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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC18-0270

WILLIAM J. VICKERS,

Petitioner,
v.

ANNIE D. THOMAS,

Respondent.

On appeal from the District Court of Appeal
Fifth District of Florida
Case No.: 5D15-3610

INITIAL BRIEF ON THE MERITS OF PETITIONER WILLIAM J. VICKERS

ANGELA C. FLOWERS
KUBICKI DRAPER
101 S.W. 3rd Street
Ocala, Florida 34471
Telephone: (352) 622-4222
Facsimile: (352) 622-9122
af-kd@kubickidraper.com

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STATEMENT OF THE CASE

This automobile negligence case was tried to a jury which returned a verdict in favor of Plaintiff, Annie Thomas, on November 21, 2014. [R.835-36]. Defendant, William Vickers, appealed the final judgment seeking a new trial based on: (1) erroneous evidentiary rulings; (2) improper damage awards; and, (3) objected-to improper closing argument. [R.1620-21, 3558-65].

The Fifth District issued a panel decision identifying multiple trial errors, but deeming them harmless citing pre-*Special* law. *Vickers v. Thomas*, 237 So. 3d 412 (Fla. 5th DCA 2017). The court, however, reversed the jury's award of future loss of earning capacity damages, finding the evidence insufficient to support the award, and remanded for a remittitur or new trial solely on that element of damages. *Id*. at 414.[1]

Defendant invoked this Court's discretionary jurisdiction to review the decision based on its express and direct conflict with the decisions of this Court and other district courts on the same question of law regarding the correct legal standard for determining harmless error.

[1] This appeal is not addressed to the district court's eminently correct ruling striking the award of future loss of earning capacity damages.

STATEMENT OF THE FACTS

A. The accident and pre-trial proceedings.

This case arises from a rear-end collision that occurred on May 15, 2010. [R.28; T.978].[2] Defendant admitted responsibility for causing the accident, but denied that his negligence was a legal cause of any loss, injury or damage to Plaintiff or that it caused a permanent injury. [T.7, 276-77, 278].

Initially, Plaintiff focused her damages case on claims of right shoulder and knee injury, in addition to asserting a neck and back injury. [R.676-78, 679-80]. Four days before trial, Plaintiff announced the withdrawal of her shoulder injury claim and successfully moved in limine to preclude any mention of the withdrawn claim during trial. [R.676-80].

B. The trial.

Defendant admitted that Plaintiff suffered a sprain/strain to her spine that required limited chiropractic treatment, but denied that he was the cause of any permanent injuries or related economic loss. [T.7, 107, 213, 276-77, 320-21]. Thus, the jury was tasked with determining the scope of the injury caused by the accident. [T.278].

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[2] "R." refers to the electronic PDF page number(s) as reflected in the Index to the Record on Appeal. "T." refers to the electronic PDF page numbers assigned to the separately filed trial transcript.

Plaintiff sought substantial damages for neck and low back injuries. [T.300-03, 307, 1617-22]. She acknowledged a prior automobile accident in 1993 involving neck and back injuries and conceded that she had preexisting neck herniations dating back five years. [T.306-07]. Nevertheless, she attributed all of her current problems to the May 15, 2010 accident. [T.397, 399, 980, 984-85].

Plaintiff sought chiropractic treatment and was initially diagnosed with cervical thoracic and lumbosacral sprain/strain. [T.370, 380, 408, 413-14, 469]. On November 18, 2010, he found Plaintiff to be at maximum medical improvement for her sprain/strain. [T.486-88].

Beginning around October 2010, Plaintiff first consulted with Dr. Robert Masson, a neurosurgeon. [T.431]. He referred her to Dr. Dunson, a pain management specialist, who she began seeing in June 2011 for the herniated discs in her neck and low back. [T.547-48, 596-97]. Dr. Dunson acknowledged that if the accident caused an acute herniation in the low back, he would expect the symptoms to have manifested sooner than she reported. [T.636-37]. Further, he conceded that arthritic findings on the MRI were not the result of the accident. [T.638-39]. However, he attributed the symptomatic radiculopathy and herniated discs in both the neck and low back to the accident. [T.624-26].

Plaintiff continued to consult with Dr. Masson periodically and he last saw her on March 7, 2014. [T.859-60, 881, 888, 914]. At trial, he recommended neck surgery, with certain reservations. [T.870, 870-73, 881, 883-84, 900-01, 903]. He also indicated lumbar surgery could be warranted depending on the outcome of the cervical surgery, which possibly would resolve her low back symptoms. [T.873-74, 882, 884].

During trial, the origin and extent of Plaintiff's back and neck injuries were hotly disputed topics. [T.320-21]. Defendant presented evidence that Plaintiff only received temporary injuries in the accident and that once she healed, any neck and back injuries that remained were attributable to the arthritic findings reported on MRI, together with the preexisting conditions and the fact she had spent years at a physically demanding job. [T.451-52, 638-39].

