates on the number of births per year and the number of cases of AFE he saw. He then compared the overestimate of the number of cases of AFE with the actual number of births per year and the national statistical rate of occurrence (T19:2763-66), to argue that Dr. Aldelman and other doctors at the hospital were wrongly over-diagnosing AFE, and must have done so in this case:

> Again, nobody put words in his mouth. 10- to 20,000 births a year. One to two amniotic fluid emboluses a year. The national average he gave is right here, 1 in 30- to 1 in 80,000. Right. Fair. Then we showed him the actual number of births at West Boca Medical Center. It's 2,200, not 20,000, 2,200, just over 2,000 births a year, six births a day, average. And he says there's one to two a year, so it's 1 in 2,200 to 2 in 2,200. Remember that?
>
> So very simply, if you take his numbers, and you believe they have this many amniotic fluid emboluses at West Boca Medical Center every year, it is somewhere between 15 and 80 times the national average they're diagnosing amniotic fluid embolus at West Boca Medical Center, between 15 and 80 times the national average.
>
> So it was either an epidemic, which there isn't, at West Boca Medical Center, or they're overdiagnosing amniotic fluid embolus. They're calling things that aren't amniotic fluid embolus, like he did in this case, . . . because they're not bothering to look at autopsies, they're not bothering to look at other records, they're not bothering to investigate why. . . .

* * *

It's not the epidemic, it's that he's overstating the diagnosis, and that's wrong, ladies and gentlemen, that is flat out wrong to do, and that's what they did in this case. . . .

(T19:2766-67).

The jury's verdict found Defendants not liable, and this appeal followed.

E. The Fourth District's Opinions.

Following oral argument, the Fourth District issued a panel decision with three separate opinions. *Special v. Baux*, 52 So. 3d 682 (Fla. 4th DCA 2010). One panel member concluded that no error occurred in excluding Dr. Dildy's cross-examination and that alternatively, the error was harmless; one panel member concluded that harmless error had occurred; and one panel member concluded that harmful error occurred. The two panel members that found harmless error applied a harmful error test, utilized only in the Fourth District, that asks "whether, but for the error, a different result would have been reached." *Id.* at 686.

The Fourth District thereafter granted Special's motion for rehearing *en banc* and ordered briefing. The opinion below followed, without oral argument on the motion or the *en banc* briefs. The *en banc* district court concluded that the trial judge erred in refusing to allow the cross-examination and undertook a detailed harmless error analysis. The court examined the history of the civil harmless error rule, receded from its prior "stringent" standard, and adopted a harmless error test for civil cases that requires the beneficiary of the error to show "it is more likely

than not that the error did not influence the trier of fact and thereby contribute to the verdict." (A:1).

The district court certified the following question of great public importance:

> IN A CIVIL APPEAL, SHALL ERROR BE HELD HARMLESS WHERE IT IS MORE LIKELY THAN NOT THAT THE ERROR DID NOT CONTRIBUTE TO THE JUDGMENT?

(A:23). Applying this test, the *en banc* district court concluded that harmless error occurred because:

> The ultimate purpose of the proposed cross-examination was to call into question the hospital's AFE diagnosis by suggesting that the hospital diagnosed that condition about 15 times more than the rate elsewhere. This issue was presented to the jury through the testimony of Dr. Adelman and in part from Dr. Dildy. This evidence allowed the plaintiff's attorney in closing argument to hammer on the significance of the statistical abnormality. During the proffer of Dr. Dildy, he said that if the incidence of AFE at the hospital were accurate, he would be concerned that AFE was being over-diagnosed. Yet, even when confronted with the statistics documenting this possibility, he persisted in his opinion that Susan presented a special case of AFE....
>
> Considering all of the testimony, the jury had the full ability to take the statistical anomaly into consideration; the omitted testimony added little to the plaintiff's case. Having reviewed the entire record, we conclude that it is more likely than not that the restriction on the cross-examination of Dr. Dildy did not contribute to the verdict. The error was harmless.

(A:23).

Two judges concurred that given this Court's precedent, the Fourth District, going forward, should apply the "more likely than not" harmless error test. (A:24). They opined, however, if they were writing on a clean slate, the plain language of

the harmless error statute -- "miscarriage of justice" -- should apply and under that standard, there was no miscarriage of justice in this case. (A:27-28). Two other Judges concurred in the result, but opined the Fourth District should not recede from its prior harmless error test. (A:28). Regardless, the *en banc* court unanimously agreed that whichever standard applied, the error was harmless in this case and the defense judgment should be affirmed.

Following jurisdictional briefing, this Court accepted review.

SUMMARY OF THE ARGUMENT

The plain terms of the harmless error statute demonstrate that the party seeking a new trial has the burden to show that a "miscarriage of justice" occurred based on the particular facts of the case. The phrase "miscarriage of justice" is not ambiguous, and no interpretive test is required to define its meaning.

Alternatively, if the Court finds "miscarriage of justice" ambiguous, it should require the party seeking a new trial to show there is a reasonable probability that the verdict would have been different had the error not occurred.

Dr. Baux submits that no error occurred in this case. Defendants did not call Dr. Adelman as a witness and defense experts did not rely on his diagnosis in formulating their own opinions. Permitting cross-examination of a defense expert on whether another doctor misdiagnosed other patients would turn every malpractice case into multiple trials within a trial, unfairly prejudicing the

defendant doctor. Should this Court disagree, it should affirm the *en banc* district court's unanimous conclusion that the error was harmless as the proffer was merely cumulative and added nothing to Plaintiff's case.

The Court should decline to exercise its discretionary jurisdiction to review Plaintiff's witness tampering claim, which wholly lacks merit and was summarily rejected below.

ARGUMENT

I. THE BURDEN IS ON THE PARTY SEEKING A NEW TRIAL TO SHOW AN ERROR RESULTED IN A MISCARRIAGE OF JUSTICE.

The *en banc* Fourth District did not specifically hold that the phrase "miscarriage of justice" is ambiguous. Yet, it concluded an interpretive test was needed to define this term. In adopting its test, the Fourth District relied heavily on *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), and opined that in civil cases following that decision, this Court has: (1) "utilized an 'effect on the fact finder' test for harmless error in civil cases, even though it has not explicitly declared so;" and (2) "expressly declared that . . . the burden of proving harmlessness of an error is on the beneficiary of the error in the trial court, who improperly introduced the offending evidence." (A:17).

The *en banc* Fourth District misapplied the harmless error statute and this Court's precedent in creating its test and in placing the burden on the beneficiary of the error to show that an error is harmless. The Court should hold that the plain

language of the harmless error statute applies, and that the party seeking a new trial has the burden to show that an error resulted in a miscarriage of justice.

A. Section 59.041, Florida Statutes.

Section 59.041, Florida Statutes, enacted in 1911, provides:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

§ 59.041, Fla. Stat.

Based on the plain language of the statute, the Fourth District erred in concluding that the beneficiary of the error, or the party that prevailed at trial, bears the burden of proving an error harmless, and that an interpretive test was required to define a "miscarriage of justice." This Court has repeatedly held that when a statute is clear and unambiguous, its plain and ordinary meaning must control. *See, e.g., Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1082 (Fla. 2009). Here, the statute's plain language demonstrates that the burden is on the party seeking to set aside or reverse a judgment, or to obtain a new trial, to show that an error is harmful or that a miscarriage of justice has occurred. § 59.041, Fla. Stat. ("[n]o judgment shall be set aside or reversed, or new trial granted . . . unless . . . it shall appear that the error complained of has resulted in a miscarriage of

justice."). Put another way, if the party seeking a new trial does not meet the burden of showing that an error resulted in a miscarriage of justice, the judgment shall not be set aside or reversed, or a new trial granted.

While the district courts have apparently attempted to define the term "miscarriage of justice" through the use of various "tests," none have ever expressly held this term ambiguous, and it is not. The statute provides that whether a "miscarriage of justice" has occurred is to be determined on an individual basis "after an examination of the entire case." Thus, the legislature has specifically entrusted this determination to the discretion of the courts, based on the particular facts and circumstances of the case.

Although the Fourth District spent much effort distinguishing between a "correct result" test, which asks the judge to look at everything but the error and to determine whether the verdict would have been different without it, versus an "effect on the fact finder" test, which asks the judge to look closely at the error and estimate its effect on the trier of fact, nothing in the language of the harmless error statute suggests that the legislature intended for courts to be constrained by either. To the contrary, the statutory language shows that courts should consider the totality of the circumstances, which includes both the result and the process.

A determination of whether a "miscarriage of justice" has occurred in light of the facts of the case may be somewhat subjective, but that does not make it

ambiguous. Appellate courts routinely apply this and other discretionary principles such as "irreparable harm" and "abuse of discretion" to the specific facts of a case. Moreover, the statutory standard is no more subjective than the various "tests" that have been created to define it. Under the Fourth District's test, for example, the appellate court must speculate as to whether and how much an error influenced the jury, and whether such influence contributed to the verdict. (A:22). While phrased differently, other tests similarly require the appellate court to prognosticate the likely effect of an error on the jury and whether a different result may have been reached without it. *See, e.g., Katos v. Cushing*, 601 So. 2d 612, 613 (Fla. 3d DCA 1992) ("[t]he test for harmless error is whether, but for the error, a different result may have been reached."); *Damico v. Lundberg*, 379 So. 2d 964, 965 (Fla. 2d DCA 1979) ("error is reversible only when, considering all the facts peculiar to the particular case under scrutiny, it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed.").

If anything, the statutory language is clearer than the various tests proposed by the district courts because it provides guidance for situations where reasonable minds may disagree. As Judge Damoorgian pointed out in his concurring opinion, the last sentence of the statute, which requires a liberal construction, favors setting aside, or reversing the judgment, or granting a new trial where a close question is presented. (A:25).

Thus, the phrase "miscarriage of justice" is not ambiguous and does not require a mechanical test to define it in the first instance.

B. Section 90.104, Florida Statutes.

Moreover, in the context of this case, the phrase "miscarriage of justice" is clarified by section 90.104, Florida Statutes, which also governs harmless error in civil cases.[4] That statute, enacted in 1976, provides in pertinent part:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected . . .

§ 90.104(1), Fla. Stat.

Section 90.104(1), "amplifies § 59.041 . . . in stating the 'harmless error' rule as it applies to evidentiary rulings by the court." Law Revision Council Note to § 90.104(1), Fla. Stat. (1976). Consistent with earlier precedent from this Court, section 90.104 clarified that a "miscarriage of justice" occurs where evidence is wrongfully admitted or excluded "when a substantial right of the party is adversely affected." *See Prince v. Aucilla River Naval Stores, Co.*, 137 So. 886, 887 (Fla.

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[4] Both sections 59.041 and 90.104 apply in civil and criminal cases; however, there are additional harmless error statutes that apply only in criminal cases. *See* § 924.33, Fla. Stat. ("No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant."); § 924.051(1)(a), Fla. Stat. (defining "prejudicial error" to mean "an error in the trial court that harmfully affected the judgment or sentence.").

1931) ("A judgment should not be reversed or new trial granted in any case for error in rulings upon the admission or rejection of evidence unless it shall appear to the court from a consideration of the entire case that such errors injuriously affect the substantial rights of the complaining party.").

The *en banc* Fourth District acknowledged that "if admitted or excluded evidence does not adversely affect a 'substantial right of a party,' its admission cannot be a 'miscarriage of justice' under section 59.041," yet concluded that section 90.104 "adds little to harmless error analysis" other than "its requirement of preservation." (A:6, n.4). This was erroneous. Section 90.104 specifically applies to evidentiary rulings. Thus, to the extent that the Fourth District found the term "miscarriage of justice" ambiguous (which it is not), it should have looked to this statute for clarification before creating an interpretive test.

C. This Court's Precedent.

This Court has never adopted a harmless error test in civil cases, and its precedent supports applying the plain terms of the harmless error statute and placing the burden on the party seeking a new trial to show that the error resulted in a miscarriage of justice.

1. Civil Harmless Error Cases.

Although the *en banc* Fourth District cited to *Tallahassee Memorial Regional Medical Center, Inc. v. Meeks*, 560 So. 2d 778 (Fla. 1990), as supporting

its test, the *Tallahassee Memorial* Court did not employ any test at all. To the contrary, the Court applied the plain terms of section 59.041 and concluded, after an examination of the entire case, that the improper admission of evidence did not result in a "miscarriage of justice." *Id.* at 782. *See also Medina v. Peralta*, 724 So. 2d 1188, 1189-90 (Fla. 1999) (explaining that "[a]n evidentiary ruling . . . could be deemed harmless error under section 59.041. . . . When examining an evidentiary ruling under section 59.041, we are required to look at the entire record.") (footnote omitted); *White Constr. Co., Inc. v. Dupont*, 455 So. 2d 1026, 1029 (Fla. 1984)[5] (applying plain terms of section 59.041 to conclude that improper admission of evidence did not result in a miscarriage of justice).

Moreover, the Court in *Tallahassee Memorial* placed the burden on the appellant that was seeking a new trial to demonstrate both that an evidentiary error occurred, and that prejudice resulted from such error. The Court concluded that the trial court erred in permitting privileged statements inadmissable in evidence to be used as impeachment, and stated:

> This does not mean, however, that the verdict should be vacated or a new trial ordered. Not only must an appellant demonstrate error in the improper admission of evidence, prejudice therefrom must also be demonstrated.

Tallahassee Mem'l, 560 So. 2d at 782.

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[5] *Receded from on other grounds, Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000).

Multiple district courts of appeal have likewise applied the plain language of the harmless error statutes to determine whether the party seeking a new trial has shown that a miscarriage of justice resulted. *See, e.g., Dones v. Moss*, 884 So. 2d 230, 232 (Fla. 2d DCA 2004); *Bulkmatic Transp. Co. v. Taylor*, 860 So. 2d 436, 447-48 (Fla. 5th DCA 2003); *Tormey v. Trout*, 748 So. 2d 303, 306 (Fla. 4th DCA 1999); *Centex-Rooney Const. Co., Inc. v. Martin County*, 706 So. 2d 20, 26 (Fla. 4th DCA 1997); *Forester v. Norman Roger Jewell & Brooks Int'l, Inc.*, 610 So. 2d 1369, 1372-74 (Fla. 1st DCA 1992); *Jones v. Airport Rent-A-Car, Inc.*, 342 So. 2d 104, 104 (Fla. 3d DCA 1977).[6]

Contrary to the *en banc* opinion, this Court's decisions in *Gormley v. GTE Products Corp.*, 587 So. 2d 455 (Fla. 1991) and *Sheffield v. Superior Insurance Co.*, 800 So. 2d 197 (Fla. 2000), do not support the imposition of a *per se* rule that the beneficiary of the error always bears the burden of proving harmlessness. To the contrary, in these cases a party led the trial court into clear error by arguing that collateral source evidence was admissible, in the face of well-established law

[6] Indeed, the Fourth District has employed such a test subsequent to its decision in this case. *See Young v. Becker & Poliakoff, P.A.*, 88 So. 3d 1002, 1013 (Fla. 4th DCA 2012), *rev. denied*, No. SC12-1282, 2012 WL 4052115 (Fla. 2012) ("Only when it appears that evidentiary errors injuriously affected the substantial rights of the complaining party will a judgment be reversed. Appellant has the duty to demonstrate not only error in evidentiary rulings, but prejudice from such rulings as well.") (internal citation omitted).

prohibiting the admission of such evidence. *Sheffield*, 800 So. 2d at 200; *Gormley*, 587 So. 2d at 457-59.

