IN THE SUPREME COURT

STATE OF FLORIDA

WILLIAM J. VICKERS,

Petitioner,

v.

ANNIE D. THOMAS,

Respondent.

_____/

Appeal No.: SC18-270

DCA Case No.: 5D15-3610

L.T. Case. No.: 11-CA-2198-08-L

RESPONDENT'S ANSWER BRIEF

Jeffrey M. Byrd, Esquire
Florida Bar # 0959596
Heather A. Trombly, Esquire
Florida Bar #118128
Jeffrey M. Byrd, P.A.
2620 E. Robinson Street
Orlando, FL 32803
(407)423-1313
(407)422-5297
attorneybyrd@aggressiveattorneys.com
pleadings@aggressiveattorneys.com
attorneyhtrombly@gmail.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Sources

Statement of Case

Respondent, Annie D. Thomas, was permanently injured in an automobile crash caused by Petitioner, William J. Vickers, on May 15, 2010, and filed suit. The case proceeded to trial in the Eighteenth Judicial Circuit, of and for Seminole County, and the jury awarded Thomas damages for $116,572.29 in past medical expenses, $38,000 in past lost earnings, $353,100 in future medical expenses, $164,673.60 in lost earning ability for future years, $225,000 for past pain and suffering, and $587,500 for future pain and suffering; thus awarding a total of $1,484,845.89. After extensive post-trial motion practice by Petitioner, Petitioner appealed to the District Court. After reviewing the perfected brief file, the record, and hearing oral arguments, the District Court affirmed the trial court in part, reversed in part, and remanded for a new trial or remittitur on the issue of damages for future loss of earning capacity alone. *Vickers v. Thomas*, 2017 Fla. App. LEXIS 19470, 43 Fla. L. Weekly D 28 (Fla. 5th DCA 2017).

A. Procedural History

The crash causing Thomas's permanent injuries occurred on May 15, 2010. R. 28-29. Thomas filed suit in June 17, 2011. *Id.* The case was tried in the Eighteenth Judicial Circuit Court in and for Seminole County, FL in November of 2014. T. 1. The jury returned a verdict for Thomas on November 21, 2014. R. 835-36. Petitioner filed Motions for (1) a New Trial, (2) Remittitur, and (3)

Motion for Partial JNOV and Renewed Motion for Mistrial on December 8, 2014. R. 1470-98. Petitioner amended his Motion for New Trial and Renewed Motion for Mistrial twice – once on June 9, 2015 and then again three months later on September 9, 2015. R. 1521-1538; 1539-68. Thomas filed a Response in Opposition on September 10, 2015. R. 1580-1603. The trial court held the post-trial hearing on the motions on September 11, 2015. R. 1604-05. Petitioner has failed to file that transcript. On October 23, 2015, the trial court entered its order denying Petitioner's post-trial motions. R. 1629-30. The final judgment was entered on October 7, 2015. R. 1619. Petitioner filed the notice of appeal to the district court on October 9, 2015.

B. Statement of Facts

On May 15, 2010, Appellee, Annie D. Thomas, was hit in a significant collision caused by the Petitioner, William Vickers, that pushed Thomas's stopped car onto railroad tracks, as a train was approaching. Thankfully, Thomas was able to get off the train tracks, but she did not escape the automobile crash without injuries. Thomas sued Petitioner for negligently causing her permanent damages. R. 28-29.

The trial ran for a duration of five full days, with opening statements starting on November 17, 2014 and closing arguments taking place on November 21, 2014, concluding at 3:53 pm. During this five-day trial, for Plaintiff, Drs. Masters, Dunson, Mahan, and Masson testified, as well as Plaintiff, and one lay before-and-

after witness. Defendant (Petitioner) had Mr. Smith (in-house counsel for Plaintiff's insurance company), and Drs. Hurbanis and Foley. The testimonies of Dr. Hurbanis and Dr. Foley took the entire day of trial on November 20th, 2014 (trial started at 9:09 am and concluded at 5:37pm). *See generally transcript.*

During trial, Thomas testified that she currently works for the United States Postal Service ("USPS"), making $26.39 per hour, and made roughly $25 per hour at the time of the accident, 4.5 years before trial. T. 1017-18. Thomas is 62 years old, with a high school education. T. 963; 966. She expected to retire at 67 years old, though due to her injuries and the pain, she definitely did not believe she would be able to work to her desired retirement. T. 1022. Prior to working for USPS, Thomas was an oncology abstractor, until the field became obsolete. T. 964. Those were her only two jobs over nearly thirty years. T. 964; 966-67. Thomas's doctors testified to her continued pain, the permanent injuries she sustained, her lack of recovery at the time of trial, and that the permanent restrictions that they would put her on were contrary to her job and could in fact, cost her her job. T. 629; 384; 403-35; 437; 439; 444; 449; 590; 624-27; 634-35; 863-79; 884-90; 969; 1003-05; 1022. Thomas testified that she missed 235 days of work, due to the crash, over the 4.5 years before trial. T. 1018-21. Petitioner argued that her employment records only showed 137 days, yet these incomplete employment records only showed the days missed from 2010 through 2012, when the trial was

at the end of 2014. *See* T. 1036-37. Thomas testified, uncontroverted, that her employer would force her to apply for FMLA leave of twelve weeks if she went out for surgery, and recovery for the neck surgery would be 3 to 6 months, meaning her employer would not have to keep her. T. 1005; 1018-21; 1023-24; 1073; 1077. She further testified that surgery would be her next step as she felt that her life was being cut short due to the pain. T. 1004. Throughout trial, Thomas's doctors testified to the treatments they were reasonably certain that she would need in the future, as well as the costs. T. 626-27; 631-34; 447-48; 885-889.

Dr. Masters testified about the specifics of Thomas's condition, when she came to see him, how long he treated her, and that she had a permanent impairment rating based on AMA guidelines of 12 to 15 percent. T. 384; 403-34; 435; 439.

Dr. Masson also testified to Thomas's condition, when she started treating with him, that Thomas was still treating with him, and that surgery was being discussed – and that the surgical recommendation had changed from artificial disk replacement to fusion surgery in her neck. T. 863-64; 868-76; 878-79 (more than enough to justify a surgical recommendation in her low back as well); 884; 886; 887.

Dr. Hurbanis testified that he commonly sees shoulder and knee problems and that the only surgery he does not do is spine surgery. *See* T. 1143 (Hurbanis: shoulders and knees are common problems he sees; only surgery he does not do is

spine surgery); 1187 (not a spine surgeon); 1215-16 (Hurbanis - $1,250 per hour); 856 (Hurbanis: Dr. Masson specializes in spine surgery).

During Dr. Foley's cross-examination, he was asked by Thomas about medical literature. T. 1438-46. The substance never came out and he was never impeached. Petitioner objected to several of the questions, which the trial court properly exercised its discretion, ruling on the specific question asked. *Id.* Thomas asked questions to lay ground work to impeach one of Petitioner's experts with an authoritative text or to establish enough framework for the trial court to take judicial notice. The questioning did not reach the point of impeachment according to the trial court. The District Court disagreed, but found the questioning to be harmless. *See Vickers v. Thomas*, 2017 Fla. App. LEXIS 19470 *3, 43 Fla. L. Weekly D 28 (Fla. 5th DCA 2017).

During closing arguments, Thomas went through the evidence presented at trial and presented arguments regarding the characterization of the evidence and witness bias. For the sake of space and economy, the complained-of comments are detailed in the argument below.

