IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

WEST BOCA MEDICAL CENTER, INC., et al.,

Respondents.
_____/

Case No. SC11-2511

L.T. Case No. 05 CA 002533

ANSWER BRIEF ON THE MERITS OF DEFENDANT/RESPONDENT WEST BOCA MEDICAL CENTER, INC. D/B/A WEST BOCA MEDICAL CENTER

On Appeal From The Fourth District Court of Appeal of the State of Florida

---

Michael K. Mittelmark, Esq.
Florida Bar No. 791751
Meghan K. Zavoina, Esq.
Florida Bar No. 0093159
K. Calvin Asrani, Esq.
Florida Bar No. 0573671
MICHAUD, MITTELMARK, MAROWITZ & ASRANI, PLLC
Attorneys for Respondent, West Boca Medical Center, Inc.
621 NW 53rd Street, Suite 260
Boca Raton, FL 33487
Tel: (561) 392-0540
Fax: (561) 392-0582

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PREFACE

This is an appeal from a Final Judgment for West Boca Medical Center, Inc. d/b/a West Boca Medical Center rendered by the Honorable Glenn D. Kelley on November 14, 2007 following a jury verdict.

Petitioner, Frank Special, is referred to as "Plaintiff" or "Petitioner." Respondent, West Boca Medical Center, Inc. d/b/a West Boca Medical Center is referred to as "Respondent" or "West Boca Medical Center". Respondent, Ivo Baux, M.D. is referred to as "Dr. Baux".

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

STATEMENT OF THE CASE AND FACTS

On March 17, 2005, Petitioner, Frank Special, as Personal Representative of the Estate of Susan Special, filed a wrongful death/medical negligence claim naming Ivo A. Baux, M.D., his professional associations and West Boca Medical Center. At trial, Petitioner contended that his wife died after suffering a coagulopathy following a C-section because Dr. Baux (not West Boca Medical Center) was negligent in administering anesthesia, in controlling her fluids during the surgery, in delaying in the initiation of a code and in not performing timely interventions during the code (A2). All Defendants denied negligence and contended that Mrs. Special died after suffering an amniotic fluid embolism (AFE) following the C-section (A2).

Evidence at trial revealed that AFE triggers an anaphylactic reaction causing cardiorespiratory collapse (A2). After Mrs. Special passed away, the Palm Beach County Medical Examiner, Barbara Wolf, M.D. testified that she performed an autopsy which revealed no evidence of AFE unlike the majority of cases where AFE causes death (A2).

The alleged negligence of Dr. Baux (not the alleged negligence of West Boca Medical Center) and the cause of Mrs. Special's death were in dispute and hotly contested throughout the trial. Plaintiff and Defendants called qualified experts at trial to support their negligence and causation theories. The Petitioner continues to claim

Judge Kelley's limitation of the cross examination of Dr. Dildy was harmful error despite the *en banc* panel's conclusion that both sides were given ample opportunity by Judge Kelley to present evidence and testimony to support their respective theories of the case (A2, A3, A4).

Petitioner also revives its claim of error as to the exclusion of testimony regarding witness intimidation of Dr. Wolf which was rejected without discussion by the Fourth DCA. (A1). Dr. Wolf's proffer makes it clear that it would have been improper to permit testimony on witness intimidation based on the Department of Health complaint because the connection to the Defendants was, at best, purely speculative.

> Q. . . . The communications that you referenced, and I'm going to let Mr. Ciotoli speak for himself, did you ever receive any communications from anybody, whether Mr. Pincus or anybody else, suggesting that West Boca Medical Center or any of their counsel or anybody else had anything to do with this complaint that was made to the Board of Medicine, as far as you were concerned?
>
> A. No, I was not given any information as to who made the complaint.
>
> Q. Okay.
>
> A. Nor was Mr. Pincus
>
> ***
>
> Q. . . . have you ever received any confirmation of any

kind that [West Boca Medical Center] or my office or Mr. Ciotoli's office or his client are the ones that made a complaint against you?

A. No, my attorney has attempted to demand that information from the Board of Medicine, but as yet, we have not received it.

(T754-755). Moreover, as Judge Kelley correctly recognized, Dr. Wolf's opinions at her deposition and trial were unequivocally not affected by the complaint or conversation with Mr. Pincus prior to her deposition.

Q. . . . Irrespective of those issues, you issued a report in this case, correct?

A. Yes, I did.

Q. You stand by that report?

A. Absolutely.

Q. Not influenced in any way, shape, or form by all this other . . . that swirled around, true?

A. That's correct.

(T755-756).

Judge Kelley gave Plaintiffs the opportunity to tell the jury about the supposed witness intimidation as long as it was based on something more than speculation and improper stacking of inferences. Judge Kelley stated on the record outside the presence of the jury:

> What evidence do we have, other than to say it must have been someone from the defense? I'm concerned about just laying that out there without being able, from an evidentiary point of view, to connect those dots . . . And I don't know whether it's true or it's not true, I just have to deal with what evidence is going to come in at this time which would allow me to make that leap and open that door. If there's direct evidence that there was witness tampering and that we can establish through testimony in court that Dr. Wolf knows that somebody actually made the report, I think that's one thing. . . . But nevertheless, if it's fuzzy, and we don't have that connection, I'm not—I'm not seeing how I can let that in.

(T718-719).

On the issue of the Department of Health Complaint, Plaintiff's own counsel admitted there was no direct evidence. (T719). Consequently, Judge Kelley ruled that there was not sufficient evidence to permit the testimony because it was merely on "implication" and not evidence. (T719).

On October 19, 2007, following a four (4) week trial, the jury returned a verdict for the Defendants (A4). On June 23, 2010, Associate Judge Jeffrey R. Levenson issued the Fourth DCA's majority opinion affirming the defense verdict below. Special v. Baux, 52 So.3d 682 (Fla. 4th DCA 2010). As Judge Taylor, concurring specially in the Fourth DCA's initial opinion, first pointed out and remains unchallenged on appeal, Plaintiff's counsel was unable to establish during its proffer that evidence of the hospital's over-diagnosis of AFE in other cases would have

affected Dr Dildy's opinion that Mrs. Special died as a result of AFE. Notably, at no point in this appeal has any attention been paid to witness intimidation other than a denial by the initial Fourth DCA panel that it was an issue requiring further discussion.

On December 7, 2010, the Fourth DCA entered its Order granting Petitioner's Motion for Rehearing *en banc*. On November 16, 2011, the Fourth DCA, without any oral argument, entered its corrected *en banc* opinion affirming the judgment below finding that the error restricting the cross-examination of Dr. Dildy was harmless (A23). Special v. Baux, 79 So.3d 755 (Fla. 4th DCA 2011)(*en banc*) rev. granted 90 So.3d 273 (Fla. 2012).

The Fourth DCA, sitting *en banc*, found that decisions applying an outcome determinative test for harmless error were contrary to this Court's interpretation of the harmless error statute. (A1). Following a careful consideration of the reasonable possibility standard used in criminal cases, among others, the Fourth DCA adopted a new standard placing the burden on the appellee in all cases and requiring that party to 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. (A21- A23). The *en banc* panel recognized that the harmless error test in criminal appeals was based on the elevated burden of proof placed on the state in order to deprive a defendant of their life or liberty. (A21) The Fourth DCA further recognized that accord must be given to the special concern

for the legitimacy of criminal convictions expressed in our constitutional and statutory protections. (A21). Where merely financial loss is at stake, there is a greater premium on finality in civil cases than in criminal cases, one which the court appropriately recognized should come sooner rather than later. (A22).

In applying this "newly formulated" harmless error test, the *en banc* Fourth DCA panel recognized that the ultimate purpose of the proffered testimony was to reiterate that the purported cause of Susan Special's death was being over-diagnosed at West Boca Medical Center. (A23). Nevertheless, both the trial court and the *en banc* panel recognized that this information was presented to the jury through Dr. Adelman's testimony and Dr. Dildy's testimony and that the significance of the statistical abnormality was "hammered on" during closing argument by Plaintiff's counsel. (A23). In reaching their opinion, the *en banc* panel clearly recognized after reviewing the entire transcript that Dr. Dildy's proffered testimony added little to the Plaintiff's case and the statistical abnormality did not persuade the jury that there was medical negligence. (A23).

Furthermore, the *en banc* thirty-two (32) page opinion is devoid of even a cursory reference to the issue of alleged witness intimidation. In fact, the only reference to Dr. Wolf was to demonstrate the emphatic testimony she provided regarding the lack of AFE in the autopsy slides to support the *en banc* opinion that the

limitation on Dr. Dildy's testimony was harmless error. (A2).

