IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC11-2511

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

Petitioner,

-vs-

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

Respondents.
_____/

INITIAL BRIEF OF PETITIONER ON MERITS

On Appeal from the Fourth District Court of Appeal of the State of Florida

GROSSMAN ROTH, P.A.
925 South Federal Highway, Suite 775
Boca Raton, FL 33432
and
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 430
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
(561) 721-0465 (fax)
Attorneys for Petitioner
aah@FLAppellateLaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

PREFACE

This is an appeal from a Final Judgment entered by the Circuit Court, as affirmed by the Fourth District sitting *en banc*. The parties will be referred to by their names or as Plaintiff or Defendants. The following designations will be used:

(R) - Record-on-Appeal

(T) - Trial Transcript

(SR) - Supplemental Record-on-Appeal[1]

(A) - Appendix to Jurisdictional Brief

[1] The transcript of the evidentiary hearing taken on May 16, 2008 is the subject of a Motion to Supplement the Record-on-Appeal contemporaneously filed with the Initial Brief. References to the exhibits introduced at the hearing will be referred to as SRX.

STATEMENT OF THE CASE

This medical malpractice action arises out of the death of a woman after she gave birth by Cesarean section. There is a dispute between the parties as to the proximate cause of her death, and as to many of the underlying facts relating to her treatment. The case was tried to a jury which returned a verdict in favor of the Defendant hospital, West Boca Medical Center, Inc. (hereafter "the Hospital") and the Defendant anesthesiologist, Dr. Evo Baux and his P.A. and medical group, Pinnacle Anesthesia, P.L. (hereafter "Dr. Baux").

The Fourth District initially issued a panel decision, with three opinions. One judge found there was no error, and it would also be harmless. One judge found there was an evidentiary error in restricting the Plaintiff's cross-examination of the chief defense medical expert, but that it was harmless. One judge found this was an evidentiary error that was harmful. Thus, two judges on the panel agreed there was an evidentiary error, but two deemed this harmless error.

The Fourth District then issued an *en banc* Opinion. The Court agreed there was an evidentiary error, receded from prior cases on the harmless error test in civil cases, and adopted a new harmless error test. The Court applied the test and deemed the error in this case to be harmless. The Court certified a question of great public importance to this Court, and after Jurisdictional Briefing, this Court accepted jurisdiction.

STATEMENT OF FACTS

Frank Special met his future wife, Susan, in 2000, and they married in 2001 (T2137). She became pregnant in 2002, at which time she was 38 years old (T2140, 2210, 2211). She was in good health and there was no testimony that any prior health condition was causally related to the events at issue (T1500, 2147).

On the morning of June 8, 2003, at approximately 4 a.m., Susan's water broke (T257). She presented to the hospital emergency room at approximately 6:15 a.m. (T258). The baby was in the breach position and, as a result, it was determined that a Cesarean section would be necessary (T259).

At approximately 7:15 a.m., IV fluids began to be administered to Susan (T274), and at 7:25 a.m. Dr. Baux saw her for the first time (T183, 277). At 8:10 a.m., Susan was moved into the operating room in a wheelchair (T176, 177, 286).

Dr. Baux applied spinal anesthesia at 8:16 a.m. (T2415, 2417). Spinal anesthesia is a very delicate medical procedure, as it involves essentially anesthetizing the nervous system to the degree that the patient feels no pain, but it can be dangerous because it can cause a sympathetic block of the autonomic nervous system, and can thereby interfere with breathing, heart rate, etc. There was a dispute regarding whether Susan was conscious and "chatty" or "out-of-it" after the time she obtained the spinal anesthesia (T289, 2240-41, 2242, 2247). Frank stood next to her and he testified that she was "out-of-it" and that she

vomited down the pillow and drape (T289, 2240-41, 2242, 2243). Certain medical personnel involved testified, however, that they did not recall that she had vomited, and that she did not appear to be "out-of-it" (T204, 2059, 2060, 2242, 2243).

At approximately 8:23 a.m., Dr. Cueto made the incision for the C-section (T2024-25), and four minutes later the baby was delivered (T204). The placenta came out at 8:28 a.m. and Petocin was immediately administered (T226). At approximately 8:29 a.m., Susan's pulse dropped, even though her blood pressure was also dropping (T1583, 2420, 2434).[2] Susan's cardiopulmonary system then "crashed" and she had a seizure, resulting in her blood pressure dropping precipitously and an inability to breathe (T458, 459, 2420, 2434).

Dr. Baux intubated Susan, but by 8:32 a.m., she had no pulse, and "Code Blue" was called (T2434). Dr. Schweiger, one of Plaintiff's experts, contended that the Code should have been called earlier (T463), and that certain steps in the Code Blue, such as the administration of Ephedrine and chest compression, were unreasonably delayed (T463, 465). Susan was ultimately resuscitated and transferred to the Intensive Care Unit; however, another Code Blue was called later in the day, and she was pronounced dead at 1:43 p.m. (T2647). The cause of death

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[2] Ordinarily, the body compensates in that situation and if the pulse drops the blood pressure increases in order to maintain the requisite blood flow (T410, 411, 420). There was a dispute whether the fluids being provided to Susan were increased after her blood pressure dropped (T438, 491).

was Disseminated Intravascular Coagulopathy (DIC), i.e., uncontrolled bleeding (T447, 806, 2478, 2489).

It was the Plaintiff's position that Susan's death was a result of negligence in the administration of anesthesia, the treatment of Susan's fluids, the monitoring of her system in conjunction with the operation, and negligence in handling the first Code Blue. The Defendants, on the other hand, claimed she suffered from amniotic fluid embolus (AFE or ASP)[3], an extremely rare condition whereby the mother's blood system is exposed to the amniotic fluid and has an extreme allergic reaction to it (T1130-32). It is undisputed that the condition is exceedingly rare, occurring to one in 20,000 to 80,000 mothers (T1135), and a majority of AFE cases have autopsy findings consistent with it (T794).

After her death, an autopsy of Susan was performed by Dr. Barbara Wolf, the Deputy Chief Medical Examiner for Palm Beach County (T778). Dr. Wolf received her medical training at Harvard and Boston University, and had been a professor of pathology and Director of the Department of Anatomic Pathology at Albany Medical Center prior to working in forensic pathology (T772-76).

Dr. Wolf conducted a complete autopsy and reviewed the medical records (T783, 798). She focused particularly on the lungs, because in most cases of AFE

[3]AFE has been recharacterized by many in the medical profession as Anaphylactoid Syndrome of Pregnancy, because technically it does not involve an embolus, i.e., an obstruction, but rather a chemical reaction similar to an allergy (T794).

the woman develops pulmonary edema, i.e., fluid in the lungs (T783, 787). However, she found no fluid in Susan's lungs (T787). Dr. Wolf also prepared eleven slides using multiple staining agents, each slide containing more than one piece of lung tissue (T791). Her examination of them under the microscope revealed no evidence of AFE (T791).

Limitations on the Cross-Examination of Dr. Gary Dildy

As noted above, the Fourth District concluded that there was an evidentiary error in limiting the cross-examination of a defense expert witness (Dr. Dildy), but that this was harmless error. He was the Defendants' primary expert on AFE (T1111-1230). The trial court precluded Plaintiff's counsel from confronting him with evidence that the Hospital over-diagnosed AFE (T1215-28). That evidence came from Dr. Adelman's testimony, a pulmonologist who consulted in Susan's case, who was also the Chairman of the Hospital's Board of Directors (T1030). Dr. Adelman claimed to be an expert in AFE (T1050), and diagnosed Susan as dying from AFE based on clinical grounds (T1033).

In his May 2006 deposition, Dr. Adelman stated that he personally "see[s] about one or two" cases of AFE a year (T1037). At trial, Dr. Adelman testified that he had seen 1-2 AFE cases annually since the OB department opened 18 years ago, although he characterized that as a "rough estimate" (T1037-38).

