IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: SC18-270

WILLIAM J. VICKERS,

Petitioner,
vs.

ANNIE D. THOMAS,

Respondent.

On appeal from the District Court of Appeal
Fifth District of Florida

CASE NO.: 5D15-3610
L.T. CASE NO.: 11-CA-2198-08-L

JURISDICTIONAL BRIEF OF PETITIONER WILLIAM J. VICKERS

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STATEMENT OF THE CASE AND FACTS

Petitioner, William J. Vickers, seeks to invoke this Court's discretionary jurisdiction to review the decision of the Fifth District Court of Appeal in this case. As will be explained, the Fifth District's decision expressly and directly conflicts 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. [A.3-7].[1]

Respondent, Annie Thomas, sued Vickers alleging substantial damages arising out of an automobile accident caused by Vickers. [A.3]. The jury returned a verdict awarding past and future compensatory damages, including medical expenses and future loss of earning capacity. [A.3-4]. During trial, Plaintiff was permitted, over objection, to improperly impeach Vickers' medical expert with text the expert did not recognize as authoritative. [A.4]. Further, Plaintiff's counsel made numerous improper statements during closing argument to which Vickers objected. [6-7].

Following the adverse verdict, Vickers asserted that a new trial was necessary to correct multiple trial errors. [A.4]. Additionally, he requested a new trial or remittitur to address the totally unsupported future loss of earning capacity award. [A.4.]. The trial court denied Vickers' post-trial motions. [A.3-4].

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[1]The Appendix is filed in compliance with Rule 9.220(c), Fla. R. App. P. The cover sheet is page 1 and the conformed copy of the decision begins on page 3. The Appendix will be cited as "A." followed by the appropriate page number.

On 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." [A.4]. Nevertheless, the court declared the evidentiary errors harmless. [A.4 n.2]. 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). [A.4 n.2].

Likewise, the district court identified as improper many of the objected-to comments made during Plaintiff's counsel's closing argument. [A.6-7 & n.4]. The district court found that the trial court erred in failing to give a curative instruction requested by Vickers. [A.6-7 & n.4]. In so ruling, the district court identified Plaintiff's counsel as a repeat offender who in this case improperly attacked Vickers' counsel for hiring a particular expert. [A.6-7]. The attack was improper per se as well as being "disingenuous and improper" in suggesting that the expert was not qualified to render opinions. [A.6]. Nonetheless, the district court found both the improper comments and the failure to give a curative instruction harmless. [A.7 & n.4].

Finally, the Fifth District held that the evidence was insufficient to support the jury's award of future loss of earning capacity damages. [A.5]. 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. [A.4-5, 7].

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review decisions of the district courts of appeal that expressly and directly conflict with decisions of the Florida Supreme Court or other district courts on the same question of law. *See* Fla. Const. Art. V, §3(b)(3); Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. The district court need not directly state that its decision conflicts with that of another appellate court; rather, the conflict is determined from the points of law expressed in the district court's opinion. *See, e.g., Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981) (failure to apply correct standard in reviewing trial court's granting of motion for new trial created express conflict and required that decision be quashed). This Court has discretionary conflict jurisdiction where the district court's opinion (1) announces a rule of law that conflicts with a rule previously announced by this Court or another district court, (2) applies a rule of law to produce a different result in a case involving similar controlling facts as a prior case; or (3) misapplies this Court's decisions. *See Wallace v. Dean*, 3 So. 3d 1035, 1039-40 & n.4 (Fla. 2009).

SUMMARY OF THE ARGUMENT

The Fifth District's decision is in direct and express conflict with decisions of this Court and other district courts concerning the test for harmless error. Most notably, the district court failed to follow this Court's decision in *Special v. West*

Boca Medical Ctr., 160 So. 3d 1251, 1256 (Fla. 2014), which places the burden on the beneficiary of trial error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. Instead, the district court applied a "but for" test to summarily conclude that trial court error was harmless.

Review is warranted to clarify application of *Special* and the requirement that the beneficiary of the error carry the burden to establish that the error did not contribute to the outcome. Specifically, 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 result oriented 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 of the harmless error test. Moreover, the conflict undermines the salutary public policy expressed in *Special*'s 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." *Id*. at 1257.

ARGUMENT

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER DECISIONS REGARDING THE HARMLESS ERROR STANDARD

In *Special*, the Court adopted the *DiGuilio*[2] 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. *Special* makes clear that it is not the role of the appellate court to step into the shoes of the appellee and carry the burden to establish that there is no reasonable possibility that the error did not influence the verdict.

The district court's role is threefold: to evaluate the beneficiary's proffer, to focus on the effect of the error, 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. . . . Unless the beneficiary of the error proves that there is no reasonable possibility that the error contributed to the verdict, the error is harmful.