> Q. Doctor, as we were saying, did you do a full and complete and exhaustive investigation to determine whether or not this lady died of amniotic fluid embolus?
>
> A. Yes, I did.
>
> Q. Tell the jury, please, all the tests you went through and how long it took you to look to see if this lady died of amniotic fluid embolus?
>
> A. . . . So all in all, it took quite some time to send more tissue to the lab, get more stains, and by the end of it, I believe I had submitted 11 slides, each of which contained more than one piece of lung tissue, and special stains on many of these slides.
>
> Q. Okay. And what did you find?
>
> A. There was no evidence of amniotic fluid embolism.
>
> Q. Dr. Wolf, in the majority of cases where somebody does die of AFE, is it seen on an autopsy, can you find evidence of it on the autopsy?
>
> A. In the majority of cases, when numerous sections are done, there will be evidence under the microscope, yes.
>
> Q. Therefore, can you say within a reasonable degree of medical probability, that the cause of Susan Special's death was not AFE?
>
> A. Yes, I can.

(T790-794). Unquestionably, the jury was thoroughly informed as to the Plaintiff's theory regarding Mrs. Special's cause of death and Plaintiff's argument that the diagnosis was incorrect **in this case.** Consequently, the jury heard unrestricted testimony from a qualified medical expert pathologist not retained by either party in

this case who testified as to the lack of presence of AFE during the autopsy she performed and the opinion that Mrs. Special's death was not due to AFE. Therefore any error in the exclusion of the proffered testimony of Dr. Dildy, was, at best, harmless.

The *en banc* opinion confirms that the Fourth DCA properly considered the entire record and concluded that it is more likely than not that the error did not contribute to the verdict (A23). Nevertheless, the Fourth DCA 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?

Special v. Baux, 79 So.3d at 771-772. Following jurisdictional briefing, this Court granted review of the case at bar based on the certified question. Special v. Baux, 79 So.3d 755 (Fla. 4th DCA 2011)(*en banc*) rev. granted 90 So.3d 273 (Fla. 2012).

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourth DCA's decision and affirm the judgment in favor of Dr. Baux, his related corporations and West Boca Medical Center because the exclusion of Dr. Dildy's cross-examination testimony proffered at trial was harmless error in light of all the other testimony and evidence adduced at trial.

The party which bears the burden of proof under the proper standard for

harmless error in civil cases is the Petitioner in this case. Florida has long recognized doctrine that the appellant in civil appeals must show entitlement to the relief being sought. Shifting the burden of proof in this case to West Boca Medical Center as the beneficiary of the trial court's error would be improper since West Boca Medical Center did not cause clearly egregious evidence to be introduced. Consequently, the Petitioner must bear the burden of demonstrating that the limitation on Dr. Dildy's cross-examination was harmful error in the context of this case and that the error caused a "miscarriage of justice".

The proper standard for harmless error in civil cases is whether there was a reasonable probability that the error affected the verdict causing a miscarriage of justice. This test appropriately combines the considerations that guided the passage of the harmless error statute which applies to both civil and criminal cases, §59.041, Florida Statutes by respecting the finality of verdicts unless there was a miscarriage of justice or the substantial rights of the Appellant were injuriously affected. This standard is also based on this Court's opinion in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) strikes a necessary balance between preserving every litigant's right to a fair trial and recognizes that life and liberty are uniquely at risk only in criminal trials.

Applying the proper standard for harmless error in civil cases to the exclusion of Dr. Dildy's proffered testimony leads to the inescapable conclusion that the limitation

on Dr. Dildy's cross-examination was, at best, harmless error. After a review of the entire record, the Fourth DCA made clear that under two differently articulated standards on harmless error the admission of Dr. Dildy's proffered testimony would not have affected the jury's conclusion that Dr. Baux was not negligent nor did it cause a "miscarriage of justice". As this Court has repeatedly confirmed, where there is ample evidence to support the verdict as well as proof in the record that the jury ultimately heard the information which was erroneously excluded, there is not even a reasonable possibility that the error contributed to the verdict let alone a reasonable probability.

Finally, Petitioner's request to this Court to consider allegations of witness intimidation is contrary to the litany of case law developed by this Court. An analysis of witness intimidation was not even given a passing mention in the Fourth DCA's initial opinion or the *en banc* opinion. Moreover, this Court should not hear argument regarding alleged witness intimidation since the trial judge determined there was an insufficient nexus connecting the proffer with the Defendants in the case and Dr. Wolf could not say with any certainty whether Dr. Baux was responsible for the Department of Health Complaint. Furthermore, this issue was given extraordinary consideration in Plaintiff's post-trial motions without a change in Judge Kelley's ruling. Consequently, allegations of alleged witness tampering should not be reached by this Court since it

was not considered worthy of comment by either the initial Fourth DCA majority panel or the subsequent *en banc* panel. Regardless, the proffered testimony on alleged witness intimidation was properly excluded as hearsay and did not amount to witness tampering.

ARGUMENT

Point I

THE PETITIONER IS NOT ENTITLED TO A NEW TRIAL BECAUSE HE CANNOT DEMONSTRATE THAT IT WAS MORE LIKELY THAN NOT THAT THE EXCLUSION OF DR. DILDY'S PROFFERED TESTIMONY CONTRIBUTED TO THE JUDGMENT OR AFFECTED THE VERDICT CAUSING A MISCARRIAGE OF JUSTICE.

A. Petitioner must bear the burden of proof and demonstrate the error was not harmless.

§59.041, Florida Statutes and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) require that the burden of proof in civil appeals addressing harmful error remain with the appellant or, in other words, the party seeking relief due to harmful error. A cornerstone of our justice system is that the moving party holds the preponderance of evidence burden of proof in civil cases. Just as the State holds the beyond a reasonable doubt burden in criminal cases, a Plaintiff in medical malpractice cases must show that the injury more likely than not resulted from the defendant health care provider's negligence and that the negligence was causally related to the injuries.

See, e.g., Gooding v. Univ. Hosp. Bldg., Inc., 445 So.2d 1015, 1020 (Fla. 1987).

In this case, there are no facts that demonstrate that West Boca Medical Center invited the error that would justify a departure from the rule that the burden of proving harmful error remain with the appellant. Plaintiff in the case at bar simply cannot say that West Boca Medical Center invited the introduction of any evidence that forced the Appellants to mitigate the damage by addressing the potential negative impact of the evidence in their case-in-chief. See, e.g., Sheffield v. Superior Ins. Co., 800 So.2d 197 (Fla. 2001) (collateral sources); Flores v. Allstate Ins. Co., 819 So.2d 740 (Fla. 2002) (fraud); Porter v. Vista Bldg. Maint., 630 So.2d 205 (Fla. 3d DCA 1993) rev. denied 640 So.2d 1109 (Fla. 1994) (alcohol abuse); Duffell v. S. Walton Emergency Services, 501 So.2d 1352 (Fla. 1st DCA 1987) (drug use); Mattek v. White, 695 So.2d 942, 944 (Fla. 4th DCA 1997) (unqualified expert testimony).

Consequently, where there is no applicable public policy rationale to discourage the introduction of improper evidence, it would be improper to always shift the burden of proof to the party that merely received the benefit from the error. In contrast, keeping the burden of proof on the Petitioner in this case fosters the purpose of the harmless error statute: "to enhance finality by limiting the granting of new trials". (A8) Furthermore, it ensures that the Petitioner in this case, where life and liberty were not at stake, recognizes that they must demonstrate that their own substantial rights were

injuriously affected and it furthers the legislative purpose of conserving judicial resources. (A8).

Although the *en banc* panel's conclusion that there was no harmful error in this case was correct, the burden of proof does not always need to be on the beneficiary of the error in every appellate case addressing harmful error. In the *en banc* opinion, the Fourth DCA held that the "beneficiary of the error in the trial court **who improperly introduced the offending evidence**" has the burden of proving harmlessness. Special v. Baux, 79 So.3d 755 (Fla. 4th DCA 2011) (*en banc*)(emphasis added). (A15). Appellant also relies on Mattek v. White, 695 So.2d 942 (Fla. 4th DCA 1997), Sheffield v. Superior Ins. Co., 800 So.2d 197 (Fla. 2001) and Flores v. Allstate Ins. Co., 819 So.2d 740 (Fla. 2002) to support the shifting the burden under a harmless error analysis to the party benefiting from the error. However, the reliance on Mattek is misplaced because not only did the court not address which party holds the burden of proof but the defendant in that case improperly interjected medical expert testimony as to the permanency of the injury through an expert on accident reconstruction and biomechanics.

Additionally, in Sheffield, the Defendant UM insurer improperly received permission from the trial court to discuss collateral sources after the plaintiff's motion in limine was denied. Apparently, the trial court in Sheffield ignored a landmark

decision, Gormley v. GTE Products Corp., 587 So.2d 455 (Fla. 1991) when denying the motion in limine. In order to minimize the adverse effect this ruling was going to have on their case, plaintiff's counsel discussed collateral sources in their case-in-chief and obtained a less than satisfactory verdict. On appeal, the Defendant UM insurer argued that the admission of collateral source evidence was harmless error and did not affect the verdict. The First DCA affirmed the jury's verdict.