Dr. Adelman testified that his understanding is that the national AFE rate is 1/30,000 births, although some literature suggests 1/10-20,000 (T1038-39). The Plaintiff introduced into evidence an interrogatory answer from the Hospital stating there are just over 2,000 births annually at the Hospital (T1048; P's Ex. 9). Dr. Adelman agreed it would be "alarming" and an epidemic if the Hospital had a diagnosis rate of 1-2 AFE cases a year (T1055).

Dr. Dildy was the Defendants' primary AFE expert and his practice is limited to high-risk obstetrics (T1112, 1120, 1125). He testified that AFE is a diagnosis of exclusion, which means it is reached only after excluding all other causes in a differential diagnosis, such as a heart attack, stroke, or hemorrhage of the brain (T1130-32, 1145-46). Dr. Dildy concluded that Susan's death was due to AFE (T1144).

Dr. Dildy opined that even in a hospital with 4,000 deliveries a year, there may only be one AFE case every other year, at the most (T1133). He characterized AFE as a rare condition, with recent research indicating a rate of perhaps 1/20,000 births (T1134). Although Dr. Dildy supervised the delivery of thousands of babies and delivered over 1,000 babies, he only recollected one AFE birth (T1138-39).

In cross-examination, Plaintiff's counsel asked Dr. Dildy to comment on the AFE diagnosis rate and the actual occurrence rate in the Hospital, based on Dr.

Adelman's testimony (T1212). Defense counsel objected and the trial court sustained the objection based on the form of the question (T1212).

Plaintiff's counsel then asked Dr. Dildy to assume that there are 1-2 AFE diagnoses a year and about 2,200 annual births, and then asked Dr. Dildy to opine on what this data revealed about the instances of AFE at the Hospital (T1214). Defense counsel again objected, asserting that this was impeachment of a collateral matter and irrelevant (T1214). Plaintiff's counsel contended this testimony was relevant to show that AFE was being improperly diagnosed at the Hospital, and that the physicians and employees at the Hospital had quickly and erroneously jumped to that conclusion (T1216).

The trial judge sustained Defendants' objection, concluding that the question required Dr. Dildy to testify about the credibility of another witness, that Dr. Adelman did not know the specific numbers for AFE cases at the Hospital, and that it was a collateral matter (T1218-19, 1228).

Plaintiff's counsel proffered Dr. Dildy's testimony on this subject (T1228-30). Dr. Dildy agreed that diagnosing AFE in 1 per 1,000 births would be much higher than the national rates and that, based upon 1-2 AFE cases yearly, the Hospital's diagnosis rate was twenty times higher (T1230-34). Dr. Dildy also opined that the Hospital was over-diagnosing AFE if this rate of diagnosis was sustained over a period of time (T1232).

In the proffer, Dr. Dildy also noted that every doctor who treated Susan opined that AFE was the cause of death, as reflected in their consult notes (T1236). Dr. Dildy agreed the diagnosis by all Hospital personnel was done well before the autopsy (T1236-37). Dr. Dildy noted that in his research there have been many cases initially presumed to be AFE, which were then excluded upon further review (T1232). The trial court ruled that the proffered testimony was collateral, and even if relevant, the risk of prejudice outweighed any probative value (T1242-44, 1249).

Dr. Dildy's cross-examination continued and he stated it was very easy to make an AFE diagnosis on the day of Susan's death (T1254-55). Dr. Dildy testified that all doctors taking care of Susan rendered this diagnosis by looking at the clinical picture, and there was no need to look at the anesthesia record or autopsy when reaching that conclusion (T1255-56). He testified that 25% of AFE cases cannot be detected in an autopsy. Plaintiff's counsel made two further attempts to question Dr. Dildy on the Hospital's rate of AFE diagnosis, and the trial court sustained each objection based on the prior rulings (T1251-52; 1258-60).

Events Relating to Plaintiff's Claim of Witness Intimidation of Dr. Wolf

The Plaintiff raised two other Points-on-Appeal in the Fourth District. The Court stated that, "We affirm" on all Points, (A1) but did not address the Plaintiff's other two claimed errors, beyond Dr. Dildy's excluded testimony. One of these

other Points concerned the evidence of witness intimidation of Dr. Wolf, which the trial court precluded from being considered by the jury.[4]

As noted above, Dr. Wolf, in her capacity as Deputy Chief Medical Examiner for Palm Beach County, performed the autopsy on Susan (T778). She found no evidence that Susan had AFE, and she did not believe the Hospital's medical records provided a clinical basis for that diagnosis (T790, 820). It needs to be emphasized that Dr. Wolf was not an expert hired by the Plaintiff, but solely testifying as the medical examiner who performed the autopsy (T778).

Prior to the filing of the Complaint, the Plaintiff filed a Notice of Intent to Initiate Medical Malpractice Litigation against, inter alia, Dr. Baux. During pre-suit, Dr. Baux retained Dr. Stephen Factor as an expert (T732). The case was not resolved in pre-suit and Plaintiff filed the initial Complaint on March 17, 2005 (R1-1-107). As required by §733.106(2)(b), Fla. Stat., Plaintiff served a copy of the Complaint on the Department of Health, which resulted in the initiation of an administrative proceeding against Dr. Baux.

Dr. Factor was then retained to assist in the defense of Dr. Baux's administrative case (R14-2735-2800, Dep. 31). Dr. Factor testified that he would not have become involved in the administrative case without being assured that it had been cleared through the defense firm representing Dr. Baux in the medical

[4] The Plaintiff is not raising the third point in this Court.

malpractice action (R14-2735-2800, Dep. 30-36). Dr. Factor then prepared a report stating that his review of the eleven autopsy slides of Susan's lung tissue demonstrated that every one contained multiple indications diagnostic of AFE (SRX1). He reported that "with absolute certainty" Susan suffered a sudden arrest secondary to AFE, which resulted in the DIC which caused her death (SRX1).

Sometime thereafter, based on Dr. Factor's report, a complaint was initiated in the Department of Health against the medical examiner, Dr. Wolf (T746). The complaint was apparently filed anonymously, and the Department refused to disclose to Dr. Wolf or her attorney who had initiated it (T754). However, the complaint contended that Dr. Wolf had failed to identify the widespread indications of AFE on the autopsy slides, and sought to discipline her, including the possibility of suspending or terminating her license (T746). Dr. Wolf was required to hire an attorney to represent her in that administrative proceeding (T746). The administrative complaint was filed against Dr. Wolf a few months prior to her deposition in the malpractice action (T752).

Dr. Baux's counsel arranged through Dr. Wolf's counsel to schedule her pretrial deposition (T757-58). Prior to the deposition, there were oral communications between Dr. Baux's counsel and Dr. Wolf's counsel. According to Dr. Wolf, her counsel told her that Dr. Baux's counsel suggested she should reevaluate her analysis of the autopsy slides because he had a world famous expert

who was prepared to testify that AFE was "all over" those slides, and if she maintained her position she would embarrass herself (T747).[5] This was obviously a reference to Dr. Factor, and was a reiteration of the charge made against Dr. Wolf in the administrative proceeding (T747).

It is undisputed that as a result of the discussion between counsel, Dr. Wolf arrived early for her deposition and Dr. Baux's counsel provided her with Dr. Factor's photographs of the autopsy slides, which he claimed all showed widespread evidence of AFE (T747). Dr. Wolf understood that the Defendants' intention in having her view those photographs was to persuade her to change her testimony (T753). In fact, however, she did not change her opinion, and her deposition testimony was consistent with her autopsy report (T753).

Thereafter, on October 31, 2006, Dr. Factor's deposition was taken in the medical malpractice action (R14-2735-2800). At that time, he refused to identify who had retained him to assist in the administrative action against Dr. Wolf, based upon a generalized claim of privilege (R14-2735-2800, Dep. 46). In his deposition, Dr. Factor testified that he had never researched or written on the subject of AFE (R14-2735-2800, Dep. 6, 13). He testified that he reviewed the autopsy slides prepared by Dr. Wolf and had photographed them (R14-2735-2800, Dep. 14). Dr. Factor testified that there was widespread evidence of AFE on every

[5] This testimony was excluded at trial based on the trial court's determination that it constituted hearsay (T720-21, 760).

one of those slides and that he could state with 100% certainty that Susan died from AFE (R14-2735-2800, Dep. 41).