C. District Court Appeal

At the district court level, Petitioner challenged the alleged impeachment of Dr. Foley, the trial court allegedly "err[oring] in failing to remit or direct a verdict on

certain damage awards not supported by any credible evidence," and claiming that "a new trial is required due to Plaintiff's counsel's exceedingly improper and inflammatory comments during closing arguments."

D. **District Court Opinion**

In relevant parts for this appeal, the District Court held that the future loss of earning capacity damages were speculative and reversed and remanded for a remittitur or a new trial solely on the issue of damages for loss of earning capacity. The District Court did not state a "but for" standard and cited to Florida Statute § 59.041 and stated to *"see also Herbello v. Perez*, 754 So. 2d 840, 840 (Fla. 3d DCA 2000) (finding that erroneous evidentiary rulings did not affect the outcome of trial; therefore, the errors are harmless.)."

In the District Court, Petitioner challenged eighteen closing argument comments, of which only seven were preserved for appellate review. The District Court only cited one preserved comment as improper and stated that it **did not** meet the standard of being "highly prejudicial, inflammatory, and improper." The District Court continued that they did not find that the improper comments were so highly prejudicial and inflammatory as to deny Petitioner a fair trial. The District Court did not identify what comment it was referring to. It further held that the lower court's failure to give a curative instruction on the one comment was

harmless. The District Court again cited to Florida Statute § 59.041 and cited to *Bakery Assocs., Ltd. v. Riguad*, 906 So. 2d 366, 367 (Fla. 3d DCA 2005).

The District Court concluded its opinion by citing to another case where Petitioner's trial counsel's closing arguments were challenged, and stating in summary, that if there is improper comment that merits reversal, that it will "lead to a new trial in the appropriate case." In Petitioner's brief, she misconstrues Respondent's trial counsel as a "repeat offender." This is not the case at all. Respondent's trial counsel is a very seasoned attorney, who successfully tries roughly 6-8 cases per year, most resulting in verdicts close to or well over a million dollars. This results in a plethora of appeals from insurance companies trying to avoid liability. The trend for these appeals has been for the insurance companies to unsuccessfully appeal primarily unobjected-to closing argument comments. Respondent's trial counsel has never been reversed on any of these allegedly improper comments, and as such is not a "repeat offender."

In footnote #2, the Fifth District wrote: "While certain evidentiary rulings were erroneous, such as allowing cross-examination of a medical expert with text the expert did not recognize as authoritative, the errors were harmless. *See* § 59.041, Fla. Stat. (2011); *see also Herbello v. Perez*, 754 So. 2d 840, 840 (Fla. 3d DCA 2000) (finding that erroneous evidentiary rulings did not affect outcome of trial; therefore, errors were harmless)."

Additionally, the Fifth District also expressly wrote: "Under the circumstances of this case, we find that the improper comments were not so highly prejudicial and inflammatory as to deny Vickers a fair trial. The trial court's failure to give the curative instruction was harmless on the facts of this case. *See* § 59.041, Fla. Stat. (2011); *Bakery Assocs., Ltd. v. Rigaud*, 906 So. 2d 366,367 (Fla. 3d DCA 2005)."

Finally, in footnote 5, the Fifth District expressly stated that "On appeal, Vickers cites to eighteen comments Thomas's counsel made during closing arguments warranting reversal for a new trial. The majority of the comments were unobjected-to, unpreserved for appeal, and failed to rise to the level of fundamental error. *See Murphy v. Int'l Robotic Sys.*, 766 So. 2d 1010 (Fla. 2000). Of the seven comments preserved for appeal, our ruling on the loss of future earning capacity cures three of those comments. Additionally, Vickers's position that Thomas characterized the defense as a "grand scheme" is not supported by the record." These expressly written statements show that the Fifth District did engage in a proper analysis under *Special*.

Summary of Argument

The Fifth District applied the correct standard for each question it was asked to rule on; however, Respondent challenges the Fifth District's holding on the issue of loss of future earning capacity.

Petitioner asks this Court to rule on two questions never before presented to the trial court or the district court, never before part of the appellate process, claiming that the district court erred by not applying the right standard to these questions that it did not ask it to review.

Petitioner complains of a short, isolated line of questioning of his expert Dr. Foley, regarding medical literature that his professional witness did not find authoritative. This isolated line of questioning was never brought up again in trial, and consisted of very limited questioning. *See* T. 1438-46. While Petitioner claims there was an improper impeachment and the Fifth District considered it impeachment, Thomas respectfully disagrees as the questioning never reached that point. However, even if there was error, it would be harmless under *Special*.

For the two challenged closing remarks, Petitioner presents different questions of law on both of these than he did to the district court, shifting the question of if Thomas's actions constituted prejudicial error enough to deprive Petitioner of a fair trial, to if the trial court's denial of a curative instruction and overruling of an objection was harmful error. This is improper and these arguments

cannot be brought on appeal for the first time to this High Court. Even if this Court, chooses to hear these issues on the merits, neither of these complained of actions of the trial court were improper, and even if this Court finds them to be error, any error would be harmless with no reasonable possibility of contributing to the verdict.

The Fifth District held Thomas to a higher standard of proof than is required for proving damages for loss of future earning capacity. Thomas provided sufficient evidence to meet the standard of the current case law, yet the Fifth District held that her evidence was speculative and not reasonably certain. During oral argument, it became clear that the Fifth District was looking for a beyond a reasonable doubt standard, over a reasonably certain standard.

This Court should affirm the portions of the verdict that the Fifth District affirmed, and reverse the portion of the Fifth District's holding that reverses Thomas's award for loss of future earning capacity, thereby reinstating the full final judgment of the trial court.

Standard of Review

Petitioner does not state a standard of review in his brief, but merely argues that there is error and therefore, the harmless error test must be employed. *See* Initial Br. 9-30. In his initial brief before this Court, Petitioner complains about the trial court's exercise of discretion with handling objections during the cross-

examination of a witness (Dr. Foley), overruling objections during closing on two allegedly improper closing argument remarks, and (for the first time) the trial court's alleged failure to give a curative instruction.

The trial court's rulings on Petitioner's objections to questioning of Dr. Foley is reviewed for an "**abuse of discretion** as limited by the rules of evidence." *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956, 960 (Fla. 4th DCA 2013) (emphasis added). *See also Kirkpatrick v. Wolford*, 704 So. 2d 708, 710 (Fla. 5th DCA 1998). A trial court's decision to admit (or exclude) evidence is reviewed under the **abuse of discretion** standard. *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1274 (Fla. 2014)(emphasis added).

Appellate courts must apply the **abuse of discretion** standard for review of allegedly improper closing argument as the trial judge is in the best position to determine the propriety and potential impact. *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1031 (Fla. 2000) (emphasis added).

While the argument of the alleged failure to give a curative instruction has been waived by Petitioner, and cannot be brought for the first time on appeal to this Honorable Court, should this Honorable Court chose to review it, the standard of review for a court exercising its discretion to not give a curative instruction is, as with the other complained-of alleged errors, **abuse of discretion**. *See Morris v.*

State, 223 So. 3d 438, 447 (Fla. 2018) (citing to *Salazar v. State*, 991 So. 2d 364, 372 (Fla. 2008).

Argument

I. FOR THE HARMLESS ERROR TEST DESCRIBED IN *SPECIAL* TO APPLY, THERE MUST ACTUALLY BE ERROR ON THE PART OF THE TRIAL COURT.