In reversing the First DCA's decision and granting a new trial, this Court held that "once a trial court makes an unequivocal ruling admitting evidence over a movant's motion in limine, the movant's subsequent introduction of that evidence does not constitute a waiver of the error for appellate review." Sheffield v. Superior Ins. Co. at 203. This Court further noted that "[t]he burden of proving that the admission of the collateral source evidence was harmless rests on [the Defendant UM insurer]." This Court relied on equity and logic in determining that the burden of proof should be on the party who benefited from the error in the introduction of collateral source evidence because to hold otherwise would encourage the introduction of improper evidence. Id. See also, Gormley v. GTE Products Corp., 587 So.2d 455 (Fla. 1991). Although the Supreme Court in Flores v. Allstate Ins. Co., 819 So.2d 740 (Fla. 2002) cited approvingly to Sheffield v. Superior Ins. Co., 800 So.2d 197 (Fla. 2001) regarding the shifting of the burden of proof to the beneficiary of the error when there

has been an improper **admission of evidence**, the Justices declined to address its' applicability. Flores v. Allstate Ins. Co at 751 (emphasis added).

However, the admission of improper evidence is not the situation in the case at bar. Furthermore, in cases where there the beneficiary of the error did not mislead the court or otherwise invite the introduction of improper evidence, the district courts of appeal have held that the burden to show the error was harmful remains with the appellant. See Webster v. Body Dynamics, Inc., 27 So.3d 805, 809 (Fla. 1st DCA 2010) ("Reversal is unwarranted in a civil case **unless the appellant demonstrates** that 'it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed") (quoting In re Commitment of DeBolt, 19 So.3d 335, 337 (Fla. 2d DCA 2009)) (emphasis added).

Moreover, not carving out an exception to the general rule that the moving party bears the burden of proof in civil appeals for harmless error will not result in prejudice to the aggrieved party or an unreasonable hurdle in obtaining a new trial. See Cole v. Cole, 86 So.3d 1175, 1179 (Fla. 5th DCA 2012) (finding the error permitting the step-mom to testify via telephone over appellant's objection at a critical evidentiary hearing was not harmless where movant claimed the court relied on the testimony and appellee did not argue to the contrary). Clearly, an aggrieved party, such as the Petitioner in this case, is in the best position to demonstrate a miscarriage of justice or injurious effect

on their substantial rights.

In civil cases, the harmless error test must be crafted so that reversal is not a rarity. On the other hand, the statutory purpose to enhance finality by limiting the granting of new trials must also be given full force and effect. Similar to State v. DiGuilio, 491 So.2d at 1135,civil cases looking at harmless error should require "an examination of the entire record by the appellate court [and include] 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**". The proper test must be consistent with the goals of justice for all and place the greater emphasis on the record as a whole, considering the impact of the error, and whether a miscarriage of justice resulted. Goodwin v. State, 751 So.2d 537, 545 (Fla. 1999) (referencing approvingly Brecht v. Abrahamson, 507 U.S. 619, 643 (1993) (Stevens, J., concurring) (explaining it is better for the judge not to put the question in terms of proof burdens).

The Fourth DCA has found harmful error in civil cases using the "more likely than not" standard after issuing its *en banc* decision in Special v. Baux, 79 So.3d 755 (Fla. 4th DCA 2011)(*en banc*) rev. granted 90 So.3d 273 (Fla. 2012). See, e.g., Bank of Montreal v. Estate of Antoine, 86 So.3d 1262 (Fla. 4th DCA 2012) ("we are unconvinced that it is more likely than not that [excluding Antoine's deposition

testimony and plea agreement] did not influence the trier of fact and thereby contribute to the verdict as Antoine was the only party with personal knowledge of the embezzlement"); Reffaie v. Wal-Mart Stores, Inc., 96 So.3d 1073 (Fla. 4th DCA 2012) (concluding that the defendant/appellee did not show that the improper comments made by its counsel in closing argument attacking plaintiff's expert witness' credibility more likely than not did not contribute to the verdict" when noting the jury only awarded approximately one third of the medical bills introduced); Benjamin v. Tandem Healthcare, Inc., 93 So.3d 1076 (Fla. 4th DCA 2012) (holding appellee did not convince the court that excluding testimony of defendant's employee that was an admission of a party's agent was harmless error); Intramed, Inc. v. Guider, 93 So.3d 503 (Fla. 4th DCA 2012) (holding the appellee-plaintiff did not demonstrate "more likely than not" that their untimely disclosure of an expert witness and improper comments during closing argument did not influence the trier of fact and contribute to the verdict because the jury awarded substantial damages and indicated a long life expectancy); and Lenhart v. Basora, 37 Fla. L. Weekly D2439 (Fla. 4th DCA October 17, 2012)(new trial required where Defendant could not prove that the failure to allow evidence on the nature of his negligence "did not influence the trier of fact and thereby contribute to the verdict" because the exclusion of this evidence prevented the jury from fully evaluating the parties' comparative negligence). In these cases, there was

clearly a "miscarriage of justice" from the exclusion of evidence which affected the verdict. Additionally, these recent decisions make it clear that the Fourth DCA has crafted a harmless error test that does not make reversal a rarity.

B. The proper standard under Florida law for the harmless error test in a civil case is whether there was a reasonable probability that the error affected the verdict causing a miscarriage of justice.

The proper standard under Florida Law for the harmless error test in a civil appeal should be: **"whether there was a reasonable probability that the error affected the verdict causing a miscarriage of justice."** Stated another way, the trial court's judgment should be reversed only where it appears that such error **'injuriously affect[ed] the substantial rights of the complaining party."** Anthony v. Douglas, 201 So.2d 917 (Fla. 4th DCA 1967) cert. denied, 210 So.2d 222 (Fla. 1968) citing to Jacksonville v. Glover, 69 So. 20 (Fla. 1915); Prince v. Aucilla River Naval Stores Co., 137 So. 886 (Fla. 1931); and Seaboard Air Line R.R. Co. v. McCutcheon, 158 So.2d 577 (Fla. 3d DCA 1963) cert. denied 165 So.2d 178 (Fla. 1964) (emphasis added).

This harmless error test is consistent with the Fourth DCA's application for the past forty years prior to the case at bar. See, e.g., Stecher v. Pomeroy, 244 So.2d 488 (Fla. 4th DCA) writ discharged 253 So.2d 421 (Fla. 1971) ("[A]fter an examination of the entire record, it does not appear to us that the improper admission of this evidence

resulted in a miscarriage of justice."); Anthony v. Douglas, 201 So.2d 917 (Fla. 4th DCA 1967), cert. denied 210 So.2d 222 (Fla. 1968) ("The trial court's judgment should be reversed only where it appears that such error 'injuriously affect[ed] the substantial rights of the complaining party.'); Centex–Rooney Constr. Co., Inc. v. Martin County, 706 So.2d 20, 26 (Fla. 4th DCA 1997) rev. denied 718 So.2d 1233 (Fla. 1998) (citing to both "injurious affect" and "miscarriage of justice" language).

Other districts have also concluded that reversal is unwarranted in a civil case unless the appellant demonstrates that it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed. Webster v. Body Dynamics, Inc., 27 So.3d 805 (Fla. 1st DCA 2010); In re Commitment of DeBolt, 19 So.3d 335, 337 (Fla. 2d DCA 2009); Damico v. Lundberg, 379 So.2d 964, 965 (Fla. 2d DCA 1979) cert. denied 389 So.2d 1108 (Fla. 1980); Esaw v. Esaw, 965 So.2d 1261 (Fla. 2d DCA 2007) rev. denied 981 So.2d 1199 (Fla. 2008), Florida Inst. for Neurologic Rehab., Inc. v. Marshall, 943 So.2d 976 (Fla. 2d DCA 2006).

Other Second DCA cases have used similar "reasonably probable" harmless error analysis language. See, e.g., Esaw v. Esaw, 965 So.2d 1261 (Fla. 2d DCA 2007) rev. denied 981 So.2d 1199 (Fla. 2008); Florida Inst. for Neurologic Rehab., Inc. v. Marshall, 943 So.2d 976 (Fla. 2d DCA 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.'"). It is clear from the First DCA and Second DCA decisions in Webster and In Re Commitment of DeBolt that both of these districts require error that is reasonably probable to have a favorable effect on the verdict before being deemed harmful.

In Webster v. Body Dynamics, Inc., 27 So.3d 805 (Fla. 1st DCA 2010), a 2-1 decision similar to the case at bar, the majority found the exclusion of a Food and Drug Administration (FDA) rule banning the products with ephedrine six (6) years after plaintiffs injury was harmless error. After an across-the-board defense verdict, plaintiff argued that he was precluded from questioning an FDA employee to establish that a total ban of products with ephedrine was made. Nevertheless, the FDA employee was able to testify at length during trial about the FDA's investigation into the product that occurred prior to the plaintiff's injury and her opinion on what constituted "unreasonably dangerous" levels of ephedrine in products for consumers including the product at issue. Id. at 808. Ultimately, after applying "a more probable than not" harmless error analysis, the First DCA concluded any error in precluding the FDA employee from testifying that the FDA banned products containing ephedrine was harmless. Because the plaintiff could not demonstrate a reasonable probability that proof of the ban itself would have led to a different result, the majority affirmed

the defense verdict. Id. at 810.

