IN THE SUPREME COURT OF FLORIDA

SC11-2511

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

Plaintiff/Appellant,

Case No. 4D08-2511

vs.

L.T. Case No. 05 CA 002533

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

Defendants/Appellees.
_____/

JURISDICTIONAL ANSWER BRIEF OF DEFENDANT/APPELLEE WEST BOCA MEDICAL CENTER, INC. D/B/A WEST BOCA MEDICAL CENTER

On Appeal From The Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

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

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

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

Gary Dildy, M.D. was harmful error despite the *En Banc* panel's conclusion that both sides were given ample opportunity by Judge Kelley to present evidence and testimony to support their respective theories of the case (A2, A3, A4).

On October 19, 2007, following a four (4) week trial, the jury returned a verdict for the Defendants (A4). On June 23, 2010, Associate Judge Jeffrey R. Levenson issued the Fourth DCA's majority opinion affirming the defense verdict below. Special v. Baux, 52 So.3d 682 (Fla. 4th DCA 2010). On December 7, 2010, the Fourth DCA entered its Order granting Petitioner's Motion for Rehearing *En Banc*. On November 16, 2011, the Fourth DCA entered its corrected *En Banc* opinion affirming the judgment below finding that the error restricting the cross-examination of Dr. Dildy was harmless (A23). The *En Banc* opinion confirms that the Court considered the entire record and concluded that it is more likely than not that the error did not contribute to the verdict (A23). However, the Fourth DCA certified the following question of great public importance:

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

Nevertheless, discretionary jurisdiction is not necessary because after reviewing all of the evidence adduced at trial in this case no conclusion contrary to the one arrived at by the initial majority panel and the *En Banc* panel below can be reached by this Court.

SUMMARY OF THE ARGUMENT

This Court should not conduct a discretionary review of the Fourth DCA's *En Banc* opinion because there is no conflict regarding the application of the harmless error test in civil cases amongst the Districts. All Districts are required to follow this Court's guidance in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) and the Legislatures pronouncements in §59.041, Florida Statutes and §90.104, Florida Statutes (2009). The *En Banc* panel for the Fourth DCA below rendered an opinion consistent with State v. DiGuilio as well as §59.041, Florida Statutes (2009) and §90.104, Florida Statutes (2009).

Moreover discretionary review by this Court is unnecessary because, at best, this case presents a narrow issue with unique facts. Judge Kelley's exclusion of Dr. Dildy's proffered testimony is harmless error based on the substantial evidence in the record that clearly demonstrates the testimony would not have impacted the fact finder or verdict and the exclusion of the testimony did not cause a miscarriage of justice which injuriously affected Petitioner's substantial rights. Therefore, because the Fourth DCA reviewed the entire record and found substantial and competent testimony regarding the exact issue that the restricted cross-examination arguably supported, any error was harmless.

ARGUMENT

Applying the harmless error test pronounced by this Court in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) and promulgated by the Legislature in §59.041, Florida Statutes and §90.104, Florida Statutes to the facts of this case would enable every Court in this State to reach the same result the Fourth DCA *En Banc* panel reached. Regardless of the particular language utilized by trial or appellate courts when deciding whether harmless error exists, this Court has stated that "in the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." Goodwin v. State, 751 So.2d 537, 546 (Fla. 1999) (citing approvingly Brecht v. Abrahamson, 507 U.S. 619, 643 (Stevens, J., concurring) reh'g denied 508 U.S. 968 (1993).

Cases in each appellate district in Florida highlight the similarities in the application of a harmless error analysis. For example, in Hogan v. Gable, 30 So.3d 573, 575 (Fla. 1st DCA 2010), the court recognized a distinction between showing that, without the error, the jury verdict would have been different, and "whether, but for such error, a different result may have been reached." Importantly, the First DCA's analysis was the same as that of the Fourth DCA *En Banc* panel below as they both looked at the outcome and the impact the evidence had on the jury. Hogan, 30 So.3d at 575. In contrast to the holding in Hogan, the record in the case at bar is clear that in light of the substantial testimony regarding the AFE abnormality already considered by the jury, the excluded testimony could not have

possibly affected the verdict causing a miscarriage of justice which injuriously affected Petitioner's substantial rights.

