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.
_____/

REPLY BRIEF OF PETITIONER ON MERITS

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

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

(IB) - Initial Brief on the Merits

(West Boca AB) - Answer Brief on the Merits of West Boca Medical Center

(Dr. Baux AB) - Answer Brief on the Merits of Dr. Baux

(A) - Appendix to Jurisdictional Brief

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 Trial Court Incorrectly Limited Dr. Dildy's Cross-Examination

West Boca does not attempt to argue that the trial court's evidentiary ruling was correct. It only addresses whether this error is harmless (West Boca AB 8). Disagreeing with West Boca's apparent concession, Dr. Baux devotes just two paragraphs of his Answer Brief to argue the trial court correctly excluded Dr. Dildy's cross-examination on AFE rates (Dr. Baux AB 29).

Dr. Baux states that defense experts did not rely on Dr. Adelman's diagnosis of AFE in rendering their opinions (Dr. Baux AB 29). Thus, Dr. Baux contends it was improper for the Plaintiff to call Dr. Dildy as a witness, "simply to impeach the doctor's opinion [presumably Dr. Adelman] in order to discredit the defense" (Dr. Baux AB 30) (citing to case law regarding improper impeachment of "an opposing party's expert witness").

Dr. Baux mentions a rule that would have limited the Plaintiff's ability to call Dr. Dildy as a witness, i.e., an opposing party's expert witness. However, it was the defense who called Dr. Dildy as an expert witness (T1111). Also, the

Defendant discusses a rule that restricts a party's ability to call an opposing expert witness "solely" to discredit another expert witness. Again, Plaintiff did not call Dr. Dildy as a witness and, further, the Plaintiff's cross-examination was not limited to discrediting an expert witness. The excluded testimony generally undermined the credibility of Dr. Dildy, Dr. Adelman, and the AFE defense.

Also, Dr. Adelman, while claiming to be an expert in AFE, was one of the physicians who diagnosed Mrs. Special with the condition and, thus, was a fact witness. By cross-examining on this subject, the Plaintiff was not seeking to attack Dr. Adelman or Dr. Dildy's truthfulness or character, but rather to undermine the defense theory which they supported.

Dr. Baux complains that it would have been unfair for the Plaintiff to cross-examine Dr. Dildy on AFE diagnoses by West Boca in other cases, since Dr. Dildy was unable to conduct a formal review of other cases in the Hospital (Dr. Baux AB 30). This is not a reason to exclude the cross-examination. Since Plaintiff's theory was that the Defendants (and Hospital health care professionals and experts) misdiagnosed Mrs. Special's condition, evidence that it was being over diagnosed was highly probative and critical to Plaintiff's case. Plaintiff had the right to confront the defense's proclaimed expert on this theory, Dr. Dildy.

The en banc Court held the excluded cross-examination would have had "bearing upon the credibility of" Drs. Dildy and Adelman's AFE diagnosis (A5).

The en banc Court also found the testimony "relevant" to Dr. Dildy's direct examination where he testified to the incidence of AFE births (A3, 5). The trial judge later acknowledged that, "It's an important issue" (T1228). The evidence was wrongly excluded.

Appellees Should Carry the Burden of Proving Harmless Error

The Fourth District correctly reasoned that the burden falls on the beneficiary of the error to prove it is harmless. Both Defendants point to §59.041, Fla. Stat., as proof that Appellants must prove an error is harmful. However, the statute is silent on this, and the Defendants do not coherently explain how the statutory language supports their viewpoint.

Dr. Baux contends that this Court has previously held that appellants must carry the burden to prove an error is harmful (Dr. Baux AB18-19) (citing Tallahassee Memorial Regional Medical Center, Inc. v. Meeks, 560 So.2d 778 (Fla. 1990)). There, this Court only stated that appellants must demonstrate error; the Plaintiff has not stated otherwise in this Court. An appellant should always have the burden to show there was an error.

