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.
_____/

BRIEF OF PETITIONER ON JURISDICTION

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

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PREFACE

This is Petitioner Frank Special's request for discretionary review of a November 16, 2011 corrected decision of the Fourth District Court of Appeal, *en banc*, affirming an Order denying a new trial to Special in his medical malpractice wrongful death suit against West Boca Medical Center, Dr. Ivo Baux, and Pinnacle Anesth*e*sia, P.L.

Petitioner Frank Special will be referred to as "Petitioner" or "Special."

Respondents will be referred to as "Respondents," or "West Boca Medical Center" or "Dr. Baux," respectively.

STATEMENT OF THE CASE AND FACTS

Petitioner brought a medical malpractice action against Respondents, after his wife, Susan, died while undergoing a cesarean delivery at West Boca Medical Center, Inc. (West Boca) (A2). Petitioner alleged that Respondents were negligent in administering anesthesia, monitoring Susan's system and controlling her fluids during surgery, and in responding to her cardiopulmonary arrests (A3). Respondents contended that Susan's death was caused by amniotic fluid embolus (AFE), an allergic reaction from a mother's blood mixing with amniotic fluid, sometimes causing heart-lung collapse (A2).

The Fourth District noted that the "essential issue at trial . . . the crux of the lawsuit" was the AFE diagnosis (A5). Petitioner presented the testimony of the medical examiner that performed the autopsy, who concluded there was no evidence of AFE in Susan's body (A2).

Dr. Mark Adelman is a pulmonary specialist, who was called into the Hospital when Susan went into distress (A2). He diagnosed her with AFE based upon her clinical signs (A2). At trial, Petitioner asked Dr. Adelman about the number of patients diagnosed with AFE at West Boca, and he testified that he saw all patients diagnosed with AFE (A2). Dr. Adelman estimated he saw about 1-2 AFE patients per year at West Boca (A2). Statistics showed that West Boca's AFE diagnosis rate was about 15 times the rate elsewhere (A2).

Dr. Gary Dildy, the defense expert, opined that Susan died of AFE (A3). He reached this opinion through West Boca's medical records and tests (A3). He opined that AFE is a diagnosis of exclusion (A3). Dr. Dildy stated that the probability of AFE is 1 in 20,000, but can range from 1 in 8,000/80,000 (A3).

The trial court prohibited Petitioner from cross-examining Dr. Dildy about the reliability of Dr. Adelman's diagnosis of AFE in light of "the unusually high incidence of it at the hospital" (A3). The trial court ruled that Petitioner could only inquire about the statistical occurrence of AFE and discuss disproportional diagnoses in closing (A3).

Petitioner proffered Dr. Dildy's testimony (A4). The expert stated he would be "concerned" that AFE was being over-diagnosed at West Boca, assuming Dr. Adelman was accurately recollecting the incidence of AFE at West Boca (A4). Yet when Dr. Dildy was confronted with West Boca's diagnosis rate per year, Dr. Dildy insisted that Susan presented a case of AFE (A4).

In closing argument, Petitioner argued that West Boca either had an epidemic of AFE or was over-diagnosing it (A4). A jury determined that Respondents were not negligent (A4).

The initial panel decision affirmed the defense verdict. See Special v. Baux, 52 So.3d 682 (Fla. 4th DCA 2010). One judge concluded there was no error, and that any error would be harmless. A second judge concluded there was error, but harmless. The dissenting judge concluded there was harmful error.

On rehearing, sitting *en banc*, the Fourth District held that the proffered testimony was relevant to impeach Dr. Adelman's diagnosis, and should have been permitted (A5). The Fourth District explained that the frequency with which Dr. Adelman came to the AFE diagnosis conclusion bore upon *his* credibility (A5).

The Fourth District also held the proffered testimony was relevant to Dr. Dildy's testimony (A5). Nonetheless, it deemed the error harmless (A23). The Fourth District certified the following question as one of great public importance (A23):

> 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?

SUMMARY OF ARGUMENT

This Court already has discretionary review because the Fourth District certified a question of great public importance as to the harmless error test.

The Fourth District's adopted harmless error test is in express and direct conflict with decisions of other district courts of appeal. This Court should bring clarity to the district courts on this important and often-used test, which impacts hundreds of civil cases every year in application, if not in theory.

Separately, the Fourth District's s summary conclusion in this case that the evidentiary error was harmless expressly and directly conflicts with the "battle of

the experts" emphasis in medical malpractice cases. The Court reasoned the error was harmless because the excluded evidence would have been cumulative.

Yet it is precisely because medical malpractice cases depend on expert testimony that cumulativeness rarely, if ever, can equate to harmless error. The excluded testimony went directly to the credibility of the physician who diagnosed Susan with AFE, and the defense expert who purported to confirm this diagnosis.

ARGUMENT

The Fourth District's decision expressly and directly conflicts with other district court decisions on the harmless error test, whether in name or application. The Fourth District stated that, "[w]ithout specific guidance from the Supreme Court, the district courts of appeal have drifted in directions in applying a section 59.041 harmless error test to civil cases" (A17).