In the case of *Special v. West Boca Medical Center*, 160 So. 3d 1251 (Fla. 2014), this Honorable Court created a uniform test to determine if an error made by the trial court was harmless. This Court held that the test for harmless error in civil appeals was to be consistent with that of *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), which it decided 28 years beforehand. *Id.* at 1255. The test for harmless error in a civil appeal became: "To test for harmless error, the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict." *Id.* at 1257. This Court stated that "appellate courts must evaluate harmless error on a case-by-case basis" and that it must include an analysis of "the entire record." *Id.* at 1255; 1256 ("[a]pplication of [this] test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied. . ."). The appellate court must remain focused on the error itself and its effect of the error on the trier-of-fact. *Id.* This

Court affirmatively stated "[t]he test recognizes that **not all errors have a reasonable possibility of contributing to the verdict**, but the test affords relief of account of errors that do." *Id.* at 1257 (emphasis added).

In this Court's lengthy and informative opinion in *Special*, this Court went through several alleged errors of evidentiary objections, finding two errors and one non-error on the part of the trial court. This Court's ruling is demonstratively instructive that first one of the three standards of review is employed to find whether there is an error (here, abuse of discretion), and then if error is found, the harmless error test is then employed. *See, e.g., Special*, 160 So. 2d at 1265 ("The trial court's failure to admit testimony on this issue amounted to an abuse of discretion, and in light of the harmful error caused by the exclusion of this evidence, a new trial is required."); 1263 (Holding without going through an harmless error analysis, as there was no error, "[t]hus, this evidence was properly excluded."). Thus, the harmless error test is not the standard of review, but rather a test for determining that when (or if) a true error is found, is that error is harmful.

Additionally, in order for *Special* to apply, these must be errors of the trial court, not counsel. See *R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 682 n. 3 (Fla. 1st DCA 2017) ("We reject Reynolds' argument that it is entitled to a new trial because Robinson "cannot prove that her trial counsel's improper arguments were harmless." "Error," in the context of harmless-error analysis, is an

improper ruling by the trial court, not an improper comment by counsel or a witness. . . .").

Petitioner has previously made the claim, and now makes a more muted assertion, that because he has claimed error, that he is entitled to a new trial under *Special*, or alternatively he believes that the court is in direct conflict or applying a "less stringent standard." Initial Br. 16-18. Petitioner asks this Court to expand the holding of *Special*, beyond what would be allowed based on section § 59.041, Florida Statutes, to create a carte blanche standard of "where all an unhappy litigant has to do is complain of an error, harmful or not, error or not, he immediately becomes entitled to a new trial." This mutation of the *Special* holding would greatly tax our court systems, hinder the administration of justice, and in some instances even deny justice to deserving litigants by allowing new trial, after new trial, after new trial. What Petitioner seeks is expressly against what the *Special* case stands for. This Court has expressly held that not all errors will reasonably affect the verdict, it has expressly held not all complained-of errors are true errors, and that the purpose of the harmless error test was to "conserve judicial resources while protecting the integrity of the process." *Id.* at 1255-57 ("The purpose of the harmless error analysis is to "conserve judicial labor by holding harmless those errors which, in the context of [a] case, do not vitiate the right to a fair trial and, thus, do not require a new trial." *Id.* at 1255).

Petitioner appears to be of the mindset that **all** errors require reversal, so any district court that does not reverse is instead applying a "less stringent standard" and is "in conflict" with this Court. That is simply not true. Petitioner fails to consider: (1) the nearly thirty-two years of *DiGuilio*-progeny cases which have applied this same "*Special*" standard and yet have found errors as harmless; (2) the multitude of per curium affirmances without opinions that found errors either non-existent or harmless; (3) cases that do not cite to *Special* but found errors harmless based upon the test in *Special*; and (4) the cases that expressly state *Special* was employed and found harmless error. *See, e.g., Gutierrez v. Vargas*, 43 Fla. L. Weekly S 143, (Fla. 2018) (holding that there was error; however, "We also hold that the comment made by Petitioners' counsel during closing argument does not merit a new trial."); *Maines v. Fox*, 190 So. 3d 1135 (Fla. 1st DCA 2016) ("Here, we find appellee successfully proved there was no reasonable possibility that the trial court's limitation of Dr. Bowles' testimony contributed to the jury's verdict . . ."); *R. J. Reynolds Tobacco Co. v. Hiott*, 129 So. 3d 473 (Fla. 1st DCA 2014) ("Reviewing the record in its totality, there is simply no reasonable possibility that the evidence affected the fact finder . . ."); *Rodriguez v. State,* 187 So. 3d 903, (Fla. 3d DCA 2016) ("Applying the harmless error test as set forth in *Special* to the facts of this case, we conclude that there is no basis for reversal"); *Cohen v. Jain*, 219 So. 3d 100, 100 (Fla. 3d DCA 2017) ("we find that the trial court did not err in its

evidentiary rulings excluding certain evidence and, to the extent any evidence was erroneously excluded, such error was harmless.").

Additionally, even if there is error, and it is deemed harmful error, it does not always necessitate a full new trial, as the error may have only affected a small portion of the verdict and the purpose of the harmless error test is to preserve judicial economy and integrity. *See, e.g., Reffaie v. Wal-Mart Stores, Inc.*, 96 So. 3d 1073 (Fla. 4th DCA 2012) (finding harmful error and holding, "[f]rom our review of the record, we are also confident that the effect of the improper comments was limited to damages. Accordingly, we reverse and remand for a new trial on damages only."); *Landmark Am. Ins. Co. v. Pin-Pon Corp.*, 155 So. 3d 432, 442 (Fla. 4th DCA 2015) (concluding error was not harmless and holding, "Because the court allowed the jury to consider Exhibit 98 in determining the amount of code upgrade damages, we reverse and remand for a new trial as to code upgrade damages only."); *Phillip Morris United States, Inc. v. Green*, 175 So. 3d 312 (Fla. 5th DCA 2015) ("Accordingly, under the circumstances of this case, we find that the trial court erred by not applying comparative fault. We remand with directions for the trial court to enter an amended final judgment against each party liable on the basis of such party's percentage of fault. . . all other aspects, the final judgment is affirmed."). In this very case, the Fifth District expressly stated that

any such errors were harmless, and were further remedied by the Court's ruling on the future wage loss claim.

Additionally, Petitioner complains that courts summarily conclude on the harmless error test, and concludes that such means that courts are applying a less rigid standard or stepping into the shoes of the error beneficiary, neither of which is the case. Initial Br. 16-18. Petitioner is of the misconception that the district courts have time with their already overly burdened caseloads to write an opinion detailing every nuance in its decision when it does not have to even write an opinion at all, and to write an opinion in each and every case that deals with trial court error (as by default, it would also deal with *Special* to see if the trial court error was harmful). *See Whipple v. State*, 431 So. 2d 1011, 1012-14 (Fla. 2d DCA 1983) (describing the overly burdened court system that cannot explain every detail and nuance of every decision, and the judge's discretion to write opinions). This ideal of Petitioner (that a court *must* detail its entire rationale to prove that it is properly applying *Special*) is impractical, unnecessary, and far too taxing on the judicial system.