Additionally, while the Court stopped short of announcing a *per se* rule of reversal in *Gormley*, it "recognized the inherently damaging effect of the jury hearing collateral source evidence both on the issues of liability and on issues of damages." *Sheffield*, 800 So. 2d at 203. Due to the inherently prejudicial nature of this evidence, the Court concluded that in this specific context, the beneficiary of the error must bear the burden of proving harmlessness:

> With regard to the introduction of collateral source evidence, this Court held in *Gormley* that:
>
> > Equity and logic demand that the burden of proving such an error harmless must be placed on the party who improperly introduced the evidence. Putting the burden of proof on the party against whom the evidence is used ... would simply encourage the introduction of improper evidence.
>
> 587 So.2d at 459. The burden of proving that the admission of the collateral source evidence was harmless rests on Superior. As the Fourth District observed, "when a trial lawyer leads a judge into an obvious error ... cries of harmless error on appeal are likely to fall on deaf ears." *Mattek v. White*, 695 So. 2d 942, 944 (Fla. 4th DCA 1997).

Id.[7] Nothing in *Sheffield* or *Gormley* demonstrates that the Court intended to impact the harmless error statute's clear intent that the party seeking a new trial

[7] *Flores v. Allstate Ins. Co.*, 819 So. 2d 740 (Fla. 2002), is consistent. *Flores* did not address whether the error was harmful, and its statement that "ordinarily" the

must show that the error resulted in a miscarriage of justice, or overrule *Tallahassee Memorial*.

And, although the Fourth District relied on *Gormley*, *Sheffield*, and *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006), as supporting its test, they do not. No "test" can be discerned from these cases at all. To the contrary, *Gormley* and *Sheffield* held the errors could not be harmless due to the inherently prejudicial effect of admitting collateral source evidence, and the Court's harmless error analysis in *Linn* is consistent with an application of the plain statutory language.

2. Criminal Harmless Error Cases.

The Fourth District's reliance upon *DiGuilio* and its progeny was also misplaced. *DiGuilio* analyzed a comment on a defendant's failure to testify under a criminal harmless error statute, section 924.33, that differs from section 59.041 "in two significant respects." 491 So. 2d at 1133-34. First, by providing that the harmless error analysis is applicable to all criminal judgments, regardless of the type of error involved. Second, and most notably, by providing that there shall be no presumption that errors are reversible unless it can be shown that they are

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burden is on the beneficiary of the error to establish that the error was harmless, and citation to *Sheffield*, is no more than dicta. *Id.* at 751. In any event, *Flores* represents another instance where the appellee led the trial court into clear error by arguing that evidence of an unrelated fraud in connection with a PIP claim was admissible against the insured on his claim for statutory UM coverage, when the entitlement to PIP benefits was not an issue in the case. *Id.*

harmful. *Id.* This Court noted this particular statement was at odds with a defendant's constitutional right to a fair trial free of harmful error, explaining:

> Section 924.33 respects the constitutional right to a fair trial free of harmful error but directs appellate courts *not* to apply a standard of review which requires that trials be free of harmless errors.

Id. at 1134.

While this Court explained that the authority of the Legislature to enact harmless error statutes is "unquestioned," it also explained that "courts may establish the rule that certain errors *always* violate the right to a fair trial and are, thus, per se reversible." *Id.* This Court then explained that it was required to show constitutional reasons to override the legislature's decision, and determined that protecting a defendant's due process right to a fair trial justified the adoption of the harmless error test set forth in *Chapman v. California*, 386 U.S. 18 (1967), which:

> 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 or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.
>
> * * *
>
> The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

DiGuilio, 491 So. 2d at 1138-39.

DiGuilio thus recognizes "the undeniable obligation of the judiciary to safeguard a defendant's right to a fair trial" and the Court's "constitutional authority to determine 'when an error is harmless and the analysis to be used in making the determination." *Goodwin v. State*, 751 So. 2d 537, 543 (Fla. 1999) (*quoting State v. Lee*, 531 So. 2d 133, 136 n.1 (Fla. 1988)). Nothing in *DiGuilio* can be viewed as affecting the legislature's "unquestioned" authority to enact harmless error statutes in civil cases. *DiGuilio*, 491 So. 2d at 1134.

Nor does *DiGuilio* support the Fourth District's conclusion that the burden must remain on the beneficiary of the error in a civil case. To the contrary, the *DiGuilio* standard recognizes that the burden in a criminal case always remains on the state, whether at trial or on appeal. *See generally Knowles v. State*, 848 So. 2d 1055 (Fla. 2003); *Goodwin*, 751 So. 2d at 537.

II. ALTERNATIVELY, THE PARTY SEEKING A NEW TRIAL MUST SHOW THERE IS A REASONABLE PROBABILITY THE VERDICT WOULD HAVE BEEN DIFFERENT.

It is submitted that the harmless error statute is unambiguous and that no interpretive test is required to define a "miscarriage of justice." However, to the extent the Court disagrees, it should require the party seeking a new trial to show there is a reasonable probability that the verdict would have been different had the error not occurred.

A. The Fourth District's Proposed Standard.

Although the Fourth District moved from an "outcome-determinative 'but-for' test" to an "effect on the fact finder test," the district court has still held that error must actually contribute to the verdict, and thus affect the outcome, in order to warrant a new trial. This is consistent with the Fourth District's prior test and tests from other district courts, all of which require at least a reasonable probability that the error may have affected the outcome of the trial.

However, to the extent that the Fourth District's new standard places the burden on the beneficiary of the error to show harmlessness, it should be rejected. Additionally, to the extent the Fourth District's new standard indicates that any influence on the trier of fact necessarily contributes to the verdict, it should be rejected. (A:1 "[T]he beneficiary of the error . . . must show . . . that it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict."). Such an interpretation would open the floodgates and lead to a lavish granting of new trials.

Finally, to the extent that the Fourth District's reliance on *DiGuilio* and adoption of an "effect on the fact finder" test can be construed as proposing a standard that looks only to the process, but ignores whether the outcome was likely to be different without the error, it should also be rejected. As the Fourth District recognized, in a criminal prosecution there are constitutional concerns for the

legitimacy of convictions which may require a judgment to be reversed and a new trial granted if there is a reasonable possibility that an error influenced the trier of fact and contributed to the verdict, regardless of whether the outcome of the trial was likely to be different.

There are no similar constitutional concerns in civil cases, where social policy places a higher premium on finality and society is willing to tolerate more mistakes. (A:22). For this reason, a test that reverses a judgment and grants a new trial regardless of whether there is a reasonable probability that the outcome would have been different is ill-suited to civil cases, and would result in judicial inefficiency and waste. As Judge Connor noted in his specially concurring opinion: "It is appropriate to protect the fairness of the fact-finding process *above* protecting the finality of the decision in criminal cases. I submit in civil cases it is more appropriate to protect the finality of a decision *above* protecting the fairness of the fact-finding process." (A:29).

B. The Petitioner's Proposed Standard.

The Petitioner argues this Court should apply the criminal *DiGuilio* standard in civil cases and require the beneficiary of the error to prove there is no reasonable possibility that the error contributed to the verdict. The Court should reject this argument, as this standard would impose a presumption that all errors in a civil case are harmful. While such a presumption may be appropriate in a criminal case,

where the state must prove its case beyond a reasonable doubt, it has no place in a civil case. Indeed, many jurisdictions that apply the same harmless error standard in civil and criminal cases do not utilize a "reasonably possible" standard,[8] and in his influential work on harmless error, former Chief Justice Traynor of the California Supreme Court advocated against applying this severe standard, which he noted compels an almost automatic rule of reversal. *See* Roger J. Traynor, *The Riddle of Harmless Error* 37-45 (1970).

C. Other Districts' Standards.

Contrary to Plaintiff's brief, the tests utilized by the First, Second, Third, and Fifth districts are not in conflict. *See, e.g., Webster v. Body Dynamics Inc.*, 27 So. 3d 805, 809 (Fla. 1st DCA 2010); *Hogan v. Gable*, 30 So. 3d 573, 575 (Fla. 1st DCA 2010); *Fla. Inst. for Neurologic Rehab., Inc. v. Marshall*, 943 So. 2d 976, 978 (Fla. 2d DCA 2006); *Gencor Indus., Inc. v. Fireman's Fund Ins. Co.*, 988 So. 2d 1206, 1209 (Fla. 5th DCA 2008); *Katos*, 601 So. 2d at 613. There is simply no

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[8] *See, e.g., McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 923-28 (3d Cir. 1985) (explaining that in the Third Circuit, errors in a criminal case are not harmless unless it is "highly probable" that they did not affect a party's substantial rights, and concluding that the same standard should apply in a civil case); *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-23 (D.C. Cir. 1990) (the standard announced in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), applies to both criminal and civil cases; this standard asks "'whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [verdict] cannot stand.' This inquiry 'involves an assessment of the likelihood that the error affected the outcome of the case.'") (citation omitted); *Aetna Cas. & Sur. Co. v. Gosdin*, 803

meaningful distinction between a test that asks whether "it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed" and one that asks whether, "but for the error a different result may have been reached." Despite stylistic differences in the language used, both tests hold error harmful where a reasonable probability exists that the verdict would have been different had the error not occurred.

Additionally, these tests can be applied in harmony with the harmless error statutes. For example, in *Florida Institute for Neurologic Rehabilitation*, now-Justice Canady, writing for the Second District, explained:

> To prevail in its appeal, FINR [the appellant] must not only establish that the trial court abused its discretion but also show that the trial court's error was harmful. An appellate court may "set aside or reverse a judgment, or grant a new trial on the basis of [improperly] admitted or excluded evidence" only "when a substantial right of the party [appealing] is adversely affected." § 90.104(1), Fla. Stat. (2006). In order for an appealing party to be successful in a challenge to a judgment based on "the improper admission or rejection of evidence," the appellate court must conclude "after an examination of the entire case ... that the error complained of has resulted in a miscarriage of justice." § 59.041, Fla. Stat. (2006). In a civil case, an error is reversible - that is, harmful error - where "it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed." *Damico v. Lundberg*, 379 So. 2d 964, 965 (Fla. 2d DCA 1979).

Id. at 978.

F.2d 1153, 1159-60 (11th Cir. 1986) (applying *Kotteakos* standard to both criminal and civil cases).

Thus, to the extent the Court wishes to adopt an interpretive test to define "miscarriage of justice," Dr. Baux submits it should adopt a test similar to that used in the First, Second, Third, and Fifth districts, and require a reasonable probability that the verdict would have been different had the error not occurred. It appears that this is the test the *en banc* Fourth District also adopted in that it requires "more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict." (A:1). However, the language "did not influence the trier of fact," coupled with the decision's lengthy discussion of an "effect on the fact finder" test, "that is oriented on the process," versus a "correct result" test, "that is oriented on the outcome," (A:9) is confusing. It could lead to an argument that what the Fourth District meant was that if there was any influence on the trier of fact, the error *ipso facto* contributed to the verdict.

III. THERE WAS NO HARMFUL ERROR HERE.

A. No Error In Excluding The Cross-Examination.

Initially, the trial court did not err in excluding the cross-examination as collateral and irrelevant. Defendants did not call Dr. Adelman as an expert and defense experts did not rely on Dr. Adelman's or any other physician's diagnosis of AFE in rendering their own opinions. Dr. Adelman was called as a witness by Plaintiff, who then sought to discredit his opinion that the decedent suffered AFE, which was never presented by the defense, and to argue that Dr. Adelman was

"overstating the diagnosis, and that's wrong, ladies and gentlemen, that is flat out wrong to do[.]" (T19:2767).

It is improper for the Plaintiff to call a doctor as a witness, when the doctor's opinion is not elicited by the defense, simply to impeach the doctor's opinion in order to discredit the defense. *See Jordan v. Masters*, 821 So. 2d 342, 348 (Fla. 4th DCA 2002) (improper impeachment to call an opposing party's expert witness, whom the opposing party does not call, solely for the purpose of discrediting him). The entire line of inquiry was wholly collateral and irrelevant, and the trial court was correct to exclude it. Indeed, as Dr. Dildy testified in his proffer, to opine on whether other cases were correctly or incorrectly diagnosed by Dr. Adelman (an issue wholly irrelevant to whether anesthesiologist Dr. Baux was negligent), he would have to conduct a formal review. Allowing such evidence would turn every malpractice case into multiple trials within a trial on other patients' cases and on other doctors' alleged misdiagnoses, unfairly prejudicing the defendant doctor.

B. The Excluded Proffer Was Entirely Cumulative And Added Nothing To Plaintiff's Case.

In any event, whether the plain language of the harmless error statute or an interpretive test is utilized, the alleged error was harmless. As Judge Damoorgian explained in his concurring opinion:

> If we were to apply the harmless error statute's plain language to this case, it would not appear that the error complained of resulted in a miscarriage of justice. The plaintiff was able to present evidence

> of the statistical anomaly and was able to argue its weight to the jury. The omitted testimony added little to the plaintiff's case, and the failure of Dr. Dildy to address the statistical anomaly may have been more damaging than what he would have said if the trial court had allowed the cross examination. Therefore, applying either the harmless error statute's plain language or the majority opinion's "more likely than not" harmless error test, our decision to affirm would be the same.

(A:28). It is not reasonably probable that the outcome would have been different had the jury heard the excluded testimony as it was entirely cumulative and added nothing to Plaintiff's case.

The issue of over-diagnosis of AFE was sufficiently presented in Dr. Adelman's testimony, evidence of the actual number of births per year, and by the national statistic rate testified to by Dr. Dildy. During Dr. Adelman's direct examination, Plaintiff's counsel established that: (1) based on the national average, if Dr. Adelman sees one to two cases of AFE a year at the hospital (as he guessed he did), the hospital must have approximately 30,000 to 60,000 births a year (T7:1041); (2) the hospital actually had just over 2,000 births a years (and not 10,000 to 20,000 births as Dr. Adelman had also guessed) (T7:1042; 1048-49); and (3) if Dr. Adelman in fact sees one to two cases of AFE per year in 2,000 births, this is between fifteen to eighty times the national average (T7:1049-55).