This does not answer who has the burden to prove harmless error. In Meeks, this Court stated that "prejudice must be demonstrated." Id. at 782. This brief statement was not a pronouncement from this Court that appellants must bear the burden in civil cases to prove harmless error. Cf. Florida Patients Comp. Fund v.

Von Stetina, 474 So.2d 783, 793 (Fla. 1985) (Overton, J., concurring in part and dissenting in part) (observing that this Court has never set forth a harmless error test).

The Defendants' reliance on White Constr. Co., Inc. v. DuPont, 455 So.2d 1026 (Fla. 1984), is also misplaced. This Court cited to §59.041, but did not state that the appellant had the burden to prove the evidentiary error was harmful. This Court did not address the issue at all.

West Boca contends that State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) "require[s] that appellants carry the burden in civil appeals" (West Boca AB 11). The only discussion of who carries the burden was this Court's statements that the state was the beneficiary of the error, and would have the burden to prove harmlessness. Id. at 1135, 1136, 1138, 1139. So, too, should the burden be placed on the beneficiary of the evidentiary error in civil cases.

Both Defendants minimize prior civil cases from this Court (explaining that appellees must prove an error is harmless) by stating those were cases with "clear" or "obvious" error (IB 27) (citing to these cases). The Defendants do not explain why the supposed degree of an erroneous evidentiary ruling should guide who has the burden on appeal. Asking appellate judges to assess the severity of the error as a prerequisite to allocating the burden on harmless error would lead to subjective, unpredictable and inconsistent results.

Further, there was clear and obvious error in this case. West Boca does not defend the trial court's evidentiary ruling. Dr. Baux devotes one page of his 50-page Answer Brief to defend the trial court's ruling.

The Defendants also state that the burden should only be placed on appellees who improperly introduce evidence, as opposed to here where evidence was improperly excluded. This is not a logical distinction. Highly relevant evidence was kept from the jury's consideration. The Defendants prevented the Plaintiff from having a fair trial on properly admitted evidence. If they did not wish to prove the error is harmless, they should not have introduced the error to the trial.

The Defendants mention District Court of Appeal decisions which place the burden on appellants (West Boca AB 15) (citing cases). Those decisions do not explain why appellants should carry this burden, nor do they explain why appellees should not. It appears the Fourth District is the only District Court to have examined the reasoning of these past decisions, and it receded from the decisions in its Court placing the burden on appellants. The only appellate judges outside the Fourth District to have touched upon this issue apparently agree with the Fourth District. See Bill Kasper Constr. Co., Inc. v. Morrison, 93 So.3d 1061, 1064 (Fla.

5th DCA 2012) (four judges concurring state that "the burden is on the beneficiary of the erroneous ruling to demonstrate that the error did not cause harm").[1]

The Defendants also believe that appellants in civil cases should be required to prove errors are harmful, because life and liberty are not at stake, as in criminal cases. Mrs. Special died while delivering her baby. Her Estate is entitled to a fair trial, and it is fair for the beneficiary of an error to prove it is harmless. As West Boca admits, many jurisdictions utilize the same harmless error test in civil and criminal cases. See, e.g., McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985). Indeed, in McQueeney, the Third Circuit reasoned, id. at 927:

> [B]road institutional concerns militate against increasing the number of errors deemed harmless. Although it is late in the day to pretend that all trials are perfect, perfection should still be our goal. Judge (now Chief Judge) Robinson put the point well:
>
> > The justification for harmless-error rules is single-minded; they avoid wasting the time and effort of judges, counsel and other trial participants. Other considerations enter into the picture, however, when we set out to ascertain what is harmless and what is not. Wisdom of the ages counsels against appellate erosion of the stature and function of the trial jury. Societal beliefs about who should bear the risk of error in particular types of proceedings deserve weight in decisions on harmlessness. Respect for the dignity of the individual, as well as for the law and the courts that administer it, may call for

[1] Bill Kasper addressed certiorari jurisdiction to review a pre-trial ruling denying discovery. The majority did not address harmless error. The concurrence reasoned that the denial of discovery would not cause irreparable harm to a moving party, in part because appellees (on plenary appeal) would carry the burden to prove an error is harmless. 93 So.3d at 1064.