Further, Petitioner incorrectly makes this assumption as a vehicle to have this Court to use Petitioner's hypothesized reason to further explain the district court's intentions when it cited to *Herbello v. Perez*, 754 So. 2d 840 (Fla. 3d DCA 2000), stating it was decided before *Special* and therefore must show that a "but for" test

was used. However, the opinion states this *Herbello* citation is a *see also*, and further it was being utilized as an example of a case discussing harmless evidentiary rulings. It does not show or state that a "but for" test was used, and as discussed above, the court does not have to go into every detail of every analysis to satisfy a litigant's displeasure with the outcome.

II. THERE WAS NO IMPROPER IMPEACHMENT OF DR. FOLEY, AS SUCH THERE IS NO ERROR. FURTHER, EVEN IF THIS COURT FINDS ERROR, THERE IS NO REASONABLE POSSIBILITY THAT IT CONTRIBUTED TO THE VERDICT.

Petitioner complains of a short, isolated line of questioning of his expert Dr. Foley, regarding medical literature that his professional witness did not find authoritative. This isolated line of questioning was never brought up again in trial, and consisted of very limited questioning. *See* T. 1438-46. While Petitioner claims there was an improper impeachment and the Fifth District considered it impeachment, Thomas respectfully disagrees as the questioning never even came close to reaching the point "improper impeachment"; therefore, it could not meet the definition of any "error".

Special requires the Court to look at the entire context of the trial, and not to look at a single error in a vacuum. The trial ran for a duration of five full days, with opening statements starting on November 17, 2014 and closing arguments taking place on November 21, 2014, concluding at 3:53 pm. During this five-day

trial, for Plaintiff, Drs. Masters, Dunson, Mahan, and Masson testified, as well as Plaintiff, and one lay before-and-after witness. Defendant (Petitioner) had Mr. Smith (in-house counsel for Plaintiff's insurance company), and Drs. Hurbanis and Foley. The testimonies of Dr. Hurbanis and Dr. Foley took the entire day of trial on November 20th, 2014 (trial started at 9:09 am and concluded at 5:37pm). Dr. Hurbanis' testimony spans over approximately 130 pages of transcript. Petitioner's other expert, Dr. Foley, testified for approximately 175 pages of transcript.

The cross-examination of Dr. Foley consists of 47 pages of transcript, including objections and argument. The cross-examination started out with questions regarding the frequency in which Dr. Foley testifies for the defense, and how even the week before this trial, Dr. Foley and Mr. Byrd were in yet another trial together (with Foley being for the defense). T. 1417-19. Dr. Foley provided 91 of 143 invoices for cases that he had been hired for in the last three years for Petitioner's counsel's law firm, and that he had been paid $1.1 million dollars in the last three years to testify in cases that Petitioner's counsel's law firm retained him for. T. 1421-22. Thomas then went through how much money was paid to the witness for this case, and what he had reviewed, followed by questions that went into Dr. Foley's opinions and the evidence. T. 1422-63. As an expert witness making over $1.1 million dollars from just one law firm alone over the course of three years, Dr. Foley's testimony shows he is very adept in answering cross-

examination questions and avoiding answering what he does not wish to answer. *See generally* T. 1417-63. The questioning Petitioner complains of started off,

> Q. All right. Doctor, let's go over a couple of other things, and then believe it or not I will be done. You – you spent a good bit of time telling the jury about how one of the findings you will look for on MRIs to help assist you conclude whether somebody has suffered a traumatic or acute disc injury was you're looking for swelling, soft tissue swelling, edema, hemorrhage, those type of things, correct?
>
> A. Yes.
>
> Q. Mr. Jewett asked you is it true that those things take longer than 72 hours to dissipate. Do you remember he asked you that question?
>
> A. Yes.
>
> Q. All right. You, Doctor, are aware of research which shows that the optimal time –

T. 1438-39. At this point, Petitioner objected to improper use of medical literature. The court had the attorneys approach the bench. *Id.* The following discussion was had:

> MR. BYRD: I'll tell you what, I'll just re-ask the question. I don't have to reference the literature. If he denies the existence of it, then I'll deal with the literature.
>
> THE COURT: Okay.
>
> MR. JEWETT: Well, even then – **okay. I'll– I'll see what happens**, but–
>
> THE COURT: Let's see where this goes because – where's the literature from again?
>
> MR. BYRD: **I already know he knows of this literature. He's the one that told me all about it four weeks ago**. So –
>
> MR. JEWETT: Regardless of the medical literature, Your Honor, whether he knows about it or not, the proper way of doing this is you

show him the article and then you ask him if it's – if it's an authoritative article.

THE COURT: Well you don't have to necessarily show it. You just – you can ask him if he knows of it and if he's quoted it or relied on it or anything of that nature.

MR. JEWETT: Well, no, he has to – he cannot use the medical literature unless the witness agrees that it's authoritative.

THE COURT: I understand that, and that's what I'm saying. If he has –

MR. BYRD: Or the courts.

THE COURT: -- relied upon it or used it or otherwise there's some kind of circumstances – it depends as far as per the court on something that's medical literature. So we'll see where it goes.

MR. JEWETT: All right.

T. 1439-41. (emphasis added). The bench conference concluded, and Thomas resumed her cross-examination, under the understandings from the bench conference:

MR. BYRD: All right. Doctor, do you agree with the statement that for successful MRI imaging of spinal trauma that the optimal time interval between injury and MRI imaging should probably be less than 72 hours because beyond this time reabsorption of the edema or hemorrhage reduces sensitivity of MRI imaging to reveal injuries?

A. Agree with that in a sense that if you talk about optimal time interval, I would say an optimal time interval better than 72 hours would be 24 hours. So I totally agree with the closer you are to the date of accident, the better you are going to be able to see edema and hemorrhage. But I think you're taking it is after 72 hours –

[. . .] Q. I think I've also heard you tell the jury that the reason people have desiccation in their discs is due to fissures or radial tears that everybody gets as part of the aging process?

A. Yes. Annual tears. You have a communication between the inside of the disc to the outside to let fluid leak out in the first place.

Q. Doctor, do you agree with the statement that radial tears of the annulus are found only in a minority of postmortem examinations of individuals over 40 years of age, so that cannot be considered a usual consequence of aging?

A. **I don't agree with that. In fact, I have papers that say that is a consequence of aging.**

T. 1441-42. (emphasis added). Petitioner's expert witness carefully answered each question, affirming what he said in direct, and contesting anything contrary to the opinions he offered, even bolstering his testimony with "In fact, I have papers that say that is a consequence of aging." *Id.* at 1442.

After Dr. Foley bolstered his own testimony with unnamed papers, Thomas continued:

Q. All right. Doctor, your very definitions that you used for the jury to describe the differences from bulge and herniation, do they come from a document published in the year 2001 entitled Nomenclature and Classification of Lumbar Disc Pathology?

A. No. I do not find that document authoritative.

T. 1443. While Thomas could have moved to strike the "I do not find that document authoritative" as it was nonresponsive to the question asked of this seasoned-witness, the witness's answer definitively shows how adept and informed of legal requirements/concepts this particular witness is. After hearing this answer, Thomas tried to lay the foundation for the court to find the medical literature authoritative:

Q. Okay. Is that not the document that was universally accepted by all of the radiological societies to define the differences between bulges, protrusions, and herniations?

MR. JEWETT: Objection, Your Honor. He said it was not authoritative.

THE COURT: **Overruled as to the way the question was phrased.**

THE WITNESS: It's not universally accepted. It's written by different doctors from different specialty areas, but it's not universally accepted.

