THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2511

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

Petitioner,

v.

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

Respondents.

____ /

BRIEF OF RESPONDENTS', IVO BAUX, M.D., IVO BAUX, M.D., P.A. AND PINNACLE ANESTHESIA, P.L, ON JURISDICTION

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

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

The Fourth District, sitting *en banc*, examined the history of the civil harmless error rule and adopted a standard requiring the beneficiary of error to show "it is more likely than not that the error did not influence the trier of fact and thereby contribute to the verdict." (A1).[1] In so doing, the Fourth District receded from its prior more stringent test and aligned itself with Supreme Court precedent. The Court also certified a question of great public importance as to whether this test should apply. (A23). Applying the test, the *en banc* Court concluded there was harmless error in excluding certain cross-examination of defense expert Dr. Dildy because the same evidence was already presented to the jury. (*Id.*).

Two Judges concurred that given Supreme Court precedent, the Fourth District, going forward, should apply the "more likely than not" harmless error test. (A24). They opined, however, if they were writing on a clean slate, the plain language of the harmless error statute - "miscarriage of justice" -- should apply and under that standard, there was no miscarriage of justice in this case. (A27-28). "Therefore, applying either the harmless error statute's plan language or the majority opinion's 'more likely than not' harmless error test, our decision to affirm would be the same." (A28).

[1] The opinion below is attached as an appendix to Petitioner's brief on jurisdiction.

Two other Judges concurred in the result, but opined the Fourth District should not recede from its previous, more stringent analysis. (A28). Regardless, the *en banc* court unanimously agreed that whichever standard applied, the error was harmless in this case and the defense judgment should be affirmed.

In this medical malpractice case, Susan Special, went into cardiopulmonary arrest after a cesarean delivery, and ultimately died. Plaintiff, Special, contended Dr. Baux, the anesthesiologist, and the hospital were negligent in administering anesthesia, monitoring her system, controlling her fluids, and responding to arrests. (A2).

Dr. Adelman, a pulmonary specialist called in when she went into distress, diagnosed amniotic fluid embolus (AFE) based on her clinical signs. (A2). AFE is an allergic reaction from a mother's blood mixing with amniotic fluid, sometimes causing heart-lung collapse. (A2).

The defendants did not present Dr. Adelman's opinion at trial. They relied on an expert, Dr. Dildy, who opined she died of AFE. (A3). Dr. Dildy based this conclusion on his analysis of the medical records and tests. He explained that AFE is a diagnosis of exclusion. A doctor looks at all the circumstances and test results to determine likely causes for the patient's condition. Where no other circumstances account for the distress, a diagnosis of AFE can result. (*Id.*).

Plaintiff relied on an expert who testified that Mrs. Special died because of

departures from the requisite standard of care and also called the chief medical examiner who had conducted the autopsy. The medical examiner concluded the autopsy she performed found no evidence of AFE, although in the majority of AFE cases the autopsy provides such evidence. (A2).

The plaintiff also presented testimony from treating physician Adelman that he diagnosed AFE at the time he saw Mrs. Special. Plaintiff then asked him about the number of patients diagnosed with AFE at West Boca. He testified he saw all such patients. He estimated he saw one or two cases per year at the hospital, but indicated this was only an estimate, and had no medical records to back up his recollection. During Dr. Adelman's testimony, Special was able to elicit national statistics showing that, based upon Dr. Adelman's estimate, incidence of AFE diagnosis at West Boca was about 15 times the rate elsewhere. (A2).

The purpose of the proposed cross-examination of defense expert Dr. Dildy was to impeach Dr. Adelman's diagnosis -- testimony introduced by plaintiff, not defendants -- by "showing that the incidence of diagnosed AFE at West Boca, all done by Dr. Adelman, was grossly in excess of national statistics[.]" (A5).

The evidence suggesting Dr. Adelman's diagnosis was about 15 times the national statistic rate was already adduced during Dr. Adelman's testimony. (A2). Plaintiff also adduced the statistical rate from Dr. Dildy and the jury heard this testimony. Plaintiff then attempted to cross examine Dr. Dildy on Dr. Adelman's

diagnosis "in light of the unusually high incidence of it at the hospital." The trial court sustained a defense objection as to relevance. (A3). Plaintiff proffered Dr. Dildy's testimony on this issue. He stated that, assuming Dr. Adelman's recollection of the incidence of AFE was accurate, he would be concerned that AFE was being over-diagnosed, but persisted in his opinion that Mrs. Special died from AFE. (A4).