At the deposition, Dr. Factor did not provide Plaintiff's counsel any of the materials he had filed in the administrative case, and claimed that he did not have them with him, nor were they on the computer he brought (R14-2735-2800, Dep. 32). After the deposition, Plaintiff moved to compel production of those materials (R11-2104-38). However, Defendants then withdrew Dr. Factor as an expert (R11-2097-99), and the trial court denied Plaintiff's Motion to Compel (R11-2165).

At trial, not a single witness testified consistent with Dr. Factor's analysis; in fact, no one testified that there were any diagnostic indications of AFE on Dr. Wolf's autopsy slides. Defendants' expert pathologist did not see any indications of AFE on those slides, and admitted that there were none of the usual things you might see in AFE such as squamous cells, fetal hairs, or mucin (T2329-31).[6] In fact, at trial, the defense position was that in a minority of cases there will be no evidence of AFE in the autopsy, and that this was one of those cases (T1162-63, 2296-97).

[6] Dr. Collins did testify that on one slide "there was a hint of a blue under the staining, and I said that could be mucin, it may not be mucin." He acknowledged that "there is not one classic diagnosis criteria" of AFE on the slides (T2331).

In opening statement at trial, Plaintiff's counsel began to discuss Dr. Wolf's deposition and the Defendants' attempt to influence her testimony (T60-79). The Defendants objected and, after a lengthy colloquy, the court overruled the objection, but limited Plaintiff's counsel from further discussion of the subject (T60-79).

The issue was then discussed in depth prior to Dr. Wolf's live testimony (T698-743). At that time, Plaintiff argued that the evidence of the administrative proceeding filed against Dr. Wolf and the events prior to her deposition were relevant and admissible as constituting an attempt at witness intimidation (T699-701). Neither Defendant objected on the basis of relevance, but instead on the grounds that Plaintiff had not adequately demonstrated witness intimidation, and that the information relayed from Dr. Wolf's counsel to her about being embarrassed by Dr. Factor constituted hearsay (T705-07, 727).

The trial court analyzed the situation as presenting two distinct issues, the first being the admissibility of information relating to the administrative proceeding, and the second being the pre-deposition events (T710-12). The trial court ultimately ruled that the evidence relating to the administrative complaint filed against Dr. Wolf was "fuzzy" and insufficient to present to the jury (T720-21). Thereafter, the trial court ruled that the testimony of Dr. Wolf regarding what

her attorney relayed to her was inadmissible hearsay, albeit the trial court determined that otherwise it would be relevant (T738).

After those preliminary rulings, Dr. Wolf gave a proffer that included the following testimony (T745-46, 747, 748, 749-50, 752-53):

> Q. ...At some point, were you contacted and told that your deposition was going to be taken in this case?
>
> A. Yes, I was.
>
> Q. Were you told anything prior to your deposition about what another expert in this case had found?
>
> A. Yes, I was.
>
> Q. Who were you told that by?
>
> A. Actually I received notice from the Board of Medicine that indicated that there had been a complaint filed against me, pertaining to this case, and that as it was phrased, a defense expert had found widespread – excuse me, widespread amniotic fluid embolism that I had failed to identify.
>
> * * *
>
> Q. Did you, as a result of that, have to hire counsel?
>
> A. Yes, I did.
>
> Q. Was your counsel Mr. Bill Pincus?
>
> A. Yes, it was.
>
> * * *
>
> Q. Please tell us what you were told [prior to the deposition] and by who?
>
> A. I was informed by Mr. Pincus that, as he phrased it, I would not want to embarrass myself according to the

defense attorney, by disagreeing with Dr. Factor, who was identified to me as the defense expert involved in the Board of Medicine complaint.

Q. And –

A. I'm sorry.

Q. Go ahead.

A. I was also given a note. Mr. Ciotoli [defense counsel] gave my lawyer, who was also present, who then gave to me a notebook containing a number of photographs that were identified as being photographs taken by Dr. Factor of the slides in this case that allegedly demonstrated the presence of amniotic fluid embolism.

***

Q. Were you told by Mr. Pincus, through his conversation with Mr. Ciotoli, that their expert had found widespread evidence of amniotic fluid embolus?

A. Yes, I was.

Q. How did you feel about that, before you actually saw the notebook of pictures?

A. Well, initially I'm receiving the medicine -- Board of Medicine complaint, I was horrified. I take my work very seriously, and the idea that I had made, what sounded from the complaint, an egregious error was very upsetting to me. I retained counsel to deal with the legality of the complaint.

***

Q. And having been told previous to that that your diagnosis was wrong and that there was widespread AFE on the slides and that you would see them on the pictures, how did you feel when you looked at the pictures and they showed what you just described as no evidence of AFE?

A. I was shocked, totally shocked, and then subsequently became quite outraged that on the basis of that supposed diagnosis, a complaint had been rendered, and I had to defend my license.

Q. When was your deposition taken in relation to having that feeling?

A. Within minutes, immediately thereafter.

Q. Did you feel comfortable during your deposition, based upon what you had just gone through?

A. I was very upset and very angry.

* * *

Q. Okay. What did you think, after you looked at the pictures, after you heard what you had been told first, that it was supposedly on these slides, and then you looked at these pictures and it wasn't there. What did you think somebody was attempting to do to your testimony?

A. By being offered that, being shown those photographs immediately before my deposition, I assumed that an attempt was being made to change my mind.

Q. And you were not intimidated in that regard, were you?

A. Certainly not.

Q. And you stated your opinion truthfully, didn't you?

A. Yes, I did.

During the Defendant's cross-examination on the proffer, Dr. Wolf acknowledged that she did not know if the Defendants had initiated the

administrative complaint against her, and that her attorney had unsuccessfully attempted to determine that information from the Board of Medicine (T755). Defense counsel's attempt to put a harmless spin on the pre-deposition events was unsuccessful (T757):

> Q. Did you understand that the whole purpose of trying to arrange for your deposition was for you to take another look at the slides, from the autopsy?
>
> A. No, I didn't understand that. If I wanted to do that, I would have gone to the medical examiner's office where the original slides were.

The trial court adhered to its prior rulings and excluded the evidence (T760).

Post-Trial Evidentiary Hearing on Witness Intimidation

The trial court held a post-trial hearing on the issue of the alleged witness intimidation of Dr. Wolf (SR1-51). At that hearing, Plaintiff's counsel summarized the facts discussed above, and noted that he had obtained the complete administrative file of Dr. Wolf, but had not been able to obtain the administrative file of Dr. Baux (SR4-16).[7] Plaintiff's counsel noted that there was a "work product memorandum" that was supposedly part of Dr. Wolf's file that he had just been provided, which had not been provided to him a year ago when he received

[7] The attorney for the Department of Health represented that the agency had just received Dr. Baux's release and waiver of the confidentiality of his file the day prior to the hearing (SR20).

what was supposed to be Dr. Wolf's entire file (SR33). That memorandum recommended initiating the proceeding against Dr. Wolf (P's Ex.2):

> We must not include the name of the doctor associated with that case number. I recommend that we open a file on Barbara Wolf, M.D., the medical examiner who did the initial autopsy and specifically indicated that she found no evidence of amniotic fluid embolus. At the request of a defense attorney, another pathologist reviewed the tissue and apparently cut new sections and found evidence of widespread embolism from amniotic fluid. This is a serious error and we should open the file so that we may deal with it appropriately.

Plaintiff's counsel argued that it was clear that Dr. Factor's report in the administrative proceeding was false, as demonstrated by the fact that Dr. Factor was withdrawn as an expert and not a single witness at trial supported his observations or theory (SR13-15). He argued that Dr. Factor knew that the false report would get Dr. Wolf "in hot water" and that it was an attempt to intimidate Dr. Wolf (SR16). Plaintiff's counsel argued that when "you put it all in context,...this was an attempt to intimidate Dr. Wolf" (SR38).