Dr. Adelman repeatedly testified that his numbers were "rough estimates" not based on any facts or medical records. (T7:1047-53, 1055-56). He agreed that

if the hospital had as many as forty to eighty times the national average of cases of AFE, that this would be "alarming." (T7:1055).[9]

Dr. Dildy's excluded proffer simply reiterated that, if one of Dr. Adelman's grossly overestimated numbers was correct (the number of cases of AFE he thought he saw), and the other was not (the number of births), then the hospital saw between ten to eighty times more cases of AFE than the national average. (T8:1233-35). Dr. Dildy did not state that Dr. Adelman's reported rate of AFE was "inflated" as Petitioner contends. He indicated that "if this is actually a recorded incidence, as opposed to somebody's recollection" then he would be concerned that the rate is probably inflated. (T8:1235). Thus, Dr. Dildy's proffer added nothing new and would have been entirely cumulative of Dr. Adelman's testimony. Moveover, as Judge Damoorgian noted, Dr. Dildy's failure "to address the statistical anamoly may have been more damaging than what he would have said if the trial court had allowed the cross examination." (A:28). This is so because in the proffer Dr. Dildy testified he could not opine on whether there had been an "overdiagnosis," misdiagnosis or correct diagnosis in other cases, without a formal review of the cases. (T8:1236).

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[9] However, he also testified that he did not believe the hospital was over-diagnosing AFE and that if Plaintiff's counsel wanted to know the actual number of cases of AFE per annual births that information should be obtained from the medical records department rather than from Dr. Adelman's guesswork. (T7:1056).

The district court did not, as Plaintiff claims, find the evidentiary error harmless because it was cumulative to closing argument. (IB:38). To the contrary, the court simply noted that Plaintiff's counsel was fully permitted to argue his theory that AFE was being over-diagnosed at the hospital during closing arguments from the facts already in evidence. (App:23).

This Court has held that where, as here, the evidence would be cumulative of other evidence, it is not harmful error. *See Sims v. Brown*, 574 So. 2d 131, 134 (Fla. 1991) ("Even if wrongfully excluded, the exclusion of cumulative testimony is not an adequate basis for vacating a jury verdict."); *Tallahassee Mem'l*, 560 So. 2d at 782 (holding cumulative impeachment evidence harmless in considering the totality of the evidence); *White Constr.*, 455 So. 2d at 1029 (error in admitting evidence of subsequent brake repairs to loader was harmless since there was enough independent evidence of defendants' negligence to make the evidence of subsequent repairs merely cumulative).[10]

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[10] *See also Duss v. Garcia*, 80 So. 3d 358, 361-62 (Fla. 1st DCA 2012) (any error in excluding testimony from patient's standard of care expert witness that obstetrician's use of vacuum extractor during patient's birth created the conditions known to have the potential to cause neurological injury in newborns was harmless where expert stated several times that use of vacuum caused patient's ischemic stroke, and other experts also so testified); *Broward County Sheriff's Office v. Brody*, 969 So. 2d 447, 449-50 (Fla. 4th DCA 2007) (if poster boards were erroneously admitted in negligence action, the error was harmless where they merely reproduced testimony of witnesses the jury already heard); *Castaneda v. Redlands Christian Migrant Ass'n, Inc.*, 884 So. 2d 1087, 1093 (Fla. 4th DCA 2004) (refusal to admit testimony and memorandum of daycare center employee

The "battle of the expert" case law Plaintiff relies on is not in conflict with the Fourth District's decision. In *Linn*, the Court found harmful error in allowing an expert to testify she consulted with colleagues in reaching her standard of care opinions because competing expert opinions on the proper standard of care, and thus the credibility of the expert witnesses, was the focal point of the trial. 946 So. 2d at 1032. Here, in contrast, the cross-examination was not relevant to attack Dr. Adelman's credibility because his diagnosis of AFE was not presented or relied upon by the defense. Nor was it relevant to attack Dr. Dildy's credibility, since he did not rely on Dr. Adelman's diagnosis of AFE in reaching his opinion. He relied on the clinical facts. Further, the proffered cross-examination did not address standard of care issues.

In *Witham v. Sheehan Pipeline Construction Co.*, 45 So. 3d 105 (Fla. 1st DCA 2010), the Judge of Compensation Claim's ("JCC") reliance on a toxicologist's inadmissible opinion was harmful because under section 440.13(9)(c), the opinion of an expert medical advisor appointed by the court is presumed correct unless there is clear and convincing evidence to the contrary as

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was harmless error in personal injury action where information was cumulative to portion of employee's deposition read to jury); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Blackmon*, 754 So. 2d 840, 843 (Fla. 1st DCA 2000) (no "reasonable possibility" that error contributed to verdict where tortfeasor's alleged statement was cumulative of other evidence); *Katos*, 601 So. 2d at 613 (no harmful error where wrongfully excluded evidence was cumulative); *Webster*, 27 So. 3d at 809-10 (same).

determined by the JCC. *Id.* at 110. The JCC found such clear and convincing rebuttal based on two expert opinions, one of which was inadmissible, and the order did not indicate the other expert opinion was sufficient rebuttal. *Id.* The court explained, "[w]hen considered in conjunction with the underlying harmless error test, however, 'cumulative evidence' means unnecessary evidence-evidence so repetitive that, notwithstanding its exclusion, it is not reasonably likely a different result would have occurred." *Id.* at 109. This test was not met in *Witham* due to the statutory presumption requiring rebuttal by clear and convincing evidence.

In contrast, the Fourth District *en banc* determined that here, the proffered cross-examination was so unnecessary and repetitive that it more likely than not did not influence the trier of fact and thereby contribute to the verdict.

Lake v. Clark, 533 So. 2d 797 (Fla. 5th DCA 1988), and *Cenatus v. Naples Community Hospital, Inc.*, 689 So. 2d 302 (Fla. 2d DCA 1997), are likewise distinguishable. Those cases found the exclusion of standard of care expert testimony in malpractice cases harmful, even where cumulative. They do not create a blanket rule that exclusion of any cumulative evidence in malpractice cases is harmful. It is not. *See Katos*, 601 So. 2d at 613 (where excluded evidence in malpractice case was essentially cumulative, its exclusion was harmless).

Plaintiff was not precluded from introducing qualified experts or from introducing evidence on his theories that the decedent did not die from AFE and it

was being over-diagnosed. He presented the deputy chief medical examiner who conducted the autopsy and found no physical evidence of AFE. He further presented Dr. Adelman's testimony that his off-the-cuff estimate of the number of AFE cases he saw was about 15 times the rate elsewhere, and elicited from Dr. Dildy the statistical rate of AFE. He was then able to use this evidence to vigorously argue his theory that the hospital either had an epidemic of AFE or it was being over-diagnosed.

The excluded hypothetical cross-examination added nothing to his case. Dr. Dildy simply stated that if Dr. Adelman's off-the-cuff estimate was accurate, then he would be concerned that AFE was being over-diagnosed, but his opinion was the decedent died as a result of AFE. Also, he could not opine whether there was a correct or incorrect diagnosis in other cases without a formal review. Plaintiff's claim that the excluded testimony would have made his theories more believable, fails. The theory was based on off-the-cuff gross overestimates by Dr. Adelman and Plaintiff's insistence on crediting one overestimated number as correct when it was shown the other overestimated number was wrong.

IV. NO ERROR IN EXCLUDING SPECULATION OF WITNESS TAMPERING AND INADMISSIBLE DOUBLE HEARSAY.

The Court should decline Petitioner's request to exercise its discretionary jurisdiction to review an argument that the trial court erred in excluding evidence of alleged witness tampering, as this issue is outside the scope of the certified

question and was twice rejected by the Fourth District without discussion. (A:1; *Special*, 52 So. 3d at 684). *See, e.g., Chames v. DeMayo*, 972 So. 2d 850, 853 n.2 (Fla. 2007) (declining to address claims that were not specifically addressed by the district court and were outside the scope of the certified question).

A. Pertinent Facts.

Dr. Barbara Wolf was the Deputy Chief Medical Examiner who conducted the autopsy on the decedent. (T5:772, 777-78). After a full autopsy, Dr. Wolf was unable to diagnose the cause of death and thus listed it as: "Acute bradycardia [slow heartrate], hypotension [low blood pressure] and coagulopathy [blood clotting problem], coagulation problem, following cesarean section delivery." (T5:819). Although Dr. Wolf was unable to diagnose the cause of death, she opined it was not related to AFE. However, she agreed AFE was possible, and her report did not rule out AFE as the cause of death. (T5:804, 812, 822).

At trial, Petitioner sought to have her testify about two alleged acts of witness tampering. (T5:697-701). The first related to a Department of Health (DOH) complaint that was filed against her. The second related to certain alleged "pre-deposition conduct," namely, a cell phone conversation that occurred between Dr. Wolf and her attorney, Bill Pincus, wherein Mr. Pincus told her about an earlier conversation that he had with Dr. Baux's trial attorney, Gene Ciotoli. (*Id.*).

The DOH Complaint: After the DOH was served with a copy of Petitioner's complaint for medical malpractice in this case, that entity generated a separate administrative complaint against Dr. Baux. Dr. Baux hired an attorney named Mark Dresnick to represent him in the administrative action, and Mr. Dresnick asked Dr. Factor, who had served as Dr. Baux's presuit expert witness, to write a letter in Dr. Baux's defense. Dr. Factor complied by writing a four-page letter addressed to Mr. Dresnick which stated his opinions that Mrs. Special developed DIC as a result of AFE, leading to generalized bleeding that occurred until her death, and that he was absolutely certain the presence of trophoblasts and other materials was diagnostic of AFE. (R15:2858-61, 2863-64, 2981-84). Other experts, including Dr. Wolf, disagreed. (T5:706, 795). Dr. Factor was subsequently withdrawn as a defense expert and did not testify at trial.

In April 2006, the DOH generated a complaint against Dr. Wolf. The uniform complaint form states that the complainant's name was "Doh-Psu," and summarized that the complainant:

> alleges that during the course of another DOH investigation . . . it was found that the Subject (medical examiner) which did the initial autopsy, specifically indicated that she found no evidence of amniotic fluid embolus. At the request of a defense attorney, another pathologist reviewed the tissue and apparently cut new sections and found evidence of widespread embolism from amniotic fluid.

(R14:2638). Both the DOH investigation as to Dr. Baux and Dr. Wolf were subsequently dismissed for lack of probable cause. (SR:21-22).

At trial, Plaintiff's counsel conceded he had no direct evidence that Defendants were involved in the complaint against Dr. Wolf, and emphasized he was not making any allegations against defense counsel. (T5:701, 719). However, Petitioner sought to introduce Dr. Wolf's testimony that, although she did not know who filed the complaint, she believed Dr. Factor had filed an affidavit "of some type" to attempt to intimidate her testimony in this case. (T5:697-01). The trial court excluded the testimony because there was no evidence tying the filing of the DOH complaint to Defendants. (T5:718-21, 733, 744-46, 752-53).[11]

Post-trial, the trial court allowed Petitioner to conduct a six-month investigation and discovery into the matter and granted an evidentiary hearing. (R14:2632-2640A, 2669-70). The evidence adduced for that hearing established that no one acting on behalf of the defense sought to have Dr. Wolf investigated by the DOH. Dr. Baux testified: (1) he had not known that Mr. Dresnick retained Dr. Factor to assist in the DOH action; (2) he never spoke to Dr. Factor; and (3) he never reported Dr. Wolf to the DOH, nor did anyone acting on his behalf. (R15:2888, 2891-92, 2894).

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[11] The trial court did not, as Petitioner contends, initially rule that the evidence relating to the administrative complaint was "fuzzy." (IB:13). The trial judge ruled that he was not going to allow questioning regarding the alleged intimidation unless Petitioner could establish a connection between the investigation of Dr. Wolf and the defense. (T5:718-20). Petitioner's citation is to a comment the trial court made prior to Dr. Wolf's proffer, and not the court's ruling.

Dr. Factor testified he prepared a letter in defense of Dr. Baux's DOH complaint (R15:2858-63), but never spoke to Dr. Baux and did not recall that anyone ever questioned Dr. Wolf's work. (R15:2856, 2858-59, 2864-65). As for himself, he testified "I had no interest or concern regarding Dr. Wolf whatsoever. I simply set out my opinions in this report. And what happened regarding Dr. Wolf subsequent to that, I had no knowledge or involvement with." (R15:2868).

At another deposition (R14:2735-R15:2850), Dr. Factor similarly testified he prepared a report for an attorney he believed was named "Dresnick" for the administrative action. (R14:2764-67).[12] Although he and Dr. Wolf reached different conclusions about what was present on the slides, he made no conclusions about whether she was delinquent in her duties or negligent. (R14:2771-72). Moreover, he specifically testified he did not file a complaint against or make any criticism of Dr. Wolf. (R14:2782).

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[12] Dr. Factor did not "refuse to identify who had retained him to assist in the administrative action against Dr. Wolf, based on a generalized claim of privilege," as Petitioner claims (IB:11), and his citation is to Mr. Ciotoli's assertion that Dr. Factor's report would be protected as privileged. (R14:2780-81). Petitioner also misrepresents why Dr. Factor's materials from the DOH proceeding were not provided at the deposition, and the circumstances surrounding a motion to compel. (IB:12). Dr. Factor testified that he did not bring the report because the DOH proceeding was separate from this case. (R14:2765-66). Petitioner subsequently moved to compel Dr. Factor's report after he had already been withdrawn as a defense expert. (R11:2097-2101, 2104-38). In any event, the report was produced at Dr. Factor's post-trial deposition. (SR:4-5).

At the evidentiary hearing (SR:1-52), Petitioner did not claim the defense had any role in initiating Dr. Wolf's DOH complaint, but sought to have Dr. Factor disqualified as an expert witness on the contention that Dr. Factor had filed a "false report" in Dr. Baux's DOH case "to intimidate Dr. Wolf." (SR:17-18, 46). Plaintiff's counsel explained that once he obtained the requested finding from the trial court, he would "see to it then that that's filed with the DOH in New York against Dr. Factor because of his unethical actions." (SR:18).

The evidence Plaintiff presented at the hearing demonstrated that an in-house medical expert employed by the DOH, Dr. Katims, recommended that a file be opened on Dr. Wolf. (SR:9-10, 21-22). In a memo, Dr. Katims wrote that, at the request of a defense attorney, another pathologist reviewed the tissue slides and found wide-spread evidence of AFE. (SR:10). Counsel for the DOH also explained that the complaint against Dr. Wolf was initiated as part of its own internal review of Dr. Baux's file, and was not instigated by any third party. (SR:21-23).

The trial court's order on evidentiary hearing (R15:2900-01) concluded "there is no evidence of witness tampering by the parties in this case, nor is it likely that further discovery will reveal such evidence." (*Id.*:2900). The order denying Petitioner's motion for new trial similarly explains there was no evidence to link the filing of Dr. Wolf's DOH complaint to Defendants. (R15:2906).

The "Pre-Deposition Conduct": Petitioner also sought to have Dr. Wolf testify at trial about a cell phone conversation she had with her lawyer en route to her deposition. During this conversation, Mr. Pincus told Dr. Wolf about an earlier conversation that he had with Dr. Baux's attorney, Mr. Ciotoli. Mr. Pincus relayed that Mr. Ciotoli had told him that Dr. Factor, a defense expert, had found "widespread evidence" of AFE and that Dr. Wolf would not want to "embarrass" herself by disagreeing with him. (T5:746-47). Contrary to Petitioner's brief (IB:13), the defense objected to this evidence on the basis of both relevancy and hearsay. (SR:721-27). The trial court excluded the testimony based on Defendants' double hearsay objection. (T5:745-48, 760; R15:2905).