Defendant called Dr. Matthew Hurbanis, an orthopedic surgeon, whose practice includes treatment of sprains/strains of the neck and back, as well as arthritis, and who regularly refers patients for surgery when warranted, including to Dr. Masson. [T.1135, 1140-41, 1198]. Dr. Hurbanis diagnosed Plaintiff with preexisting degenerative disc disease and found she suffered a cervical and lumbar sprain as a result of the 2010 automobile accident that was successfully treated with anti-inflammatories and therapy and which healed within three to four months consistent

with her chiropractor's records. [T.1159-62, 1170-71, 1187-88, 1246]. Plaintiff focused her cross-examination of Dr. Hurbanis on his qualifications as a "shoulder doctor," not a spine surgeon, and portrayed him as overly biased toward the defense. [T.1185-89, 1196, 1198-1200, 1203-09].

Defendant also called Dr. Michael Foley, a diagnostic and forensic radiologist. [T.1270-71]. Dr. Foley reviewed each of the MRI films and testified along the lines of Dr. Hurbanis that the findings all supported the conclusion that Plaintiff's ongoing complaints resulted from chronic and degenerative conditions. [T.1379-86, 1411].

During cross-examination of Dr. Foley, Plaintiff was erroneously permitted to impeach the doctor with reference to medical literature he did not find authoritative. [T.1439-41]. Prior to any question regarding medical literature, defense counsel objected preliminarily and a discussion occurred concerning the proper method for interrogating the witness. [T.1436-38]. Thereafter, Dr. Foley was cross-examined concerning whether he relied on the 2001 article entitled *Nomenclature and Classification of Lumbar Disc Pathology*. [T.1439-40]. He answered that he did not find the document authoritative. [T.1440].

Rather than end the inquiry there, Plaintiff's counsel pressed on asking: "Is that not the document that was universally accepted by all of the radiological societies to define the differences between bulges, protrusions and herniations?" [T.1440]. At

sidebar, defense counsel objected. [T.1440]. The trial court overruled the objection and Dr. Foley was required to respond, stating again that the document was not authoritative. [T.1440-41].

Feeling confident of the trial court's approval, Plaintiff's counsel pushed further insisting that Dr. Foley had in fact relied on the document, demanding: "It is not the subject of the document entitled *Nomenclature and Classification of Lumbar Disc Pathology*? Does that not define those very terms?" [T.1441]. Following a further objection by defense counsel, the trial judge sustained. [T.1441, 1443]. However, the court denied Defendant's motion for mistrial. [T.1441, 1443].

During closing arguments, Plaintiff's counsel made a number of comments to which Defendant objected as improper. These improper comments included: (1) personal attacks on the defense, defense counsel, and defense witnesses; (2) arguments based on facts not in evidence; (3) statements of personal belief; (4) arguments to the jury based on incorrect statements of law; and (5) arguments based exclusively on appeals to emotion. [T.1562-66, 1571, 1575-76, 1597, 1613-16, 1619-21, 1681-84].[3]

[3] To the extent that several of the objected-to improper arguments were addressed to Plaintiff's claim for future loss of earning capacity damages, the district court ruled that its reversal of that award cures the impropriety. 237 So. 2d at 415 n.4.

Most notable, at sidebar, the trial court denied Defendant's request for a curative instruction after it sustained his objection to Plaintiff's counsel's improper comments attacking defense counsel for hiring Dr. Hurbanis, who was not a spine surgeon. [T.1562-63]. Immediately thereafter, Plaintiff's counsel turned his attack to Dr. Hurbanis for being a shoulder surgeon and not a spine surgeon. [T.1563-64]. The court overruled Defendant's objection. [T.1564].

The jury returned a verdict in favor of Plaintiff awarding past and future compensatory damages in the amount of $1,484,845.89, which was reduced to $1,484.544.26 after setoffs. [R.835-36].

C. The Fifth District's decision.

On plenary appeal, the district court found that "certain evidentiary rulings were erroneous," specifically identifying "allowing cross-examination of a medical expert with text the expert did not recognize as authoritative." *Vickers*, 237 So. 3d at 414 n.2. Nevertheless, the court declared the evidentiary errors harmless. *Id*. In reaching its determination, the district court applied the "but for" standard articulated in *Herbello v. Perez*, 754 So. 2d 840 (Fla. 3d DCA 2000). *Vickers*, 237 So. 3d at 414 n.2.

Likewise, the district court identified as improper many of the objected-to comments made during Plaintiff's counsel's closing argument. *Id*. at 415 & n.4. The

district court found that the trial court erred in failing to give a curative instruction requested by Defendant. *Id*. at 415. In so ruling, the district court identified Plaintiff's counsel as a repeat offender who in this case improperly attacked defense counsel for hiring a particular expert. *Id*.[4] The district court described the attack as "disingenuous and improper." *Id.* Nonetheless, the district court found both the improper comments and the failure to give a curative instruction harmless. *Id.*

Finally, the Fifth District held that the evidence was insufficient to support the jury's award of future loss of earning capacity damages. *Id*. at 415. The court reversed solely for a new trial or remittitur on the issue of damages for future loss of earning capacity and affirmed the remainder of the final judgment. *Id*. at 414-15.