BY MR. BYRD: Q. So your nomenclature –

A. It's not the law among radiologists.

Q. I didn't say it was the law, sir. I said it was adopted by all the radiologic societies. Your nomenclature that you drew– and I'll find your drawing, you told the jury over her the bulge is greater than 180 degrees, protrusion is less than 180 degrees, where did you come up with that?

A. It's commonly taught in radiology.

Q. It is not the subject of the document entitled Nomenclature and Classification of Lumbar Disc Pathology? Does that not define those very terms?

MR. JEWETT: Judge, may we approach?

THE COURT: You may.

(Attorneys approached the bench.)

THE COURT: Do you have an objection?

MR. JEWETT: I have an objection, Your Honor.

THE COURT: What's the legal basis?

MR. JEWETT: It is the improper use of medical literature.

THE COURT: **Sustained.** He already said he doesn't rely on it as authoritative, and you asked the other question. So to go back to it –

MR. BYRD: All right. Let me –

MR. JEWETT: And I move for a mistrial.

THE COURT: Okay. He didn't even get to finish the question or answer it, so I'm going to deny the motion for mistrial. . . .

T. 1443-46.

As is evident with the excerpt above, impeachment did not occur, and even if it had, which it did not, Dr. Foley, a long-time expert witness in radiology, neutralized any impact this question may have even had with his answers to the questions above, as he did not even answer the alleged impeachment question. Additionally, once Petitioner objected and the court sustained the objection, Thomas moved on to other questioning. Petitioner moved for mistrial, never requesting a curative instruction, which the trial court denied as Thomas did not get to finish the question **nor** did Dr. Foley answer the posed question. T. 1444.

Florida Statute § 90.706, allows treatises to be utilized in cross-examination of an expert witness if the witness **or** the trial court recognize the author or treatise to be authoritative. § 90.706, Fla. Stat. In the instant case, the trial court ruled on each objection based on the questions asked, and when it came even remotely close to an impeachment, which it was not, before the question was even answered, the trial court sustained Petitioner's objection, and Thomas promptly moved on to other topics. Thomas's counsel was permitted to ask questions to lay the predicate in order to establish authoritativeness through other means, so the trial court would be able to exercise its discretion in determining if the literature was authoritative. Petitioner did not have to defend the literature, as the substance never came out,

and he had already said that he had papers stating the opposite of some of counsel's questions prior to the literature being named. T. 1442. As such, there was no harm, no impeachment, no error, and no abuse of discretion in the trial court's ruling. Even if this Honorable Court finds there to be improper impeachment, the error must be one of the trial court, not counsel, for *Special* to apply and the trial court did not commit error in its rulings on the objections.

Further, even if this Court were to find error on the part of the trial court, it **would be** harmless error under *Special*, as this was an isolated line of questioning, not a focal point or a feature of the trial, this line of questioning was never brought up again during the trial, the jury never asked any questions about it, or to see Dr. Foley's testimony. This was a small isolated area of questioning, with no reasonable possibility of contributing to the verdict. This was such a limited area of questioning and the one question regarding its acceptance was so well defended by Dr. Foley, that Petitioner did not even try to rehabilitate his witness on this alleged "focal point." *See* T. 1463-75. Instead examination of the record shows the true areas that were focal points of the cross-examination (his opinions regarding the records and his financial bias), were the only focal points of Petitioner's redirect examination. As such, while there is no error, even if there were, it would be harmless as this isolated event had no reasonable possibility of contributing to the verdict.

III. PETITIONER FOR THE FIRST TIME ON APPEAL ARGUES THAT THE COURT ABUSED ITS DISCRETION BY ALLEGEDLY FAILING TO GIVE A CURATIVE INSTRUCTION. THIS ARGUMENT IS PROCEDURALLY WAIVED, AND EVEN IF IT WAS NOT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, AND ANY ABUSE OF DISCRETION WOULD HAVE BEEN HARMLESS UNDER *SPECIAL*.

"[I]t is not appropriate for a party to raise an issue for the first time on appeal." *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (citing to *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) (a claim not raised in the trial court will not be considered on appeal); *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (appellate court will not consider issues not presented to the trial judge on appeal from final judgment on the merits)). "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)). The argument Petitioner made to the lower court and to the district court was that the lower court abused its discretion in not granting a new trial based upon allegedly improper closing remarks. *See* Petitioner's Initial Br., dated 2/6/2017, pp. 39-50. In the brief at the district court level, Petitioner claimed 18 alleged improper comments during closing argument, many of which were not preserved for appellate review or were

evaluated under the *Murphy*[1] test as they were unobjected-to during the trial. In the instant brief, Petitioner only challenges the *trial court's ruling* on failing to give a curative instruction, over *the comment* itself as argued to the lower court and the district court. As such, this argument is not preserved and is waived.

Petitioner claims that the district court applied the wrong test, claiming that it should have applied *Special*; however, the district court was not asked to rule on the curative instruction ruling, it was asked to rule on allegedly improper closing arguments, to which it did apply the correct standard. *See* Petitioner's Initial Br., dated 2/6/2017, pp. 39-50 and *Vickers v. Thomas*, 2017 Fla. App. LEXIS 19470 *5 (Fla. 5th DCA 2017) ("an improper closing argument will not result in a new trial unless the statements are highly prejudicial, inflammatory, and improper.").

As to the curative instruction, this Court has held that "the trial judge is in the best position to determine the propriety and potential impact of allegedly improper closing argument." *Murphy*, 766 So. 2d at 1031. In the instant case, the trial judge heard arguments, and either properly overruled the objections or when sustained, properly determined that a curative instruction or mistrial was not required based on the propriety and potential impact of the alleged improper argument, as she was supposed to do.

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[1] *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000).

After the objection was sustained, Thomas moved on to other argument. This was an isolated commented, that was not even finished, as the objection came early on. *Poole v. State*, 997 So. 2d 382, 395 (Fla. 2008) ("While this comment was improper, the comment still does not amount to fundamental error. The prosecutor did not repeat this statement during the rest of his closing arguments."); *Truehill v. State*, 211 So. 3d 930, 949-50 (Fla. 2017) (denying relief as the allegedly improper closing argument comment was very minor, isolated, not repeated, and the objection came so early into the statement that it was unclear whether the jury would have been aware where the prosecutor was going with the statement).

While Thomas does not concede that this comment was erroneous, even if for sake of argument the comment was erroneous, Thomas quickly moved on, never mentioned the comment again, and the comment was not completed, so the jury was probably not even aware of where Mr. Byrd was going with the comment. Additionally, the trial court judge, who this Court has held is in the best position to determine the impact of any potential effect on the jury, found that a curative instruction was not necessary for the isolated, incomplete comment.

As such, this argument was waived by Petitioner, who raises it for the first-time on this appeal, and even if not waived, the trial court did not error, and any error would have been harmless.

IV. THIS ARGUMENT IS WAIVED BY PETITIONER; HOWEVER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY OVERRULING OBJECTIONS, AND EVEN IF IT DID, ANY ERRORS WOULD HAVE BEEN HARMLESS UNDER *SPECIAL*.