An attorney from the Department of Health appeared by phone at the hearing and made numerous factual representations, albeit the trial court later stated that he (SR24), "didn't take her comments to be those of -- in a testimonial capacity. She's just stating the department's position." Nonetheless, the agency's attorney stated that the initiation of the complaint against Dr. Wolf arose from an

in-house consultant, Dr. Katim, as reflected in Plaintiff's Ex. 2, but acknowledged that the consultant relied on Dr. Factor's report (SR21-23).

The Defendants argued that there was no evidence that either client was personally involved in the instigation of the complaint against Dr. Wolf, albeit counsel for the Hospital acknowledged the suspicious circumstances (SR27, 40):

> I would just say, I understand how this got started. I understand Mr. Cohen's suspicions when this whole thing got started....
>
> ***
>
> I can appreciate [Plaintiff's] counsel's apprehension about the timing of things....

The trial court acknowledged that it appeared undisputed that Dr. Factor's conclusions were "all wrong," noting that no one had defended them (SR35, 41). The court took the matter under advisement (SR50), and later entered an order concluding that there was no evidence of witness tampering by the parties in this case, and that no further action would be taken by the court (R15-2900-01).

The Fourth District's Opinions

As noted previously, the Fourth District panel decision consisted of three opinions. Special v. Baux, 52 So.3d 682 (Fla. 4th DCA 2010)("Special I"). One panel member, Associate-Judge Levenson, concluded that the trial court did not err in preventing Plaintiff from posing the questions to Dr. Dildy regarding the frequency of AFE diagnosis at the Hospital. Alternatively, Judge Levenson determined that any error would have constituted harmless error. Another panel

member, Judge Taylor, concluded the trial court had erred in limiting Dr. Dildy's cross-examination, but that the error was harmless. Finally, the third panel member, Judge Farmer, concluded there was error and that it was harmful. Thus, the majority holding of the Fourth District was that there was an evidentiary error, but the error was harmless.

In deeming the error harmless, Associate-Judge Levinson and Judge Taylor relied on a harmless error standard that had been utilized in a few prior Fourth District decisions. In their opinions, Judge Levenson and Judge Taylor stated that the Plaintiff was required to demonstrate that "but for the error, a different result would have been reached." 52 So.3d at 686 (citing to prior cases).[8]

The Plaintiff moved for rehearing, rehearing *en banc*, and requested a question of great public importance be certified to this Court on the definition of harmless error in civil cases. The Fourth District granted the request to hear this case *en banc*, and requested supplemental briefing on harmless error.

Sitting *en banc*, the Fourth District affirmed. See Special v. Baux, 79 So.3d 755 (Fla. 4th DCA 2011)("Special II"). The Fourth District held that the trial court erred in restricting Plaintiff's cross-examination of Dr. Dildy's on the central issue

[8] The cited cases were: Dessanti v. Contreras, 695 So.2d 845 (Fla. 4th DCA 1997); Pascale v. Federal Express Corp., 656 So.2d 1351 (Fla. 4th DCA 1995); Aristek Communities, Inc. v. Fuller, 453 So.2d 547 (Fla. 4th DCA 1984); and Anthony v. Douglas, 201 So.2d 917 (Fla. 4th DCA 1967). The harmless error test in Dessanti appears in a dissenting opinion.

of the case, AFE diagnosis (or misdiagnosis). The Court then examined whether the error was harmless. The Court traced the history of the harmless error test to common-law decisions, and Florida's adoption of the harmless error test in 1911, see §59.041, Fla. Stat. (A6-8). The Court focused on two possible tests; a "but-for correct result" test that is oriented on the outcome, and an "effect on the fact finder" test that is oriented on the process (A9).

The Court discussed State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), the "touchstone for harmless error analysis in Florida." (A13). This Court adopted the test set forth in Chapman v. California, 386 U.S. 18 (1967):

> 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) (A13). The Fourth District deemed this an "effect on the fact finder" test (A13). The Fourth District concluded that three cases from this Court utilized the "effect on the fact finder" test similar to that applied in DiGuilio (A15-17) (citing cases).

The Fourth District examined how it and the other Districts have treated this issue, with their "but for" outcome-oriented focus. The most stringest test, primarily from the Fourth District, see n.8, *supra*, asked whether the result "would have been different, but for the error" (A18). Another test "lower[ed] the bar for

harmful error, and asks whether the result may have been different had the error not occurred" (A18). A third "asks whether it is reasonably probable that the appellant would have obtained a more favorable verdict without the error" (A18).

The Fourth District receded from its prior cases that had utilized the far more stringent and outcome-oriented "but for" harmless error test (A17-18, 23). Ultimately, the Fourth District adopted a new standard, modified from DiGuilio (A21). The beneficiary of the error would be required to show that "it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict" (A22). The Fourth District apparently disapproved of the "alternatively stated" test for harmless error that emerged from DiGuilio, i.e., this Court's test which requires the beneficiary of an error to prove "there is no reasonable possibility that the error contributed to the conviction" (or verdict) (A21).

The Fourth District certified a question of great public importance to this Court, addressing its newly-adoped standard (A23):

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

The Fourth District's Application of its Newly-Adopted Test

Applying the newly-adopted standard, the Fourth District deemed the evidentiary error to be harmless. The Fourth District stated that the question of the

AFE over-diagnosing was presented through Dr. Adelman's testimony, and in part from Dr. Dildy (A23). Plaintiff's counsel addressed this in closing argument (A23). The Fourth District noted that in Dr. Dildy's proffer, he persisted that his opinion that Susan presented a special case of AFE did not change under any circumstances (A23).

Two judges concurred specially with an opinion, and a third concurred in result and specially with opinion (A24-32). Two judges recused themselves (A24).[9]

The Plaintiff filed a Jurisdictional Brief. The Plaintiff pointed out that this Court already had jurisdiction to consider this case, because of the Fourth District's certified question. The Plaintiff also argued that the Fourth District's decision expressly and directly conflicts with decisions from this Court and other Districts, on two issues. The Defendants filed Briefs opposing Jurisdiction. This Court accepted this case for review.

SUMMARY OF ARGUMENT

As to the certified question, an appellee -- as the beneficiary of an error -- should be required to prove that an error is harmless. On this point, the Fourth District correctly noted that this Court has already held as such. Placing the burden

[9] Judge Farmer, who was the judge on the panel who found the erroneous ruling to be harmful and justifying reversal, was no longer at the Fourth District when the *en banc* decision was issued. He had retired from the Court in the interim.

on an appellee discourages error from being introduced in the first place, and re-affirms the notion of fairness in the proceedings.

With the burden appropriately placed, decisional conflict on the harmless error test in civil cases exists. The Plaintiff agrees with the Fourth District that an "effect on the trier of fact" test is consistent with this Court's harmless error doctrine in criminal cases. However, the Fourth District should not have rejected the "reasonable possibility" test used by this Court in criminal cases, albeit with an elevated reasonable doubt burden of proof in criminal cases. The harmless error standard in civil cases should require an appellee to prove that there is no reasonable possibility an error contributed to the verdict.

There is no sound reason the reasonable possibility test would govern some, but not all cases in this State. The Fourth District incorrectly believed this was subject to arbitrary application by appellate judges. It appropriately ensures that appellees have to establish harmless error, since they were the beneficiaries of the error at the trial court level. An appellant is entitled to a fair trial in the first instance. If there is a reasonable possibility the error contributes to a verdict, a new trial should be granted.

The evidentiary error was not harmless, regardless of the test applied by this Court. As the Fourth District correctly concluded, the Hospital's Chairman of the Board testified that he personally observed 1-2 cases of AFE annually, which was

grossly disproportionate to the reported statistics. Plaintiff was improperly precluded from cross-examining the Defendants' primary AFE expert on this subject, which would have undermined his testimony and diagnosis of AFE, and the entire defense theory. Dr. Dildy's proffered testimony that the Hospital was misdiagnosing AFE was testimony elicited from the chief defense expert on causation, the critical issue of this case.

The Fourth District's reasoning that the exclusion of expert testimony was harmless because there is admissible evidence on the same subject creates conflict with other district courts of appeal. This is a misapplication of what makes evidence cumulative. This doctrine is rarely applied in medical-malpractice cases, which are generally complicated and "battle of the expert" cases. Dr. Dildy was, after all, the chief defense expert and foundation of the defense. The error was also not rendered harmless because the Plaintiff was permitted to present his theory in closing argument, which jurors are told is not evidence.