SUMMARY OF THE ARGUMENT

When the harmless error test is correctly applied to the erroneous trial court rulings, Defendant is entitled to a new trial on all issues. Plaintiff, as the beneficiary of the trial errors, failed to establish there is no reasonable possibility that the errors complained of did not contribute to the verdict. The district court, in reviewing the trial errors, failed to properly apply the harmless error standard and deprived Defendant of his right to a new trial.

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[4] In *Rasinski v. McCoy*, 227 So. 3d 201, 202 n.1 (Fla. 5th DCA 2017), the Fifth District previously warned Plaintiff's counsel concerning improper closing arguments.

ARGUMENT

THE FIFTH DISTRICT FAILED TO PROPERLY APPLY THE *SPECIAL* HARMLESS ERROR TEST

In *Special v. West Boca Medical Ctr., Inc.*, 160 So. 3d 1251 (Fla. 2014), the Court adopted the *DiGuilio*[5] harmless error test for civil cases. As applied in the civil context, "the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict." *Id.* at 1256. In adopting this standard, the Court removed from the district court "a result-oriented test that is strictly focused on the accuracy of the result or the weight of the evidence." *Id.* The *Special* harmless error test serves a salutary public policy: "Requiring the beneficiary of the error to demonstrate that there is no reasonable possibility that the error contributed to the verdict discourages efforts to introduce error into the proceedings." *Id*. at 1257.

From time to time, the Court has found it necessary to clarify the test for harmless error. *See Johnson v. State*, 205 So. 3d 1285, 1290 (Fla. 2016), *cert. denied sub nom., Florida v. Johnson*, 137 S. Ct. 2272, 198 L. Ed. 2d 714 (2017); *Cooper v. State*, 43 So. 3d 42, 43 (Fla. 2010). Left unchecked, reviewing courts have historically fallen into common mistakes in applying the harmless error test:

> The worst is to abdicate judicial responsibility by falling into one of the extremes of all too easy affirmance or all

[5] *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).

> too easy reversal. Neither course is acceptable. The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

DiGuilio, 491 So. 2d at 1139 (*citing* Traynor, Roger J., *The Riddle of Harmless Error* (1970)).

It is evident from the district court's decision, as well as various other conflicting decisions cited herein, that appellate courts have yet to uniformly apply the *Special* harmless error test. As this case illustrates, there exists confusion and conflict in the district courts when differentiating between the different stages of error analysis (identifying error versus applying harmless error test), in determining who carries the burden to establish error is harmless, and in applying the test to determine the effect on the trier-of-fact.

Deviation from *Special* jeopardizes the fundamental right of all parties to the uniform application of the harmless error test. Consistent application creates predictability in our court system and strengthens the public's perception that all

Florida citizens will receive equal justice under the law.

A. Erroneous evidentiary rulings requiring reversal.

"An error in the admission of evidence requires a new trial unless" the beneficiary of the error satisfies the *Special* test. *Philip Morris USA, Inc. v. Pollari*, 228 So. 3d 115, 130 (Fla. 4th DCA 2017). Applying *Special*, "any error is harmful '[u]nless the beneficiary of the error proves that there is no reasonable possibility that the error contributed to the verdict'." *Maines v. Fox*, 190 So. 3d 1135, 1142 (Fla. 1st DCA 2016) (*quoting Special*, 160 So. 3d at 1256-57).

In this appeal, the district court found that "certain evidentiary rulings were erroneous," specifically identifying: "allowing cross-examination of a medical expert with text the expert did not recognize as authoritative." *Vickers*, 237 So. 3d at 414 n.2. As such, the trial court clearly erred in admitting irrelevant and highly prejudicial evidence which permitted improper expert witness impeachment with a published treatise not recognized as authoritative. Nevertheless, the district court summarily declared the evidentiary errors harmless, citing to pre-*Special* law and referencing the failure of the erroneous evidentiary rulings to affect the "outcome of the trial" in a parenthetical. *Id.*

In reaching its determination, the district court followed the "but for" standard articulated in *Herbello*, 754 So. 2d at 840. The district court summarily concluded that the evidentiary error was harmless without applying the *Special* harmless error test and despite a nearly unanimous body of law holding that a violation of §90.706, Fla. Stat. (2014), is prejudicial harmful error. *See, e.g., Donshik v. Sherman*, 861 So. 2d 53, 56 (Fla. 3d DCA 2003); *Brown v. Crane, Phillips, Thomas & Metts, P.A.*, 585 So. 2d 947 (Fla. 2d DCA 1991).