Petitioner argues that the trial court erroneously denied a curative instruction and erroneously overruled an objection during closing argument. Initial Br. 23-29. This argument is raised for the first time to this Court, which is improper as the waived as it was unpreserved for appeal. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005); *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985). The argument Petitioner made to the lower court and to the district court was that the lower court abused its discretion in not granting a new trial based upon allegedly improper closing remarks. *See* Petitioner's Initial Br., dated 2/6/2017, pp. 39-50. In the district court brief, Petitioner claimed 18 alleged improper comments during closing argument, many of which were not preserved for appellate review or were evaluated under the *Murphy*[2] test as they were unobjected-to during the trial. In the instant brief, Petitioner only challenges the *trial court's rulings* on two allegedly improper comments, one of which Petitioner acknowledges that the district court did not find to be improper, not *the comments* themselves as argued to the lower court and the district court. As such, this argument is not preserved and is waived.

[2] *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000).

Should this Court find that this argument is not waived, the trial court still did not error in its rulings. Provided an allegedly improper argument has been properly preserved, a new trial can only be granted if the argument was "so highly prejudicial that it denied the [objecting party] the right to a fair trial." *Rosario-Paredes v. J.C. Wrecker Serv.*, 975 So. 2d 1205, 1208 (Fla. 5th DCA 2008).

As to the first comment, "Dr. Hurbanis who, by the way, isn't a spine surgeon, why did they hire -- they get to pick any doctor they want. So ask yourself why do you hire a doctor –", Petitioner objected, it was sustained and Petitioner moved for a curative instruction. T.1565. The trial judge, being in the best position to determine the potential impact, ruled that a curative instruction was not necessary as Thomas had not finished the comment, as discussed in the section above. T. 1565-66. Thomas still maintains that this was not an improper argument to it was pointing to the expert's lack of knowledge and skill, but nevertheless it is clear in the record that Thomas moved on instead of debating the matter as time was of the essence. Even if this Court found that the trial court judge, in not giving a curative instruction, committed error, there still is no reasonable possibility that this unfinished comment contributed to the verdict. As such, any error would be harmless. It is of note that while Petitioner now complains that the trial court erred by not giving a curative instruction, the argument to the lower court was on counsel's alleged mistake allegedly depriving Petitioner of a fair trial, which is

what the district court answered. *Vickers v. Thomas*, 2017 Fla. App. LEXIS 19470 *5 (Fla. 5th DCA 2017) ("an improper closing argument will not result in a new trial unless the statements are highly prejudicial, inflammatory, and improper.").

The second closing argument comment complained-of is:

> "let me speak briefly about the witness in evaluating the believability of any witness . . . . But you're also allowed to consider as it relates to expert witnesses the knowledge, skill, experience, training or education of the witness. So in a case where we're talking about neck and back injuries, you have heard testimony from a shoulder and knee surgeon tell you –

T.1566-67. As argued to the lower court, this closing argument is taken out of context and missing the majority of it:

> ". . . . let me speak briefly about the witness in evaluating the believability of any witness and the weight you'll give the testimony of that witness being whether it is very persuasive or not, you may properly consider a lot of things. Number one, the demeanor of the witness while testifying. How were they? Were they sharing or were they combative or were they not answering the question that they were asked but instead giving a long answer to a very simple question. So you're allowed to consider demeanor. You're also allowed to consider the frankness or lack of frankness of the witness. Were they being forthcoming or did it seem like they were trying to avoid the question the way sometimes politicians do when they're in the middle of a debate. But you're also allowed to consider as it relates to expert witnesses the knowledge, skill, experience, training or education of the witness. So in a case where we're talking about neck and back injuries, you have heard testimony from a shoulder and knee surgeon tell you –

T. 1566-67. While Petitioner objected, he lodged the same objection as the first comment above, which was "he's making a comment on why we hired Dr. Hurbanis." Compare T. 1566 to 1567. Clearly, Thomas was not making any

comment as to **why** Petitioner **hired** Dr. Hurbanis. The trial court correctly overruled as to that objection. Only the specific argument/objection made at trial can be advanced on appeal unless it is fundamental error. This remark basically goes over the jury instruction for assessing credibility, determining his skill or experience (or lack thereof it), and then goes into the evidence that Dr. Hurbanis opined that Thomas should have been better within three to four months. *See also Murphy*, 766 So. 2d at 1029 ("If the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence.").

As such, the trial court correctly overruled the objection as it was not the correct objection and the argument being advanced was proper. Because it was proper, the court's ruling cannot be found to be error. Even if that ruling was error, which it was not, counsel commenting in closing argument upon Dr. Hurbanis' lack of training as related to the specific injuries in the case was not harmful error. Counsel was simply stating facts Dr. Hurbanis testified to.

During closing argument, the law provides Thomas wide latitude to argue Dr. Hurbanis's qualifications and bias. *See Murphy*, 766 So. 2d at 1029 ("If the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the

jury a conclusion that reasonably may be drawn from the evidence."). While Petitioner wants to claim a "gotcha" tactic was utilized, this is also false, as from the beginning of the case, as demonstrated with all of the evidence, especially Thomas's own testimony, and the deposition taken of Dr. Masson, the neck and back were always also at issue, regardless of the subsequently waived shoulder.

Petitioner made a strategic decision to use a shoulder and knee surgeon (who did not do any spine surgery) to address all injuries, knowing from the beginning there were two spine issues - neck and back, and equally knowing that the Plaintiff is the master of her Complaint and she can withdraw any claim at any time up to it going to the jury.

Petitioner could have retained and called multiple specialists, or found a specialist who did all three types of injuries, or retained one of the many specialists out there who operate on neck and back injuries (so two of three injuries). Instead, he selected a specialist who only focused on one of the three claimed injuries, to cover all three. Petitioner could have also sought a continuance upon the Plaintiff's withdrawal of her alleged shoulder injuries. Despite all these options available to Petitioner, the strategic decision actually employed by Petitioner was to use their expert's lack of qualifications in neck and back treatment as both a sword and shield.

"The Florida Rules of Civil Procedure expressly recognize [a plaintiff's] right to withdraw any claim without an order by the court, at any time both prior to and during trial." *Health First, Inc. v. Cataldo*, 92 So. 3d 859, 865 (Fla. 5th DCA 2012). Petitioner implies that Plaintiff did something improper in withdrawing a shoulder claim prior to trial, despite the fact that the law permits it. If this withdrawal was so egregious, Petitioner could have sought a continuance of the trial if he felt it would prejudice his case or cause an injustice, but he did not do so.

Further, this Court has held that "the trial judge is in the best position to determine the propriety and potential impact of allegedly improper closing argument." *Murphy*, 766 So. 2d at 1031. In the instant case, the trial judge heard arguments, and either properly overruled the objections or when sustained, properly determined that a curative instruction or mistrial was not required based on the propriety and potential impact of the alleged improper argument.

While the Petitioner claims that the Fifth District erred by applying the wrong standard (which it did not), Petitioner also asked it to rule on different questions. As with the first complained-of comment, the Petitioner complained of only the allegedly improper comment to the district court, which while it is still an abuse of discretion standard, the test is that the comment has to be "so highly prejudicial that it denied [him] the right to a fair trial." *Rosario-Paredes*, 975 So. 2d at 1208. Here, the Petitioner complains, for the first-time to this High Court, of

the trial court overruling the objection, which carries an abuse of discretion standard, and follows with the *Special* harmless error test if error is found. This is a completely different question and test than the Petitioner asked the district court to apply.[3] *See R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 682 n. 3 (Fla.