Petitioner further argued that Dr. Wolf was intimidated because Mr. Ciotoli offered to make Dr. Factor's photographs of the autopsy slides available for Dr. Wolf to review, alone with her own attorney, prior to her deposition. However, this claim was based on the incorrect assumption that Dr. Factor had initiated Dr. Wolf's DOH complaint. (T5:669-700, 705, 707, 745-47, 750, 752-53).

B. Argument.

a. Waiver.

Petitioner argues that the trial court erred in separately analyzing the two alleged instances of witness intimidation, which he contends collectively demonstrate an attempt to influence Dr. Wolf's testimony. (IB:41, 46-47).

Petitioner did not present this argument to the trial court. At trial, Petitioner alleged two separate incidents of witness intimidation, stating "there are two other issues that I plan on raising with her. . . ." (T5:698). The incidents were presented as separate issues and Petitioner did not dispute the trial court's analysis of them as such below. (T5:718, 720). The argument is waived. *See Aills v. Boemi*, 29 So. 3d 1105, 1108-09 (Fla. 2010) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.")

b. Merits.

i. No competent evidence of witness intimidation.

Petitioner presented no evidence of witness intimidation, regardless of whether the instances are analyzed separately or together. In fact, Petitioner's speculation that the defense or Dr. Factor may have initiated the DOH complaint against Dr. Wolf was proven to be false. Dr. Baux and Dr. Factor both unequivocally testified that they did not report Dr. Wolf to the DOH (R14:2782; R15:2868, 2892, 2894), and there is no evidence to the contrary. The evidence presented by Plaintiff demonstrated that Dr. Katims, the DOH's in-house medical expert, initiated the review, and DOH's counsel explained the complaint against Dr. Wolf was not initiated at the behest of any third party. (SR:9-10, 21-23).

While Petitioner claims there is "extensive evidence" that the letter Dr. Factor submitted in Dr. Baux's defense was "blatantly false," he cites no evidence at all, and there is none. Dr. Factor and Dr. Wolf both found trophoblast on the pathology slides, and simply disagreed on the significance of that finding. (SR:43). Even if Dr. Factor was mistaken in his opinion, there was no basis for the trial court to find he committed perjury by submitting a letter to the DOH, without affording this non-party due process, as Petitioner requested. (SR:42, 46-47). Petitioner has also never demonstrated that it was improper for Mr. Dresnick to rely on Dr. Factor's letter in defending against Dr. Baux's DOH complaint, or that Mr. Dresnick (or anyone else) filed the letter as an intimidation tactic.

Petitioner's argument that it "has never been disputed" that "[o]bviously, [Dr. Factor's] filings in the administrative proceedings were done with the authority of Dr. Baux," was never raised below, and is thus waived. It is also incorrect. Dr. Baux testified he did not know that Mr. Dresnick retained Dr. Factor to assist in the defense of the DOH complaint and he never spoke to Dr. Factor. (R15:2888, 2891-92). Dr. Factor similarly testified he never spoke to Dr. Baux, and further testified he did not know whether Mr. Ciotoli knew about the report he wrote in the DOH proceeding. (R14:2467-68, 2770; R15:2856). While Dr. Factor testified he would not have gotten involved in that proceeding without clearance from Mr. Ciotoli, he could not recall whether he actually spoke to Mr. Ciotoli personally or just

assumed Mr. Dresnick had received clearance from Mr. Ciotoli. (R14:2769-70). Regardless, submitting an expert's opinion in defense of a DOH complaint initiated due to Plaintiff's malpractice filing does not amount to witness intimidation, and nor does the filing of an administrative complaint against the medical examiner.

Petitioner also presented no competent evidence that a telephone call from Mr. Ciotoli to Dr. Wolf's attorney, Mr. Pincus, even arguably constituted witness intimidation. Petitioner's only evidence in support of this claim was the proffered testimony from Dr. Wolf, who was not a party to the conversation. (T5:745-59). Petitioner never elicited testimony from Mr. Pincus or Mr. Ciotoli. However, as an officer of the court, Mr. Ciotoli flatly denied telling Mr. Pincus that Dr. Wolf would be "embarrassed" if she testified against Dr. Factor. (T5:706-07).[13]

In any event, Petitioner has not and cannot demonstrate that the trial court was wrong in concluding that Dr. Wolf's proffered testimony in this regard was inadmissible double hearsay. *See* § 90.805, Fla. Stat. (providing that double hearsay is "not excluded under s. 90.802, provided each part of the combined statements conforms with an exception to the hearsay rule as provided in s. 90.803 or s. 90.804."); *Gosciminski v. State*, 994 So. 2d 1018, 1026 (Fla. 2008) (victim's statement to sister and husband, which was relayed to detectives and testified to,

[13] Mr. Ciotoli explained that the phone call to Mr. Pincus was made as a courtesy to give Dr. Wolf the opportunity, prior to her deposition, to review photographs of slides illustrating what Dr. Factor thought was evidence of AFE. (T5:706-07).

was inadmissible double hearsay). The statement made and relayed through Dr. Wolf's counsel and eventually through Dr. Wolf was offered to prove the truth of the matter asserted -- that Mr. Ciotoli allegedly said that Dr. Wolf would not want to embarrass herself by testifying against Dr. Factor. (T5:747). Petitioner does not assert that Mr. Ciotoli's alleged statement to Mr. Pincus[14] or Mr. Pincus's statements to Dr. Wolf fall within any hearsay exception and they do not.

Petitioner's claim that Dr. Wolf was "intimidated" because she was given the opportunity to sit alone with her own lawyer to review Dr. Factor's photographs prior to her deposition is based on pure speculation. (IB:47). There is no evidence that this was "done to connect the disciplinary proceeding to this case" as Petitioner claims, and Dr. Wolf testified she was not intimidated. (T5:752-53).

ii. Speculation and double hearsay is not admissible to demonstrate witness intimidation.

Petitioner's alleged "evidence" of witness intimidation amounted to no more than speculation and double hearsay and was not admissible, as Petitioner contends, as substantive evidence or impeachment (IB:41). Evidence of threats or intimidation of a witness can be admitted under two different circumstances. First, when a defendant or someone acting with the defendant's authority, consent, or knowledge threatens a witness, the threat is admissible as substantive evidence of

[14] On appeal, Plaintiff abandoned her erroneous position that the statement was admissible to show Dr. Wolf's state of mind. *See* § 90.803(3), Fla. Stat.

the defendant's guilt. *See, e.g., Koon v. State*, 513 So. 2d 1253, 1255-56 (Fla. 1987); *Lopez v. State*, 716 So. 2d 301, 307 (Fla. 3d DCA 1998); *Jenkins v. State*, 697 So. 2d 228, 229 (Fla. 4th DCA 1997) (*en banc*); *Jost v. Ahmad*, 730 So. 2d 708 (Fla. 2d DCA 1998). Second, even if the defendant is not implicated in the threat, the fact that a witness has actually been threatened with respect to his or her testimony is admissible to impeach the witness's credibility, regardless of who made the threat. *See, e.g., Koon*, 513 So. 2d at 1256; *Lopez*, 716 So. 2d at 307; *Jost*, 730 So. 2d at 710 (quoting *Koon*).

However, Florida case law does not allow the admission of rank speculation that witness intimidation may have occurred. *See Penalver v. State*, 926 So. 2d 1118, 1129-30 (Fla. 2006) (comments implying that a party has tampered with a witness without evidentiary support generally constitute reversible error). In *Marmol v. State*, 750 So. 2d 764, 764-65 (Fla. 3d DCA 2000), the Third District held it was error to allow the prosecutor to ask the victim whether he had been threatened or anyone had offered him "any money or other financial considerations to testify falsely...in court," when there was no factual basis for the question:

> The correct procedure in these circumstances is to conduct a hearing outside the presence of the jury. During this hearing the witnesses should be questioned to establish whether they are afraid, and, if so, whether they have been threatened or intimidated. If the state, or the party seeking to explain the witness's change of testimony, presents evidence of the existence of threats or intimidation, either from the witness's testimony, through the testimony of third parties, or through

> some type of physical evidence such as tape recordings, then the same testimony can be presented to the jury.

Marmol, 750 So. 2d at 764 (quoting *Lopez v. State*, 716 So. 2d 301 (Fla. 3d DCA 1998) (Sorondo, J., concurring specially)). *See also Penalver*, 926 So. 2d at 1129-30 (error to admit irrelevant and prejudicial evidence that witness had conversations with defendant's attorney, as such evidence, standing alone, did not support state's argument that witness changed testimony at trial based on those conversations); *Manuel v. State*, 524 So. 2d 734, 735-36 (Fla. 1st DCA 1988) (error in admitting evidence that amounted to no more than "a bare suspicion" the defendant attempted to intimidate a witness).

The cases Petitioner relies upon are not to the contrary. In *Jost*, there was evidence that a party had attempted to intimidate a key witness. 730 So. 2d at 708. The Second District reversed and remanded a jury verdict for the defendants where the trial court excluded evidence that the defendant hospital's liability insurer had telephoned the plaintiff's treating physician's risk management office to remind him that his testimony was "to limit collateral damage." *Id.* at 710. The district court noted that, although the insurance carrier was not a party to the action, it was the entity that would be responsible for paying all or a substantial part of any verdict rendered against the hospital, and thus that "[a] communication from it is akin to a communication from [the hospital] itself." *Id.*

Moreover, in *Jost*, unlike here, there was evidence that the physician was likely influenced by the statement. *Id.* at 710. Likewise, in *McCool v. Gehret*, 657 A.2d 269 (Del. 1995), there was evidence that the defendant physician, using another physician as an intermediary, attempted to coerce or intimidate the plaintiff's expert to prevent him from testifying. As in *Jost*, it was highly likely the plaintiff's expert was influenced by the defendant doctor's intimidation where he actually withdrew as an expert and only agreed to participate two days before trial, after the plaintiff pleaded with him to reconsider, and at a point where the plaintiff's lawyer could not meet with him for trial preparation. *Id.* at 274.

There was no evidence the defense (or anyone acting on its behalf) initiated the DOH complaint against Dr. Wolf; thus the testimony was not admissible as substantive evidence. Nor could it have been admitted as impeachment evidence, since the record irrefutably shows Dr. Wolf was not intimidated:

> A. By being offered that, being shown those photographs immediately before my deposition, I assumed that an attempt was being made to change my mind.
>
> Q. And you were not intimidated in that regard, were you?
>
> A. Certainly not.
>
> Q. And you stated your opinion truthfully, didn't you?
>
> A. Yes, I did.

(T5:752-53). Dr. Wolf never wavered from her original conclusion that the tissue samples showed no signs of AFE. (SR:706-07).

Petitioner's argument that the admission of double hearsay is supported by *Jost* fails as this issue was not discussed or addressed at all in *Jost*. However, the argument was expressly rejected in *5 Star Builders, Inc. of W.P.B. v. Leone*, 916 So. 2d 1010 (Fla. 4th DCA 2006). The Fourth District rejected plaintiff's reliance upon *Jost* and argument that letters from a third party witness's lawyer to the defendant's lawyer, detailing the defendant's alleged threats to the witness, were admissible because they involved witness tampering: "[W]e find no support in *Jost* or elsewhere to conclude that these letters that were not written by or received by a testifying witness and were hearsay were admissible merely because on party was accused or witness tampering." *Id.* at 1012.

The trial court's rulings were correct. There was no evidence of witness intimidation, and had the proffered testimony been allowed and the jury returned a verdict for Plaintiff, there would have been reversible harmful error.

CONCLUSION

The Court should affirm the judgment in favor of Dr. Baux.

Respectfully Submitted,

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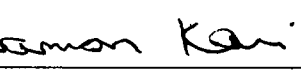
By: 

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CERTIFICATE OF SERVICE

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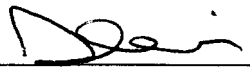
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing answer brief complies with the font requirements of Rule 9.210(a)(2). It is typed in Times New Roman 14-point font.

BY: 

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INDEX TO APPENDIX TO ANSWER BRIEF ON THE MERITS OF RESPONDENTS, IVO BAUX, M.D., IVO BAUX, M.D., PA., PINNACLE ANESTHESIA, P.L.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

FRANK SPECIAL,
as Personal Representative of the Estate of Susan Special,
Appellant,

v.

IVO BAUX, M.D., IVO BAUX, M.D., P.A. PINNACLE ANESTHESIA, P.L.; and **WEST BOCA MEDICAL CENTER, INC.**,
Appellees.

No. 4D08-2511

[November 16, 2011]

En Banc

GROSS, J.

Frank Special, as the personal representative of his wife's estate, appeals a final judgment in favor of the defendants below, Dr. Ivo Baux, his related corporations, and West Boca Medical Center, Inc. Special raises three claims. We affirm on all three, but write to discuss Special's contention that the trial court erred in limiting the cross-examination of one of the defendants' expert witnesses.

In considering that issue, we take up this case *en banc* to reconsider other decisions of this court describing the harmless error test in civil cases. We hold that our cases using an outcome determinative, "but-for" test for harmless error are contrary to the Florida Supreme Court's interpretation of the harmless error statute. We recede from those cases and adopt the following standard for harmless error in civil cases: To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict. Applying this test, we find that harmless error occurred in the trial court and affirm the judgment.

Facts

Susan Special became pregnant at age 38. Five weeks before her due date, she underwent a cesarean delivery. She was wheeled into the operating room at the Center's labor and delivery suite. Dr. Baux, the anesthesiologist, administered spinal anesthesia. A moment after the placenta was removed, Susan became unresponsive, her blood pressure fell precipitately, and she went into cardiopulmonary arrest. Dr. Baux and hospital staff attempted to revive her. She was temporarily resuscitated and transferred to the Intensive Care Unit, where another cardiopulmonary arrest occurred. Susan died five hours after the delivery.

Susan's estate sued the defendants for negligence. The claim was that Dr. Baux and the hospital were negligent in administering anesthesia, in monitoring her system and controlling her fluids during surgery, and in responding to her cardiopulmonary arrests. The defendants denied the allegations; they alleged instead that Susan's death was caused by amniotic fluid embolus (AFE), an allergic reaction from a mother's blood mixing with amniotic fluid, sometimes causing heart-lung collapse.

At trial, the plaintiff's expert testified that Susan died because of the departures from the requisite standard of care. The AFE diagnosis figured prominently. Most notably, the plaintiff called Dr. Barbara Wolf, the chief medical examiner of Palm Beach County at the time of Susan's death. Dr. Wolf conducted the autopsy on Susan and concluded that there was no evidence of AFE in her body. She explained that in a majority of cases where someone dies from AFE, the autopsy provides evidence of AFE, and that was not the case with Susan.