The rules regarding impeachment of a medical witness with authoritative materials are well-established. Medical literature may be used in cross-examination if an expert witness recognizes the author or the treatise as authoritative. §90.706, Fla. Stat. (2014). Where the witness does not affirm the reliability of a published treatise, the trial court must enter a ruling determining the material authoritative or the cross-examination may not occur. *Id*.; *Brown*, 585 So. 2d at 948.

It is equally well-established that improper impeachment of an expert whose testimony is a focal point is prejudicial and deprives that party on whose behalf the witness testified of a fair trial. *See Myron v. Doctors Gen. Hosp., Ltd.*, 704 So. 2d 1083, 1092 (Fla. 4th DCA 1997), *rev. denied*, 718 So. 2d 167 (Fla. 1998) ("We cannot find that this was harmless error. As we have said before, the parties' expert testimony was the focal point of this trial."); *see also In re Commitment of DeBolt*,

19 So. 3d 335, 337-38 (Fla. 2d DCA 2009) (where expert testimony focal point at trial, erroneous impeachment constitutes harmful error). *Special*, itself, dealt with this issue noting that the "battle of experts has become as much a part of a trial as the conflict that the litigation addresses" thus elevating the effect of evidentiary error. 160 So. 3d at 1260; *see also Pollari*, 228 So. 3d at 131.

When cross-examined about the 2001 article entitled *Nomenclature and Classification of Lumbar Disc Pathology,* Dr. Foley testified that he considered neither the document nor the author authoritative. That should have been the end of the matter. Instead, over multiple objections, the trial court erroneously permitted Plaintiff's counsel to impeach Dr. Foley with further questions concerning the material. Plaintiff's counsel (1) expressly challenged Dr. Foley's opinion regarding authoritativeness, thus, requiring Dr. Foley to further defend his position that the document is not authoritative, and (2) initiated a debate concerning whether, in fact, Dr. Foley relied on the document. Plaintiff succeeded in severely impeaching Defendant's expert and damaging his credibility by advising the jury that Dr. Foley disagreed with a published treatise that contradicted his testimony. Further, during closing argument, Plaintiff focused heavily on challenging all aspects of Dr. Foley's testimony. [T.1575-77, 1583-89, 1619].

Applying the appropriate harmless error test, Plaintiff, as the beneficiary of the error, is unable to demonstrate that there is no reasonable possibility that the highly prejudicial impeachment of this key defense expert contributed to the verdict. Specifically, there is no basis for Plaintiff to demonstrate that Dr. Foley's credibility was unimportant or insignificant. Further, there are no facts that mitigate the harm.

Because Plaintiff, as the beneficiary of the error is unable to satisfy her burden, the error is by definition harmful. Applying the *Special* harmless error standard, the proper remedy is a new trial. *Cantore v. West Boca Medical Ctr., Inc*., 2018 WL 1959479 (Fla. Apr. 26, 2018) (jury's consideration of inadmissible evidence not harmless under *Special*); *Ring Power Corp. v. Condado-Perez*, 219 So. 3d 1028, 1030-35 (Fla. 2d DCA 2017) (beneficiary of evidentiary error excluding admission not able to meet *Special* burden); *Mootry v. Bethune-Cookman Univ., Inc*., 186 So. 3d 15, 20 (Fla. 5th DCA 2016) (beneficiary unable to establish that trial court's error in admitting certain hearsay evidence and allowing defendant's outside counsel to provide improper opinion testimony was harmless); *Maniglia v. Carpenter*, 182 So. 3d 18, 18-19, 20 (Fla. 3d DCA 2015) (erroneous exclusion of admissible evidence required reversal where beneficiary did not carry the burden to establish no reasonable possibility that the error contributed to the verdict); *Hurtado v. Desouza*, 166 So. 3d 831, 833 (Fla. 4th DCA 2015) (after initially finding admission of

improper evidence harmless, on rehearing applying *Special*, error required reversal for new trial because beneficiary failed to prove that the error did not contribute to the verdict).

As a further matter, the district court's decision illustrates the confusion and lack of uniformity that exists concerning whether the burden to establish harmless error belongs solely to the beneficiary of the error. Throughout the appellate proceedings, Plaintiff acknowledged that *Special* was the correct harmless error standard, but insisted that there was no trial error. Plaintiff never undertook the burden to demonstrate that the erroneous impeachment of Defendant's expert could not have influenced the trier-of-fact. Nevertheless, the district court conducted an independent evaluation to reach its holding.

Special describes the reviewing court as having three roles: to evaluate the beneficiary's proffer, to focus on the effect of the error on the fact finder, and to avoid engaging in a "but for" analysis.

> As the appellate court evaluates whether the beneficiary of the error has satisfied its burden, the court's obligation is to focus on the effect of the error on the trier-of-fact and avoid engaging in an analysis that looks only to the result in order to determine harmless error. Could the admission of evidence that should have been excluded have contributed to the verdict? Could the exclusion of evidence that should have been admitted have contributed to the verdict? Unless the beneficiary of the error proves that

> there is no reasonable possibility that the error contributed to the verdict, the error is harmful.