The Second DCA found in USAA Cas. Ins. Co. v. McDermott, 929 So.2d 1114, 1117 (Fla. 2d DCA 2006), that any error in admitting irrelevant evidence regarding criminal history was harmless and there was no harmful error in light of the other evidence presented to the jury. McDermott, 929 So.2d at 1117. Similarly, the Third DCA in Katos v. Cushing, 601 So.2d 612 (Fla. 3d DCA 1992) viewed the error in the context of all the other "competent and substantial evidence" and found that the alleged evidentiary rulings "did not affect the outcome." Citing to Katos, the Fifth DCA found in Gencor Industries, Inc. v. Fireman's Fund Ins. Co., 988 So.2d 1206 (Fla. 5th DCA 2008) that the Defendant suffered no prejudice from the error in submitting a negligence claim to the jury because a different result would not have been reached.

Also, in Nat'l Union Fire Ins. Co. of Pittsburgh v. Blackmon, 754 So.2d 840, 843 (Fla. 1st DCA) rev. denied 779 So.2d 272 (Fla. 2000), no harmful error was found when the First DCA concluded that the erroneous statement was cumulative and "its admission had **minimal** impact on the jury." Nat'l Union Fire Ins. Co., 754 So.2d at 843 (Emphasis added). The First DCA in Blackmon looked at the entire record and concluded that the statement was insignificant in light of the evidence provided to the jury to the contrary. The First DCA's approach in

Blackmon assessing the level of impact on the jury is analogous to the Fourth DCA's inquiry as to the qualitative effect on the fact finder.

Moreover, the First DCA took the same approach in evaluating harmless error as the Fourth DCA *En Banc* panel below in Webster v. Body Dynamics, Inc., 27 So.3d 805 (Fla. 1st DCA 2010). In Webster, the rejected evidence tended to prove a defect but not causation of the stroke appellant suffered. In concluding that rejecting the evidence was harmless error, the First DCA found that the jury had sufficient testimony as to the defect and possible causal link and it was made clear by plaintiff's expert that the allegedly consumed product was "unreasonably dangerous." Id. Therefore, regardless of the formulation of the test used, both Courts properly examined the entire record to determine whether there was sufficient evidence presented to the jury on the issue that the rejected evidence would tend to prove. See §59.041, Florida Statutes.

Furthermore**,** unlike the unsuccessful Plaintiffs in Cenatus v. Naples Community Hospital, 689 So.2d 302 (Fla. 2d DCA) rev. denied 698 So.2d 839 (Fla. 1997) and Lake v. Clark, 533 So.2d 797 (Fla. 5th DCA 1988) rev. denied 542 So.2d 1332 (Fla. 1989), the Petitioner in this case was not prohibited from putting on their case through their primary expert. More importantly, the Petitioner was able to challenge Defendants' theory of causation unlike the unsuccessful Plaintiff in Poland v. Zaccheo, 37 Fla. L. Weekly D417 (Fla. 4th DCA February 15, 2012)

(The court's restriction on cross examination of defendant's expert witness was error because it foreclosed plaintiff's attempt to negate defendant's theory of proximate cause **and defendant's expert witnesses' theory was left unchallenged**)(Emphasis added); Also, Philippon v. Shreffler, 33 So.3d 704 (Fla. 4th DCA) rev. denied 47 So.3d 1290 (Fla. 2010) is inapplicable because there was no error alleged in this case that the Petitioner was not able to present expert testimony from treating physicians. To the contrary, the Petitioner was fully able to present their theory of liability and causation to the jury and Judge Kelley permitted Petitioner ample opportunity to reference and attack Dr. Adelman's testimony (A23). Special v. Baux, 52 So.3d 682, 685 (Fla. 4th DCA 2010). Simply put, the exclusion of Dr. Dildy's proffered testimony on a statistical anomaly which did not pertain to standard of care issues did not cause a miscarriage of justice which injuriously affected Petitioner's substantial rights.