The Second District's In Re Commitment of DeBolt opinion applied the reasonably probable standard used in civil appeals involving harmless error finding that it was inappropriate to apply the criminal standard. The court specifically receded from prior opinions applying the criminal harmless error standard to error pertaining to expert witnesses in Jimmy Ryce appeals. See In Re Commitment of DeBolt, 19 So.3d at 338 (receding from Lee v. State, 854 So.2d 709, 712-13 (Fla. 2d DCA 2003) Williams v. State, 841 So.2d 531, 531 (Fla. 2d DCA 2003). Consequently, the Second District interpreted this Court's decision in State v. Harris, 881 So.2d 1079, 1082-3 (Fla. 2004), recognizing that the Jimmy Ryce Act is civil in nature because the state must prove only by clear and convincing evidence that the person has been convicted of a sexually violent offense and is likely to engage in acts of sexual violence if not confined, as requiring an entirely different standard for harmless error than criminal cases where the State is saddled with the highest burden. See In Re Commitment of DeBolt, 19 So.3d at 338.

The Second District applied a more probable than not harmless error analysis in Florida Inst. for Neurologic Rehab., Inc. v. Marshall, 943 So.2d 976 (Fla. 2d DCA 2006) and reached a similar result. In Marshall, the jury awarded $2.5 million to the parents of a deceased patient in a long-term facility for brain-injured patients. On

appeal, the facility claimed numerous evidentiary errors such as allowing the medical examiner's opinion that the cause of the patient's death was homicide and subsequently disallowing the opinions of law enforcement personnel that the death was not a homicide. In discussing whether the trial court abused its discretion in making its evidentiary rulings, the court cited to §90.104(1), Florida Statutes and §59.041, Florida Statutes. Additionally, the Second DCA concluded the facility could not illustrate that it was more probable than it would have received a favorable result if the trial court had barred the medical examiner from testifying. Id. at 979. The *en banc* panel in this case similarly concluded that the Petitioner was unable to establish that it was more probable than not he would have gotten a favorable result had Judge Kelley admitted Dr. Dildy's proffered testimony at trial. Special v. Baux, 79 So.3d 755, 772 (Fla. 4th DCA 2011)(*en banc*) rev. granted 90 So.3d 273 (Fla. 2012).

Moreover, this harmless error test properly emphasizes the fundamental component of this Court's harmless error analysis that there must be a "miscarriage of justice" as reflected in the holding of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) and the statutory language §59.041, Florida Statutes which provides **that judgments will not be set aside or reversed or new trials granted in any cause, civil or criminal, unless a "miscarriage of justice"** would result. Accordingly, the appropriate harmless error test, whether there was a reasonable probability that the

error affected the verdict causing a miscarriage of justice is what the Legislature in §59.041, Florida Statutes and this Court in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) Rooney Constr. Co. v. Martin County, 706 So.2d 20, 24 (Fla. 4th DCA 1997) rev. denied 718 So.2d 1233 (Fla. 1998), Pascale v. Fed. Express Corp., 656 So.2d 1351 (Fla. 4th DCA), rev. denied 666 So.2d 143 (Fla. 1995) ("Generally, an error is harmless if it does not injuriously affect the substantial rights of the complaining party. §59.041, Fla.Stat. (1993)").

Under this harmful error test, a "miscarriage of justice" will always result in a new trial for Appellant and the "reasonable probability" standard does not make it more difficult for Appellant to prove harmful error. Moreover, this test is predicated upon §59.041, Florida Statutes and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) and amplified by §90.104, Florida Statutes. Thus, the "reasonable probability" formulation is inconsequential to the ultimate outcome when Appellant can demonstrate that there was a "miscarriage of justice" which adversely affected their substantial rights.

Two years prior to DiGuilio, this Court considered whether error in improperly admitting evidence of repairs made after an accident in a negligence trial where the jury awarded Plaintiff compensatory and punitive damages caused a "miscarriage of justice" in White Constr. Co., Inc. v. DuPont, 455 So.2d 1026 (Fla. 1984). This Court found that the admission of the improper subsequent remedial repair evidence was

harmless error and did not warrant a new trial because "[t]here was enough independent evidence of defendant's negligence admitted that made this testimony merely cumulative." Id. at 1029. In citing to §59.041, Florida Statutes, this Court did not believe the jury's verdict, even after receiving the inadmissible evidence, resulted in a "miscarriage of justice". Id.

The Petitioner cannot demonstrate that it was more likely than not that the exclusion of Dr. Dildy's proffered cross examination was harmful when Petitioner's counsel was permitted to vigorously argue their theory during closing, although irrelevant, that AFE was being over-diagnosed at West Boca Medical Center. Even under a reasonable possibility standard, the error did not result in a "miscarriage of justice" or injuriously affect the Petitioner's substantial right. See §59.041, Florida Statutes; Anthony v. Douglas, 201 So.2d 917 (Fla. 4th DCA 1967) cert. denied, 210 So.2d 222 (Fla. 1968) (citing Jacksonville v. Glover, 69 So.20 (Fla. 1915); See also §90.104(1), Florida Statutes.

One of this Court's recent opinions discussing the harmless error test in criminal cases, that is, there must be a reasonable possibility that the error contributed to the verdict, emphasizes not only how the same standard is inappropriate in the civil context but, even when applied to the issue in this case, still leads to the inescapable conclusion that the error was harmless. Delhall v. State, 95 So.3d 134 (Fla. 2012). In fact, Delhall

v. State, 95 So.3d 134 (Fla. 2012) confirms that there can be no reasonable possibility that the error in excluding a particular source of the same information could have contributed to the verdict where the jury hears the erroneously excluded testimony through other means.

In Delhall, the defendant was found guilty of murdering the only eyewitness to a murder perpetrated by his younger brother. The trial centered on his motive for doing so and not how the defendant became aware of the information identifying the eyewitness. This Court determined it was error to exclude the booking sheet as proof that the defendant was in jail at the time of the hearing in which the name of the only eyewitness was mentioned but recognized that the defendant was nonetheless permitted to repeatedly testify he was in jail on those dates. Consequently, the error was found harmless beyond a reasonable doubt because the "case did not hinge on proving" the defendant's presence at the bond hearing and the information was presented to the jury through other testimony.

Similarly, logic dictates that the jury's verdict in the case at bar could not have hinged on Dr. Dildy's proffered testimony that was excluded by Judge Kelley because the only issue for Dr. Dildy was whether Mrs. Special's death was due to AFE on June 8, 2003 and not whether West Boca Medical Center was over-diagnosing AFE on other patients. There were no direct allegations of negligence against West Boca Medical

Center and it belies common sense to argue that a hospital can negligently diagnose patients. Furthermore, Judge Levenson correctly noted that the focal issue in this case was whether Dr. Baux caused Mrs. Special's unexpected death after delivery of her healthy baby at West Boca Medical Center either by negligently attending to her during delivery or negligently attempting to resuscitate her post delivery. Special v. Baux, 52 So.3d 682, 685 (Fla. 4th DCA 2010).

In another recent criminal case, Martin v. State, 37 Fla. L. Weekly S563 (Fla. Sept. 20, 2012), this Court held that the trial court's failure to consider the testimony of Dr. Krop regarding psychological mitigation evidence was not error because the same information was addressed through other sources. The Court reasoned that "[a]lthough Dr. Krop's testimony would have been relevant to the trial court's consideration of aggravating and mitigating factors—including mitigators the court found unproven such as emotional abuse, sexual abuse, and remorse—we find it unlikely that had the trial court found these factors proven in light of Dr. Krop's testimony, it would have given them anything more than slight weight". Martin, 37 Fla. L. Weekly S563.

C. Petitioner cannot show there was a reasonable probability or even a reasonable possibility that the error in excluding Dr. Dildy's proffered testimony affected the verdict or caused a miscarriage of justice affecting their substantial rights

The jury in this case heard testimony from Dr. Adelman regarding the incidence of AFE diagnosis on patients at West Boca Medical Center, expert testimony from Dr.

Dildy on the incidence of AFE diagnoses on patients on a national level as well as counsel's argument that their was an overdiagnosis of AFE on patients at West Boca Medical Center prior to Susan Special's deat. The jury's failure to consider the proffered testimony of Dr. Dildy on the alleged over-diagnosis of AFE at West Boca Medical Center was harmless error because the same information was addressed by other sources.

The fact that medical malpractice cases have been categorized as a battle of the experts has no import in determining whether the error in this case was harmful. To the contrary, this Court determined in Krawczuk v. State, 92 So.3d 195, 201-202 (Fla. 2012) that the trial judge's independent research into the credentials of an expert witness was harmless error. The Court reasoned that "although [the expert's] testimony was provided to establish possible mitigation, two other experts testified regarding Krawczuk's mental health, which served as a part of the basis for Judge Thompson's findings". Krawczuk, 92 So.3d at 202.