160 So. 3d at 1256-57.

Special expressly places the burden on the beneficiary of the error to prove that there is no reasonable possibility that the error contributed to the verdict. Contrary to this directive, the district court, without any substantive input from the beneficiary of the error, stepped into Plaintiff's shoes.

The Fifth District is not alone in undertaking the beneficiary's burden. There currently exist two approaches to the reviewing court's role: (1) those cases that place the burden on the beneficiary to carry the burden to establish error is harmless; and, (2) those cases in which the reviewing court is willing to determine harmfulness without input from the beneficiary of the error.

In the following cases, the appellate courts strictly adhere to *Special's* directives and find the error harmful unless the beneficiary meets its burden to demonstrate otherwise. *See, e.g., Pollari*, 228 So. 3d at 131 (beneficiary of evidentiary error failed to meet burden to establish erroneously admitted evidence was harmless); *MDVIP, Inc. v. Beber*, 222 So. 3d 555, 565 (Fla. 4th DCA 2017) (argument by beneficiary of error found persuasive, but not compelling enough to meet the heightened standard of *Special*); *Maines*, 190 So. 3d at 1137, 1142-43

(although expert's testimony improperly limited, because the jury nonetheless received all the opinions through other evidence the beneficiary of the error successfully established there was no reasonable possibility the error contributed to the verdict); *see also* cases cited *supra* at 14.

In another line of cases, the reviewing courts are less stringent and undertake the heavy lifting involved in reviewing the evidence for mitigating factors. The conclusory determinations in these cases fail to demonstrate that the focus is on the effect of the error on the trier-of-fact. *See, e.g., Tower Hill Preferred Ins. Co. v. Cabrera*, 219 So. 3d 862, 863 (Fla. 4th DCA 2017) (conclusory determination that admission of inadmissible evidence cumulative and, thus, harmless); *Boley Centers, Inc. v. Vines*, 179 So. 3d 464, 465 (Fla. 1st DCA 2015) (independently concluding based on review of record as a whole that addition of improper evidence harmless).

As the Court warned in *DiGuilio*, "harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence." 491 So. 2d at 1136 (*citing* Justice Traynor, *supra*). If it is a proper role for the reviewing court to undertake the task of canvassing the record to demonstrate that the improper evidence was unimportant or insignificant, the better practice would be

for the court to identify how, upon examination of the entire proceedings, the record demonstrates that there is no reasonable possibility that the error contributed to the verdict. Such transparency would serve to guide lawyers and the judiciary in generating more uniform, predictable, and fair results.

In the present case, not only did the district court fail to place the burden on the beneficiary of the error, it failed to conduct a meaningful analysis of the effect of the error on the trier-of-fact. Its reference to the error not affecting the "outcome of trial," and citation to *Herbello*, is an express application of the antiquated "but for," correct result, not clearly wrong, more probably than not, reasoning. Applying the legally correct test for determining harmless error, Defendant is entitled to a new trial on all issues.

B. Erroneous denial of curative instruction requiring reversal.

The harmless error test applies to the erroneous denial of a request for a curative instruction. *See Truehill v. State*, 211 So. 3d 930, 948-49 (Fla. 2017), *cert. denied sub nom*., *Truehill v. Florida*, 138 S. Ct. 3, 199 L. Ed. 2d 272 (2017) ("For those comments to which the defense objected and the trial court erroneously overruled defense counsel's objection, we apply a harmless error test."); *Dessaure v. State*, 891 So. 2d 455, 464-65 n.5 (Fla. 2004) ("We recognize that the proper standard of review for an overruled objection is a harmless error standard. *See Rodriguez v.*

State, 753 So. 2d 29, 39 (Fla. 2000); *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986)."); *Parker v. State*, 873 So. 2d 270, 284 n.10 (Fla. 2004), *cert. denied*, 543 U.S. 1049, 126 S. Ct. 868, 160 L.Ed. 2d 768 (2005) (because trial court neither sustained an "objection in front of the jury nor gave a curative instruction, we conclude that a harmless error analysis is appropriate"); *Goodwin v. State,* 751 So. 2d 537, 547 (Fla. 1999) (holding that "use of a harmless error analysis under *DiGuilio* is not necessary where . . . the trial court recognized the error, sustained the objection and gave a curative instruction"; and, in companion case, overruled objection to improper admission of evidence reviewed under harmless error test); *see also Poole v. State*, 997 So. 2d 382, 397-99 (Fla. 2008) (Pariente, J., concurring) (where jury hears an improper comment but never hears the ruling deeming it impermissible, error should be reviewed under harmless error standard); *Dessaure*, 891 So. 2d at 473 (Pariente, C.J., concurring) ("harmless error analysis applies when the trial court denies a motion for mistrial after a prosecutor's misstatement in front of the jury and neither sustains the accompanying objection nor gives a curative instruction").[6]