In closing argument, citing testimony of Dr. Adelman and Dr. Dildy, Special's counsel vigorously argued the hospital either had an epidemic of AFE or was over-diagnosing it. (*Id.*)

Although the *en banc* Fourth District concluded the intended cross-examination should have been allowed, it unanimously held the error was harmless because:

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

examination of Dr. Dildy did not contribute to the verdict. The error was harmless.[2] [A23].

SUMMARY OF THE ARGUMENT

This Court has jurisdiction based on the certification of a question of great public importance. However, because the result in this case will remain the same regardless of the answer to that question, it is submitted that the Court should not exercise its jurisdiction in this case. The entire *en banc* District Court agreed there was harmless error in this case, regardless of the test applied.

Petitioner's assertion of conflict on the harmless error test fails. The Fourth District's definition of harmless error as error which more likely than not did not contribute to the verdict is the corollary of other districts' definition of harmful error as error which may have affected the verdict. The Fourth District applied this test and found the error harmless.

There is also no conflict with "battle of the experts" cases, which hold it is harmful error to exclude qualified standard of care opinions in a medical malpractice case, even where cumulative. Special was not precluded from introducing expert testimony on the cause of death, or even from introducing evidence to support the AFE over-diagnosis theory. Special presented expert testimony that the death was not caused by AFE, elicited testimony from Dr. Adelman and defense expert Dr. Dildy about the alleged statistical anomaly, and vigorously argued during closing

[2] All underlined emphasis herein is supplied.

argument that the hospital either had an epidemic of AFE or was over-diagnosing it. The excluded hypothetical proffer -- that Dr. Dildy would be concerned about the so-called statistical anomaly <u>if</u> Dr. Adelman's recollection was accurate -- amounted to harmless error because it added nothing to Special's case and was completely cumulative.

ARGUMENT

Petitioner erroneously contends the Fourth District's decision conflicts with other districts which define harm<u>ful</u> error as occurring when it is shown that a different result may have been reached and the Fourth District "shifted dramatically from this test[.]" (Petitioner's Brief on Jurisdiction at 4-5). Petitioner's reasoning is flawed because the Fourth District's decision defines the standard for harm<u>less</u> error, which is the corollary to the definition of harm<u>ful</u> error enunciated by other districts. There is no conflict.

Notably, the Fourth District did not certify conflict between its decision and other Florida appellate decisions. Instead, it receded from its prior more stringent test to ensure <u>consistency</u> with this Court's precedent and other districts.

The Fourth District noted that: (1) section 59.041 applies in both civil and criminal cases (A8); (2) this Court adopted an "effect on the fact finder" harmless error test for criminal cases in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) (A13-14); and (3) in civil cases after *DiGuilio*, decisions from this Court employed an

"effect on the fact finder" test akin to *DiGuilio*. (A15-17). Therefore, it adopted the "effect on the fact finder" test of *DiGuilio*. (A22).

It also noted that articulations of the standard from other districts were similar and less stringent than its prior precedent, and thus, receded from that precedent:

> 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 contained in the earlier Supreme Court cases, and asks whether the result would have been different, but for the error. 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. 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. The last two tests are arguably similar to each other, but the test most frequently applied by this court is clearly more stringent.

(A17-18) (Footnotes omitted).

To say that error is harmless when more likely than not it did not contribute to the verdict means that error is harmful when the result may have been different but for the error. If it cannot be shown that it is more likely the error did not affect the result (harmlessness) that means that the error may have affected the result, and is thus harmful. There is no conflict.[3]

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[3] Petitioner also argues there is another more "harsh" test, which finds error harmful when "it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed." (citing, *e.g.*, *Webster v. Body Dyamics, Inc.*, 27 So. 3d 805, 809 (Fla. 1st DCA 2010). However, Petitioner does not contend that this test should be adopted and, because Petitioner received the benefit of the test he contends is most lenient, whether there is truly a conflict in the two articulations and their application is not an issue in this case. Notably, one of