> rectification of errors not visibly affecting the accuracy of the judicial process. And the prophylactic effect of a reversal occasionally might outweigh the expenditure of effort on a new trial.
>
> United States v. Burton, 584 F.2d 485, 512-13 (D.C.Cir.1978) (Robinson, J., dissenting). By maintaining a moderately stringent, though not unreasonably high, standard in civil as well as criminal cases, we preserve a strong incentive for the district courts to minimize their errors, and we thereby bolster the integrity of the federal judicial process.

See also Williams v. U.S. Elevator Corp., 920 F.2d 1019, 1023 (D.C. Cir. 1990) (reaffirming that a harmless error analysis in civil cases would match the standard in criminal cases); Aetna Cas. and Sur. Co. v. Gosdin, 803 F.2d 1153, 1160 n.13 (11th Cir.1986) (noting that precedent in the Circuit holds that the same harmless error standard applies in civil and criminal cases).

The Harmless Error Test

The Initial Brief advocates a fair test that this Court should adopt in civil cases: an appellee, as the beneficiary of the error, must demonstrate there is no reasonable possibility that the error contributed to the verdict. The Defendants' tests are flawed and unfair to parties who never introduced the error in the first place. The dual effect of placing the burden on appellants to prove harmful error, and the Defendants' proposed standard would make it almost impossible for evidentiary errors to result in new trials.

Dr. Baux asserts this Court can follow a "plain language" test of what it characterizes as an unambiguous statute, §59.041. The statute provides no clarity on how courts are to determine whether there has been a "miscarriage of justice." Dr. Baux stated this phrase is "somewhat subjective," which is precisely why it cannot reasonably be characterized as unambiguous (Dr. Baux AB 15-16). Section 90.104, Fla. Stat., also offers no clarity. A new trial is warranted when "the substantial rights of a party are adversely affected." These phrases need guidance from appellate courts, to set a framework for whether a new trial is warranted. The statutory terms otherwise mean nothing in application. A party who wins a jury trial never believes the substantial rights of the losing party are adversely affected.

Dr. Baux is not credible in arguing there is no inter-district conflict on harmless error (Dr. Baux AB 27-29). West Boca does not appear to acknowledge the conflict, but cites to cases utilizing a "reasonable probability" and "reasonable possibility" test, exemplifying the conflict (West Boca AB 18-25).

The Fourth District's Opinion addressed the conflict at length (A17-21). The Plaintiff's Initial Brief demonstrated that there is also intra-district conflict. See IB 31 n.10. The First District recently utilized two different standards in a six-day span. Compare Hogan v. Gable, 30 So.3d 573, 575 (Fla. 1st DCA 2010) (asks "whether the result may have been different had the error not occurred" with Webster v. Body Dynamics, Inc., 27 So.3d 805, 809 (Fla. 1st DCA 2010) (asks

"whether it is reasonably probable that the appellant would have obtained a more favorable verdict without the error"). Cf. Saleeby v. Rocky Elson Constr., Inc., 3 So.3d 1078, 1079 (Fla. 2009) (Canady, J., dissenting) (observing that the First District utilized a different "harmless error standard" from the Second District).

Dr. Baux suggests the differences are "stylistic," which is meritless (Dr. Baux AB 28). Dr. Baux's standard would require appellants to prove with reasonable probability that a different result would have been reached without the error (Dr. Baux AB 24). West Boca advocates a test that asks "whether there was a reasonable probability that the error affected the verdict causing a miscarriage of justice" (West Boca AB 18). These tests resemble the one [often] used in the Second District (IB 31) ("whether it is reasonably probable that the appellant would have obtained a more favorable verdict without the error"); but see USAA Cas. Ins. Co. v. McDermott, 929 So.2d 1114, 1117 (Fla. 2d DCA 2006) (asking "whether the result may have been different had the error not occurred").