Special also presented the testimony of Dr. Mark Adelman, a pulmonary specialist, who was called in when Susan went into distress. He diagnosed AFE at the time based upon her clinical signs. Special asked him about the number of patients diagnosed with AFE at West Boca. He testified that he saw all such patients. He estimated that he saw about one or two cases per year at the center. During his testimony, Special was able to elicit national statistics showing incidence of AFE diagnosis at West Boca was about 15 times the rate elsewhere. Dr. Adelman, however, contended in his answers that he was only estimating the number of cases he saw and had no medical records to back up his recollection.

The defendants called Dr. Gary Dildy as their expert. Dr. Dildy opined that Susan died of AFE. He based this on his analysis of the medical records and tests. He explained that AFE is a diagnosis of exclusion. In other words, a doctor will look at all the circumstances and test results to determine likely causes for the patient's condition. Where no other circumstances account for the patient's distress during or after a delivery, a diagnosis of AFE can result.

On cross-examination, the plaintiff elicited from Dr. Dildy that the probability of AFE is approximately 1 in 20,000 births, but can range between 1 in 8,000 and 1 in 80,000. The plaintiff then tried to begin a line of cross-examination of Dr. Dildy about the reliability of the Adelman diagnosis that AFE had actually occurred in Susan, in light of the unusually high incidence of it at the hospital. The defendants' objection on relevancy grounds was sustained.

Special responded that this line of questioning was sought to impeach Dr. Adelman's testimony. The trial court sustained the objection, noting that the plaintiff could inquire about the statistical occurrence of AFE and make argument about disproportionate diagnoses in closing, but could not question Dr. Dildy using the substance of Dr. Adelman's testimony and its reliability to explore the trustworthiness of the AFE diagnosis. The court concluded that doing so would amount to improper collateral impeachment. We understand the trial court's characterization of the proposed impeachment as "collateral" as being merely another way of saying that the line of questioning was irrelevant.[1]

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[1]In the field of evidence, another use of the term "collateral" concerns the ability to offer extrinsic evidence to contradict a witness's answer to a question posed on cross examination. As the first district observed in *Faucher v. R.C.F. Developers*, 569 So. 2d 794 (Fla. 1st DCA 1990), *overruled on other grounds by Ullman v. City of Tampa Parks Dep't*, 625 So. 2d 868 (Fla. 1st DCA 1993):

> The law is well settled that it is improper to litigate purely collateral matters solely for the purpose of impeaching a party or witness. Once a question is put to the party or witness on a purely collateral matter for the purposes of impeachment, the proponent of the question is bound by the witness's answer; it is inappropriate to then try the truth or falsity of the answer on the collateral matter by adducing independent proof through other witnesses.

Id. at 804. Here, the plaintiff was attempting to ask Dr. Dildy a type of fact that could bear on his opinion under section 90.704, Florida Statutes (2009). The plaintiff's cross examination did not violate the rule stated in *Faucher*.

The plaintiff proffered Dr. Dildy's testimony on this issue. The expert stated that, assuming Dr. Adelman's recollection of the incidence of AFE at the hospital was accurate, he would be concerned that AFE was being over-diagnosed at the Center. Yet even when confronted with statistics documenting this possibility, Dr. Dildy persisted in his opinion that Susan presented a case of AFE. He testified, "But this case here, we're talking about, it doesn't matter what all these other cases are, this case is the case, and this case is an amniotic fluid embolism."

In closing argument, the plaintiff vigorously argued that the hospital either had an epidemic of AFE or was over-diagnosing it:

> [Dr. Adelman] said, I see one to two a year at West Boca Medical Center. I didn't put the words in his mouth. He said, I see one to two a year at West Boca Medical Center.
>
> . . . .
>
> [I]f you take his numbers, and you believe they have this many amniotic fluid emboluses at West Boca Medical Center every year, it is somewhere between 15 and 80 times the national average they're diagnosing amniotic fluid embolus at West Boca Medical Center, between 15 and 80 times the national average.
>
> So, it was either an epidemic, which there isn't, at West Boca Medical Center, or they're overdiagnosing amniotic fluid embolus. They're calling things that aren't amniotic fluid embolus, like he did in this case, . . . because they're not bothering to look at autopsies, they're not bothering to look at other records, they're not bothering to investigate why. . . .
>
> It's not the epidemic, it's that he's overstating the diagnosis, and that's wrong, ladies and gentlemen, that is flat out wrong to do, and that's what they did in this case.

The jury found no negligence by the defendants and the trial court rendered a final judgment in their favor.

The Evidentiary Ruling

Again, the principal dispute at trial was the cause of Susan's death. In response to the plaintiff's claims of negligence, the defendants

contended that regardless of their handling of the emergency from cardiopulmonary arrest, it was AFE that caused Susan's death. The presence of AFE was thus the essential issue at trial. The trial court abused its discretion in failing to allow the cross-examination.

Three sections of the evidence code provide the framework for evaluating questions of relevance. The general rule is that "[a]ll relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. (2009). "Relevant evidence is [defined as] evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2009). Section 90.403, Florida Statutes (2009), establishes a limitation on the introduction of relevant evidence: "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

When, on cross-examination, a piece of evidence is offered to attack the credibility of a witness on a material issue, such evidence is "relevant" under section 90.401 because credibility is central to the truth seeking function of a trial. Under subsection 90.608(5), Florida Statutes (2009), any party "may attack the credibility of a witness by . . . proof by other witnesses that material facts are not as testified to by the witness being impeached."

The object of the proposed cross-examination of the defense expert was to elicit answers leading to proof of the cause of death, the crux of the lawsuit. Dr. Adelman and Dr. Dildy both testified that the cause of death was AFE. Counsel sought to impeach Dr. Adelman's diagnosis with evidence showing that the incidence of diagnosed AFE at West Boca, all done by Dr. Adelman, was grossly in excess of national statistics, thus impeaching Dr. Adelman. Where the diagnosis is one of exclusion,[2] the frequency with which one comes to that conclusion is a "material fact" bearing upon the credibility of the diagnosis. The cross-examination was also relevant to Dr. Dildy's direct examination where he testified to the incidence of AFE in births and its rarity. The trial judge abused his discretion in refusing to allow the cross-examination.[3]

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[2]Dr. Dildy also referred to this as a "wastebasket" diagnosis.

[3]We also reject the trial court's explanation that the evidence was unfairly prejudicial under section 90.403. This provision is not a general grant of authority to trial judges to bar evidence adversely impacting a party's position at trial; rather the concept of "unfair prejudice" pertains to "evidence which is directed to an improper purpose, such as evidence that inflames the jury or appeals improperly to the jury's emotions." Charles W. Ehrhardt, *Florida*

The central question to this appeal is whether the exclusion of the cross-examination amounted to harmless error. To consider that issue, it is necessary to review the development of the harmless error standard in Florida.

Harmless *Error Prior to State v. DiGuilio*

We first review the history of the harmless error rule contained in section 59.041, Florida Statutes (2009)—the circumstances leading to its enactment and how the interpretation of it has evolved since 1911.[4] The Florida cases describe a general trend away from a "correct result" test, utilized in the earliest common-law decisions and in earlier interpretations of the harmless error statute, and toward an "effect on the fact finder" test, as embodied in the Supreme Court's landmark decision in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

According to the "orthodox" English rule, an error in admitting or rejecting evidence was not a sufficient ground for a new trial unless it appeared, looking at all the evidence, that the truth had thereby not been reached. 1 Wigmore, *Evidence* § 21 (3d ed. 1940); *see also Doe v. Tyler*, (1830) 130 Eng. Rep. 1397, 1399 (C.P.) (orthodox rule). In contrast, under the more stringent "Exchequer" rule, which took hold in English and in many American courts after the 1830s, an error at trial created

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Evidence § 403.1 (2006 ed.); *see also Westley v. State*, 416 So. 2d 18, 19 (Fla. 1st DCA 1982) (same). Unfair prejudice within the meaning of section 90.403 does not arise from relevant inquiries directed at experts offering contrary opinions relevant to a material issue at trial.

[4]In addition to section 59.041, section 90.104, Florida Statutes (2009) provides that a court may reverse a judgment or grant a new trial on the basis of admitted or excluded evidence "when a substantial right of the party is adversely affected" and the point is properly preserved in the trial court. The primary contribution of the statute to the law is its requirement of preservation. Section 90.104 adds little to harmless error analysis; if admitted or excluded evidence does not adversely affect "a substantial right of a party," its admission cannot be a "miscarriage of justice" under section 59.041

Nonetheless, some cases involving evidentiary errors apply a harmless error test based on "injury to substantial rights." *See, e.g., Tormey v. Trout*, 748 So. 2d 303 (Fla. 4th DCA 1999); *Wall v. Alvarez*, 742 So. 2d 440 (Fla. 4th DCA 1999); *Centex-Rooney Constr. Co. v. Martin Cnty.*, 706 So. 2d 20 (Fla. 4th DCA 1997). *See also Prince v. Aucilla River Naval Stores Co.*, 137 So. 886, 887 (Fla. 1931) ("A judgment should not be reversed or new trial granted in any case for error in rulings upon the admission or rejection of evidence unless it shall appear to the court from a consideration of the entire case that such errors injuriously affect the substantial rights of the complaining party.") (citations omitted)).

per se a right to reversal. *See Crease v. Barrett*, (1835) 149 Eng. Rep. 1353, 1360 (Ex.).[5] The earliest Florida cases followed the orthodox rule,[6] though by the turn of the century some cases applied the more rigid Exchequer rule in narrow circumstances.[7]

The Exchequer rule and its influence on American courts were widely criticized for making reversal too easy. *See, e.g.*, 1 Wigmore, *Evidence* § 21. A reform movement in the United States gained steam in the early twentieth century,[8] spurred by an influential address by Roscoe Pound, in which he opined that "the worst feature of American procedure is the lavish granting of new trials." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 413 (1906). The American Bar Association studied the problem and suggested statutory reforms, which were adopted at the state and federal levels. *See* 33 A.B.A. Rep. 542 (1908). Florida's harmless error statute, originally enacted in 1911, *see* Ch. 6223, Laws of Fla. (1911), was almost identical to the A.B.A.'s proposed statute,[9] and has remained unchanged since:

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[5]*But see* Roger J. Traynor, *The Riddle of Harmless Error* 4-8 (1970) (arguing that later cases applying a rule of *per se* reversal misinterpreted the Exchequer's decision in *Barrett*).

[6]*O'Steen v. State*, 111 So. 725, 730 (Fla. 1926) ("This jurisdiction appears to have followed what is known as the 'orthodox English rule,' rather than the rule announced by the Court of Exchequer in 1830 . . . "). *See also McKay v. Lane*, 5 Fla. 268, 276 (1853) ("This court has uniformly proceeded upon the practice not to reverse a judgment, however erroneously an isolated point may have been ruled by the Judge below, when it is clearly apparent that the party complaining has been in no degree injured by the improper ruling."); *Hooker v. Johnson*, 10 Fla. 198, 203 (1860) (same); *Randall v. Parramore*, 1 Fla. 409, 486 (1847) (same).

[7]*See, e.g., Mayer v. Wilkins*, 19 So. 632, 637 (Fla. 1896) (holding with regard to erroneous jury charge that "injury is presumed" and reversal appropriate where Court could not say "that the misdirection of the court did not influence the result of the verdict"); *Walker v. Parry*, 40 So. 69, 71 (Fla. 1906) (reversing for an erroneous jury charge, citing *Mayer*). *See generally Wadsworth v. State*, 201 So. 2d 836, 841-43 (Fla. 4th DCA 1967) (Willson, Assoc. J., dissenting) (summarizing early history of harmless error in Florida), *rev'd*, 210 So. 2d 4 (Fla. 1968).

[8]*See generally* Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 Marq. L. Rev. 433 (2009) (chronicling the movement to curb excessive reversals by reforming harmless error rules).

[9]That proposed model provided:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

§ 59.041, Fla. Stat. (2010) (formerly § 54.23, Fla. Stat.).

Two aspects in the wording of the statute are significant. First, the statute applies in both civil and criminal cases. Second, the trigger for reversible error is the occurrence of a "miscarriage of justice"; how the courts have defined this term has determined the scope of the statute's application since its enactment.

The 1911 harmless error statute differs in one important respect from the A.B.A. model set forth in footnote 9. The Florida statute adds the last sentence: "This section shall be liberally construed." While a "strict construction" of a statute would consider "only the literal words of [the] writing," a liberal construction is "[a]n interpretation that applies a writing in light of the situation presented and that tends to effectuate the spirit and purpose of the writing." *Black's Law Dictionary* 332 (8th ed. 2004). The purpose of the harmless error statute is to enhance finality by limiting the granting of new trials. However, by insisting on a liberal construction, the statute allows for discretion and flexibility in its interpretation; the term "miscarriage of justice" should not be construed so narrowly that reversal is a rarity.[10]

> No judgment shall be set aside, or new trial granted, by any court of the United States, in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

33 A.B.A. Rep. 542, 550 (1908).

[10]There are two plausible explanations for the legislative softening of the language from the model statute. One explanation is that the problem of excessive reversals does not seem to have been as serious in Florida where the infamous Exchequer rule never fully took hold, compared to other jurisdictions.

In the years following the passage of the harmless error statute in 1911, the Florida Supreme Court used two tests to define a "miscarriage of justice" giving rise to a reversible error: a "but-for," "correct result," test that is oriented on the outcome, and the more forgiving "effect on the fact finder" test that is oriented on the process.

A "correct result" approach asks whether, despite the error, the trial court reached the correct result. It assumes that when the result was correct, there cannot have been a "miscarriage of justice." *But see* Traynor, *supra* note 5, at 18-22 (criticizing this approach). The question is, would the result have been the same without the error? Or, but for the error, would the result have been different? An "effect on the fact finder" approach, on the other hand, asks whether the error influenced the trier of fact and contributed to the judgment, not just whether it changed the result. Looking at the record as a whole, did the error mislead the trier of fact? *See id.* at 22-23 (discussing benefits of this approach). The former approach effectively narrowed the class of cases that could be reversed; the latter broadened it.

The most commonly used test, the "but-for" formulation, focused on whether the result of the trial would have been different but for the error. This outcome oriented approach considered whether the "wrong" result was reached as a result of the error. A typical criminal case, *Henderson v. State*, 113 So. 689 (Fla. 1927), illustrates the Supreme Court's early interpretation of the harmless error statute:

> The language of the statute . . . makes it clear that it was the purpose of the Legislature that verdicts and judgments of trial courts should not be overturned and set aside by this court on account of mere errors committed in the court below unless it is made to appear to this court, after inspection of the entire record, that the errors complained were prejudicial and injurious in their nature and tendency and resulted in a miscarriage of justice. This statute was, no doubt, based upon the idea that if the result of a trial, the verdict and judgment, was just and right, even though there were technical errors committed by the trial court, no good purpose could be subserved by the labor, expense, and delay

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Legislators may have worried that a radical cure would be worse than the mild disease. Another explanation is that in a state like Florida, with a strong tradition of electing state judges, legislators expected that the ballot box would be a more effective check on abuses of judicial discretion than statutory rules, and therefore saw little purpose in tying judges' hands.