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[3] Petitioner states that "the district court erred in applying the abuse of discretion standard instead of the harmless error test." Initial Br. 29. As discussed in Section I of this answer brief, the review for an error is abuse of discretion, if an error is found, then the harmless error test is applied. *See infra* Section I. Petitioner fails to make, or potentially fails to understand, that there are three standards of review (the one in this case being "abuse of discretion") and that *Special* created a test, not a new standard of review. The *Special* case, as discussed in Section I, makes this very clear.

Additionally, Petitioner cites to numerous cases that do not stand for the proposition he claims that they do.

In Feldman v. State, 194 So. 2d 48 (Fla. 4th DCA 1967), Petitioner claims it stands for the proposition that a mistrial is the remedy when the corrective instruction is denied or is inadequate or when the offense is repeated. However, the case states, "A mistrial should not be entered by the court unless the remarks are such that instructing the jury to disregard them would not cure the error." *Id.* at 49. The same goes for *Perry v. State*, 200 So. 525, 527 (Fla. 1941).

In *M-5 Communs. V. ITA Telecomms.*, 708 So. 2d 1039 (Fla. 3d DCA 1998), Petitioner claims that it stands for "reversal mandated by an application of the anti-gotcha rule in its original and purest form." However, this case is is grossly dissimilar to the instant case where Plaintiff exercised her right to withdraw a claim. In *M-5*, plaintiff voluntarily dismissed two defendants, who chose to stay in the case and actively defendant it – even filed a motion to dismiss, then later tried to claim that the court did not have jurisdiction over them because of the voluntary dismissal.

In *Segundo v. Reid*, 20 So. 3d 933 (Fla. 3d DCA 2009), Petitioner claims that it stands for "plaintiff's change in nature of claim completely turned the tables on

1st DCA 2017) ("We reject Reynolds' argument that it is entitled to a new trial because Robinson "cannot prove that her trial counsel's improper arguments were harmless." "Error," in the context of harmless-error analysis, is an improper ruling by the trial court, not an improper comment by counsel or a witness. . . . 'Harmless error' plays no part in this analysis."). This Honorable Court just recently also used the standard that improper closing remarks must "have potential to compromise the fairness of the proceeding such that a new trial would be required." *Gutierrez v. Vargas*, 2018 Fla. LEXIS 721 *25-26, 43 Fla. Weekly S

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defense." This case does not stand for this proposition either. While plaintiff withdrew and added claims, this case did not deal with the tables being turned. It dealt with attorney's fees after an offer of judgment, under the bad faith statute and whether the new claim (the only one awarded for and sought at trial) had satisfied the requirements for attorney's fees and when the attorney's fees should start. Of note, Petitioner's counsel was also the counsel on that case.

Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337 (Fla. 3d DCA 1979) is a case dealing with a defendant who claimed that the case was not a negligence case, but a medical malpractice case, as such the trial court dismissed the action and required the plaintiffs to go to mediation before filing a lawsuit. When the plaintiffs refiled the action after mediation, defendant claimed that it was a standard negligence action and thus was time barred by the statute of limitations, despite defendant previously taking the opposite position, and causing the delay. This is nothing like the instant case.

Harley v. Lopez, 784 So. 2d 447 (Fla. 3d DCA 1999), does not deal with removing a claim from consideration for damages, but rather plaintiff agreeing to pay appellate attorney fees if it was affirmed on appeal and then attempting to defend against paying it using "gotcha" tactics.

143 (Fla. 2018) (holding comment made during closing argument does not merit a new trial).

As to the unobjected-to comments briefly mentioned, but not detailed, in Petitioner's brief, many were waived procedurally by failure to preserve them for appeal and the remainder were properly reviewed under the *Murphy* standard. None of them amounted to harmful error. While Thomas does not believe (due to the lack of detail/argument) that Petitioner is attempting to reargue these on this appeal, in the unlikely event that he is or this Court believes he is, Thomas incorporates her arguments to these waived and un-objected to arguments as stated in her answer brief with the district court.

In the unlikely event that this Court reaches the *Special* analysis, a review of the entire record is required. While only one factor, every bit of the jury verdict is supported by the evidence. For past medical expenses, the evidence showed that a figure of approximately $126,572.29 would be appropriate, and the jury awarded $116,572.29. T. 1602; R. 835-36. For past lost wages, the evidence showed that a figure of $47,000 would be appropriate, and the jury awarded $38,000. T. 1606; R. 835-36. For past pain and suffering, the jury was asked for $300,000 and awarded $225,000. T. 1623; R. 835-36. For future medical expenses, the evidence showed that a figure of approximately $1.5 million would be appropriate, and the jury awarded $587,500. T. 1615; R. 835-36. For future loss of earning capacity, the

evidence showed that a figure of approximately $250,000 would be appropriate, and the jury awarded $164,673.60. T.1619; R. 835-36. For future pain and suffering for the 23.6 years she is estimated to have left (based on the mortality tables), the jury was asked for $352,000 to $1.5 million and awarded $587,500, which is by no means excessive, and on the lower end of what Thomas argued. T. 1624; R. 835-36.

This was not a runaway jury impacted by prejudice from allegedly harmful statements, as Petitioner has argued, but a jury that clearly looked at the evidence and awarded sums accordingly to someone permanently injured in a significant crash who is in excruciating pain that is impacting her everyday existence. *See Special*, 160 So. 3d at 1253 (beneficiary of error to prove that the error complained of did not contribute to the verdict).

As an aside, Petitioner paints Thomas's counsel, Jeffrey M. Byrd (undersigned counsel as well), as an attorney who has a flagrant disregard for the rules and is a "repeat offender." *See* initial br. 8. This is far from the truth. Factually, while a few of undersigned's closing arguments have been the one of the subjects of several appeals, **none** of those appeals have merited reversal on any of undersigned's allegedly "improper" closing arguments, i.e. – undersigned has not been an "offender" that warranted a new trial even one single time, let alone a "repeat" offender. Whenever a closing argument comment has been challenged in

any trial and it even gives even the smallest inkling that it might even be a marginally borderline argument, undersigned never makes that argument again. Petitioner's mischaracterization of Mr. Byrd, undersigned counsel, is distasteful, unprofessional, and offensive.

For the forgoing reasons, Petitioner has failed to preserve this argument for appeal, and even if he had preserved it, the trial court did not error, and even if the trial court had, any error would have been harmless based upon the record.

V. THE DISTRICT COURT APPLIED THE WRONG STANDARD FOR FUTURE EARNING CAPACITY.

"[O]nce this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal." *Special*, 160 So. 3d at 1261.

Petitioner raised an issue to the lower court on Thomas's award for future loss of earning capacity. Respondent believes the District Court reached the wrong ruling on this issue.