There is far more than a stylistic difference in a "may have" and "would have" test, as well as phrases like "reasonable possibility" and "reasonable probability." This is especially so if courts place the burden on appellants to prove harmfulness. The burden and test directly impact the opportunity for an appellant to receive a new trial.

The test this Court adopts in civil cases should be workable in practice, and fair to all parties. The Plaintiff's proposed test accomplishes this task. It deters parties from introducing error. It will not open the floodgates to reversible error. Nor will it curtail the ability for a new trial, as the Defendants seek to accomplish.

The Limitation on Dr. Dildy's Cross-Examination is Not Harmless Error

The evidentiary error was not harmless. The Defendants ignore the weight of evidence which a reasonable jury may have given (or will give) to the excluded testimony. Both Defendants follow the Fourth District's lead in reasoning the error was harmless because it was cumulative to admissible evidence. This ignores the purpose of the excluded testimony.

For evidence to be cumulative, "the substance, function and effect of the previous evidence should be the same." Wax v. Tenet Health Sys. Hosp., Inc., 955 So.2d 1, 4 (Fla. 4th DCA 2006). The Defendants do not suggest Dr. Dildy's excluded cross-examination falls into this category. Rather, after they led the trial judge into error with meritless objections, they trivialize the importance of the excluded evidence.

The focal point of this medical-malpractice case was the AFE diagnosis. Dr. Dildy was the Defendant's primary expert on AFE, and Dr. Adelman was a Hospital physician, and fact witness. Dr. Dildy's causation opinion was admittedly based on clinical findings and conclusions reached by health care providers at

West Boca. The jury heard evidence of AFE rates in Dr. Adelman's testimony. However, the jury did not hear the evidence from the Defendant's AFE expert on over diagnosis, his acknowledgment of this over diagnosis, and his persistence in maintaining with certainty that Susan Special died of AFE, despite the Hospital's frequency to over diagnose.

The Defendants suggest that Dr. Dildy's resoluteness in his proffer may have been damaging to the Plaintiff if before the jury. The Defendants obviously did not think so when they objected at trial; otherwise why did they object so vigorously? The Defendants ignore that the jury likely would have found Dr. Dildy less than credible if he refused to show any equivocation in his causation opinion, confronted with the Hospital's overall diagnosis rate. AFE is a diagnosis of exclusion, reached only after every other possible cause is excluded. The Plaintiff's theory was that the Hospital consistently rushes to judgment, over diagnoses this rare condition, and overlooks other possibilities. Dr. Dildy stated that he reviewed the conclusions reached by Hospital personnel (T1185, 1254-56). He may have lost all credibility before the jury by showing undivided and unreasonable loyalty to the Defendants' position.

The Defendants suggest that the jury was able to perform a mathematical analysis of over diagnosis, based on admissible evidence via Dr. Adelman. The

Defendant is speculating what jurors may have done after the Defendants successfully excluded evidence from the chief defense expert.

West Boca argues it "belies common sense that a hospital can negligently diagnose patients" (West Boca AB 26). This statement is puzzling; medical providers can easily over diagnose patients, and hospitals are not immune from group diagnosis. The diagnosis rate is highly relevant where the Hospital raises a defense that its patient died from a condition that is a diagnosis of exclusion, after every other diagnosis is (supposedly) ruled out.

Both Defendants emphasize that Plaintiff's counsel was able to address AFE rates in closing argument. The Defendants ignore the basic premise that closing argument is not evidence (IB 38-39). Plaintiff's counsel could not mention the excluded cross-examination in closing, or how it tied to the AFE defense; nor demonstrate the weakness in Dr. Dildy's unreasonable opinions. The wrongly-excluded evidence in this case was of significant weight.