> of trying the case over again. And to make [this] intention effective, *the statute was so framed as to require it to be made to appear to the reviewing court that the error complained of caused, or at least contributed to causing or reasonably tended to cause, the result, and that the result was wrong—a miscarriage of justice.*

Id. at 697-98 (emphasis added). This equation of a "miscarriage of justice" with a "wrongful result" characterizes much of the Supreme Court's early harmless error jurisprudence, and harkens back to Florida's earlier application of the orthodox English rule.[11]

The same outcome oriented analysis also prevailed in some early civil cases. In *E.O. Roper, Inc. v. Wilson & Toomer Fertilizer Co.*, 156 So. 883 (Fla. 1934), the Supreme Court held that even if the trial court committed technical errors, under the harmless error statute, its judgment would not be set aside where

> the record as a whole shows that *the judgment rendered accords with justice in the premises,* and that a reversal of the cause for the correction of such technical errors as may have occurred must *inevitably lead to the rendition of a new judgment identical with that now appealed from* . . . .

Id. at 884 (emphasis added). This interpretation of the harmless error statute focused on the legislative purpose of conserving judicial resources; because the statute was designed to reduce the waste caused by needless retrials of cases reversed for technical error, it was therefore applied to prevent reversal whenever errors would not have altered the outcome.[12]

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[11]*See also Johnson v. State*, 61 So. 2d 179, 179 (Fla. 1952) ("[A]ny error in allowing such statements to remain in the confession was harmless when considered in context with the entire record, and we cannot find that it could have had any effect whatsoever in the ultimate outcome of the case."); *Cornelius v. State*, 49 So. 2d 332, 335 (Fla. 1950) ("In determining whether the error . . . was harmful or prejudicial, we must decide upon examination of all the evidence whether the result would have been different had the improper evidence been excluded."); *Banks v. State*, 156 So. 905, 906 (Fla. 1934) ("[U]nder the facts shown by the record, the jury should not have returned any other verdict than that which was returned.").

[12]Other civil cases applying the outcome oriented analysis are *Rance v. Hutchinson*, 179 So. 777, 780 (Fla. 1938); *Herman v. Peacock*, 137 So. 704 (Fla. 1931); *Routh v. Richards*, 138 So. 72 (Fla. 1931).

Other early civil and criminal cases focus less on the correctness of the outcome and more on whether the decision-making process was compromised; these cases apply an "effect on the fact finder" test for harmless error. For example, *Eggers v. Phillips Hardware Co.*, 88 So. 2d 507 (Fla. 1956), involving an action for injuries to a pedestrian caused by a truck driver, held it was error to admit into evidence the testimony of the investigating officers that, following the investigation, they had not arrested the driver for breaking any of the city's traffic ordinances. The Court reversed the trial court's judgment for the defendant and remanded for a new trial on the grounds that the erroneously admitted evidence might have influenced the jury's verdict:

> There was a direct conflict in the evidence at the trial on this vital point [whether the defendant ran a red light] and *it may well be* that the fact of the non-arrest of defendant *might have balanced the issue* in favor of the defendant. We think that the ends of justice would best be served by submitting this issue to another jury, so that it can be decided without the defendant's having the benefit of the inadmissible evidence in question.

Id. at 508 (emphasis added).

Further, an early criminal case anticipates the *DiGuilio* test of a "reasonable possibility" of an effect on the verdict. *See infra* pp. 11-13. In *Pearce v. State*, 112 So. 83 (Fla. 1927), the defendant challenged his conviction for murder on the grounds that improperly excluded evidence of a pair of bloody brass knuckles found at the crime scene, together with evidence of the defendant's head wounds, would have supported his claim of self-defense. The Supreme Court agreed and used an analysis that emphasized the effect that the excluded evidence might have had on the jury:

> It is impossible to say with any degree of certainty that, if the evidence of the finding of a 'piece of a pair of knucks' [sic] near the scene of the difficulty had been admitted for consideration by the jury . . . , the jury would not have accounted for the wounds on the head of the defendant upon the theory that the deceased had attacked him with metallic knuckles.

Id. at 86.

And, fifteen years before *DiGuilio*, the Supreme Court applied an "effect on the fact finder" harmless error test in a civil case, but without explicitly characterizing its approach. In *Stecher v. Pomeroy*, 253 So. 2d 421 (Fla. 1971), a personal injury action, the trial court erroneously admitted evidence about the extent of the defendant's insurance coverage; the Supreme Court held that the error was harmless "in light of the fact that the verdict was $19,000 despite policy limits of $100,000/$300,000; where there was a disc involvement with serious and prolonged disability, traction and hospitalization; and where the injuries were permanent." *Id.* at 422. The Supreme Court emphasized that the error was harmless, and not a basis for reversal, when considered in the context of the whole trial, because the record showed that it did not contribute to the judgment.

> This recognition of harmless error in these particular circumstances is not to be regarded as approval by this Court of the mention of policy limits to a jury. This should not be done. Nor is it approval of the trial court's refusal to grant the requested instruction to disregard, which should have been given. It is simply held to be harmless error here where an examination of the entire record reflects a tone which indicates in no wise any adverse effect upon the jury's verdict.

Id. (footnote omitted). In essence, the Supreme Court set the defense oriented verdict against the abundant evidence favorable to the plaintiff and concluded that the erroneous admission of the defendant's insurance coverage had little effect on the jury's verdict.

From *Eggers* and *Stecher*, we distill two general propositions about harmless error analysis in civil cases: First, to determine whether an error is harmful, the appellate court must examine the entire record. Second, the central issue is whether the error had an adverse effect upon the jury's verdict; in other words, whether the error contributed to the judgment.[13] Such was the state of the law before *DiGuilio*.[14]

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[13]*See also Josey v. Futch*, 254 So. 2d 786, 787 (Fla. 1971) (following *Stecher*) ("[T]he essential consideration is evidence of influence on the jury . . . .").

[14]In 1985, the year before *DiGuilio*, Justice Overton noted that the Florida Supreme Court had "never expressly set forth a harmless error test for the appellate courts of this state to apply in civil cases." *Fla. Patient's Comp. Fund, Inc. v. Von Stetina*, 474 So. 2d 783, 793-94 (Fla. 1985) (Overton, J., concurring in part and dissenting in part). But Justice Overton added that, in general, "[t]he application of the harmless error statute requires an appellate court to

State v. DiGuilio

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), is the touchstone for harmless error analysis in Florida. In it, the Supreme Court firmly establishes an "effect on the fact finder" harmless error test for criminal cases.

In *DiGuilio*, testimony from a police officer about his arrest of an alleged cocaine trafficker was interpreted as a comment on the defendant's silence. *Id.* at 1130-31. The Fifth District ordered a new trial, applying a rule of *per se* reversal for comments on a defendant's silence. *Id.* at 1134. The Supreme Court rejected a rule of *per se* reversal, and instead adopted the harmless error test announced by the U.S. Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). The Court explained the test:

> The harmless error test, as set forth in *Chapman* and progeny, 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 or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

DiGuilio, 491 So. 2d at 1135 (citation omitted). This "effect on the fact finder" test focuses on the likelihood that an error at trial influenced the trier of fact and contributed to the judgment. If it is reasonably possible that the error contributed to the verdict, then the verdict must be set aside, even when, in the reviewing judge's opinion, the verdict would have been the same without the error. The error and its probable effects must be evaluated in light of the other evidence:

> Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

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consider the entire record and determine whether the verdict was affected by the error." *Id.* at 793.

Id. Following Chief Justice Traynor,[15] the Supreme Court emphasized that applying the harmless error test is not simply a matter of reviewing the evidence left untainted by error to determine whether it is sufficient to support the judgment. *Id.* at 1136. Instead, the appellate court places the error in the context of the other evidence to estimate the effect of the error on the trier of fact. The purpose of the analysis, in other words, is not to retry the case without the error, but to reconstruct the original trial to determine what role, if any, the error played in the judgment. As the Court said:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

Id. at 1139. Thus, even abundant evidence in support of a verdict will not prevent reversal when the appellate court cannot say, after reviewing the whole record, that there is no "reasonable possibility that the error affected the verdict." *Id.* The "burden to show that the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." *Id.*

The *DiGuilio* test for harmless error, which draws heavily on Chief Justice Traynor's insights, contrasts sharply with the "correct result" test applied by the Supreme Court in the decades following the enactment of the harmless error statute in 1911. Under the "correct result" test, a judgment generally could not be reversed unless the appellate court concluded that the outcome of the trial would have been different, but for the error. Under the *DiGuilio* test, a judgment should be reversed, and a new trial granted, whether or not the outcome of that trial is likely to be different whenever the appellate court believes there is a reasonable possibility that the error influenced the trier of fact and contributed to the verdict.

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[15] *See* Traynor, *supra* note 5, at 18-22 (arguing against a "correct result" test for harmless error); *see also People v. Ross*, 429 P.2d 606, 620-21 (Cal. 1967) (Traynor, C.J., dissenting) (same), *rev'd*, 391 U.S. 470 (1968) (citing, *inter alia*, *Chapman*).

The differences between a "correct result" test and an "effect on the fact finder" test are subtle but important. An "effect on the fact finder" test asks the appellate judge to look closely at the error and estimate its effect on the trier of fact. A "correct result" test asks the judge to look at everything but the error and determine whether the verdict in a trial without it would have been different. In short, one test focuses on process; the other on the end result. Moreover, a "correct result," or "but-for," test asks the judge to exclude the wrongly admitted evidence (or include the wrongly rejected evidence) and weigh the evidence anew—precisely what *DiGuilio* forbids. *See DiGuilio*, 491 So. 2d at 1136.

***Supreme Court Civil Cases After* DiGuilio**

While the Florida Supreme Court has not explicitly adopted a standard for harmless error in civil cases after *DiGuilio*, three cases employed an "effect on the fact finder" test akin to the one that the court applied in *DiGuilio*.

Gormley v. GTE Products Corp., 587 So. 2d 455 (Fla. 1991), established two things about harmless error analysis. First, the court expressly placed the burden on the beneficiary of an error in the trial court to demonstrate on appeal that the error was harmless. Second, the court used an effect on the verdict analysis to determine whether harmless error had occurred. In *Gormley*, the Supreme Court ordered a new trial after finding that the introduction of collateral source evidence may have influenced the jury's verdict for a defendant. The court explained why the burden to prove the harmlessness of the error was on the defendant-appellee, which injected the improper evidence into the trial.

> Equity and logic demand that the burden of proving such an error harmless must be placed on the party who improperly introduced the evidence. Putting the burden of proof on the party against whom the evidence is used . . . would simply encourage the introduction of improper evidence.

Id. at 459. The Court held that the defendant-appellee had failed to meet its burden to establish that the erroneous introduction of the collateral source evidence was harmless—because the issue of liability was close, the Supreme Court "[could not] say that the jury's verdict on liability was

not improperly influenced by the evidence of the [plaintiffs'] insurance claim." *Id.*[16]

A second case applying *DiGuilio's* "effect on the fact finder" analytical framework is *Sheffield v. Superior Insurance Co.*, 800 So. 2d 197 (Fla. 2000). There, the trial court denied the plaintiff's motion to exclude collateral source evidence, and the plaintiff, after stipulating that she would have a standing objection to the introduction of the evidence, introduced her own rebuttal collateral source evidence. *Id.* at 199. Although the jury found for the plaintiff, they found no permanent injury and awarded only her past medical expenses and $6,554.61 for future medical expenses. *Id.* The first district affirmed, holding that Sheffield invited the error by introducing her own collateral source evidence. *Id.*

The Supreme Court reversed. It held that (1) allowing any collateral source evidence was error because of "the inherently damaging effect of the jury hearing collateral source evidence on the issues of liability and on issues of damages:" and (2) that Sheffield did not waive her objection to that evidence by introducing her own collateral source evidence following the trial court's denial of her motion in limine. *Id.* at 203 (citing, *inter alia*, *Gormley*). The court explained the reversal with language that evaluated the effect of the improper evidence on the jury:

> [G]iven the inherently prejudicial effect of such evidence, which is the very reason the collateral evidence rule was first established, we cannot conclude that in this case the introduction of collateral source evidence was harmless. *The jury certainly could have concluded* that because Sheffield had group insurance available to cover future medical expenses, there would be no need to award substantial damages for the future.

Id. (emphasis added). The italicized language demonstrates the Supreme Court's conclusion that the error was not harmless, because the appellee had failed to demonstrate that it was more likely than not that the error did not contribute to the verdict.

A third post-*DiGuilio* civil case is *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006). In that medical malpractice case, the court did not explicitly

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[16] *See also Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 751 (Fla. 2002) ("[I]f there has been error in the admission of evidence, the burden is on the beneficiary of the error to establish that the error was harmless." (citing *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 203 (Fla. 2001)).

apply a harmless error test, but held that a trial court's error in allowing an expert witness to testify that she had consulted with colleagues before forming her opinion "was not harmless because the competing expert opinions on the proper standard of care were the focal point of this medical malpractice trial." *Id.* at 1041. This reasoning is consistent with an "effect on the fact finder" test because it recognizes that in a "battle of the experts" the trier of fact would likely be influenced by the credibility of an expert witness which had been enhanced by the hearsay confirmation of other doctors.

In summary, in civil cases after *DiGuilio*, the Supreme Court has utilized an "effect on the fact finder" test for harmless error in civil cases, even though it has not explicitly declared so.[17] The court has expressly declared that on appeal the burden of proving the harmlessness of an error is on the beneficiary of the error in the trial court, who improperly introduced the offending evidence.

District Court of Appeal Harmless Error Cases

Without specific guidance from the Supreme Court, the district courts of appeal have drifted in different directions in applying a section 59.041 harmless error test to civil cases.[18] There are three principal lines of cases applying tests for harmless error in the district courts. The most stringent test, occurring primarily in this district, derives from language

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[17]*See also Tallahassee Mem'l Reg'l Med. Ctr. v. Meeks*, 560 So. 2d 778, 782 (Fla. 1990) ("Considering the totality of the evidence, we conclude that the introduction of this one privileged statement did not prejudicially affect the jury's determination of negligence and that no reversible error occurred in its admission.").

[18]Recently, now-Chief Justice Canady acknowledged the split in the lower courts over the test for harmless error:

> The requisite prejudice to support overturning the judgment based on the jury's verdict can be established neither under a harmless error standard requiring a showing of a *reasonable probability* of a result more favorable to the appellant if the error had not occurred, *see Damico v. Lundberg*, 379 So. 2d 964, 965 (Fla. 2d DCA 1979), nor under a standard requiring a showing that the appellant *might have* obtained a more favorable result but for the error, *see National Union Fire Ins. Co. of Pittsburgh v. Blackmon*, 754 So. 2d 840, 843 (Fla. 1st DCA 2000).

Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1089 (Fla. 2009) (Canady, J., dissenting) (emphasis in original).

contained in the earlier Supreme Court cases, and asks whether the result would have been different, but for the error.[19] Another strain of decisions, from the first and third districts, lowers the bar for harmful error, and asks whether the result *may* have been different had the error not occurred.[20] Finally, a third line of cases, mostly from the second district, asks whether it is reasonably probable that the appellant would have obtained a more favorable verdict without the error.[21] The last two tests are arguably similar to each other, but the test most frequently applied by this court is clearly more stringent.

Under this court's stringent "but-for" formulation, it is difficult for an appellant to establish harmful error, that a "miscarriage of justice" occurred within the meaning of section 59.041. The line of cases applying this "but-for" test began with *Anthony v. Douglas*, 201 So. 2d 917 (Fla. 4th DCA 1967). Though it has often been cited by this court, *Anthony* rests on shaky footing. *Anthony* cites two cases in support of its test for harmless error, i.e., "whether, but for the error complained of, a different result would have been reached by the jury." *Id.* at 919.

The first, *Cornelius v. State*, 49 So. 2d 332, 335 (Fla. 1950), is a criminal case that predates *DiGuilio*. Following other criminal cases from the same period, *see supra*, *Cornelius* states the test for harmful error as "whether the result would have been different had the improper evidence

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[19] *See Hayes v. State*, 55 So. 3d 699 (Fla. 4th DCA 2011) (civil commitment); *Petit-Dos v. Sch. Bd. of Broward Cnty.*, 2 So. 3d 1022 (Fla. 4th DCA 2009), *rev. denied*, 19 So. 3d 311 (Fla. 2009); *Marshall v. State*, 915 So. 2d 264 (Fla. 4th DCA 2005) (civil commitment); *Kammer v. Hurley*, 765 So. 2d 975 (Fla. 4th DCA 2000); *Pascale v. Fed. Exp. Corp.*, 656 So. 2d 1351 (Fla. 4th DCA 1995); *Nationwide Mut. Fire Ins. Co. v. Vosburgh*, 480 So. 2d 140 (Fla. 4th DCA 1985); *Aristek Cmtys., Inc. v. Fuller*, 453 So. 2d 547 (Fla. 4th DCA 1984); *Anthony v. Douglas*, 201 So. 2d 917 (Fla. 4th DCA 1967). *See also Dessanti v. Contreras*, 695 So. 2d 845, 849 (Fla. 4th DCA 1997) (Hauser, Assoc. J., concurring in part and dissenting in part) (citing *Pascale*, *Aristek*, and *Anthony*).

[20] *See Witham v. Sheehan Pipeline Constr. Co.*, 45 So. 3d 105 (Fla. 1st DCA 2010); *Hogan v. Gable*, 30 So. 3d 573 (Fla. 1st DCA 2010); *Healthcare Staffing Solutions, Inc. v. Wilkinson ex rel. Wilkinson*, 5 So. 3d 726 (Fla. 1st DCA 2009); *Gold v. W. Flagler Assocs., Ltd.*, 997 So. 2d 1129 (Fla. 3d DCA 2008); *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899 (Fla. 3d DCA 2003); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Blackmon*, 754 So. 2d 840 (Fla. 1st DCA 2000); *Katos v. Cushing*, 601 So. 2d 612 (Fla. 3d DCA 1992).

[21] *See In re Commitment of DeBolt*, 19 So. 3d 335 (Fla. 2d DCA 2009); *Esaw v. Esaw*, 965 So. 2d 1261 (Fla. 2d DCA 2007); *Fla. Inst. for Neurological Rehab., Inc. v. Marshall*, 943 So. 2d 976 (Fla. 2d DCA 2006); *Damico v. Lundberg*, 379 So. 2d 964 (Fla. 2d DCA 1979) (citing *Stecher*) (on rehearing).

been excluded." *Id.* The persuasiveness of *Cornelius* has been undercut by the different direction the Supreme Court took in *DiGuilio.*

The second case cited as authoritative in *Anthony, Banco Nacional de Cuba v. Steckel,* 134 So. 2d 23, 25 (Fla. 3d DCA 1961), does not articulate any test for harmless error, holding only that, "[w]hile the defendant contends the trial court erred in striking his defensive motions, this could constitute no more than harmless error where summary final judgment was properly entered." In fact, the holding in *Banco Nacional* does not appear to support any one test for harmless error, so it is unclear why we cited it as authoritative in *Anthony.* This stringent "but for" test, which characterizes almost every error as harmless, encourages evidentiary gambles on questionable evidence in the trial court, placing a premium on winning at all costs, because only the most egregious evidentiary errors will result in reversal.

Like the outcome oriented approach in this district, the second line of cases, from the first and third districts, focuses on the impact of the improperly admitted evidence on the outcome of the trial. These cases appear to have sprung from a footnote in *Marks v. Delcastillo,* 386 So. 2d 1259, 1267 n.15 (Fla. 3d DCA 1980), which stated, without citation:

> We tentatively suggest the following as a shorthand-rule of thumb approach to this and related questions as applied to civil cases: fundamental error occurs when the result would have been different; reversible error, when the result might have been different; harmless error, when it would not have been different.

In *Katos v. Cushing,* 601 So. 2d 612, 613 (Fla. 3d DCA 1992), this "tentative suggestion" morphed into persuasive authority for the proposition that "[t]he test for harmless error is whether, but for the error, a different result may have been reached." *Katos* in turn has often been cited as stating the proper test for harmless error in civil cases.[22] This test eases the difficulty of the strict "but-for" test by requiring some

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[22]*See, e.g., Hogan,* 30 So. 3d at 575; *Gold,* 997 So. 2d at 1130-31 (also citing *Marks*); *Blackmon,* 754 So. 2d at 843. *See also Gencor Indus. Inc. v. Fireman's Fund Ins. Co.,* 988 So. 2d 1206, 1209 (Fla. 5th DCA 2008); *USAA Cas. Ins. Co. v. McDermott,* 929 So. 2d 1114, 1117 (Fla. 2d DCA 2006).

lesser degree of probability that the result in the case would have been different.[23]

The third line of cases, starting with *Damico v. Lundberg*, 379 So. 2d 964 (Fla. 2d DCA 1979) (on rehearing), uses somewhat different language to put a finer point on the test of the probability of a different result. In *Damico*, the second district held that an "error is reversible only when, considering all the facts peculiar to the particular case under scrutiny, it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed." *Id.* at 965 (citing *Stecher*, 253 So. 2d at 422).[24] This test differs from the *DiGuilio* test for harmless error in two ways. First, it requires a "reasonable probability," rather than a mere "reasonable possibility." Second, it focuses on the probability of a different outcome on retrial rather than the probability that the error contributed to the outcome in the actual trial.

We believe that the district courts of appeal have primarily used a variation of outcome-oriented analysis in approaching the harmless error conundrum instead of employing the process-oriented "effect on the fact finder" approach that the Supreme Court adopted in *DiGuilio* and reaffirmed in *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999) and *Ventura v. State*, 29 So. 3d 1086 (Fla. 2010).

At least one of our civil cases appears however to apply an "effect on the fact finder" test similar to the one applied in *DiGuilio*. *Mattek v. White*, 695 So. 2d 942 (Fla. 4th DCA 1997) was a personal injury action arising from an auto accident. The trial court allowed a physicist, who was an accident reconstruction and biomechanics specialist, to offer his opinion that the collision could not have caused permanent injury to the plaintiff. *Id.* at 943. We held it was error to admit the physicist's testimony about permanent injury because the physicist was not a qualified medical expert. *Id.*

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[23]It is unclear exactly what degree of probability the test requires. But we can safely assume that "may" implies a lesser degree of probability than "would," which implies near-certainty.

[24]This interpretation of the harmless error statute accords with the longstanding interpretation of a similar constitutional provision in another jurisdiction. *Cf.* Cal. Const. art. VI, § 13 (formerly art. VI, § 4 1/2); *People v. Watson*, 299 P.2d 243, 254 (Cal. 1956) ("[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (citation omitted)).

Holding that the error was harmful, we said: "We cannot find the error in admitting this testimony to be harmless because there was ample evidence in this case that plaintiff did have a permanent injury, and the admission of [the physicist's] opinions regarding permanency *could well have been what persuaded the jury* to find no permanency." *Id.* at 944 (emphasis added). Here, as in *DiGuilio*, "[t]he focus [was] on the effect of the error on the trier-of-fact." 491 So. 2d at 1139.[25] But *Mattek*, with its "effect on the fact finder" test, stands as an island in a sea of cases applying outcome-oriented, "but-for" analyses.

Harmless Error in Civil Cases

In formulating a harmless error test in civil cases, it is important to recognize that *DiGuilio* derived its formulation from the elevated burden of proof in criminal cases:

> The harmless error test . . . 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 or, alternatively stated, that there is *no reasonable possibility* that the error contributed to the conviction.

DiGuilio, 491 So. 2d at 1135 (emphasis added) (citation omitted). This elevated test acknowledges (1) the higher burden of proof in criminal cases, which amplifies the potential effect of an evidentiary error on the trier of fact, and (2) the special concern for the legitimacy of criminal convictions expressed in the constitutional and statutory protections accorded to criminal defendants. A harmless error test for civil cases should acknowledge the particular attributes of those cases.

As in a criminal case, the approach to harmless error analysis in a civil case should begin with an examination of the entire record by the appellate court,[26] including a close examination of both the permissible evidence upon which the jury could have relied and the impermissible

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[25]We also looked at the effect of the error on the trier of fact in another recent civil case. *See Gen. Motors Corp. v. McGee*, 837 So. 2d 1010, 1036 (Fla. 4th DCA 2002) ("We agree with GM that two errors occurred during the trial, but we find those errors to be harmless in the context of this case . . . The jury was not swept away by the emotions of the attorneys. The jury's verdict separated the issues of liability and damages from that of punitive damages.").

[26]*See also Medina v. Peralta*, 724 So. 2d 1188, 1189-90 (Fla. 1999) ("When examining an evidentiary ruling under section 59.041, we are required to look at the entire record.").

evidence which may have influenced the verdict. The focus of the analysis is to evaluate the effect of the error on the trier of fact to determine whether or not the error contributed to the judgment. We agree with Chief Justice Traynor that a "reasonableness" standard is inappropriate for a harmless error analytical framework because it does not specify a degree of probability:

> The nebulous test of reasonableness is unlikely to foster uniformity either in the application of standards, should there be any, or in the pragmatic exercise of discretion. Discretion is at least under better control within tests that focus on the degree of probability as more probable than not, highly probable, or almost certain.

Traynor, *supra* note 5, at 34-35.

Just as the Supreme Court used the burden of proof in a criminal case to describe the harmless error standard in *DiGuilio,* so should the burden of proof in civil cases inform the harmless error standard here: harmless error occurs in a civil case when it is more likely than not that the error did not contribute to the judgment. To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict.

This test for harmless error is consistent with the way the Supreme Court approached the issue in *DiGuilio*, *Gormley*, *Sheffield*, and *Linn.* Because section 59.041 applies to both criminal and civil cases, the same type of "effect on the fact finder" harmless error analysis should be used in both types of cases, with the adjustment in civil cases that takes the lower burden of proof into consideration. The "more likely than not" burden is not insurmountable for an appellee contending that a trial error was harmless; it is consistent with the "liberal construction" of the statute mandated by the legislature.

The lower burden also effectuates the statutory goal of enhancing finality in a way that recognizes the different stakes involved in criminal and civil cases. Criminal cases involve a deprivation of liberty, not merely financial loss, so the procedural and substantive law emphasizes the goal that the end result in a criminal case be just and right. Social policy places a greater premium on finality in civil cases than in criminal cases, a finality that should come sooner rather than later. Put differently, society is willing to tolerate more mistakes in civil cases than it will in criminal ones. This policy preference for a quick finality in civil

cases supports our decision to require the appellee to demonstrate not that there was a high probability that the error did not affect the verdict, or that there was a reasonable probability that it did not, but that, more likely than not, the error had no such harmful effect.

We therefore recede from the line of cases in footnote 19, which apply a strict, outcome-determinative "but-for" test for harmless error. We also certify the following question to the Supreme Court as being of great public importance:

> IN A CIVIL APPEAL, SHALL ERROR BE HELD HARMLESS WHERE IT IS MORE LIKELY THAN NOT THAT THE ERROR DID NOT CONTRIBUTE TO THE JUDGMENT?

Applying the Harmless Error test in This Case

The question here was whether the trial court's refusal to allow the proposed cross-examination of Dr. Dildy was harmless error. The ultimate purpose of the proposed cross-examination was to call into question the hospital's AFE diagnosis by suggesting that the hospital diagnosed that condition about 15 times more than the rate elsewhere. This issue was presented to the jury through the testimony of Dr. Adelman and in part from Dr. Dildy. This evidence allowed the plaintiff's attorney in closing argument to hammer on the significance of the statistical abnormality. During the proffer of Dr. Dildy, he said that if the incidence of AFE at the hospital were accurate, he would be concerned that AFE was being over-diagnosed. Yet, even when confronted with the statistics documenting this possibility, he persisted in his opinion that Susan presented a special case of AFE. He testified, "But this case here, we're talking about, it doesn't matter what all these other cases are, this is this case, and this case is an amniotic fluid embolism."

Considering all of the testimony, the jury had the full ability to take the statistical anomaly into consideration; the omitted testimony added little to the plaintiff's case. Having reviewed the entire record, we conclude that it is more likely than not that the restriction on the cross-examination of Dr. Dildy did not contribute to the verdict. The error was harmless.

Accordingly, we affirm the judgment entered below. We withdraw the panel opinion previously issued in this case and substitute this opinion in its place.

MAY, C.J., WARNER, POLEN, STEVENSON, TAYLOR, and CIKLIN, JJ., concur.
DAMOORGIAN, J., concurs specially with opinion, in which MAY, C.J., concurs.
CONNER, J., concurs in majority opinion only in result and specially with opinion, in which LEVINE, J., concurs.
HAZOURI and GERBER, JJ., recused.

DAMOORGIAN, J., concurring specially.

We commend Judge Gross for his thorough review of the history of the harmless error test and for his logical formulation of the "more likely than not" harmless error test for civil cases. Given the supreme court precedent upon which Judge Gross bases the majority opinion, we are compelled to concur that this court, going forward, should apply the "more likely than not" harmless error test in civil cases.

However, if we were writing on a clean slate, we would argue that the only harmless error test we should apply in civil cases is the plain language of Florida's harmless error statute.

As the majority opinion points out, before 1911, the common law established two different harmless error rules: (1) the "orthodox" rule by which an error was not a sufficient ground for a new trial unless it appeared, looking at all the evidence, that the truth had not been reached as a result; and (2) the more stringent "Exchequer" rule by which an error at trial created *per se* a right to reversal. The shift in the early twentieth century from the orthodox rule to the Exchequer rule was widely criticized for making reversal too easy. Therefore, at the suggestion of the American Bar Association, the Florida Legislature, in 1911, enacted Florida's harmless error statute:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

§ 59.041, Fla. Stat. (2010) (formerly § 54.23, Fla. Stat.).