Id. at 1256-57. The Court thereby removed from the district court "a result-oriented test that is strictly focused on the accuracy of the result or the weight of the

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

evidence." *Id.* at 1256. As the Court emphasized, these principles serve 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.

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); *see also Philip Morris USA, Inc. v. Pollari*, 228 So. 3d 115, 130 (Fla. 4th DCA 2017) ("An error in the admission of evidence requires a new trial unless" beneficiary meets *Special* burden).

Numerous decisions, in applying *Special*, illustrate the process by identifying the role taken by the beneficiary to prove that judicial error did not affect the trier-of-fact. *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).[3]

The Fifth District's decision is not the first decision to conflict with these precedents and reflect application of a mere summary conclusion indicative of the "but for" test rather than a meaningful analysis of the beneficiary's burden under *Special*. *See 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). Each of these cases deems judicial error harmless without evidencing a meaningful analysis of the beneficiary's burden within

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[3] The following additional conflict cases involve trial court error of an evidentiary nature: *Ring Power Corp. v. Condado-Perez*, 219 So. 3d 1028, 1030-35 (Fla. 2d DCA 2017) (beneficiary of evidentiary error not able to meet *Special* burden); *Boyles v. Dillard's Inc.*, 199 So. 3d 315, 317-21 (Fla. 1st DCA 2016) (beneficiary failed to meet *Special* burden regarding admission of erroneous impeachment evidence); *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); *see also 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).

the context of the *Special* test. None of these cases, however, go so far as to cite pre-*Special* precedent in support of their conclusions.

The Fifth District's decision reflects this trend and flat out applies the "but for" test by citing to *Herbello*, 754 So. 2d at 840, in conflict with the *Special* harmless error rule. Throughout 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. However, rather than carry the *Special* burden, the district court followed *Herbello* which applied a "but for" harmless error test to find that erroneous evidentiary rulings were "harmless" because they did not affect the outcome of trial. *Id.* at 840.

Insofar as context is always important, the district court expressly identified as reversible error: (1) the trial court's improper admission of impeachment of an expert witness with medical literature he did not find to be authoritative; and (2) the failure of the trial court to give a requested curative instruction after sustaining an objection to improper closing arguments. Without any stated basis, the district court summarily concluded that the evidentiary error was harmless despite a nearly unanimous body of law holding that a violation of §90.706, Fla. Stat. (2014), is harmful. *See, e.g.*, *Brown v. Crane, Phillips, Thomas & Metts, P.A.*, 585 So. 2d 947 (Fla. 2d DCA 1991);

Whitfield v. State, 859 So. 2d 529, 531 (Fla. 1st DCA 2003); *Kirkpatrick v. Wolford*, 704 So. 2d 708, 709 n.1 (Fla. 5th DCA 1998), and cases cited therein. This is so because the improper impeachment of an expert whose testimony is a focal point at trial 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) ("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); *Donshik v. Sherman*, 861 So. 2d 53, 56 (Fla. 3d DCA 2003). *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; *Donshik*, 861 So. 2d at 56.

Finally, although not citing to any authority for finding failure to give the curative instruction harmless, the Fifth District, again, undertook independently to evaluate harmfulness and applied a result-oriented analysis by its summary conclusion that the erroneous failure to give a curative instruction was harmless. This ruling also conflicts with the Court's decision in *Special*.

As explained, the Fifth District's decision conflicts with *Special* as to both judicial errors and is in contravention to each of the foregoing district court opinions

that apply the correct harmless error test. The opinion of the Fifth District cites only inapplicable authority in support of its finding that the trial errors were harmless and fails to place the burden on the beneficiary of the errors to establish that there is no reasonable possibility the errors contributed to the verdict. Had the district court applied the correct harmless error test and acknowledged that Plaintiff failed to meet her burden, it would have awarded Vickers a new trial on all issues.

Finally, the Fifth District is not alone. The several other decisions cited above that express similar "but for" analyses give rise to a compelling need for this Court to exercise its discretion. Application of the wrong harmless error test seriously jeopardizes the fundamental right of all parties in all types of cases to receive redress in the face of clear judicial error. *See Rodriguez v. State*, 168 So. 3d 228 (Fla. 2015) (on certified question, this Court clarifying application of *Special*). Consequently, this Court should grant review to resolve the conflicts and reaffirm the correct legal standard for harmless error so that it is applied in a uniform manner to the benefit of all Florida citizens.

CONCLUSION

Petitioner respectfully urges this Court to exercise its jurisdiction to resolve the conflicts regarding the legal standard for harmless error and decide the merits of Petitioner's arguments.

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 23rd day of February, 2018.

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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.

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