In this case, the jury heard expert testimony that Dr. Baux was negligent. Additionally, the jury heard testimony that Susan Special did not have an AFE on the date that she died. The jury also heard testimony from Dr. Dildy regarding the national average for AFE as well as Plaintiff's counsel's closing argument which referenced and vigorously attacked Dr. Adelman's testimony regarding the AFE diagnosis.

(T2065- T2069) Consequently, there was ample information provided to the jury, which as the fact finder and with full knowledge of Petitioner's theory of this case was able to find there was no negligence without causing a "miscarriage of justice".

Following Judge Levenson's statements on the focal issues in this case, whether other unnamed patients were diagnosed with AFE by Dr. Adelman or other physicians at West Boca Medical Center causing injury or death would not assist the jury in determining whether Dr. Baux was negligent or whether Mrs. Special died of an AFE on June 8, 2003. Special v. Baux, 52 So.3d 682, 685 (Fla. 4th DCA 2010). Thus, Judge Levenson properly concluded under §59.041, Florida Statutes after looking at the entire record of the trial proceedings that evidence of over-diagnosis of AFE was irrelevant in this case especially in light of Dr. Adelman's testimony that he didn't know for sure, was estimating, guessing, or speculating about the incidence of AFE more than a dozen times. (T1037, 1038, 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1056, 1065, 1066, 1067, 1068 and 1069). Special v. Baux, 52 So.3d 682, 685 (Fla. 4th DCA 2010). See also Medina v. Peralta, 724 So.2d 1188, 1189-90 (Fla. 1999) ("[E]videntiary rulings under section 59.041 require a look at the entire record."); McPherson v. Phillips, 877 So.2d 755 (Fla. 4th DCA) rev. denied 888 So.2d 18 (Fla. 2004) (Judgments shall not be reversed for misdirection to the jury unless the examination of the entire case results in a finding that the error complained

of has resulted in a miscarriage of justice).

The *en banc* panel's conclusion that Dr. Dildy's proffered testimony was admissible does not require a new trial. The exclusion of this proffer was harmless error because there was no reasonable possibility let alone probability that this ruling alone affected the verdict resulting in a miscarriage of justice. Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (Fla. 4th DCA 1997). Furthermore, exclusion of Dr. Dildy's proffered testimony on whether Dr. Adelman or other unnamed physicians were over-diagnosing AFE at West Boca Medical Center did not prevent Appellant's trial counsel from making the argument that Mrs. Special did not die of AFE.

In fact, Appellant's trial counsel was permitted to ask Dr. Dildy what the national average for AFE was so that the jury could draw the conclusion that Dr. Adelman either testified inaccurately or that it was an extremely rare diagnosis. During closing argument, trial counsel for Mr. Special discussed Dr. Adelman's testimony extensively as Judge Kelley advised them was permissible during the argument over Dr. Dildy's proffered testimony. In fact, the trial transcript reflects that Judge Kelley permitted Appellant ample opportunity to reference and attack Dr. Adelman's testimony (T2065, 2066, 2067, 2068 and 2069). Special v. Baux, 52 So.2d 682, 685 (Fla. 4th DCA 2010) Moreover, Judge Levenson cited a portion of Appellant's closing argument at length noting that counsel argued with "**vigor** that the

Center either had an epidemic of AFE or was over-diagnosing it." Id. (emphasis added).

Judge Taylor in the initial majority opinion also found significance in the fact that "plaintiff's counsel **strenuously** argued during his closing remarks that the hospital continued its practice of misdiagnosing AFE when determining the decedent's cause of death." Special v. Baux, 52 So.2d 682, 686 (Fla. 4th DCA 2010) (Taylor, J. concurring). (Emphasis added). Judge Taylor further quoted Dr. Dildy's proffered testimony while being confronted with the statistics documenting the possibility that AFE was over-diagnosed when he testified: "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." Id. (Emphasis added).

Consequently, both Judge Levenson and Judge Taylor properly concluded that there was no reasonable possibility or probability that the exclusion of Dr. Dildy's proffered testimony affected the verdict and caused a miscarriage of justice. Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (Fla. 4th DCA 1997). In other words, the exclusion of Dr. Dildy's proffered testimony did not injuriously affect Appellant's substantial rights. Anthony v. Douglas, 201 So.2d 917 (Fla. 4th DCA 1967) cert. denied 210 So.2d 222 (Fla. 1968); Pascale v. Fed. Express Corp., 656 So.2d 1351 (Fla. 4th DCA 1995), rev. denied 666 So.2d 143 (Fla. 1995).

Furthermore, in this case, there was other abundant evidence upon which the jury was able to weigh Dr. Dildy's admissible testimony and compare it to the other admissible evidence that the diagnosis of AFE is frequently and erroneously made on patients at West Boca Medical Center. Tormey v. Trout, 748 So.2d 303 (Fla. 4th DCA 1999); Kaczmar v. State, 37 Fla. L. Weekly S619 (Fla. Oct. 4, 2012)(admission of wife's testimony over marital privilege objection is harmless error since it was cumulative to other testimony). The jury, armed with the statistics that were admitted into evidence, the admissible testimony from Dr. Adelman and Dr. Dildy and its common sense could certainly perform a mathematical task and conclude that there was an over-diagnosis of patients with AFE at West Boca Medical Center compared to patients at other hospitals all over the country. Tri-Pak Mach., Inc. v. Hartshorn, 644 So.2d 118 (Fla. 2d DCA 1994).

Judge Levenson and Judge Taylor properly concluded that there was no reasonable possibility or reasonable probability that the alleged error by Judge Kelley in excluding Dr. Dildy's proffered testimony affected the verdict causing a miscarriage of justice. In fact, both concluded that any error in excluding Dr. Dildy's proffered testimony did not injuriously affect Appellant's substantial rights. See Pascale v. Fed. Express Corp., 656 So.2d 1351 (Fla. 4th DCA) rev. denied 666 So.2d 143 (Fla. 1995). Simply stated, the evidence presented to the jury was such that there was no

reasonable possibility or reasonable probability that the verdict was affected by the alleged erroneous exclusion of Dr. Dildy's proffered testimony resulting in a miscarriage of justice injuriously affecting Appellant's substantial rights.

Petitioner cites to Linn v. Fossum, 946 So.2d 1032 (Fla. 2007) where this Court held that the trial court's error in allowing the defendant's standard of care urology expert to testify in a medical malpractice case that she consulted with unnamed colleagues in reaching her opinion that defendant did not breach the standard of care was harmful. This case is distinguishable because the focal point in Linn v. Fossum was whether the defendant urologist breached the standard of care. Id. at 1041. Allowing the defense expert to bolster her opinion by telling the jury that it was supported by unnamed colleagues whose credentials were never verified clearly resulted in a "miscarriage of justice".

In our case, however, at no time during trial or during his proffer did Dr. Dildy opine on whether Dr. Baux was negligent. Rather, Dr. Dildy consistently testified regarding the cause of Mrs. Special's death, and he concluded that it was an AFE. Thus, the jury clearly had enough evidence to conclude Dr. Baux was not negligent and no error regarding the Respondents' admissibility of standard of care testimony has been shown. As a result, the Petitioner can never argue there was a reasonable possibility, let alone reasonable probability, the exclusion of Dr. Dildy's proffer on

causation would have led to a different outcome resulting in a miscarriage of justice.

Dr. Dildy never improperly used the testimony of Dr. Adelman to bolster his own opinion nor did he ever rely on the fact that physicians had diagnosed AFE in other patients at West Boca Medical Center to reach his own conclusion that Mrs. Special died from AFE on June 8, 2003. Dr. Dildy was not present when Dr. Adelman testified at trial and even Petitioner's counsel pointed out that Dr. Dildy had not read Dr. Adelman's deposition (T1220). Dr. Dildy testified that he reviewed Mrs. Special's chart, clinical course and records, and independently determined, more likely than not, that Mrs. Special died from AFE (T1143-1159). Moreover, Dr. Dildy's proffered testimony illustrated his persistence with the opinion that "Mrs. Special presented a case of AFE". Special v. Baux, 52 So.2d 682, 686 (Fla. 4th DCA 2010) (Taylor, J. concurring). In other words, had Dr. Adelman never testified at trial, Dr. Dildy would have reached the same conclusion.

In a case directly on point, Centex–Rooney Constr. Co., Inc. v. Martin County, 706 So.2d 20 (Fla. 4th DCA 1997) rev. denied 718 So.2d 1233 (Fla. 1998), the court was also confronted with whether to reverse a judgment against Defendant Centex after the trial judge excluded a favorable report for failure to comply with a pretrial order. After a plaintiff's verdict awarding substantial compensatory damages, the Fourth DCA determined that the exclusion of the favorable report was error. However,

the court pointed out that "[a] trial court's error in admitting or rejecting evidence does not necessarily constitute harmful error" (internal citation omitted). Id. at 26. Rather, the court relied on its longstanding analysis of harmless error tests, and guided by this Court's decision in DiGuilio to determine whether the trial judge's error injuriously affected Centex's substantial rights.