This Court should also consider another evidentiary error, which demonstrates that the appellees cannot prove harmless error. The trial court erred in excluding the evidence of witness intimidation of the medical examiner, Dr. Wolf. Dr. Baux's retained expert had filed a report in Dr. Baux's administrative proceeding which resulted in the initiation of an administrative proceeding against Dr. Wolf, contending that she had committed malpractice in reviewing the autopsy

slides and seeking, inter alia, suspension or termination of her medical license. Prior to her deposition, Dr. Wolf was presented with Dr. Factor's photographs in an effort to cause her to change her testimony. Such conduct is classic witness intimidation which is admissible as substantive and impeachment evidence. The trial court's exclusion of it was erroneous.

The witness intimidation evidence that was wrongly excluded also undermined the AFE defense. The Defendants attempted to intimidate the medical examiner who opined that Susan did not die of AFE. The jury should have evaluated the significance of the misconduct, on the critical issue of this case.

This Court should quash the Fourth District's decision and grant a new trial.

ARGUMENT

POINT I

[REGARDING THE CERTIFIED QUESTION] THE DEFENDANTS, AS THE BENEFICIARIES OF THE ERRORS, CANNOT DEMONSTRATE THERE WAS NO REASONABLE POSSIBILITY THAT THE EVIDENTIARY ERRORS CONTRIBUTED TO THE DEFENSE VERDICT.

The Defendants, as the Appellees, Must Prove that the Errors are Harmless

The Fourth District agreed with the Plaintiff that the beneficiary of the error must prove that an error is harmless. This Court has recognized as such in prior decisions, and should make this point explicitly clear in the instant case.

Public policy would be served by imposing a burden of proving harmless error on the party which introduced the error into the proceedings. This Court has confirmed this point on two recent occasions. See Flores v. Allstate Ins. Co., 819 So.2d 740, 751 (Fla. 2002) ("Ordinarily, if 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)); Sheffield, 800 So.2d at 203 (citation and quotations omitted):

> 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.
>
> As the Fourth District observed, "when a trial lawyer leads a judge into an obvious error ... cries of harmless error on appeal are likely to fall on deaf ears." Mattek v. White, 695 So.2d 942, 944 (Fla. 4th DCA 1997).

Although not explicitly stated in Flores, Sheffield, or Mattek, placing a burden upon the party that introduces error also *discourages* litigants from bringing error into the proceedings in the first instance. In turn, this will likely reduce error at the trial level, which this Court should promote. Requiring an appellant to carry the burden to prove an error was not harmless (or was harmful) has the opposite effect. Imposing this burden on the "guilty" party is neither "plaintiff-friendly" nor "defendant-friendly" and will benefit the entire judicial system.

The Test to Apply

The majority agreed with the Plaintiff that the unyielding test in prior Fourth District cases was unfair to appellees and made it nearly, if not impossible to prove harmful error in any evidentiary-error cases. The majority also agreed with the Plaintiff that the other Districts were in conflict with the Fourth District.

The Plaintiff agrees that the Fourth District's rejection of its "but for the error, would the result have been different" standard has marked an important and positive development in this field. Rejecting the "reasonable doubt" element to harmless error established by this Court in DiGuilio, the Fourth District adopted a "more likely than not" standard for civil cases. The Fourth District modeled its newly-adopted standard from DiGuilio.

Nonetheless, the Fourth District should not have rejected the standard utilized by this Court in DiGuilio, the reasonable possibility test. It is not precisely clear why the Fourth District rejected that test. The Fourth District discussed the different burdens of proof and public-policy considerations; at the same time, the Fourth District quoted from a law review article that a "reasonableness standard" was not proper for a harmless error analytical framework because it was "nebulous" (A21-22).

Of course in DiGuilio, this Court held that the beneficiary of error has the burden to prove there is no reasonable possibility the error contributes to the

decision on appeal. So this Court concluded that a reasonableness standard is appropriate in evaluating whether an error is harmless.

The Plaintiff understands why the different burden of proof in criminal and civil cases may yield to a different harmless error standard, i.e., a "more likely than not" vs. a "beyond a reasonable doubt" standard. However, a "more likely than not" standard can be tied into the reasonable possibility stated test from DiGuilio. That is, here the Defendants should be required to prove that there is no reasonable possibility the evidentiary errors (they introduced) contributed to the verdict.

This test respects the right to a jury trial because it recognizes that in closely contended cases, a jury can reasonably reach different conclusions. Parties are entitled to have that decision made by a jury, not an appellate court. No matter what the members of an appellate panel believe the outcome of an error-free trial would have, should have, or may have been, frequently there will be room for a reasonable jury to decide otherwise. An appellant has a constitutional right to have the jury make that decision.

The Plaintiff believes it is unfair to dismiss the "reasonable possibility" test on the rationale that society demands more from criminal than civil trials. Surely, criminal trials threaten the loss of liberty and even life, while civil trials do not. But an error a civil trial involving the death of a woman giving childbirth should not be minimized on the rationale that this civil case matters less. An appellee

bears the burden to prove harmlessness for the error it introduced; it is fair to require an appellee to show confidently that it is not reasonably possible that error impacted the process leading to the outcome.

The tests utilized by the other District Courts of Appeal are not in uniformity. The Fourth District's Opinion outlined "three principle lines of cases applying tests for harmless error," all of which have applied an "outcome oriented" analysis (A17-20). The Fourth District incorrectly described each District as maintaining internal consistency on the standard.

One test asks whether the result would have been different without the error, a test mainly within the Fourth District which the *en banc* Court receded from (A17-18). The Fourth District correctly receded from that test, that rested on "shaky footing," (A18), improperly characterizes almost any error as harmless, (A19), and wrongly encourages "evidentiary gambles on questionable evidence in the trial court" (A19).

The Fourth District stated that the First and Third Districts ask "whether the result may have been different had the error not occurred" (A18) (emphasis added). Panels from each of the four other Districts have utilized this test. First District decisions include Hogan v. Gable, 30 So.3d 573, 575 (Fla. 1st DCA 2010); Murray v. Haley, 833 So.2d 877, 880 (Fla. 1st DCA 2003); and Nat'l Union Fire Ins. Co. of Pittsburgh v. Blackmon, 754 So.2d 840, 843 (Fla. 1st DCA 2000). Second

District decisions include USAA Cas. Ins. Co. v. McDermott, 929 So.2d 1114, 1117 (Fla. 2d DCA 2006). Third District decisions include Katos v. Cushing, 601 So.2d 612, 613 (Fla. 3d DCA 1992). Fifth District decisions include Gencor Industries, Inc. v. Fireman's Fund Ins. Co., 988 So.2d 1206 (Fla. 5th DCA 2008).

The Fourth District stated that the 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" (A18). While this has been the primary test in the Second District, panels of the First District have also used it. See, e.g., Webster v. Body Dynamics, Inc., 27 So.3d 805, 809 (Fla. 1st DCA 2010)[10]; Citizens Prop. Ins. Corp. v. Hamilton, 43 So.3d 746, 753 (Fla. 1st DCA 2010); In re Commitment of DeBolt, 19 So.3d 335, 337 (Fla. 2d DCA 2009) (*en banc*) (quoting Damico v. Lundberg, 379 So.2d 964, 965 (Fla. 2d DCA 1979)).

The Plaintiff does not agree with the Fourth District that the latter two tests are "arguably similar to each other" (A18). Requiring an appellant to establish that a different result "may have been reached" appears different than asking whether it is "reasonably probable" the result would have been different.

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[10] Thus, in a six-day period of time, the First District applied two different harmless error tests, see Hogan, supra, (February 18, 2010); Webster, supra, (February 24, 2010). In September 2010, the First District returned to the "may have" test, see Witham v. Sheehan Pipeline Constr. Co., 45 So.3d 105, 109 (Fla. 1st DCA 2010).