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[6] In cases decided before *DiGuilio,* the denial of a corrective instruction or the giving of an inadequate instruction required a new trial. *Henry v. Beacon Ambulance Serv., Inc*., 424 So. 2d 914, 916 (Fla. 4th DCA 1982), *rev. denied*, 438 So. 2d 97 (Fla. 1983) (where curative instruction insufficient, "trial court should have either granted appellant's motion for mistrial as an adequate cure for appellees' improper argument or granted appellant's motion for new trial for the same reason"); *Mabery v. State*, 303 So. 2d 369, 370 (Fla. 3d DCA 1974), *cert. denied*, 312 So. 2d 756 (Fla. 1975) ("A

During closings, Defendant objected in response to Plaintiff's counsel's argument improperly attacking defense counsel's decision to hire Dr. Hurbanis as an expert based on his specialization in shoulder injuries. *Vickers*, 237 So. 3d at 415. Plaintiff pressed this argument despite her successful motion in limine on the withdrawn shoulder injury claim. *Id*. The district court correctly found the objected-to comments impugning the integrity of opposing counsel "disingenuous and improper." *Id*.

At sidebar, defense counsel objected, the objection was sustained, and the trial court refused to give a requested curative instruction. [T.1562-63]. The entire proceedings, including the objection, occurred outside the hearing of the jury. [T.1562-63]. Because the trial court refused to give the requested curative instruction, the prejudicial comments remained in place for the jury's consideration.

The district court found that: "the trial court incorrectly declined to give the curative instruction . . ." 237 So. 3d at 415. Thus, the court determined that the trial judge abused her discretion because the closing argument was sufficiently improper to warrant a curative instruction. *See Williams v. Lowe's Home Centers, Inc.*, 973 So. 2d 1180, 1187 (Fla. 5th DCA 2008) (decision to give curative instruction rests within

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mistrial is the remedy when the corrective instruction is denied or is inadequate or when the offense is repeated. *See Perry v. State*, 146 Fla. 187, 200 So. 525 (1941), and *Feldman v. State*, Fla.App.1967, 194 So.2d 48.").

sound discretion of trial judge). Once it made this abuse of discretion ruling, the only remaining test for reversal was whether the error was harmless.

The district court failed to differentiate between the different stages of error analysis and the nature of the objection, and to shift the burden to Plaintiff. Instead of proceeding to apply the harmful error test once it identified error, it placed a second burden on Defendant. The court asked whether the improper argument itself was so highly prejudicial and inflammatory as to deprive Defendant of a fair trial. 237 So. 3d at 415. The court employed the highly deferential abuse of discretion analysis to determine the harmfulness of the error. Applying the wrong standard, the court held: "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." *Id*.

The correct harmful error question is: did Plaintiff, as the beneficiary of the error, establish the failure of the trial court to give a curative instruction to counteract the effect of the prejudicial attorney argument could not have influenced the trier-of-fact in reaching its verdict. *See Special,* 160 So. 3d 1256. If the reviewing court cannot say there is no reasonable possibility that the error did not affect the verdict, then the error is by definition harmful. *Id*. at 1256-57.

As noted above, the objection and sidebar ruling occurred outside the presence of the jury. Because the prejudicial taint generated by the jury hearing such "disingenuous and improper" comments was not removed or cured by an instruction, there is a reasonable possibility that the jury was influenced by the improper attack on defense counsel's decision to hire Dr. Hurbanis, which would have affected its attitude toward both defense counsel and the expert. *See USAA Cas. Ins. Co. v. Howell*, 901 So. 2d 876, 879-80 (Fla. 4th DCA 2005) ("simple curative instruction that the jury was to only consider the evidence at trial and that counsel's statements were not evidence would have sufficed to purge the taint of the improper comments"); *see also Allstate Ins. Co. v. Buzdigian,* 776 So. 2d 1104, 1104 (Fla. 5th DCA 2001) (contemporaneous objection to improper closing argument followed by a curative instruction acts to effectively cure error); *Gonzalez v. Largen*, 790 So. 2d 497, 500 (Fla. 5th DCA 2001), *rev. denied*, 817 So. 2d 847 (Fla. 2002) (noting effectiveness of curative instruction).

Plaintiff, as the beneficiary of the error, is unable to demonstrate that there is no reasonable possibility that the failure to counteract the improper closing argument comments with a curative instruction did not contribute to the verdict. Applying the *Special* harmless error standard, the proper remedy is a new trial on all issues.

C. Erroneously overruled objections during closing argument requiring reversal.

Review of the improper attorney arguments was preserved by objection. As to the first objection, described above, the trial court denied a curative instruction. A second objection was erroneously overruled. In analyzing the harm resulting from these errors, the district court incorrectly applied the abuse of discretion standard instead of the *Special* harmless error test.