After a review of the entire trial proceedings, the Fourth DCA acknowledged that the trial court enabled Centex to present the jury with several of the report's critical findings through other witnesses. The court concluded that Centex could not reasonably claim that the exclusion of this report injuriously affected its substantial rights because there was other evidence to support plaintiff's claims. The Fourth DCA concluded that the exclusion of the report was harmless error when "[v]iewed in the context of the entire trial". Id. Similarly, in our case, the exclusion of Dr. Dildy's proffered testimony when the jury had other admissible evidence of the alleged over-diagnosis of AFE at West Boca Medical Center, when viewed in the context of the entire trial was, at best, harmless error. Special v. Baux, 52 So.3d 682, 686 (Fla. 4th DCA 2010).

In fact, an examination of the entire record confirms that even under the most liberal interpretation, there was no miscarriage of justice in this case as Appellant received a fair trial albeit an imperfect one according to Judge Taylor and Judge

Farmer in the initial Fourth DCA opinion and the *en banc* panel. See Norman v. Gloria Farms, Inc., 668 So.2d 1016, 1020 (Fla. 4th DCA) rev. denied 680 So.2d 422 (Fla. 1996) ("While a party is not necessarily entitled to a perfect trial, a party is entitled to a fair one"). See also Gen. Motors Corp. v. McGee, 837 So.2d 1010 (Fla. 4th DCA 2002) rev. denied 851 So.2d 728 (Fla. 2003) ("GM received not a perfect trial but a fair one"). Judge Levenson, Judge Taylor and the *en banc* panel properly found that Appellant received a fair trial. In short, the exclusion of Dr. Dildy's proffered testimony was not a "game changer" injuriously affecting Appellant's substantial rights. An examination of the cases discussing harmless error in all of the districts in the State of Florida and this Court has revealed that the proposed harmless error test identified in this Brief has been consistently used, conforms with §59.041, Florida Statutes, §90.104, Florida Statutes and the mandate in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) and was properly applied in this case to deny Petitioner's request for a new trial.

D. The *en banc* panel did not determine the limitation on Dr. Dildy's cross examination was harmless error merely because there was additional evidence in the record to support the jury's verdict that Defendants were not negligent.

The *en banc* panel did not exclusively rely on the abundance of other evidence that was presented to the jury on Plaintiff's theory that AFE was not the cause of Mrs. Special's death when it determined that the limitation on the cross examination of Dr.

Dildy was harmless. In fact, the Fourth DCA implemented this Court's direction in DiGuilio regarding cumulative evidence. Even the case cited by Petitioner, Witham v. Sheehan Pipeline Construction Co., 45 So.3d 105 at 110 (Fla. 1st DCA 2010), involved a similar analysis to one performed by the Fourth DCA. Both district courts of appeal recognized the direction this Court provided in DiGuilio by saying "[t]he cases concerning cumulative evidence do not stand for the proposition that an error in the admission of evidence is harmless simply because there is additional admissible evidence in the record to support the ultimate result below." See 491 So.2d at 1136. The Fourth DCA in the case at bar identified similar language in DiGuilio, "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", to correctly note that the appellate court must determine what role, if any, the error played in the judgment by looking the record as a whole. (A14).

Similarly, the Witham court addressed the effect on the trier of fact and considered what the result would have been had the improper evidence not been considered. See 45 So.3d at 110 ("Here, the JCC may have reached a different result if she had relied only on the admissible evidence. From the order, it cannot be determined whether the JCC would have found Dr. Ross' testimony alone constituted clear and convincing evidence sufficient to rebut the opinion of the EMA"). Importantly, though,

the court also noted that "the JCC expressly relied on the inadmissible opinions in reaching her conclusion." Id. The Fourth DCA's effect on the fact finder approach, which Petitioner does not dispute is the preferable approach, mandates the same analysis. (A9) (saying "[a]n '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").

The Fourth DCA found that the issue of the statistical anomaly was taken into account by the jury and that it simply added no force to the Plaintiff's case. (A 23) Therefore, the court determined that, even if the precluded testimony was admitted, the same result would have been reached because the error did not contribute to the verdict. (A 23) Through this language, it is clear the court considered whether there was sufficient evidence for the jury to weigh the credibility of the experts but was not persuaded this added any credence to the argument that the error was anything but harmless.

Moreover, in the case at bar, the conclusion Plaintiff hoped the jury would draw from the proffer and the statistical abnormality was clearly articulated in Petitioner's trial counsel's closing argument. Specifically, the jury was told about the statistics regarding amniotic fluid embolism diagnosis at the national level and at West Boca Medical Center as well as the autopsy report that did not show there was any evidence

of AFE. Therefore, while causation was a central issue at trial, the jury had independent evidence so that it did not need to exclusively rely on the credibility of experts in reaching their verdict to the extent of the cases on which Petitioner relies.

Petitioner attempts to draw a bright line from Linn v. Fossum, 946 So.2d 1032 (Fla. 2007) and its progeny that whenever expert testimony is the focus at trial or, in other words, there is a battle of the experts, any error surrounding expert testimony is harmful error. This is simply incompatible with the §59.041, Florida Statutes requirement that there be a "miscarriage of justice" and this Court's guidance that the entire record be reviewed. Moreover, while Linn may have held that it was harmful error to allow the defendant's standard of care expert to testify in a medical malpractice case that she consulted with unnamed colleagues in reaching her opinion that there was no breach of the standard of care, this Court was far from establishing a hard and fast rule that it is always harmful error whenever an argument can be made that the excluded evidence went toward the expert's credibility.

Point II

THIS COURT SHOULD DECLINE TO ADDRESS THE ISSUE OF ALLEGED WITNESS INTIMINDATION AS IT IS BEYOND THE SCOPE OF THE CERTIFIED QUESTION

This Court has repeatedly declined to address issues on appeal outside the scope of the certified question. See Chester v. Doig, 842 So.2d 106, n.4 (Fla. 2003);

See also Gouty v. Schnepel, 795 So.2d 959, 966 n.4 (Fla. 2001). Similarly, this Court has recognized that where the district court does "not **specifically** address" claims raised by petitioner, as is the case at bar, then these issues should not be reached. See Chames v. DeMayo, 972 So.2d 850, 862 n.2 (Fla. 2007). See also McEnderfer v. Keefe, 921 So.2d 597, 597 n.1 (Fla. 2006) (declining to address issues raised by petitioner "that were either not directly addressed by the district court in this case or were merely implied or cursory, at best."); Major League Baseball v. Morsani, 790 So.2d 1071, 1080 n.26 (Fla. 2001); State v. Perry, 687 So.2d 831, 831 (Fla. 1997) (declining to address cross-appeal issue raised by respondent "because the issue is unrelated to the certified question upon which this Court's jurisdiction is based").

The Fourth DCA did not certify a question related to the alleged witness intimidation claim. This Court explained in Major League Baseball v. Morsani and logic dictates, that claims outside the scope of the certified question were not the basis of the decision to grant discretionary review. "As a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution.") Major League Baseball, 790 So.2d at 1080 n.26. Moreover, the fact that the Fourth DCA affirmed on all points does not bring this tangential issue within the scope of the certified question. See id. at 852 where the court declined to reach claims raised below that the district court did not directly

address even though the district court affirmed "in all other respects". Consequently, where it is undisputed that the Fourth DCA did not address the issue of alleged witness intimidation, it is outside the scope of the certified question and not properly before this Court.

Similarly, this Court has consistently declined to answer issues outside the scope of the certified conflict that was the basis of discretionary review. See, e.g. Marsh v. Valyou, 977 So.2d 543, 571 n.1 (Fla. 2007) (declining to address issue of exclusion of expert testimony that the accident caused myofacial pain syndrome (MPS) because it was beyond the certified conflict); Borden v. East- European Ins. Co., 921 So.2d 587, 596 n.8 (Fla. 2006); Kelly v. Cmty. Hosp. of the Palm Beaches, Inc., 818 So.2d 469, 470 n.1 (Fla. 2002). This Court's decision in Marsh to decline analysis of issues beyond the scope of the basis for jurisdiction is consistent with long-standing precedent and does not support Petitioner's request to reach the alleged witness intimidation claim not discussed in the *en banc* panel's harmless error analysis. In fact, both alleged errors in Marsh stemmed from the district court's application of the *Frye* standard and exclusion of expert testimony that the accident caused MPS and fibromyalgia. Nevertheless, despite being closely related claims of error, only the issue of whether the cause of fibromyalgia was admissible as pure opinion testimony was reached as the cause of MPS was outside the scope of the certified conflict. Id.