The Defendants also ignore the discussion of cumulativeness in Witham v. Sheehan Pipeline Constr. Co., 45 So.3d 105, 109 (Fla. 1st DCA 2010), a case which rejected the argument made by the Defendants in this case.[2] In Witham, as here, the appellee contended there was harmless error because the improperly

[2] The First District also utilized a "may a different result have been reached" test. Witham, 45 So.3d at 109.

admitted evidence was simply consistent with admissible testimony (45 So.3d at 109-110; IB 35). The First District rejected the appellee's argument.

The First District concluded the evidentiary error (regarding expert testimony) was the "focal point of the trial" (45 So.3d at 110) ("where expert testimony as to a particular issue is the focal point of the trial, the erroneous admission of expert evidence constitutes harmful error") (IB 35-36). Additionally, the First District reasoned that the "error in the admission of evidence [cannot be] harmless simply because there is additional admissible evidence in the record to support the ultimate result below (45 So.3d at 110).

In this case, the exclusion of testimony was the focal point of the trial. The "admissible evidence" could not replicate Dr. Dildy's testimony, the defense AFE expert. As the initial panel's dissent wrote, "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." Special v. Baux, 52 So.3d 682 at 688 (Fla. 4th DCA 2010) (Farmer, J., dissenting).

The Defendants contend that this Court's finding of harmful error in Linn v. Fossum, 946 So.2d 1032 (Fla. 2006), was only because the evidentiary error in the medical malpractice case addressed "standard of care." Id. at 1041. The

Defendants' interpretation is not reflected in this Court's Opinion. In any event, Mrs. Special's death and the AFE diagnosis was the central issue in this case. If the jury did not believe Mrs. Special died of AFE, the jury very well could have believed Dr. Baux deviated from the standard of care and caused her death.

Both Defendants minimize the excluded testimony because they state Dr. Adelman only estimated as to the incidence of AFE in his trial testimony (West Boca AB 28). Dr. Adelman was unequivocal in his pre-trial deposition that there were 1-2 AFE cases per year that he observed (T1042). The figures in the deposition and the estimated figures in the proffer were for the jury to weigh.

Dr. Baux also suggests that because Dr. Adelman was proven wrong about the number of annual births at the Hospital, he must have been wrong about the annual cases of AFE. Surely though, a jury could have reasonably concluded that Dr. Adelman's inability to recall the number of annual births was insignificant, while his ability to recall deaths of mothers giving birth due to AFE was significant. The Plaintiff was entitled to cross-examine Dr. Dildy on these figures.

Here, the Fourth District ultimately substituted its own decision for that of a jury in a hypothetical trial in which the evidentiary error was not committed, which is the trial the Plaintiff was entitled to in the first place but never received. The Fourth District, having correctly found error, placed itself in the unenviable

position of trying to decide how this hypothetical trial would have turned out, if the excluded but undeniably significant evidence had been admitted.

No matter what the members of the Fourth District believed the more likely outcome of a trial without the evidentiary error would have been, it is unquestionable that the Plaintiff was denied a trial without the jury's consideration of Dr. Dildy's powerful testimony on the focal point of the trial. The Plaintiff should be given that opportunity. The Defendants are unable to prove there was no reasonable possibility that the evidentiary error contributed to the verdict.[3]

POINT II

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

This Court has discretion to consider this evidentiary issue. The Defendants do not suggest this Court lacks this authority. Since the certified question before this Court is the harmless error test, it is appropriate for this Court to review the record to assess all errors. An application of the harmless error test is not possible without doing so. The attempted intimidation of Dr. Wolf is inextricably intertwined with the issues already before this Court.

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[3] As explained in Point II, infra, there were multiple evidentiary errors, not just this evidentiary error regarding Dr. Dildy's cross-examination.

Contrary to Dr. Baux's argument, the Plaintiff preserved for appellate review his contention that the trial court erred in refusing to collectively consider all circumstances of intimidation. Plaintiff presented evidence regarding Dr. Wolf's administrative proceedings and deposition to the trial judge, and asked the trial judge for permission to present this evidence before the jury. Attempted intimidation is often something that can only be shown by circumstantial evidence; parties in sophisticated litigation would not leave a trail of direct evidence.