In Witham v. Sheehan Pipeline Construction Co., 45 So.3d 105,110 (Fla. 1st DCA 2010), the court cited to State v. DiGuilio saying "[t]he cases concerning cumulative evidence do not stand for the proposition that an error in the admission of evidence is harmless simply because there is additional admissible evidence in the record to support the ultimate result below." Essentially, the Witham Court was determining whether the result would have been the same in light of its effect on the fact finder. See Witham, 45 So.3d at 110 (finding "the JCC expressly relied on

the inadmissible opinions in reaching her conclusion"). In the case at bar, the Fourth DCA *En Banc* panel also found that "[c]onsidering 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" (A23). (Emphasis added). Therefore, the Fourth DCA determined that, even if the excluded testimony was admitted, it would not have impacted the fact finder. This was simply not a case where Petitioner was denied the opportunity to identify their theory as to how the AFE issue related to the case or denied the opportunity to attack the opinion testimony of Defendants' experts. See Poland v. Zaccheo, 37 Fla. L. Weekly D417 (Fla. 4th DCA February 15, 2012).

Although the Second DCA found harmful error when the trial court admitted evidence of a past disciplinary matter that discredited an expert in In re Commitment of DeBolt, 19 So.3d 335 (Fla. 2d DCA 2009), the **only** evidence at trial was expert testimony. (Emphasis added). In this case, the jury was told the statistics regarding AFE diagnosis at the national level and at West Boca Medical Center as well as the autopsy report that did not show AFE. Therefore, the jury had substantial evidence to evaluate both theories of causation and independently reach a conclusion. Secada v. Weinstein, 563 So.2d 172 (Fla. 3d DCA 1990).

This Court never extended Linn v. Fossum, 946 So.2d 1032 (Fla. 2007) to create a *per se* rule that any error in admitting or rejecting expert testimony in a medical malpractice case is harmful error because there is always a "battle of the experts". Allowing the defense expert in Linn to bolster her opinion through unnamed colleagues whose credentials were never verified clearly resulted in a "miscarriage of justice" which injuriously affected Plaintiff's substantial rights. Dr. Dildy never improperly used the testimony of Dr. Adelman to bolster his own opinion, nor did he rely on the fact that other physicians had diagnosed AFE in other patients at West Boca Medical Center in reaching his conclusion that Mrs. Special died from AFE on June 8, 2003 (A23). **"Dr. Dildy testified: 'But this case here, we're talking about, it doesn't matter what all these other cases are, this is this case, and this case is an amniotic fluid embolism'"** (A4, A23). (Emphasis added). The restricted cross-examination as to an issue that was already borne out through other evidence and argued forcefully during closing argument does not make Linn v. Fossum applicable to these facts. (A23).

The focal issue in this case was the cause of Mrs. Special's unexpected death (A5). Exclusion of Dr. Dildy's proffered testimony on whether Dr. Adelman or other unnamed physicians were over-diagnosing AFE at West Boca Medical Center did not prevent Petitioner's trial counsel from vigorously advancing the argument that Mrs. Special did not die of AFE (A4, A23). Significantly, Judge

Gross recognized in the *En Banc* opinion that "Special was able to elicit national statistics showing incidence of AFE diagnosis at West Boca was about 15 times the rate elsewhere" (A2). The **admissible evidence** in this case allowed Petitioner's counsel's closing argument to make such an extensive argument. In fact, Judge Gross cited Petitioner's closing argument and noted that the evidence of the statistical abnormality presented to the jury "allowed the plaintiff's attorney in closing argument to hammer on the significance of the statistical abnormality" without objection (A4, A23).

The *En Banc* panel properly found that Petitioner received a fair trial. In other words, the exclusion of Dr. Dildy's proffered testimony was not a "game changer" causing a miscarriage of justice injuriously affecting Petitioner's substantial rights. Cases evaluating harmless error in all of the districts in the State of Florida and this Court conform with §59.041, Florida Statutes (2009), §90.104, Florida Statutes (2009) and the direction provided by State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

This Court should decline discretionary review because there was no possibility, let alone probability, that the harmless error in the exclusion of Dr. Dildy's proffered testimony influenced the fact finder, the jury's verdict or caused a "miscarriage of justice" injuriously affecting Petitioner's substantial rights.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to each of the persons identified below on this 22nd day of March, 2012.

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

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

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