Finally, it is well established that this Court may only exercise its discretionary authority to consider issues other than those upon which jurisdiction is based "when these other issues have been properly briefed and argued **and are dispositive of the case**". See Murray v. Regier, 872 So.2d 217, 223 n.5 (Fla. 2002) Petitioner's reliance on Murray v. Regier is misplaced as there is a fundamental difference between a constitutional claim based on a deprivation of due process stemming from a civil commitment order and the alleged witness intimidation not even cursorily mentioned by the *en banc* panel.

This Court exercised its conflict jurisdiction in Murray and reached other dispositive issues principally because the District Court of Appeal improperly dismissed petitioner's habeas petition concluding it did not have jurisdiction. On the other hand, the *en banc* panel in the case at bar issued a thorough thirty-two (32) page opinion solely discussing how under the appropriate analysis, excluding proffered cross-examination testimony of one of Defendants' expert witnesses was harmless error.

Moreover, Judge Kelley, after hearing argument of counsel and Dr. Wolf's proffer, appropriately precluded testimony regarding alleged witness intimidation. Judge Kelley stated:

> First of all, just for the record, I know you made your proffer. My ruling with respect to the investigation is the

> same. I don't believe there's a sufficient evidentiary nexus to allow us to go there at this point. She doesn't know who filed it, and we can surmise who may or may not have, but I don't think we have enough to go there.
>
> With respect to the discussions or the comments that were made by her attorney to her, which were attributed to Mr. Ciotoli, I am going to sustain the hearsay, I think we have a double hearsay problem.

(T 760).

Even after hearing extensive argument by Plaintiff's counsel on Plaintiff's Motion for New Trial and Motion for Evidentiary Hearing on two separate occasions, Judge Kelley entered an order affirming that there was no error in the refusal to admit hearsay testimony on witness tampering. (R15-2900-01)("While the Court agrees that evidence of witness intimidation is relevant, the proffered testimony was double hearsay and the Court excluded the testimony on this basis. The Court does not see error in excluding this testimony based on the Defendants' hearsay objection."). Additionally, Judge Kelley's Order was clear that the testimony regarding the complaint filed against Dr. Wolf to suggest an attempt to intimidate her was excluded "because there was no evidence to link the filing of the complaint to the Defendants". (R15-2900-01) Importantly, Judge Kelley, who observed Dr. Wolf's testimony at trial, noted that "it is significant . . . that neither the conversation with Mr. Pincus, nor the filing of the complaint with the Department of Health, had any impact on Dr. Wolf's opinion or testimony. **Dr. Wolf testified emphatically before the jury that she**

found no evidence of an amniotic fluid embolism and her opinion in this regard never faltered." (R15-2900-01)(Emphasis). Thus, Dr. Wolf's proffered testimony on witness intimidation was properly excluded by Judge Kelley because there was only hearsay evidence linking the alleged intimidation of Dr. Wolf to Dr. Baux's counsel, there was no evidence linking the alleged intimidation of Dr. Wolf to West Boca Medical Center and her emphatic and unwavering testimony which supported Plaintiffs' theory of the case on the non-existence of an amniotic fluid embolism (AFE) which killed Mrs. Special. Consequently, this Court must not expand its review to reach this issue, where mere insinuations allegedly amounting to alleged witness intimidation were properly excluded by the trial judge, were not discussed by the Fourth DCA below and not addressed in the jurisdictional brief.

Point III

THE TRIAL COURT PROPERLY EXCLUDED ALLEGED EVIDENCE OF WITNESS INTIMIDATION BECAUSE IT WAS INADMISSIBLE HEARSAY AND THE ALLEGED EVIDENCE FAILED TO ESTABLISH THAT THE ALLEGED INTIMIDATION WAS WITH THE KNOWLEDGE, AUTHORITY OR CONSENT OF DR. BAUX OR WEST BOCA MEDICAL CENTER.

Judge Kelley properly excluded hearsay testimony of Dr. Wolf regarding her attorney's out of court statements relayed to her regarding the alleged efforts of unidentified individuals to change her testimony prior to a pre-trial deposition.

Petitioner concedes, as he must, that evidence of witness intimidation is only admissible where the attempt was made with the "authority, consent or knowledge of the defendant". Manuel v. State, 524 So.2d 734 (Fla. 1st DCA 1988). Importantly, Petitioner cannot provide any evidence that the alleged intimidation was with the authority, consent or knowledge of Dr. Baux or West Boca Medical Center.

This Court has held that evidence of conversations between a witness and opposing counsel's attorney is both irrelevant and prejudicial because the conversations standing alone do not support the argument that the witness changed her testimony at trial based on these conversations. See Penalver v. State, 926 So.2d 118 (Fla. 2006); See also Tindal v. State, 803 So.2d 806, 810 (Fla. 4th DCA 2001) (explaining it is "impermissible for the state to suggest, without evidentiary support that the defense has 'gotten to' and changed a witness's testimony").

Additionally, the cases cited by Petitioner are inapplicable to this case. Coronado v. State, 654 So.2d 1267 (Fla. 2d DCA 1995) and Quarrells v. State, 641 So.2d 490 (Fla. 5th DCA 1994) are criminal cases where the courts found evidence that a criminal defendant directly contacted or threatened a material witness to influence their testimony was admissible, which has no correlation to facts here. Furthermore, contrary to Petitioner's argument, Jost v. Ahmad, 730 So.2d 708 (Fla. 2d DCA 1998) is not distinguishable from 5 Star Builders, Inc. v. Leone, 916 So.2d 1010,

1012 (Fla. 4th DCA 2006) (noting "we 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 one party was accused of witness tampering**." (Emphasis added)). Moreover, in Nagel v. State, 774 So.2d 835 (Fla. 4th DCA 2000), the Fourth District determined it was error to permit an officer to testify about an out of court statement made by another officer because the testimony was hearsay and it suggested that the defendant tampered with a witness without evidence that the call was made with the defendant's authority, consent or knowledge.

The genesis of the investigation against Dr. Wolf also does not support the admissibility of her testimony on the issue of alleged witness intimidation. After receiving a Notice of Intent to Initiate Medical Malpractice Litigation, Dr. Baux's counsel retained pathologist, Stephen Factor, M.D., as an expert during the presuit period to comply with his statutory requirement to conduct a good faith investigation into the allegations against him. Unquestionably, Dr. Factor's participation in the presuit investigation was with Dr. Baux's knowledge, authority and consent. Dr. Baux continued to utilize Dr. Factor as an expert after suit was filed although he ultimately was not called to testify at trial. Similarly, during the Department of Health investigation into Dr. Baux's care and treatment of Susan Special, Dr. Factor's services were utilized to address the allegations against Dr. Baux. In conjunction with the

Department of Health's administrative investigation of Dr. Baux and the separate medical malpractice litigation, Dr. Factor reviewed the autopsy slides and prepared a report indicating that the slides demonstrated AFE. Dr. Factor also noted in the report that he was certain that Susan Special suffered a sudden arrest secondary to AFE. In fact, during the post trial May 16, 2008 evidentiary hearing, Petitioner learned that Dr. Katim, and not Dr. Factor, was the Department consultant who initiated the complaint against Dr. Wolf.

Petitioner's second claim of alleged witness intimidation by Dr. Baux's lawyer prior to Dr. Wolf's deposition is equally lacking in factual support since the allegation is predicated on the mistaken assertion that Dr. Baux, or someone who acted with his knowledge, authority or consent, initiated the Department's investigation. Based on Petitioner's proffer of Dr. Wolf's testimony, before Dr. Wolf appeared for her deposition her personal attorney, David Pincus, Esq., told her that Dr. Baux's counsel suggested she "would not want to embarrass herself by disagreeing with Dr. Factor, who was identified to [her] as the defense expert involved in the Board of Medicine Complaint" (T747). Dr. Wolf's proffer also suggests that she was given a notebook containing Dr. Factor's photographs of her slides demonstrating the presence of AFE. Dr. Wolf testified that before the deposition she was "shocked, totally shocked, and then subsequently became outraged that on the basis of that supposed diagnosis, a

complaint had been rendered, and [she] had to defend her license" (T749).

Importantly, any testimony from Dr. Wolf regarding what Dr. Baux's counsel said to her counsel is double hearsay. There was absolutely no admissible evidence to suggest that Dr. Baux's counsel directly made any attempt to verbally intimidate Dr. Wolf. Regardless, Dr. Wolf's proffered testimony improperly suggests that she felt there was an attempt to intimidate her because Dr. Factor was referenced in the conversation, photographs taken by Dr. Factor were shown to her prior to the deposition, and she made the connection that Dr. Factor was the expert who opined against her in her administrative action.

Unquestionably, it was the totality of the circumstances that created the mistaken belief on Dr. Wolf's part that Dr. Baux's lawyer attempted to intimidate her. However, since Dr. Baux was not the reason that Dr. Factor became involved in the DOH action against Dr. Wolf, the predicate for the alleged attempt to intimidate her as a witness cannot be established. The fact that Dr. Baux's counsel may have created the opportunity for Dr. Wolf to review Dr. Factor's photographs standing alone does not establish any attempt to intimidate Dr. Wolf. Rather, the intimidation or threat would stem from the fact that Dr. Wolf's license was in jeopardy due to a circumstance created by Dr. Baux, his lawyer or his representative. The proffered evidence clearly shows that this was not the case.

