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 JURISDICTIONAL ANSWER BRIEF

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Statement of Case

Respondent, Annie D. Thomas, was permanently injured in an auto crash caused by Petitioner, William J. Vickers, on May 15, 2010. At trial, the jury awarded Thomas damages: $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 and quite costly post-trial motion practice by Petitioner, Petitioner then appealed to the District Court. After reviewing extensively reviewing the record on appeal, the briefs of the parties file, 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. [Pet. App'x. 3-4]

After the District Court's opinion, Petitioner filed numerous motions (rehearing, rehearing en banc, and a motion for clarification). The post-decision motions focused on Petitioner making the same exact arguments, continuing to advocate his same exact position, and expressing his dislike of the District Court's rulings (e.g., "Respectfully, this Court's decision to reverse the future loss of earning capacity award is no "cure."). After review of such motions, the District Court properly denied the Petitioner's post-decision motions that abused the rehearing process. Further, Petitioner never filed a motion or sought certification of any questions by

the District Court. This additional and costly appeal follows the District Court's denial of the Petitioner's numerous post-decision motions.

During trial, Thomas asked several questions to lay groundwork 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. Although the District Court disagreed, the Court found the questioning to be harmless. [Pet. App'x 4 n.2]

Petitioner claimed at the District Court level, and in his jurisdictional brief, that the award for future loss of earning capacity was unsupported. 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. [Pet. App'x 5] 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.)."

Petitioner challenged eighteen closing argument comments, of which only seven were even properly preserved for appellate review. [Pet. App'x 5 n. 4]. The District Court never identified "many of the objected-to comments made during Plaintiff's counsel's closing argument" as improper as claimed by Petitioner. The District Court cited only one preserved comment as improper and clearly stated

that it did not meet the standard of being "highly prejudicial, inflammatory, and improper." [Pet. App'x 6] The District Court specifically found that the comment did not deny Petitioner a fair trial. The District Court further held that the lower court's denial of a curative instruction 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).

In dicta, the District Court referred to a different case where Petitioner's trial counsel's closing arguments were challenged, and stated if there is an improper comment that merits reversal, that it will "lead to a new trial in the appropriate case." (emphasis added). This case was not "the appropriate case". In Petitioner's brief, he wrongly accuses Respondent's trial counsel as a "repeat offender." This both offensive and personal comment is not true at all. Respondent's counsel is a very seasoned trial attorney, who successfully tries roughly 6-8 cases per year, most resulting in verdicts on par with the verdict in this case. This track record results in a plethora of appeals from the losing parties. The trend for these appeals has been for the defense to unsuccessfully appeal primarily unobjected-to closing argument comments. Despite such numerous appeals, Respondent's counsel has never been reversed on any of these allegedly improper comments, and as such is not a "repeat offender."

Jurisdictional Statement

This Court may review a decision of a district court of appeals that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Fla. Const. Art. V, § 3(b)(3).

This Court may also review a decision of a district court of appeal that is certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal. Fla. Const. Art. V, § 3(b)(4). A petitioner cannot assert a case is of great public importance. *Allstate Ins. Co. v. Langston,* 655 So. 2d 91, 93 n.1 (Fla. 1995). That certification can only come from a district court of appeal. *Id.*

Summary of Argument

Petitioner's claim relies on the unsupported and personal contention that because he did not win his appeal, the district court failed to apply the correct standard. Nothing in the four-corners of the opinion supports this flawed position. There is no express and direct wording supporting Petitioner's claim that the district court failed to follow the harmless error analysis in *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251 (Fla. 2014). Petitioner is mainly trying to argue merit and complaining of the outcome of the district court's decision, while relying on assertions that are outside the record. *Special* was argued to the Court below. Further, there was no certification of great public importance.

Argument

I. THE DISTRICT COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH OTHER DECISIONS REGARDING THE HARMLESS ERROR STANDARD.

Petitioner's claim boils down to an unsupported, personal contention that because he did not win, the district court failed to apply the correct standard. There is nothing in the four-corners of the opinion supporting this contention. There is no express and direct wording supporting Petitioner's claim that the district court failed to follow the harmless error analysis in *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251 (Fla. 2014).

As cases are decided on factually significant differences, Petitioner cannot meet the burden to prove express and direct conflict by generally citing to cases with different facts and different rulings. Petitioner completely fails to identify which district court decisions, with similar facts and circumstances, this opinion is in express and direct conflict with. Petitioner misreads/miscites cases, and uses parentheticals to explain, that he states are in conflict with *Special*, demonstrating Petitioner's own lack of understanding of *Special*. *See* Pet. Juris. Br. 7.

In *Tower Hill Preferred Ins. Co. v. Cabrera*, 219 So. 3d 862, 862-63 (Fla. 4th DCA 2017), the court expressly states that the evidence was admissible (i.e. – no error) and then looked at any effect it may had have, holding that evidence was not only admissible, but cumulative of the unchallenged evidence (meaning no

reasonable impact on the outcome). In *Boley Centers, Inc. v. Vines*, 179 So. 3d 464, 465 (Fla. 1st DCA 2015), Petitioner once again misreads/misquotes the case: "Nevertheless, based on this court's review of the appellate record as a whole, such error is harmless—as we conclude there is no reasonable possibility that this error contributed to the result in this case, nor is there a reasonable possibility that a different result would be reached were this case remanded for reconsideration...." *Boley Centers, Inc.*, 179 So. 3d at 465 (citing to *Special*).