As part of Plaintiff's impeachment of Dr. Hurbanis, she emphasized that he was a shoulder surgeon and not a spine surgeon, a pain management doctor or a chiropractor. Plaintiff's counsel's comments on this fact during closing arguments crossed the line, however, when he turned his statements into a personal attack on Dr. Hurbanis' character and expressed his personal opinion that a surgeon in this case who is not a spine surgeon is unqualified and unworthy of belief. Again, Plaintiff pursued this line of argument despite her successful motion in limine on the withdrawn shoulder injury claim. This highly improper and inflammatory line of argument went unchecked, deprived Defendant of a fair trial, and requires reversal for a new trial.

Plaintiff's counsel argued:

> One of the things that the Court told you as part of the jury instructions, the Court said 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.1563-64 (emphasis added)]. Defense counsel objected. [T.1564]. The trial court overruled the objection. [T.1564].

The district court found that this argument was not improper. While, in theory, a witness's qualifications are open to challenge, it was inappropriate for Plaintiff to question Dr. Hurbanis' qualifications in this manner, especially in light of her successful motion in limine on the withdrawn shoulder injury claim. After the trial court denied the request for a curative instruction and overruled defense counsel's objection to the follow-up attack on Dr. Hurbanis, the onslaught of improper comments escalated to a full blown attack on Defendant's expert with Plaintiff's counsel repeatedly calling him a shoulder and knee doctor and criticizing him for not being a spine surgeon. [T.1564-66, 1571, 1619, 1621]. There were no objections to the multiple subsequent improper comments after the trial court overruled Defendant's second objection. As reiterated in *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 763-64 (Fla. 4th DCA 2016), *review denied*, 2017 WL 1023712 (Fla. 2017), *cert. denied*, 138 S. Ct. 163, 199 L. Ed. 2d 39 (2017):

> Jurors cannot be expected to understand the basis of counsel's repeated objections. All that is apparent to jurors placed in this position is that frequent objections and sidebar conferences prolong their service, and perhaps limit the information available to the jury. Thus, counsel's repeated objections to the same type of behavior may well lead the jury to infer that one side of the case is trying to hide or disguise matters that would be useful to the jury.

(*quoting Bocher v. Glass*, 874 So. 2d 701, 704 (Fla. 1st DCA 2004) *(quoting Manhardt v. Tamton*, 832 So. 2d 129, 132 (Fla. 2d DCA 2002))). As the *Calloway* court further noted: "Dismissing such occurrences as mere 'harmless error' encourages 'Rambo' litigators, intent on engaging in no-holds-barred tactics at trial, to roll the dice in the appellate courts. If that occurs, the entire judicial system suffers." 201 So. 3d at 763-64.

Plaintiff's argument took advantage of her last minute tactical decision to drop her right shoulder claim four days before trial. Plaintiff was well aware of the fact Defendant retained Dr. Hurbanis when Plaintiff's main claim had been her shoulder. Yet, after withdrawing the claim, Plaintiff's counsel used Dr. Hurbanis' speciality against him to make the defense look foolish and to imply the testimony was offered because of some improper motive. *See Scipio v. State*, 928 So. 2d 1138, 1150 (Fla. 2006) ("Not only was the only available defense evidence removed, in the process the defense was made to look utterly foolish, as later pointed out and emphasized by the

State in its closing argument to the jury. Hence, not only did the State improperly ambush or pull a 'gotcha' on the defense, it then used its improper ambush as a hammer to humiliate the defense before the jury."); *see also Segundo v. Reid,* 20 So. 3d 933 (Fla. 3d DCA 2009), *rev. denied*, 29 So. 3d 291 (Fla. 2010) (plaintiff's change in nature of claim completely turned the tables on defense); *Harley v. Lopez,* 784 So. 2d 447, 448 (Fla. 3d DCA 1999) (refusing to reward "gotcha" tactics, which have been "long abhorred by this court"); *M–5 Commc'ns, Inc. v. ITA Telecomms., Inc.,* 708 So. 2d 1039, 1039 (Fla. 3d DCA 1998) (reversal "mandated by an application of the anti-gotcha rule in its original and purest form"); *Salcedo v. Asociacion Cubana, Inc*., 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979), *cert. denied*, 378 So. 2d 342 (Fla. 1979) ("[T]he courts will not allow the practice of the 'Catch–22' or 'gotcha!' school of litigation to succeed.").

Adding to the prejudice, the overruled objection occurred immediately following Plaintiff's counsel's statement attacking defense counsel for hiring Dr. Hurbanis:

> 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 - -

[T.1562]. In reality, the jury heard the attack on defense counsel for hiring a shoulder surgeon followed by an attack on Dr. Hurbanis himself as a mismatched specialist.

Taken together, Plaintiff was permitted to attack defense counsel's decision to hire Dr. Hurbanis, without the jury being instructed that such argument was improper, and then attack Dr. Hurbanis. The harm was greatly magnified by the cumulative effect of the uncorrected disingenuous and improper attack on defense counsel immediately proceeding the attack on the expert witness as the unqualified shoulder surgeon defense counsel, through improper motive, retained.