Dr. Baux faults Plaintiff for not utilizing "magic words" when it was obvious to the trial court that Plaintiff believed there was sufficient evidence for this issue to reach a fact-finder, when reviewing the evidence in the totality of the circumstances. Nothing more is demanded for appellate review. See, e.g. Ruddy v. Carelli, 54 So.3d 1055 (Fla. 5th DCA 2011):

> [Appellee] argues that [Appellant] did not preserve his argument that the policy condition requiring him to join the tortfeasor was void as against public policy. We believe this argument is unpersuasive because [Appellee] argued below the general proposition that an uninsured is not required to file suit against the tortfeasor as a precondition to obtaining uninsured motorist benefits.

The Defendants repeat the trial judge's error by focusing on Dr. Wolf's testimony that her expert opinions were not altered by the attempted intimidation. However, the attempt to intimidate is what is probative in this context. See Jost v. Ahmad, 730 So.2d 708, 711 (Fla. 2d DCA 1998) (IB 41-42). A witness' refusal to

be intimidated is not a viable reason to exclude the evidence from the jury's consideration. The Defendants' position linking the evidentiary value to the "success" of the intimidation efforts ignores the very reason why fact-finders are entitled to hear this evidence: the attempt to intimidate reveals an opposing party's consciousness of guilt, or awareness of the weakness of his or her case (IB 41) (citing cases).

The Defendants narrowly and incorrectly focus on who initiated Dr. Wolf's administrative complaint. Dr. Factor was Dr. Baux's retained expert in administrative proceedings against Dr. Baux, and for one and a half years during the litigation of this case. Dr. Factor filed a report in the administrative proceedings against Dr. Wolf, where she risked losing her license (IB 18, citing P's Ex. 2). A "pathologist" reviewed the tissue "[a]t the request of a defense attorney." Id. The Defendants' medical expert actively participated in the proceedings.

Dr. Factor's report was materially false. While Defendants continue to dispute this, the record shows otherwise. The Defendants did not defend Dr. Factor's Report or Opinions before the lower courts, and do not do so before this Court. Neither Defendant presented Dr. Factor at trial; it is obvious they knew his opinions had no credibility. At trial, Dr. Baux's own expert pathologist testified "there is not one classic diagnosis criteria" of AFE on any of Dr. Wolf's autopsy slides (T2331). Dr. Factor's report was the basis for the initiation of the

proceedings against Dr. Wolf. The fact a government employee appears to have initiated the proceedings should be of no import to whether there was an attempt by the Defendants to intimidate Dr. Wolf and, more specifically, whether a fact-finder should consider this evidence.

While the Defendants also disagree on this, the record is undisputed that Dr. Baux provided his authority, knowledge or consent for Dr. Factor's participation in the administrative proceedings (IB 10, 48).[4] Dr. Factor issued a Report stating with "absolute certainty" that Susan died of AFE (IB 10). Dr. Factor stated he never would have participated in the proceedings without Dr. Baux's approval (R14:2735-2800; Dep. 30-36).

The trial court erred by taking this issue from the fact-finder. Dr. Baux's statement that he had no knowledge of Dr. Factor is implausible, and certainly not conclusive. At the least, it is for a jury to make this determination. Dr. Factor was the expert in the administrative proceedings against Dr. Baux. Dr. Factor was Dr. Baux's expert in this case.

The pre-deposition communications by Dr. Baux's counsel also revealed the intent to intimidate. The Defendants contend they have the right to communicate

[4] Dr. Baux's contention of waiver on this point is also incorrect. The discussion during trial and in the post-verdict hearing reflects Plaintiff's position that Dr. Baux and his attorney gave authority, knowledge, or consent. Dr. Baux's attorney's actions are imputed to him.

with witnesses (West Boca AB 49). They may, except when there is evidence of improper communications, i.e., an attempt to intimidate.