Looking at the cases Petitioner cites and the language Petitioner chose "conclusory," "independently concluding," and "deems judicial error harmless without evidencing a meaningful analysis of the beneficiary's burden within the context of the *Special* test," shows what Petitioner is actually complaining of: that he is upset that he lost and wants further recourse. *See* Pet. Juris. Br. 8. Petitioner's wounded pride does not create an "express and direct" conflict. Petitioner is of the misconception that the district courts have time with its 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. *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). To require otherwise, is to require the impossible.

Petitioner claims that the district court opinion is also in conflict with this court's decision in *Special*, claiming that a "but for" analysis was utilized; however, the opinion does not show this. Petitioner incorrectly creates this assumption and asks this Court to use his hypothesized reason to further explain the district's 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 citation is a *see also* and 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. That is exactly what Petitioner is doing, and at great cost to the Respondent who is continually having "justice" delayed by Petitioner.

Petitioner also attempts to argue its case on the "merits" and cites outside the four-corners of the opinion, claiming things such as, but not limited to, "[t]hroughout the appellate proceedings, Plaintiff acknowledged that *Special* was the correct standard, but insisted that there was no trial error and never undertook the burden to demonstrate that the error identified by Vickers was harmless. Without any effort on Plaintiff's part, the district court stepped into the advocacy role." Pet. Juris. Br. 8. Not only is it <u>false</u> that Thomas never went through the *Special* analysis and that the district court stepped into an advocacy role, but it is

also outside the four-corners of the opinion, and neither is a proper ground for showing discretionary conflict jurisdiction for this Court of limited jurisdiction.

Petitioner continues, citing to cases reversing based on *Special*, claiming that it is nearly unanimous that an evidentiary error is harmful; however, Petitioner fails to consider all of the PCAs without issued opinions and the opinion he himself cites. *Id.* Petitioner appears to erroneously believe that if there is any claimed error, be it erroneous or not, that it requires reversal if *Special* is claimed. Petitioner's point of view would completely render useless the *Special* test and use it as a cart blanche for unhappy litigants to get a second bite at the apple. *See Lake v. Lake*, 103 So. 2d 639, 643 (Fla. 1958) (explaining that this Honorable Court cautiously exercising its discretion is imperative to not undermining the finality of the district court decisions, and stating that "the safeguard intended by the pertinent provision would be distorted so that a suitor who had had one day in the appellate court would have a second. We assume that an appeal to a district court of appeal will receive earnest, intelligent, fearless consideration and decision. . . . Thus justice is assured to all, injustice to any is prevented.")

> The quality of justice may not be gauged by the treatment accorded one litigant without regard for his adversary. Justice should be done, but not overdone. When a party wins in the trial court he must be prepared to face his opponent in the appellate court, but if he succeeds there, he should not be compelled the second time to undergo the expense and delay of another review.

Id. at 642 (stressing the importance of caution when exercising discretion).

Petitioner also cites outside of the opinion claiming "focal point of trial." There is no support in the opinion for this claim, and in fact, the outcome would dictate that the district court found that it was not a focal point. *See* Pet. Juris. 9. Petitioner then continues to complain that the district court did not fully explain its analysis to Petitioner's satisfaction (which it is not required to do), and did not cite to any authority (which it is also not required to do), when evaluating the trial court's denial of a curative instruction. *Id.* In short, Petitioner's brief, does not show "express and direct" conflict as is required for this Court to exercise its Constitutionally limited discretion, but merely a forum for Petitioner to complain that it does not like the result.

II. PETITIONER IMPROPERLY ATTEMPTS TO ELLICIT A "CALL TO ARMS" RESPONSE FROM THIS COURT BY IMPROPERLY TRYING TO ASSERT A "GREAT PUBLIC IMPORTANCE" ARGUMENT FROM AN UNCERTIFIED DISTRICT OPINION.

The Florida Constitution clearly delineates that a Question of Great Public Importance can only come from certification of the district court of appeals itself. *See* Fla. Const. Art. V, § 3(b)(4). Petitioner attempts to assert that this case is of great public importance claiming that "review is necessary to arrest an evident trend to selectively shift the burden away from the beneficiary of the error and revert back to a results oriented [sic] analysis by summarily declaring judicial error harmless. The district court's deviation from *Special* jeopardizes the fundamental right of all parties to a uniform application off the harmless error test." Pet. Juris.

Br. 4. Had Petitioner desired to appeal to this Court's certified conflict or great public importance jurisdiction, Petitioner would have had to request that the District Court certify it. *See* Fla. Const. Art. V, § 3(b)(4); Fla. R. App. P. 9.330. Petitioner never sought certification, making this argument improper. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 n.1 (Fla. 1995) ("This Court does not have jurisdiction to review cases that a *party* deems to present an issue of great public importance. This Court may only review questions of great public importance that are certified by a district court of appeal.").

Petitioner cites to two other cases, which it disapproves of the opinion/application of the harmless error standard. Pet. Juris. Br. 7. Neither of these two cited cases are on appeal with this Honorable Court, nor were they even appealed to this Court, and the time period to file an appeal has well elapsed on both. Thus, since there is no "piggyback" jurisdiction argument, these two cases are asserted in an attempt to call this Court to exceed its Constitutionally limited discretion, as there has been no district court certification. Further, these cases expressly do not say what Petitioner claims. *See id* and argument in above section.

Conclusion

For the reasons given above, this Honorable Court should not exercise its discretionary jurisdiction as there is no express and direct conflict and there was no certification of conflict or a question of great public importance.

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 14th day of March 2018 to: Angela C. Flowers, Esq., Attorney for Appellant, 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: _____

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