Each of these latter tests are fairer than the Fourth District's "would the result have been different" test that had appeared in prior decisions. But see Mattek, 695 So.2d at 944 (Fourth District applied an effect of the error on the trier of fact harmless error test; holding an evidentiary error to be harmful, where the wrongfully-admitted testimony "could well have been what persuaded the jury to find no permanency"). These latter tests at least present an opportunity for an appellant to establish there was an evidentiary, harmful error.

Nonetheless as explained above, this Court should resolve the conflict amongst the district courts of appeal, and utilize a "reasonable possibility" test, appropriately placing the burden on the Appellees to prove harmless error.

The Error Restricting Cross-Examination of Dr. Dildy Was Harmful

Regardless of the harmless error test that is applied by this Court, the error was not harmless (or was harmful). In Linn v. Fossum, 946 So.2d 1032 (Fla. 2006), a defense expert was permitted to testify on direct, over objection, that she consulted with her colleagues on reaching her opinion that the physician defendant complied with the prevailing professional standard of care. The First District affirmed a defense verdict. This Court concluded there was error, and that "this error 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

(emphasis added) (citing favorably to a Third District decision for the same principle).

In the instant case, the Fourth District emphasized that the focal point of this medical malpractice case was the AFE diagnosis, and the credibility of Dr. Adelman and Dr. Dildy regarding their diagnosis/expert opinions. Yet, the Fourth District deemed the error harmless, because the jury heard testimony of the AFE statistics in the hospital versus the national average, and because Plaintiff's counsel discussed that evidence in closing argument.

It is difficult to imagine how prohibiting cross-examination of Defendants' primary AFE expert on this critical issue could be deemed harmless. The autopsy showed no evidence of AFE. The Defendants and their expert, Dr. Dildy, contended that the AFE diagnosis was proper, based solely on the clinical conclusions of the doctors at West Boca. AFE was a diagnosis of exclusion. As a result, evidence that AFE was being overdiagnosed at West Boca undermined the analytical process utilized there and was critical to the Plaintiff's theory of liability in this case.

Dr. Adelman diagnosed the decedent as dying from AFE. If he was over-diagnosing it, that increased the likelihood he did not properly analyze the other possible diagnoses, since AFE is a diagnosis of exclusion. Dr. Dildy's cross-

examination lent a powerful evidentiary piece to the Plaintiff's argument that there was a rush to judgment in the Hospital's diagnosis of AFE.

As to Dr. Dildy, in his proffered testimony, he stated that Dr. Adelman's reported rate of AFE diagnosis was inflated. Plaintiff's counsel's discussion of statistical abnormalities in closing argument was not evidence; indeed the jurors would abdicate their role if they considered closing argument to be a substitute for evidence. Therefore, Dr. Dildy's testimony was also critical to provide specific evidence of the Hospital and Dr. Adelman's over-diagnosis.

The proffered, excluded testimony also would have severely undermined Dr. Dildy's own credibility. Despite being confronted with the statistical data of unusual frequency of AFE diagnosis at the Hospital, Dr. Dildy refused to budge on his AFE causation opinion.

It is easy to see that some experts may have modified their opinions, or expressed at least some uncertainty when presented with such statistical abnormalities. Dr. Dildy, in a case that is a battle of experts, stood absolutely firm in his persistence in the proffered testimony that over-diagnosis at West Boca was *irrelevant* to his medical opinion. The Defendants may believe this shows the correctness of Dr. Dildy's opinions, but this is precisely a factual issue for a jury to determine. The jury should have heard that testimony not only for the substantive importance, but also to properly evaluate Dr. Dildy's credibility as a whole. The

Fourth District did not even consider the possibility that his persistence was adverse to the defense.

The Fourth District's decision is in conflict with Witham v. Sheehan Pipeline Const. Co., 45 So.3d 105 (Fla. 1st DCA 2010). In Witham, an employee was injured while on the job, and filed a workers' compensation claim seeking benefits. The employer asserted that the employee's injuries were caused by a history of alcoholism, drug and tobacco use. The employer hired a toxicologist. Over objection, the toxicologist opined at the compensation hearing that the employee's IME's opinion [that he had encephalopathy caused by heatstroke] was inconsistent with the medical evidence or toxicology results. The judge denied compensability.

In Witham, the First District agreed with the employee that the toxicologist was unqualified to testify on causation. The First District concluded that the employee was required to show that a different result "may have been reached," Witham, 45 So.3d at 109. It then rejected the employer's argument that the error was harmless because the toxicologist's opinions were "entirely consistent" with the employer's admissible IME testimony (Id. at 109-110). The First District relied on Linn's discussion of cases turning on the weight of expert testimony. The First District concluded that, "where expert testimony as to a particular issue is the

focal point of the trial, the erroneous admission of expert evidence constitutes harmful error." Witham, 45 So.3d at 110.

Similarly here, the error as to Dr. Dildy was the focal point of the trial and constituted harmful error. As Judge Farmer explained in his panel decision in this case, Special I, 52 So.3d at 688 (dissenting):

> Barring an entire line of cross examination of one's expert witness about facts and opinions directly relating to the vital issue in the trial requires on review that we indulge the possibility that, if allowed, answers and concessions could have yielded impeachment of all or part of opinions expressed by opposing witnesses. Achieving recognition from Dr. Dildy as to anomalies or errors in Dr. Adelman's diagnosis by a probing line of inquiry could have a significant effect on the jury—namely, that the believable facts about the cause of death may not have been those opined or relied upon by Dr. Adelman and Dr. Dildy.
> . . .
>
> And the conceivable probative force of this subject of inquiry makes it very unlikely that the exclusion of the entire area of cross examination was harmless.

The Fourth District's harmless error application has created decisional conflict.

It is apparent that the Fourth District reached a harmless error outcome by incorrectly reasoning that the excluded evidence was merely cumulative. The Fourth District's reasoning has created decisional conflict. Medical malpractice cases are battles of the experts, and credibility of experts is of paramount

importance. This Court and other district courts of appeal have applied these important principles differently than the Fourth District.

In Witham, supra, 45 So.3d at 109-110, the First District stated the following, in deeming the improperly admitted evidence to be harmful:

> When considered in conjunction with the underlying harmless error test, however, "cumulative evidence" means unnecessary evidence-evidence so repetitive that, notwithstanding its exclusion, it is not reasonably likely a different result would have occurred. The 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.

As shown above, in Witham, the First District relied on Linn, in granting a new evidentiary hearing to the claimant. Yet, the Fourth District in the instant case deemed the evidentiary error to be harmless, because (a) the jury heard from Dr. Adelman of his diagnosis rate and the national average; and (b) Plaintiff's counsel was able to explore this issue in closing argument. The Fourth District has now applied a cumulative evidence test that ignores critical credibility issues in medical malpractice cases.

Other decisions emphasize this vital impact, see, e.g., Lake v. Clark, 533 So.2d 797 (Fla. 5th DCA 1988); Cenatus v. Naples Comty Hosp., Inc., 689 So.2d 302, 303 (Fla. 2d DCA 1997). In each case, the District Courts reasoned that[11]:

> The fact that [evidence] was corroborative of other testimony, or even cumulative to it, does not matter. A medical malpractice case is always necessarily a battle of expert witnesses. Within only very broad limits all qualified opinion testimony should be allowed; that is, not disallowed because it is cumulative to other evidence.

Where testimony on a central issue of a medical-malpractice case is wrongly excluded (or wrongly admitted), cumulativeness should not turn harmless error into a standard without meaningful application.

The excluded testimony in this case went to the heart of the battle of expert witnesses on the critical issue in this case. The Plaintiff's claim that there was a rush to judgment by Hospital personnel would have been significantly more believable if Dr. Dildy and Dr. Adelman's credibility had been under attack through the excluded testimony. The fact the Plaintiff introduced some evidence of a statistical abnormaility could not duplicate the impact of Dr. Dildy's cross-examination on this critical issue.