Dr. Factor's photographs of Dr. Wolf's own autopsy slides were presented by defense counsel to Dr. Wolf immediately before her deposition, with the suggestion she review them (T747). Dr. Wolf had prepared the slides and they were in the medical examiner's office for her review at any time. A jury can reasonably believe that defense counsel's actions, and the timing, were a reminder of the disciplinary action hanging over her. Dr. Wolf testified that the meaning of Dr. Baux's counsel's actions was clear to her, and she felt intimidated. The standard for relevance and admissibility of the evidence was easily satisfied. Jost, 730 So.2d at 710.

The communications between Dr. Baux and Dr. Wolf's counsel also reveal an attempt to intimidate. There were no hearsay concerns, since Dr. Baux and Dr. Wolf's attorneys are agents for their clients. Compare Nagel v. State, 774 So.2d 835 (Fla. 4th DCA 2000) (out-of-court conversations were between police officers, not parties and their agents).

The attorney communications in this case (as then relayed to the client, Dr. Wolf) also give context as to why Dr. Wolf arrived early to her deposition, to review Dr. Factor's photographs of the autopsy slides. West Boca asserts that Dr. Wolf was "mistaken" in believing defense counsel attempted to intimidate her; Dr.

Baux deems his attorney's actions to be a "courtesy" (West Boca AB 45 n.3). Reasonable jurors may find these positions, frankly, unbelievable.

The Defendants suggest there was insufficient evidence of an attempt to intimidate to present to the jury, but the cases they rely on for their argument are distinguishable. In 5 Star Builders, Inc. v. Leone, 916 So.2d 1010 (Fla. 4th DCA 2006), the excluded evidence did not involve any communications from the party with an interest in the litigation, only letters from a third party's attorney with no direct interest in the case. Additionally, neither the author of the letters, nor the recipient was available to testify. The appellate court specifically distinguished Jost, supra, because in that case the treating physician who had been subject to witness tampering was available to testify. That was the precise situation here, since Dr. Wolf testified live at trial.

In Nagel, supra, the Fourth District found error in the admission of a police officer's testimony about an out-of-court statement made by another officer. There was no evidence that that other police officer was speaking with the defendant's authority, consent, or knowledge. Here, the relevant conduct was that of Dr. Baux's retained expert witness, and his defense counsel. There is no question that those individuals were acting with Dr. Baux's authority, and on his behalf.

Penalver v. State, 926 So.2d 1118 (Fla. 2006), also bears no resemblance to the case sub judice. There, the only evidence of witness tampering was that one

witness had communications with the criminal defense counsel prior to trial. There was no evidence as to the content of those discussions and this Court found that that was insufficient evidence to justify an implication that the defense had tampered with a witness. Here, obviously, the attempts at intimidation were clearly shown by the filing of a false report and the utilization of a pending disciplinary proceeding in an attempt to influence Dr. Wolf's deposition testimony.

Finally, Manuel v. State, 524 So.2d 734 (Fla. 1st DCA 1988), is also distinguishable. In that case, the witness testified to a phone call which appeared to be an attempt to influence his testimony, but he could not identify the caller, nor was there any evidence to link that caller to the defendant. Under those circumstances, the court held that the evidence was insufficient to be admitted before the jury, because there was no showing that it was done with the authority, consent, or knowledge of defendant. Here, as noted above, the identity of the participants and their linkage to the Defendant was demonstrated.

The Defendants do not suggest the trial court's ruling on this issue could be harmless error. It is not, individually or cumulatively.

CONCLUSION

For the reasons stated above and in the Initial Brief, Plaintiff is entitled to a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been electronically filed via e-file@flcourts.org and furnished to all counsel on the attached service list, by email, on December 18, 2012.

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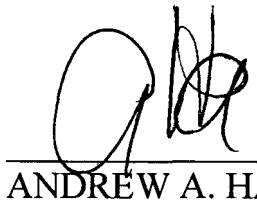

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Special v. West Boca
Case No. SC11-2511

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