There is also no conflict with "battle of the expert" cases. *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006) found harmful error in allowing an expert to testify she consulted with colleagues in reaching her standard of care opinions because competing expert opinions on the proper standard of care were the focal point of the trial. In *Witham v. Sheehan Pipeline Construction Co.*, 45 So. 3d 105 (Fla. 1st DCA 2010), the Judge of Compensation Claim's ("JCC") reliance on a toxicologist's inadmissible opinion was harmful because under section 440.13(9)(c), the opinion of an expert medical advisor ("AME") appointed by the Court is presumed correct unless there is clear and convincing evidence to the contrary as determined by the JCC. *Id*. at 110. The JCC found such clear and convincing rebuttal based on two expert opinions, one of which was inadmissible, and the order did not indicate the other expert opinion was sufficient rebuttal. *Id.* The court explained, "[w]hen considered in conjunction with the underlying harmless error test, however, 'cumulative evidence' means unnecessary evidence-evidence so repetitive that, notwithstanding its exclusion, it is not reasonably likely a different result would

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the cases cited by Petitioner, *Witham v. Sheehan Pipeline Construction Co.*, 45 So. 3d 105 (Fla. 1st DCA 2010), uses the language "a different result may have been reached" and "it is not reasonably likely a different result would have occurred" interchangeably and as meaning the same thing: "The test for harmless error in a civil case is 'whether, but for such error, a different result may have been reached.' ... 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." *Id.* at 109.

have occurred." *Id.* at 109. This test was not met in *Witham* due to the statutory presumption requiring rebuttal by clear and convincing evidence.

In contrast, the Fourth District *en banc* determined the opposite was true -- the proffered cross-examination was so unnecessary and repetitive that it more likely than not did not influence the trier of fact and thereby contribute to the verdict. While four members of the Court opined that other tests should be used, every member agreed that regardless of the test applied, the error was harmless.

Lake v. Clark, 533 So. 2d 797 (Fla. 5th DCA 1988) and *Cenatus v. Naples Community Hospital, Inc.*, 689 So. 2d 302 (Fla. 2d DCA 1997) found the exclusion of standard of care expert testimony in malpractice cases harmful, even where cumulative. They do not create a blanket rule that exclusion of any cumulative evidence in malpractice cases is harmful. It is not. *See Katos v. Cushing*, 601 So. 2d 612, 613 (Fla. 3d DCA 1992) (where excluded evidence in malpractice case was essentially cumulative, its exclusion was harmless).

Special was not precluded from introducing qualified experts nor from introducing evidence on his theories that Mrs. Special did not die from AFE and it was being over-diagnosed. He presented two experts, including the chief medical examiner who conducted the autopsy and found no evidence of AFE. He also presented Dr. Adelman's testimony that his estimate of the number of AFE cases he saw -- made without any medical records to back up his recollection -- was about 15

times the rate elsewhere; elicited from Dr. Dildy the statistical rate of AFE; and used this evidence to vigorously argue the hospital either had an epidemic of AFE or it was being over-diagnosed.

The excluded hypothetical cross-examination added nothing to his case. Dr. Dildy simply stated that <u>if</u> Dr. Adelman's off-the-cuff estimate was accurate, <u>then</u> he would be concerned that AFE was being over-diagnosed, but his opinion was Mrs. Special died as a result of AFE. Special's claim that the excluded testimony would have made his theory more believable fails. As Judge Damoorgian noted in his concurrence, "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." (A27-28).

CONCLUSION

For the foregoing reasons this Court should decline to exercise its discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE AND STYLE

Respondent HEREBY CERTIFIES that the Font Style and Size of the Respondents' Jurisdictional Brief is Times New Roman, 14 Point.

By:___________________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of March, 2012 to: **Eugene Ciotoli, Esq.**, 1240 U.S. Highway One, North Palm Beach, Florida 33408; **Philip Burlington, Esq.**, Burlington & Rockenbach, P.A., Courthouse Commons - Suite 430, 444 West Railroad Avenue, West Palm Beach, Florida 33401; **Gary M. Cohen, Esq., Andrew B. Yaffa, Esq.**, Grossman Roth, P.A., 925 S. Federal Highway, Suite #775, Boca Raton, Florida 33432; **Scott Michaud, Esq., Rose Marie Antonacci-Pollack, Esq.**, 621 N.W. 53rd Street, Suite #420, Boca Raton, Florida 33487; and **Michael K. Mittelmark, Esq.**, Michaud, Mittelmark, Marowitz & Asrani, P.A., 621 N.W. 53rd Street, Suite 260, Boca Raton, Florida 33487.

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