In Penalver v. State, 926 So.2d 1118 (Fla. 2006) this Court was called upon to consider a situation which closely resembles the case at bar. In Penalver, the defendant was charged with several felonies in relation to a crime committed by two people that was apparently caught on videotape. Prior to trial, a witness reviewed the tape and identified the defendant as one of the assailants. However, during trial the witness testified that the videotape was of such poor quality that she could not make a proper identification.

Moreover, during trial the jury was permitted to hear testimony that this witness had spoken with the defendant's attorney in person and on the phone on several occasions over the course of a week. The jury heard that the witness didn't have a specific recollection of the conversations but the witness recalled that they discussed the facts of the case. The prosecution implied that the witness changed her testimony following the conversations with the defendant's attorney. Naturally, a conviction followed.

In overturning the conviction, this Court held that the prosecution's implication that the defense tampered with a witness without evidentiary support constituted reversible error. The Court also determined that evidence of the conversations between the witness and the defendant's attorney was both irrelevant and prejudicial because the conversations standing alone did not support the argument that the witness changed her

testimony at trial based on these conversations.

Similar to the holding in Penalver, the fact that the lawyer for Dr. Baux and the lawyer for Dr. Wolf spoke about Dr. Factor's conclusions and Dr. Wolf was shown some photographs does not establish admissible evidence of witness intimidation. Just as in Penalver, evidence of the conversations would have been both irrelevant and highly prejudicial since the allegations of witness intimidation were completely lacking in factual support.

Here, the proffered testimony of Dr. Wolf suggests Dr. Baux's counsel spoke with the medical examiner's attorney and showed the medical examiner slides. County Medical Examiners, unlike treating physicians are not under the exclusive control of the patient's counsel in a medical malpractice action. As a result, Dr. Baux's counsel had an unfettered right to speak with Dr. Wolf in this case in the same fashion as a criminal defense attorney can speak to any witness in a criminal prosecution. At no time was there evidence presented to illustrate Dr. Baux's counsel spoke directly with Dr. Wolf. Rather, the proffered testimony reflected that Dr. Baux's counsel spoke with Dr. Wolf's counsel Mr. Pincus and showed her pictures taken by Dr. Factor. Had the jury been permitted to hear the proffered testimony, it would have been highly prejudicial, as the Court found in Penalver, because the jury may have improperly inferred an attempt to intimidate her when none existed.

CONCLUSION

Under the Fourth DCA's "more likely than not" standard for harmless error, the *en banc* panel correctly concluded "that 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." Special v. Baux, 79 So.3d 755 (Fla. 4th DCA 2011)(*en banc*) rev. granted 90 So.3d 273 (Fla. 2012). The Fourth DCA's opinion is consistent with DiGuilio and §59.041 and was contemplative of the balance between harmless error and expert testimony in medical malpractice cases. Therefore, because the Fourth DCA reviewed the entire record and found substantial and competent testimony regarding the issue that the restricted cross-examination would have gone to prove, any error was harmless even if it was not "cumulative." The restriction on the testimony did not hinder Petitioner from presenting his theory of the case, and the jury determined, with evidence as to all the issues, that Dr. Baux was not negligent. There was not one scintilla of evidence proffered by the Petitioner that Dr. Baux, or anyone on his behalf, initiated the DOH Complaint against Dr. Wolf or anyone did so with his knowledge, authority or consent. It also goes without saying that there is absolutely no evidence that the issue of alleged witness intimidation has anything to do with West Boca Medical Center's successful defense of this case. Consequently, this Court must affirm the judgment for West Boca Medical Center in accordance with the jury's verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to each of the persons identified below on this 7th day of November, 2012.

By: _____
MICHAEL K. MITTELMARK, ESQ.
Florida Bar No. 791751

Service Copies:
Gary Cohen, Esq.
Andrew B. Yaffa, Esq.
Grossman & Roth, P.A.
925 South Federal Highway, Suite 775
Boca Raton, FL 33432
Tel: (561) 367-8666
Fax: (561) 367-0297
Attorney for Plaintiff/Petitioner Frank Special

Irene Porter, Esq.
Mark Hicks, Esq.
Hicks, Porter, Ebenfeld & Stein, P.A.
799 Brickell Plaza, Suite 900
Miami, FL 33131
Tel: (305) 374-8171
Fax: (305) 372-8038
Attorney for Defendant/Respondent Ivo Baux, M.D.

Philip M. Burlington, Esq.
Burlington & Rockenbach, P.A.
2001 Professional Building, Suite 410
2001 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
Tel: (561) 721-0400
Fax: (561) 721-0465
Attorney for Plaintiff/Petitioner Frank Special

Attorney for Appellant/Petitioner
Eugene L. Ciotoli, Esq.
Bobo, Ciotoli, Bocchino, Newman, Corsini, White & Buigas, P.A.
1240 U.S. Highway One
North Palm Beach, FL 33408
Tel: (561) 684-6600
Fax: (561) 622-6288
Attorney for Defendant/Respondent Ivo Baux, M.D.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: _____
MICHAEL K. MITTELMARK, ESQ.
Florida Bar No. 791751

APPENDIX

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]

CORRECTED OPINION

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 plaintiffs expert testified that Susan died because of the departures from the requisite standard of care. The APE 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 APE 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 APE at the time based upon her clinical signs. Special asked him about the number of patients diagnosed with APE 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 APE diagnosis at West Boca was about 15 times the rate elsewhere, Dr, Adehnan, 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 APE. He based this on his analysis of the medical records and tests. He explained that APE 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 APE 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 APE 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]

---

[1]In the field of evidence, another use of the terra "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.

The plaintiff proffered Dr, Dildy's testimony on this issue. The expert stated that, assuming Dr. Adelman's recollection of the incidence of APE at the hospital was accurate, he would be concerned that APE 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 APE. He testified, "But this case here, we're talldng 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 APE 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 talce 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.

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 plaintiffs cross examination did not violate the rule stated in *Faucher.*

The Evidentiary Ruling

Again, the principal dispute at trial was the cause of Susan's death. In response to the plaintiffs claims of negligence, the defendants contended that regardless of their handling of the emergency from cardiopulmonary arrest, it was APE that caused Susan's death. The presence of APE 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 cmx 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 APE 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 APE in births and its rarity. The trial judge abused his discretion in refusing to allow the cross-examination.[3]

---

[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

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, utihzed 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. DiQuilio,* 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

---

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 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 (Pla, 4th DCA 1997), *See also Prince v. Audita 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)).

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 *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,^ 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

---

[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).

identical to the A.B.A.'s proposed statute," and has remained unchanged since:

> 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, Pla. Stat. (2010) (formerly § 54.23, Pla. 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

---

[9]That proposed model provided:

> 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).

interpretation; the term "miscarriage of justice" should not be construed so narrowly that reversal is a rarity.[10]

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. Looldng 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

[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. 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.

> 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 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

[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.").

applied to prevent reversal whenever errors would not have altered the outcome.[12]

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 subniitting 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

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

> 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 *DiQuilio,* 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]

[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 . . . .").

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 reviewmg 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

[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* dissentmg in part). But Justice Overton added that, in general, "[t]he application of the harmless error statute requires an appellate court to consider the entire record and determine whether the verdict was affected by the error." *Id.* at 793.

> examination of the impermissible evidence which might have possibly influenced the jury verdict.

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 appeflate 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 harniless 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 tobe different whenever the appellate court believes there is a reasonable

[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),*

possibility that the error influenced the trier of fact and contributed to the verdict.

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."[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 plaintiffs 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

[16]See *alsoFlores 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 civfl 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

[17]*See also Tallahassee Mem'l Reg'l Med. an v. Meeks,* 560 So. 2d 778, 782 (Pla. 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

[19]*See Hayes v. State,* 55 So. 3d 699 (Fla. 4th DCA 20U) (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); *Rammer 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 strildng 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.l5 (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, 6J3 (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

[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.*

[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

[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 appeUee 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 fine 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 plaintiffs 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 APE 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 talldng 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 plaintiffs 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 appllied 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. KaUamanos,* 843 So. 2d 885, 889 (Fla. 2003) ("A district court should exercise its discretion to grant certiorari review orfly 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 u. 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 reason. 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 ki 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 plaintiffs 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. DiGullio,* 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

[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 wrongfy 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 *DiGuillio* 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-,* 1 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 m civil cases because we ai-e 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. 502005CA002533XXXXMB

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

Irene Porter and Kathryn LS. Griswold of Hicks Porter Ebenfeld & btem, 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 Antonacci & Marowitz P,A., Boca Raton, for West Boca Medical Center, Inc.

[30]For civil cases in which the burden of persuasion is "clear and convincing" (such as Jimmy Ryce cases), my articulation would change the words "more hkely than not" 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?"