Noting the significance of Plaintiff's counsel's comments, the district court, in chastising Plaintiff's counsel for his improper arguments, observed:

> Lastly, we feel compelled, as we have in the past, to comment upon the closing arguments made by Thomas's counsel, Jeffrey Byrd. Leading up to the trial, Thomas had sought recovery for cervical, lumbar, and shoulder injuries allegedly arising from the automobile accident. Four days before the trial, she withdrew her claim for the shoulder injury and successfully obtained a ruling in limine to prevent discussion of the withdrawn claim. During the defense's case, Vickers presented the testimony of Dr. Hurbanis, an orthopedic surgeon specializing in shoulder surgery, who conducted a compulsory medical examination on Thomas. During closing arguments, Thomas's counsel made several comments related to Dr. Hurbanis's qualifications to testify about cervical and lumbar injuries as a shoulder specialist.
>
> While it was appropriate to question Dr. Hurbanis's qualifications to address Thomas's injuries, the closing argument by Thomas's counsel improperly attacked Vickers's counsel's decision to hire Dr. Hurbanis as an expert in the case, based on his specialization in shoulder

> injuries. This occurred despite the successful motion in limine on the withdrawn shoulder injury claim. The attack on Vickers's counsel for electing to hire Dr. Hurbanis was disingenuous and improper.
>
> ***
>
> . . . We caution that the use of such improper comments, and the effect on a litigant's right to a fair trial, will lead to a new trial in the appropriate case.

237 So. 3d at 414-15 (citations omitted; footnote omitted).

The preserved objections make this the appropriate case to examine the effect of the improper comments on Defendant's right to a fair trial. As with the erroneous denial of the request for a curative instruction, the proper standard for determining harmless error for objected-to improper attorney argument is the test found in *Special*. *See Calloway*, 201 So. 3d at 762 (applying harmless error test in support of decision to reverse due to improper closing arguments); *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 60 (Fla. 4th DCA 2016), *rev. denied*, 2016 WL 4537513 (Fla. 2016) (because there was no reasonable possibility that the improper closing arguments were harmless, judgment reversed and case remanded for new trial); *see also Truehill*, 211 So. 3d at 948-49 ("For those comments to which the defense objected and the trial court erroneously overruled defense counsel's objection, we apply a harmless error test."); *Poole*, 997 So. 2d at 397-99 (Pariente, J., concurring) (where jury hears

an improper comment but never hears the ruling that it was impermissible, error should be reviewed under harmless error standard).

Unfortunately, the occurrence of improper attorney argument during trial is rampant. One of the Court's notable public policy reasons for adopting the harmless error standard announced in *Special* involves recognition that: "Requiring the beneficiary of the error to demonstrate that there is no reasonable possibility that the error contributed to the verdict discourages efforts to introduce error into the proceedings." 160 So. 3d at 1257. Unless and until the instigator of improper attorney argument is burdened with the responsibility to demonstrate that there is no reasonable possibility that the error contributed to the verdict, the problem is likely to persist.

Faced with review of objected-to improper attorney argument, the district court erred in applying the abuse of discretion standard instead of the harmless error test. At no point did Plaintiff attempt, nor is she able, to establish that there is no reasonable possibility that the disingenuous and improper comments quoted above, in combination with the improper attack on Dr. Hurbanis, did not affect the trier of fact. Applying the *Special* harmless error standard, the proper remedy is a new trial on all issues.

CONCLUSION

Based upon the foregoing facts and legal authorities, Petitioner, William Vickers, respectfully requests that this Court reverse and remand for a new trial on all issues as a result of the harmful errors, considered either individually or cumulatively.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail to all parties listed on the Service List below and filed via the Florida Courts e-Filing Portal on this 30th day of April, 2018.

KUBICKI DRAPER, P.A.
Counsel for Petitioner
101 S.W. Third Street
Ocala, Florida 34471
Telephone: (352) 622-4222
Facsimile: (352) 622-9122
E-Service: af-kd@kubickidraper.com

By: */s/ Angela C. Flowers*
ANGELA C. FLOWERS
Florida Bar Number: 510408

SERVICE LIST

Jeffrey M. Byrd, Esquire,
2620 East Robinson Street
Suite 1600
Orlando, Florida 32801
attorneybyrd@aggressiveattorneys.com
terry@aggressiveattorneys.com
pleadings@aggressiveattorneys.com
Counsel for Respondent/Appellee

Henry W. Jewett, II, Esquire
John P. Daly, Esquire
Michael C. Woodard, Esquire
201 East Pine Street
Suite 1500
Orlando, Florida 32802
hwj.service@rissman.com
jpd.service@rissman.com
mcw.service@rissman.com
Trial Counsel for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with Florida Rule of Appellate Procedure 9.210(2), counsel for Petitioner certifies that the size and style of type used in this brief are 14 point type, Times New Roman.

/s/ Angela C. Flowers
ANGELA C. FLOWERS