The Fourth District also erred in reasoning that the evidentiary error was insignificant because it was cumulative to closing argument. It is well-settled that

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[11] The Fourth District recognized that recently, see Philippon v. Shreffler, 33 So.3d 704, 707 (Fla. 4th DCA 2010), review denied 47 So.3d 1290 (Fla. 2010).

statements made by attorneys in closing argument cannot constitute evidence. See Gatlin v. Jacobs Const. Co., 218 So.2d 188, 190 (Fla. 4th DCA 1969). Also, the jurors in this case were given a standard jury instruction that closing argument could not be deemed evidence. (T2721):

> Members of the jury, you have now heard all of the evidence in this case. The attorneys will now make their final arguments. What the attorneys say is not evidence.

The jurors would have abdicated their duty as jurors to disregard this instruction. Essentially, the Fourth District has concluded that an attorney's argument, that the Hospital was over-diagnosing AFE, which was not evidence, was the equivalent of a concession of that fact by an expert [defense] witness, which would have been evidence, if not excluded.

The Plaintiff does not claim there is a *per se* reversal rule in medical-malpractice cases, where expert testimony is excluded. The Fourth District, however, has improperly relied on cumulativeness to apparently reach its desired outcome of the case. If placing a burden on an appellee as the beneficiary of an error is to have any meaning, there is a reasonable possibility that the evidentiary error here contributed to the defense verdict.

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN EXCLUDING THE EVIDENCE OF WITNESS INTIMIDATION OF THE MEDICAL EXAMINER, DR. WOLF.

Standard of Review

Rulings on the admission of evidence are reviewed under the abuse of discretion standard, see Simmons v. State, 934 So.2d 1100, 1116-17 (Fla. 2006). However, the court's discretion is limited by the rules of evidence and by principles of stare decisis, see McDuffie v. State, 970 So.2d 312, 326 (Fla. 2007). The trial court abuses its discretion if the evidentiary ruling is based on either an erroneous view of the law or on a clearly erroneous assessment of the evidence, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

Argument

Once accepting jurisdiction, this Court has jurisdiction to resolve all issues in this case. See Murray v. Regier, 872 So.2d 217, 223 n.5 (Fla. 2002). This Point-on-Appeal is intertwined with the Certified Question, because the harmless error doctrine necessarily requires an examination of all errors.

The trial court erred in refusing to allow the Plaintiff to present evidence of witness intimidation of Dr. Wolf to the jury. This evidence was relevant to the entire defense theory of causation. The effort that the Defendants went to discredit

Dr. Wolf undermined the strength of the AFE defense, and was admissible as substantive evidence and impeachment.

At trial, Judge Kelly concluded that the evidence of witness intimidation should be analyzed separately as two issues, the first being whether there was sufficient evidence to introduce the fact of the administrative disciplinary proceeding filed against Dr. Wolf, and the second being the conduct prior to her deposition. The court separately analyzed those two issues and concluded the evidence should be excluded, and also relied upon the fact that Dr. Wolf testified that she was not, in fact, intimidated, nor did she change her testimony. This analysis is erroneous, as a matter of law.

The admissibility of evidence of threats or intimidation of a witness by or on behalf of a party is well-established in Florida, albeit it occurs more commonly in criminal cases. See Koon v. State, 513 So.2d 1253, 1256 (Fla. 1987); Jenkins v. State, 697 So.2d 228, 229 (Fla. 4th DCA 1997); Lopez v. State, 716 So.2d 301, 307-308 (Fla. 3d DCA 1998). Attempts to influence a witness by a third party are admissible, providing the attempt was made with the "authority, consent, or knowledge of the defendant." Manuel v. State, 524 So.2d 734, 735 (Fla. 1st DCA 1988); Lopez, supra, 716 So.2d at 307.

Contrary to the trial court's rationale in the case sub judice, it is not a prerequisite to the admission of such evidence that the witness be intimidated, nor

that the witness have changed any testimony. The attempted intimidation is admissible as reflecting the opposing party's consciousness of guilt, or awareness of the weakness of his or her case, see Coronado v. State, 654 So.2d 1267, 1269 (Fla. 2d DCA 1995); Quarrells v. State, 641 So.2d 490, 491 (Fla. 5th DCA 1994).

The issue of intimidation of a witness in the context of a medical malpractice action was addressed in Jost v. Ahmad, 730 So.2d 708 (Fla. 2d DCA 1998). In that case, the plaintiff's guardian sued a physician and a hospital for allegedly causing him to suffer permanent brain damage and severe physical limitations. One of the witnesses the plaintiff presented at trial was a subsequent treating physician, Dr. Gray, who took over care of the patient after the initial physician had punctured his lung, causing respiratory arrest and an ensuing coma.

At trial, the subsequent treating physician volunteered from the witness stand that somebody from the hospital had called him and passed on certain instructions for him to his risk management officer. The trial court immediately recognized that there was some type of threat involved, and instructed defense counsel to look into the matter and instruct the "hospital people" not to put pressure on the witnesses (730 So.2d at 709). When the court reconvened, defense counsel advised the court that the hospital's insurance carrier, not the hospital, had contacted the witness' risk management officer. However, Dr. Gray stated that the call had come at the direction of one of defense counsel.

Defense counsel denied that allegation. Dr. Gray then clarified his understanding that a representative of the hospital had called "to remind me that my testimony was to limit collateral damage" (730 So.2d at 710). That testimony was given outside the presence of the jury, and plaintiff's counsel then requested permission to question the witness on that subject in the presence of the jury. The trial court denied that request, and indicated that it was a matter for the court to investigate, but apparently did nothing thereafter to resolve it (730 So.2d at 710). The jury returned a defense verdict.

The plaintiff appealed on the grounds that, inter alia, the trial court erred in failing to permit plaintiff from making an adequate inquiry regarding the witness intimidation, and failing to permit him to do so in the presence of the jury. The Second District reversed, stating (730 So.2d at 710):

> This situation can be categorized generally as "witness tampering." The issue presented is whether Jost should have been permitted to question Dr. Gray regarding the communication in the jury's presence. The threshold question is whether the matter is relevant. That determination turns on the meaning of the communication as it could be reasonably understood by Dr. Gray. The communication was to remind Dr. Gray that his testimony "was to limit collateral damage." The meaning of the term "collateral damage" is not part of the record and is not crystal clear on its face. We interpret it, however, to relate to damages for which [the hospital] could be held liable for Dr. Ahmad's negligence. Therefore, the communication is relevant. [Emphasis supplied.]

The Second District concluded that the jury should have been made aware of the possibility that Dr. Gray's testimony could have been influenced by the communication in question. Id. The Second District noted that witness intimidation was admissible not just as impeachment, but also as substantive evidence, from which a jury is permitted to make adverse inferences against the party engaging in it (730 So.2d at 711).

The Jost decision relies on the Delaware Supreme Court opinion in McCool v. Gehret, 657 A.2d 269 (Del. 1995). In that medical malpractice case, the defendant physician conveyed, through a third-party physician, to plaintiff's expert that it was inappropriate for a doctor to testify against another doctor. The expert witness testified that he believed the message was intended to coerce or intimidate him. He initially decided to refuse to testify, but just before trial, changed his mind, albeit the plaintiff's attorney was deprived of any opportunity to meet with him and to prepare him as a witness for trial (657 A.2d at 274).

The trial court in McCool excluded the evidence of witness intimidation, concluding that there was a "tremendous danger" that the jury would construe as it as an implicit concession of liability and, thereby, result in "irreversible prejudice" to the defendant (657 A.2d at 276). The jury returned a defense verdict. The Delaware Supreme Court reversed, holding that the exclusion of that evidence constituted reversible error. The court noted that a party's efforts to interfere with

a witness are admissible not only as impeachment evidence, but also as substantive evidence directly supportive of the claim (657 A.2d at 277). The court quoted with approval from John H. Wigmore, Wigmore on Evidence, §278(2) at 133; (Chadbourn Rev. 1979):

> It has always been understood-the inference, indeed, is one of the simplest in human experience-that a party's *falsehood or other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the case, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

That same excerpt from Wigmore has been quoted by Florida appellate courts, see Lynch v. McGovern, 270 So.2d 770, 772 (Fla. 4th DCA 1972); Busbee v. Quarrier, 172 So.2d 17, 22 (Fla. 1st DCA 1965).[12]

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[12] Another leading authority on evidence addresses the subject, as follows (McCormick on Evidence §265 (John W. Strong, et al. eds., 4th Ed. 1992)):

> [W]rongdoing by the party in connection with its case...is also commonly regarded as an admission by conduct. By resorting to wrongful devices, the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means.... Accordingly, the following are considered under the general category of admissions by conduct...undue pressure by bribery, intimidation, or other means to influence a witness to testify favorably or to avoid testifying....