Florida law allows recovery for loss of earning capacity, which compensates a plaintiff for loss of capacity to earn as opposed to actual loss of future earnings. *Volusia Cnty v. Joynt*, 179 So. 3d 448, 450 (Fla. 5th DCA 2015). Those damages are measured by the plaintiff's diminished ability to earn money in the future. *W.R. Grace & Co. v. Pyke*, 661 So. 2d 1301, 1304 (Fla. 3d DCA 1995). A plaintiff must show reasonable certainty of injury and present evidence which will allow a jury to

reasonably calculate lost earning capacity. *Volusia Cnty*, 179 So. 3d at 450; *W.R. Grace*, 661 So. 2d at 1302. Both were demonstrated in the instant case and the jury properly returned a supported verdict of $164,673.60 on such damages. R. 835-36. This Court held in *Sullivan v. Price*, 386 So. 2d 241, 244 (Fla. 1980), that "the question of whether evidence is sufficient [...] varies with the facts of each case." The Court held that "recovery [of future damages] is justified, even in the absence of expert testimony of the likelihood of future damages **because 'the nature of the injury, its duration, and lack of recovery <u>at the time of trial</u>, make it clear that pain and suffering will continue for at least some time into the future.'**" *Id* (emphasis added). Here, evidence was presented and the jury properly concluded that Thomas had sustained permanent injuries. R. 835-36; T. 629 (Dr. Dunson testified that the injuries to the neck and back caused by the 2010 crash are permanent); T. 437; 444 (Dr. Masters); T. 888-90 (Dr. Masson). Although a permanent injury is not a prerequisite to recovering future damages, it is a significant factor in establishing the reasonable certainty of the future damages. *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89, 91 (Fla. 1995).

In the instant case, in addition to the permanent injury testimony, Thomas presented sufficient evidence showing the nature of the injury, its duration, and the lack of recovery at the time of trial. Dr. Masters testified about the specifics of Thomas's condition, when she came to see him, how long he treated her, and that

she had a permanent impairment rating based on AMA guidelines of 12 to 15 percent. T. 384; 403-34; 435; 439. Dr. Masson also testified to Thomas's condition, when she started treating with him, that Thomas was still treating with him, and that surgery was being discussed – and that the surgical recommendation had changed from artificial disk replacement to fusion surgery in her neck. T. 863-64; 868-76; 878-79 (more than enough to justify a surgical recommendation in her low back as well); 884; 886; 887. Thomas also testified that she had an immediate onset of pain after the accident, that she was still in pain as of the date of trial, which she described as "excruciating" and that surgery was her next step because she felt like her life was being cut short being in pain all the time and not being able to do anything. T. 987; 1003-05. Based on the testimony, it was clear that Thomas had permanent injuries to her neck and back, that started with the accident in 2010, and that she was still experiencing pain, and testifying that she will have surgery as the next step after the epidurals are complete as she returns to being in excruciating pain when the epidurals wear off, thus showing the nature, duration, and lack of recovery at the time of trial.

> [N]o one standard is conclusive in the determination of the degree of incapacity to earn the same wages as prior to an injury. Instead there should be taken into consideration, **among other things, such variables as** the injured [plaintiff]'s physical condition, **age, industrial history, education, and inability to obtain the type of work which he can do insofar as affected by the injury**.

Gibson v. Minute Maid Corp., 251 So. 2d 260, 263 (Fla. 1971) (emphasis added).

> Once sufficient evidence is presented, the measure of damages is the loss of capacity to earn by virtue of **any** impairment found **by the jury** and the jury must base its decision on all relevant factors including the plaintiff's age, health, habits, occupation, surroundings, and earnings before and after the injury.

W.R. Grace, 661 So. 2d at 1302 (emphasis added). The evidence showed that Thomas was 62 years old, with plans to retire at 67 years old. T. 963; 1022. Thomas made $26.39 per hour, working forty hours per week for the United States Postal Service ("USPS"). T. 1018; 968. As to education and experience, Thomas has a high school education with some college. T. 966. She worked as an oncology abstractor for 15 years, until that field became **obsolete**, at which point she started working for the USPS on the apps machine sorting mail at night. T.964; 966-67. Thomas has been with the USPS for 14 years. T. 967. Her job was a standing, physical job. T. 969. Thomas testified that for the 10 years at USPS prior to the crash, there was nothing that prevented her from doing her job. T. 970. After the 2010 automobile crash, she could no longer work on the apps machine due to crash-related injuries and had to be switched to a different job as an accommodation. T. 967; 1044. Thomas further testified that her work makes her apply for Family Medical Leave Act ("FMLA") leave to get time off of work, and that even with vacation and sick time, that her employer does not have to give time beyond the twelve weeks of FMLA (which is less than three months). T. 1023. With the surgery that was testified to, she would certainly be out of work for three-to-six months just for recovery alone, which would exceed her FMLA leave. T.

1005. Thomas further testified that whether her employer choses to let her go if she took FMLA leave was at the employer's discretion; however, she testified her employer has threatened her about FMLA and the fact that they do not have to keep her if she is not able to do the work. T. 1023-24;1073; 1077. Thomas testified that she foresees having surgery when the epidurals are done. T. 1004-05. Thomas testified that she was already having a very hard time coping with her job duties due to her injuries and "definitely" believed that due to her injuries she would not be able to work up to 67 years old. T. 1021-22.

The district court found that the evidence of Thomas's future loss of earning capacity was insufficient and not "reasonably certain evidence that the capacity to labor has been diminished." *Vickers*, 2017 Fla. App. LEXIS 19470 *3 (Fla. 5th DCA 2017). Thomas contends that her evidence was reasonably certain and that the district court is applying a "beyond a reasonable doubt" standard to a civil case.

Based upon the questioning from the panel at oral argument, it appears as though the court essentially requires a vocational expert to say that based upon Thomas's limited education and the fact at 62 years old, having limited work experience - working only two jobs during her life (one of which was obsolete and the other too demanding for her to continue until retirement), that she was reasonably certain to not be able to work or to obtain work given her proximity to retirement age, her limited education, her physical limitations and lack of recovery,

and her lack of additional work experience in a field that would not be physically demanding. Current case law does not require a vocational expert by any plaintiff in any case. It appears that the Fifth District's ruling is placing a new burden upon this Plaintiff. In fact, the law only requires lay and medical evidence, which Thomas provided.

The determination of the loss of wage-earning capacity ***is to be made by the trier of fact*** after due consideration of all the evidence, ***both lay and medical.*** *Gibson*, 251 So. 2d at 263 (emphasis added). The Fifth District, in taking this portion of the jury's verdict away, should not have sat as a seventh juror in determining these facts that were for a jury to resolve. Deciding this important issue, that was factually contested, is precisely what the jury did in this case. Therefore, this Court has the means to, and should, reverse the district court on this factual issue and affirm the trial court's discretionary ruling, as Thomas's injuries were shown with reasonable certainty, by sufficient evidence, and a means of calculating the damages was presented to the jury.

Conclusion

For the reasons given above, this Honorable Court should affirm the portions of the verdict that the Fifth District affirmed, and reverse the portion of the Fifth District's holding that reverses Thomas's award for loss of future earning capacity,

thereby reinstating the full final judgment of the trial court, as this Court has the means to direct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically furnished and filed electronically with the District Court this 21st day of May 2018 to: Angela C. Flowers, Esq., Attorney for Petitioner, at af-kd@kubickidraper.com; Henry W. Jewett, II, Esq., at hwj.service@rissman.com; John P. Daly, Esq., at jpd.service@rissman.com; Michael C. Woodard, Esq., at mcw.service@rissman.com.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements (Times New Roman, 14 pt.) of Rule 9.100(1), Florida Rules of Appellate Procedure.

By: _____

Jeffrey M. Byrd, Esq.
Florida Bar #0959596
Heather A. Trombly, Esq.
Florida Bar #118128
Jeffrey M. Byrd, P.A.
2620 East Robinson Street
Orlando, FL 32803
(407) 423-1313
(407) 422-5297 fax
attorneybyrd@aggressiveattorneys.com
terry@aggressiveattorneys.com
pleadings@aggressiveattorneys.com
attorneyhtrombly@gmail.com