The harmless error statute, which has remained unchanged in one hundred years, is unambiguous. The legislature has entrusted the courts to set aside or reverse a judgment, or grant a new trial, only when the error complained of has resulted in a miscarriage of justice. Whether a miscarriage of justice has occurred is to be determined on a case-by-case basis after an examination of the entire case. If the determination is a close question, then a liberal construction favors setting aside or reversing the judgment or granting the new trial. In short, the legislature has entrusted the courts to recognize a "miscarriage of justice" as that phrase is commonly used, and "[t]he authority of the legislature to enact harmless error statutes is unquestioned." *State v. DiGuilio*, 491 So. 2d 1129, 1134 (Fla. 1986).

As the majority opinion points out, however, over the last hundred years, courts have sought to further interpret the phrase "miscarriage of justice." The majority opinion seeks to justify that exercise by citing to the harmless error statute's last sentence, "This section shall be liberally construed." However, we do not read the statute's last sentence as the legislature's express invitation for the courts to further interpret "miscarriage of justice." Rather, the statute's last sentence merely provides that if the determination of whether a miscarriage of justice has occurred is a close question, then a liberal construction favors setting aside or reversing the judgment or granting the new trial.

Nevertheless, over the last hundred years, courts apparently have treated the phrase "miscarriage of justice" as being ambiguous and therefore have attempted to formulate more specific tests to determine whether a miscarriage of justice has occurred. As the majority opinion points out, courts have formulated two tests: (1) a "but-for," "correct result" test which focuses on the outcome; and (2) the more forgiving "effect on the fact finder" test which focuses on the process.

In our view, these two tests merely have returned us to where we were a century ago when courts debated over whether to apply the "orthodox" rule or the "Exchequer" rule to determine whether error was harmful or not. But today, the harmless error statute already is in effect. The statute is unambiguous. The statute should be applied according to its plain language in civil cases rather than continuing our century-old struggle to further define the phrase "miscarriage of justice." As our supreme court stated in *Daniels v. Florida Department of Health*, 898 So. 2d 61 (Fla. 2005):

> When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent

> or resort to rules of statutory construction to ascertain intent. In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. When the statutory language is clear, courts have no occasion to resort to rules of construction – they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.

Id. at 64-65 (internal citations and quotations omitted); *see also DiGuilio*, 491 So. 2d at 1137 ("[O]ur responsibility as an appellate court is to apply the law as the Legislature has so clearly announced it. We are not endowed with the privilege of doing otherwise regardless of the view which we might have as individuals.") (citations omitted).

In defense of our argument to apply the harmless error statute's plain language in civil cases, we foresee two concerns. First, some may be concerned that one judge's subjective view of a "miscarriage of justice" may be different than another judge's subjective view of a "miscarriage of justice." We harbor no such concern. We routinely apply the phrase "miscarriage of justice" in exercising our discretion to grant or deny certiorari review. *See Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) ("A district court should exercise its discretion to grant certiorari review only when there has been a violation of a clearly established principle of law resulting in a *miscarriage of justice.*") (emphasis added; citations omitted). More importantly, we have faith in our colleagues' experience and wisdom to recognize a miscarriage of justice when they see it.

Much more often than not, three judges of this court review the same record and arguments on a given case and reach the same conclusion. On the rare occasions when we disagree as to a conclusion, our judicial system is structured to resolve that disagreement in an orderly way - the majority's conclusion prevails. If the majority of judges on a particular panel conclude that the error complained of has resulted in a miscarriage of justice, then we should set aside or reverse the judgment or grant the new trial. If the majority concludes otherwise, then we should affirm.

Second, some may be concerned that our argument to apply the harmless error statute's plain language in civil cases merely would devolve into the "but for," "correct result" test by another name. We harbor no such concern here either. Certainly situations exist in which a "miscarriage of justice" can occur even though the result would have been the same without the error.

Perhaps the most obvious situation is when a trial court's error violates a party's constitutional rights in a criminal case. In such situations, we are not required to set aside or reverse a judgment or grant a new trial. *See Chapman v. California*, 386 U.S. 18, 22 (1967) ("We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.").

However, we have set aside or reversed judgments or granted new trials because of a constitutional error, even though the result would have been the same without the error. *Compare, e.g., Arnold v. State*, 807 So. 2d 136, 141-42 (Fla. 4th DCA 2002) (trial court's error in admitting DNA evidence at trial without giving the defendant an opportunity to present conflicting evidence constituted a violation of his due process rights, was not harmless, and required the reversal of the defendant's conviction) with *Arnold v. State*, 53 So. 3d 1042 (Table) (Fla. 4th DCA 2011) (indicating the same defendant's ultimate conviction after the reversal).

We recognize that applying the harmless error statute's plain language in civil cases may not be a perfect solution. *See Chapman*, 386 U.S. at 22-23 ("What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, *so far as possible.*") (emphasis added). But if application of the harmless error statute's plain language is flawed, it is no more flawed than the current two harmless error tests, the latter of which we are compelled to apply to civil cases beginning today.

We say this for two reasons. First, no language exists on the face of the harmless error statute suggesting that the legislature intended for courts to determine whether a miscarriage of justice has occurred based on the error's effect on the trier of fact, be it in the result or the process. Second, the current harmless error tests require appellate judges to speculate on what effect the error may have had on the trier of fact, be it in the result or the process. While our collective experience may allow us to better predict what effect the error may have had on the trier of fact, that prediction is still no more than speculation.

If we were to apply the harmless error statute's plain language to this case, it would not appear that the error complained of resulted in a miscarriage of justice. The plaintiff was able to present evidence of the statistical anomaly and was able to argue its weight to the jury. The omitted testimony added little to the plaintiff's case, and the failure of Dr.

Dildy to address the statistical anomaly may have been more damaging than what he would have said if the trial court had allowed the cross examination. Therefore, applying either the harmless error statute's plain language or the majority opinion's "more likely than not" harmless error test, our decision to affirm would be the same.

MAY, C.J., concurs.

CONNER, J., concurring specially.

I concur in the result, but I am unable to agree with receding from the position this court has previously taken on the test for harmless error in civil cases.

I agree that our supreme court has opined harmless error should be based on the effect of the error on the trier of fact. I concede in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), the supreme court established that in criminal cases, the burden of persuasion to obtain the verdict (beyond a reasonable doubt) is the same burden of persuasion in applying a harmless error analysis. I also concede there is an easy logic to the idea that in *all* cases the burden of persuasion to obtain a judgment should be the same burden of persuasion to reverse a judgment. That necessarily means there are three different tests or standards in determining if an error is harmless.[27]

Judge Damoorgian hits the nail on the head when he points out one of the concerns about the notion of harmless error is the fear that its application will rely on the subjective viewpoint of a panel of appellate judges. I also agree with Judge Damoorgian that appellate judges are periodically called upon to apply the notion of a "miscarriage of justice" in deciding whether to grant or deny certiorari review. However, petitions for certiorari review are not as "routine" (numerically) as direct appeals. I also doubt there is much consensus among appellate judges on how to define or describe a "miscarriage of justice."

My real struggle with the majority opinion is this: identifying the perspective from which harmless error is to be assessed and the burden of persuasion for establishing whether error is harmless does not tell me much about what the actual standard is. The clearest statement in the majority opinion of the harmless error standard for civil cases is: "To

[27]In criminal cases, the burden of persuasion is "beyond a reasonable doubt." In civil cases, there are two possible burdens of persuasion, depending on the type of case: "preponderance" (the majority speaks of "more likely than not") and "clear and convincing."

avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is more likely than not that *the error did not influence the trier of fact and thereby contribute to the verdict.*" (Emphasis added.) That articulation suggests to me that the thought process for the appellate panel is to weigh and consider the *amount* of influence the error may have had on the trier of fact and to assess whether some tipping point was reached in which one can safely conclude "more likely than not" the error "contributed to the verdict." For me, this standard invites too much speculation and subjective analysis. Lawyers will have great difficulty advising clients about the likely outcome of an appeal where such standards are used.

As the majority points out, we are more tolerant of error when *the outcome* is whether someone should be paid money than when *the outcome* is whether someone should be deprived of liberty. That is as it should be. Thus, it seems reasonable to assume that in passing a harmless error statute the legislature appreciated the difference in *the outcome* between a civil case and a criminal case. If I am correct, there is no reason the judiciary needs to measure harmless error the same way for both types of cases. It is appropriate to protect the fairness of the fact-finding process *above* protecting the finality of a decision in criminal cases. I submit in civil cases it is more appropriate to protect the finality of a decision *above* protecting the fairness of the fact-finding process.

Focusing on the effect of the error on the trier of fact raises another concern in civil cases. Does the application of the standard differ if the trier of fact is a judge instead of a jury? This concern is enhanced because more civil cases are tried nonjury than criminal cases. Focusing on the effect of the error on the trier of fact is really an exercise in divining whether the error may have influenced the trier of fact; and if so, was there enough influence to affect the trier of fact's decision. It would seem to me that my divining skills will be applied differently when the trier of fact is a jury as opposed to a judge.[28]

Another problem I have with the majority's contention that in this district we have set the bar of harmful error too high for civil cases is that setting the bar too low is an affront to the integrity of the jury process and the decision rendered by six impartial persons selected by both sides to try the case. In civil cases, the appellant is unhappy with a jury decision and seeks a new decision by a new jury. If the rules

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[28]Because judges are trained in the law they are less likely to be affected by error as fact-finders. Also, my assumption is that trial judges are less likely to be swayed by emotion and subjective factors.

regarding reversal required that the case be retried with the same evidence and the same arguments, minus the error, it is doubtful we would have as many appeals in civil cases as we do.

Instead, the appellant is seeking a second bite at the apple with a new jury, with the understanding that, having the benefit of a dry-run, the case will be presented in a different fashion. More often than not, the restructuring of evidence and arguments will have little connection to the error that caused the retrial. A "but for" analysis which focuses on whether the outcome would be the same with the original jury, without the error, gives honor to the original jury.

The majority quotes the supreme court in *DiGuilio*:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. [*Id.* at 1139.]

and a little later goes on to opine:

> Under the *DiGuilio* test, a judgment should be reversed, and a new trial granted, whether or not the outcome of that trial is likely to be different, whenever the appellate court believes there is a reasonable possibility that the error influenced the trier-of-fact and contributed to the verdict.
>
> The differences between a "correct result" ["but for"] test and an "effect on the fact finder" test are subtle but important. An "effect on the fact finder" test asks the appellate judge to look closely at the error and estimate its effect on the trier-of-fact. A "correct result" test asks the judge to look at everything but the error and guess whether the verdict in a trial without it would have been different. In short, one test focuses on process; the other on the end result. Moreover, a "correct result," or "but-for," test asks the judge to exclude the wrongly admitted evidence (or include the wrongly rejected evidence) and weigh the evidence anew—precisely what *DiGuilio* forbids. *See DiGuilio*, 491 So. 2d at 1136.

I submit the majority has read more into *DiGuilio* than what our supreme court said. Although the majority equates a "correct result" test with a "but for" test, I am not so sure our supreme court would do the same. What the supreme court made clear in *DiGuilio* is that the analysis of whether the error affected the verdict is to be conducted from *the perspective of the jury* (would the jury have reached the same decision without the error), and not from *the perspective of the appellate panel* (would the appellate panel have reached the same decision the jury reached if the error is excluded). I agree our supreme court has rejected a "correct result" test in *DiGuilio*; I do not agree it rejected a "but for" test.

A "but for" analysis is consistent with *DiGuilio*. In *DiGuilio*, the supreme court said: "If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." That is simply another way of saying the error is harmful if the appellate court cannot say beyond a reasonable doubt, "but for" the error, the verdict would not have been the same. Determining whether error "affected the verdict" is no different from determining whether the winning party would have gotten its verdict without the error.

A "but for" analysis of harmless error in civil cases makes the exercise of divining the influence of error on the trier of fact easier, regardless of the burden of persuasion and regardless of whether the trier of fact is a jury or a judge. It also comports more with the history of why the statute was enacted: to curb the application of an overly liberal standard for granting new trials. Also, a "but for" analysis makes it easier for lawyers to predict outcomes and advise clients. I contend that a "but for" analysis of harmless error is less prone to be criticized as too speculative and subjective.

If we are going to allow different standards for the application of harmless error depending on whether the case is criminal or civil, I am more comfortable with the more stringent "but for" test this district has adopted in civil cases because we are more tolerant of error in civil cases and because the stakes are different than criminal cases.[29] If this court is going to reformulate the harmless error test or standard to be applied to civil cases, I submit it should be this: "To avoid a new trial, the beneficiary of the error in the trial court must show on appeal that it is

[29]I agree that with a more stringent standard, there is the potential that lawyers will engage in "win at all cost" tactics because the likelihood of reversal is less. However, that type of improper lawyer conduct is better addressed by sanctions against the lawyer than by reconvening a new jury to try the case.

more likely than not that the decision of the trier of fact would have been the same without any influence of the error."[30]

Undoubtedly, the majority will contend my articulation is too "result oriented," whereas the majority's articulation is more "process oriented."[31] The distinction between the two formulations can be described this way: I submit the majority's articulation will lead to more reversals because assessing "influence on the trier of fact" is expressed as establishing a negative ("error did not influence") whereas my articulation focuses on establishing a positive (the result would have been the same). Establishing a negative is always more difficult than establishing a positive. Protecting the fairness of the fact-finding process should prevail over protecting finality of a decision in criminal cases, and the appellee should have to establish a negative to avoid reversal. However, in civil cases, protecting finality of a decision should prevail over protecting the fairness of the fact-finding process, and the appellee should have to establish a positive.

LEVINE, J., concurs.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn D. Kelley, Judge; L.T. Case No. 502005CA00 2533XXXXMB.

Philip M. Burlington and Andrew A. Harris of Burlington & Rockenbach, P.A., West Palm Beach, and Gary M. Cohen and Andrew B. Yaffa of Grossman Roth, P.A., Boca Raton, for appellant.

Irene Porter and Kathryn L.S. Griswold of Hicks Porter Ebenfeld & Stein, P.A., Miami, and Eugene Ciotoli of Bobo Ciotoli Bocchino Newman Corsini White & Buigas, P.A., North Palm Beach, for appellees Ivo Baux, M.D., Ivo Baux, M.D., P.A., and Pinnacle Anesthesia, P.L.

Michael K. Mittelmark and K. Calvin Asrani of Michaud Mittelmark

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[30]For civil cases in which the burden of persuasion is "clear and convincin"' (such as Jimmy Ryce cases), my articulation would change the words "more likely than not" would be changed to "clear and convincing."

[31]Both *DiGuilio* and the majority express the harmless error analysis in terms of whether the error "contributed to the verdict." How does one determine that without being "result oriented?"

Antonacci & Marowitz P.A., Boca Raton, for West Boca Medical Center, Inc.