The court in McCool stated that the prerequisite to the admission of such evidence is a demonstration that the acts alleged are attributable to the opposite party and done with the intent to interfere (657 A.2d at 277). The showing need not be conclusive, however, since the jury is entitled to evaluate that evidence (657 A.2d at 277):

> Once a sufficient showing is established, the evidence of interference is presented to the jury, along with appropriate instructions from the trial judge. The jury can then either reject or accept that evidence. If the evidence is accepted by the jury, it may support an inference that the party charged with interference is conscious of the weakness or unjust nature of his or her case. Accordingly, it may be considered as substantive evidence in support of the other party's claim, e.g. negligence in this case.

In the case sub judice, the trial court "bifurcated" the witness intimidation issue into whether there was a clear showing that Dr. Baux had personally initiated the administrative complaint against Dr. Wolf, and separately analyzed the issue of the pre-deposition conduct, distilling it down to the one statement allegedly made by defense counsel to Dr. Wolf's counsel. This analysis was faulty for numerous reasons.

First, it was not critical that Plaintiff demonstrate that Dr. Baux had personally initiated the administrative disciplinary proceeding against Dr. Wolf. The same expert Dr. Baux retained in the medical malpractice action, Dr. Factor, provided the basis for that complaint, which claimed that evidence of AFE was

widespread on all the autopsy slides. It is also undisputed that pursuant to communications between Dr. Baux's and Dr. Wolf's counsel, Dr. Wolf was urged to review Dr. Factor's photographs of the autopsy slides prior to her deposition. Dr. Wolf knew that they were the basis for the disciplinary complaint against her. Obviously, that was done to connect the disciplinary proceeding to this case and, as Dr. Wolf testified, it was designed to influence her to change her testimony. The fact that she was of strong character and refused to be intimidated does not grant a defendant an immunity from such misconduct. There was also extensive evidence that Dr. Factor's report was blatantly false, since he was withdrawn as an expert, and all the experts at trial testified to the contrary.

The conduct at issue in Jost supra and in McCool, was certainly much less threatening than that which occurred in the case sub judice. In Jost, the communication, through third parties, was only ambiguous instructions to Dr. Gray that his testimony was intended to "limit collateral damage." In McCool, it was simply a communication, through a third party to the expert witness, that it was inappropriate for a physician to testify against another physician. Neither of those "threats" are of career-ending significance, such as the threat in the case sub judice.

The trial court's apparent conclusion that the Plaintiff had to demonstrate convincingly that Dr. Baux had personally initiated the disciplinary complaint is not supported by logic or case law. It is not required that the party personally

participate in the threatening conduct, the threats can come from third parties if they act with the "authority, consent, or knowledge of the defendant," Manuel v. State, supra, 524 So.2d at 735.

Here, Dr. Factor was Dr. Baux's retained expert in the presuit proceedings, the administrative proceedings, and during the early stages of this litigation for over a year and a half. Obviously, his filings in the administrative proceedings were done with the authority of Dr. Baux; that has never been disputed. Dr. Factor testified he would not have participated in the administrative proceeding if it had not been authorized by Dr. Baux's legal counsel (R14-2735-2800; Dep. 30-36).

The conduct of Dr. Baux's counsel in defending this action was done with the authority of Dr. Baux. A party's attorney is also his or her agent, such that the Defendants are responsible for their agent's actions. Cf. Sebree v. Schantz, Schatzman, Aaronson & Perlman, 963 So.2d 842, 847 (Fla. 3d DCA 2007).

In Jost, the court did not require the plaintiff to prove the hospital initiated the intimidating communication to Dr. Gray; it was sufficient that it came from its insurer. Similarly here, the intimidation came from two people with authority from Dr. Baux: his retained expert and his defense counsel.

It should also be noted that the Second District did not find that the statements of Dr. Gray in Jost, constituted "double hearsay," even though there

were two out-of-courts declarants involved.[13] As to the pre-deposition conduct, it was necessarily related to the disciplinary proceeding, but was not limited simply to the out-of-court declaration which the trial court excluded as hearsay. It was undisputed that Dr. Wolf was presented Dr. Factor's photographs prior to her deposition by Dr. Baux's counsel, and Dr. Wolf was competent to give that testimony at trial. The meaning of that conduct in that context was clear to her and that is the standard for relevance, see Jost, 730 So.2d at 710. The trial court here did, in fact, find that the proffered evidence on intimidation was relevant (T738).

The Defendants could argue to the jury that providing Dr. Factor's photographs was a "courtesy," which Dr. Wolf roundly denied, and that would be for the jury to evaluate, see McCool supra. However, case law does not require that a party prove witness intimidation beyond a reasonable doubt as a prerequisite to its admissibility. The jury is entitled to evaluate such evidence, as they evaluate other evidence during the trial.

In summary, there was competent evidence presented of an attempt to intimidate a critical witness, and the court erred in excluding it. Dr. Wolf, an independent witness, testified that she perceived the conduct as an attempt to

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[13] This case is distinguishable from 5 Star Builders, Inc. v. Leone, 916 So.2d 1010 (Fla. 4th DCA 2006). That case involved the erroneous admission of threatening letters from a witnesses' attorney to a party's attorney. This Court found that the threats could not be attributed to any party, and should also have been excluded because neither the author of the letters, nor the recipient, testified.

influence her testimony, and the trial court found that the evidence was relevant. However, the trial court's bifurcation analysis was erroneous, and the exclusion of pre-deposition conduct was based on an erroneous application of the law and requires reversal, as in Jost.

However, even if it was not sufficient by itself, the witness intimidation evidence was admissible as substantive evidence, going to the merits of the Plaintiff's claims. Its exclusion prevented the Plaintiff from further seriously undermining the defense causation theory in this case. The Defendant's agents attempted to obstruct Dr. Wolf from testifying that Susan did not have any signs of AFE in the autopsy slides. Clearly, a jury could reasonably find that the Defendant was worried about the strength of its own defense that he would resort to trying to intimidate Dr. Wolf.

There is a reasonable possibility that the error contributed to the defense verdict. In conjunction with the limitation on cross-examining Dr. Dildy, the Defendants cannot show there is no reasonable possibility the errors contributed to the defense verdict.

CONCLUSION

Taken individually or cumulatively, the Plaintiff is entitled to a new trial due to the trial court's evidentiary errors, which were not harmless.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to MICHAEL MITTELMARK, ESQ. and K. CALVIN ASRANI, ESQ. (mmittelmark@michaudlaw.com, kcasrani@michaudlaw.com); EUGENE CIOTOLI, ESQ. (ciotoli@bobolaw.com); IRENE PORTER, ESQ., and SHANNON KAIN, ESQ. (iporter@mhickslaw.com, skain@mhickslaw.com, gmunoz@mhickslaw.com, eclerk@mhickslaw.com), by email, on September 14, 2012.

Gary M. Cohen, Esq.
Andrew B. Yaffa, Esq.
GROSSMAN ROTH, P.A.
925 S. Federal Highway, Suite 775
Boca Raton, FL 33432
and
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 430
444 West Railroad Ave.
West Palm Beach, FL 33401
(561) 721-0400
(561) 721-0465 (fax)
Attorneys for Petitioner
pmb@FLAppellateLaw.com
aah@FLAppellateLaw.com

By: _____
PHILIP M. BURLINGTON
Florida Bar No. 285862

By: _____
ANDREW A. HARRIS
Florida Bar No. 10061

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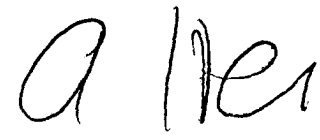

ANDREW A. HARRIS
Florida Bar No. 10061