Other courts have held that harmful error is met when an appellant shows a different result "*may have been reached*." Hogan v. Gable, 30 So.3d 573, 575 (Fla. 1st DCA 2010); Murray v. Haley, 833 So.2d 877, 880 (Fla. 1st DCA 2003); Nat'l Union Fire Ins. Co. of Pittsburgh v. Blackmon, 754 So.2d 840, 843 (Fla. 1st DCA 2000); USAA Cas. Ins. Co. v. McDermott, 929 So.2d 1114, 1117 (Fla. 2d DCA 2006); Katos v. Cushing, 601 So.2d 612 (Fla. 3d DCA 1992); Gencor Industries, Inc. v. Fireman's Fund Ins. Co., 988 So.2d 1206 (Fla. 5th DCA 2008).

The Fourth District has shifted dramatically from this test in moving from what it deemed an "outcome-determinative but-for" test to an "effect on the trier of fact" test (A1). The "may have been reached" test is consistent with §59.041's admonition that the statute must be "liberally construed." It is also consistent with this Court's holdings that the beneficiary of the error must show that an error is harmless, see, e.g., Flores v. Allstate Ins. Co., 819 So.2d 740, 751 (Fla. 2002).

There is *another* harmless error test other district courts have utilized in civil cases. See, e.g., Webster v. Body Dynamics, Inc., 27 So.2d 805, 809 (Fla. 1st DCA 2010) (a party must show that "it is *reasonably probable* that a result *more favorable* to the [party] would have been reached if the error had not been committed" (emphasis added); In re Commitment of DeBolt, 19 So.3d 335, 337 (Fla. 2d DCA 2009) (*en banc*) (citation omitted).

Petitioner does not agree with this very harsh test, but it shows the conflict in the district courts of appeal. While this Court has not established a harmless error test in civil cases, one recent case establishes conflict with the Fourth District's application of harmless error in this case.

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 Petitioner's counsel discussed this in closing argument).

It is difficult to imagine how prohibiting cross-examination 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 was critical to the causation issue in this case.

Dr. Adelman was the only person at West Boca to diagnose 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 reached only after all the other

possibilities within the differential diagnosis are eliminated). Dr. Dildy's cross-examination lent a powerful evidentiary piece to Petitioner's argument that there was a rush to judgment in West Boca'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. Petitioner's counsel's discussion of statistical abnormalities in closing argument was not evidence; indeed the jurors would abdicate their role if they considered closing to be a substitute for evidence. Therefore, Dr. Dildy's testimony was also critical to provide specific evidence of West Boca 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, Dr. Dildy refused to budge on his AFE causation opinion. Again though, his opinion was premised on "his analysis of the Hospital's medical records and tests" (A3).

It is easy to see that some experts may have modified their opinions, or expressed at least a tiny bit of doubt when presented with the statistical abnormalities. Dr. Dildy, in a case that is a battle of experts, stood firm in his persistence in the proffered testimony that over-diagnosis at West Boca was *irrelevant* to his medical opinion. The Fourth District did not even consider the possibility that this persistence was adverse to Respondents' defense.

The Fourth District's decision is also 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.

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.

Separately, although certainly related, the Fourth District's view that the excluded testimony was merely cumulative of testimony (and closing argument) is also in conflict with Linn, Witham, and other district court of appeal decisions.

Medical malpractice cases are often battles of the experts, and credibility of experts in these cases 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 admission of 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, the First District relied on Linn, in granting a new evidentiary hearing to the claimant. Yet the Fourth District 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) Petitioner's counsel was able to explore this issue in closing argument. The Fourth District has now applied a cumulative

evidence test (or that plus a closing argument as a substitution for evidence test) that ignores 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). So too did the Fourth District recently, see Philippon v. Shreffler, 33 So.3d 704, 707 (Fla. 4th DCA 2010).

Again, the excluded testimony in this case went to the heart of the battle of expert witnesses on the crux of this case. Petitioner's claim that there was a rush to judgment by West Boca 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 Petitioner introduced some evidence of a statistical difference could not duplicate the impact of Dr. Dildy's cross-examination on this critical issue. Closing argument, again, could also never duplicate that excluded testimony. The Fourth District's cumulativeness and closing argument focus short-changed the impact of expert cross-examination in medical-malpractice cases.

CONCLUSION

This Court should accept jurisdiction of the Fourth District's question certified as one of great public importance. The *en banc* decision also expressly and directly conflicts with decisions from this Court and other district courts on appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to MICHAEL MITTELMARK, ESQ. and K. CALVIN ASRANI, ESQ., 621 N.W. 53rd St., Ste. 420, Boca Raton, FL 33487; EUGENE CIOTOLI, ESQ., 1240 U.S. Highway One, North Palm Beach, FL 33408; MARK HICKS, ESQ., and IRENE PORTER, ESQ., 799 Brickell Plaza, Ste. 900, Miami, FL 33131, by mail, on February 6, 2012.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Brief of Petitioner on Jurisdiction is Times New Roman 14pt.

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