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

REPLY BRIEF ON THE MERITS OF PETITIONER WILLIAM J. VICKERS

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I.

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

Both Plaintiff and Defendant agree that the harmless error test articulated in *Special v. West Boca Medical Center*, 160 So. 3d 1251, 1253 (Fla. 2014), is applied by an appellate court once it identifies trial court error.

As argued throughout Petitioner's Initial Brief on the Merits, this Court's standard of review is a de novo examination of whether the Fifth District correctly applied the law as enunciated in *Special*. *See Gutierrez v. Vargas*, 239 So. 3d 615, 621 (Fla. 2018).

As evidenced in the district court's decision, it failed to apply the correct harmless error test to two identified trial errors contrary to this Court's decisions and those of other district courts of appeal. This alone warrants examination by this Court and resolution of the misconceptions concerning application of the *Special* test.

Regardless of whether the Court adopts best practices standards that would assist appellate courts in performing harmless error analysis, this area of the law is in need of clarification to insure the uniform application of legal rights to all parties seeking justice though appellate review. Left unchecked, the erroneous

implementation of *Special*'s test thwarts the Court's stated purpose to: "foster consistency in appellate courts' analyses of harmless error." 160 So. 3d at 1257.

A. Erroneous evidentiary rulings requiring reversal.

Plaintiff asks this Court to reexamine the Fifth District's ruling that the trial court abused its discretion in "allowing cross-examination of a medical expert with text the expert did not recognize as authoritative." *Vickers v. Thomas*, 237 So. 3d 412, 414 n.2 (Fla. 5th DCA 2017).

As previously explained, the district court correctly found that the trial court violated §90.706, Fla. Stat. (2014). Petitioner's Initial Brief on Merits at 12-13. Indeed, Florida law prohibits the very action Plaintiff admits she was engaged in–"ask[ing] [repeated] questions to lay the predicate in order to establish authoritativeness." *See* Respondent's Answer Brief at 24. Once a witness states that he does not recognize the text as authoritative, the examination must end and the examiner's only alternative is to offer testimony of another expert on authoritativeness or obtain judicial notice. *See Brown v. Crane, Phillips, Thomas & Metts, P.A.*, 585 So. 2d 947 (Fla. 2d DCA 1991). Repeatedly calling the jury's attention to medical literature that has not been authenticated violates §90.706. *See Call v. Tirone*, 522 So. 2d 533, 534 (Fla. 3d DCA 1988).

Next, Plaintiff, for the first time, claims that the error could not possibly have contributed to the verdict. Plaintiff asserts that the error was harmless because the questioning was limited and not brought up again; the subject was only addressed during six to eight pages of a 47 page cross-examination (15%); it cannot be considered impeachment; the trial was five days long with this testimony occurring on the fourth day; Dr. Foley was otherwise impeached on other grounds; and, as a long-time expert witness, Dr. Foley was able to neutralize any negative impact. Respondent's Answer Brief at 18-25.

These are not legally recognized grounds that support a finding that the harm was mitigated or nullified. Given the circumstances, Plaintiff is unable to prove that there is no reasonable possibility that the improper cross-examination contributed to the verdict. Dr. Foley was one of only two key witnesses presented by Defendant and his only radiologist who provided factual support and opinions concerning the source of Plaintiff's alleged injury. He was locked in a battle of experts with Plaintiff's treating physicians and her forensic radiologist, Dr. Mahan, over whether her injuries were caused by an earlier automobile accident, the one involving Defendant, or a degenerative condition. Plaintiff's improper cross-examination concerning the authoritative text was a key aspect of Dr. Foley's impeachment and repeatedly informed the jury of medical literature that was never authenticated. Dr. Foley's

testimony went to the core of Defendant's case and Plaintiff vigorously sought to discredit him during cross-examination and forcefully challenged his credibility during closing arguments.

Had the district court properly applied the *Special* harmless error test, it would have found that Plaintiff did not carry her burden to establish the error was somehow unimportant or insignificant so as to render it harmless. Instead, by its language and reference to pre-*Special* case law, the district court applied a "but-for" harmless error test rather than finding that there is no reasonable possibility the error contributed to the verdict. *See Herbello v. Perez*, 754 So. 2d 840 (Fla. 3d DCA 2000) (*citing Katos v. Cushing*, 601 So. 2d 612, 613 (Fla. 3d DCA 1992) for the proposition that the "test for harmful error is whether, but for such error, a different result may have been reached.")).

The district courts of appeal, as error correcting courts, must correct trial error unless the error is harmless. The district court's failure to apply *Special* to the identified trial court error departed from established principles of law and deprived Defendant of his rights to procedural due process and equal justice under the law.

B. Erroneous denial of curative instruction requiring reversal.

The Fifth District expressly ruled on the trial court's error in failing to give a curative instruction stating: "the trial court incorrectly declined to give the curative

instruction . . . The trial court's failure to give the curative instruction was harmless on the facts of this case." *Vickers*, 237 So. 3d at 415. The court identified the comment which gave rise to the request for a curative instruction as the closing argument "improperly attack[ing] Vickers's counsel's decision to hire Dr. Hurbanis as an expert in the case, based on his specialization in shoulder injuries." *Id.*

Rule 9.110(h), Fla. R. App. P., provides that this Court's scope of review includes: "any ruling or matter occurring before filing of the notice." Thus, contrary to Plaintiff's assertion, because the district court's decision rules that the trial court erred in denying Defendant's request for a curative instruction, he is permitted to ask this Court to determine whether the district court applied the correct harmless error test in determining the consequence of that error.

Moreover, Defendant did, in fact, argue the erroneous denial of his request for a curative instruction to the district court as part of the facts underlying the trial errors and the court expressly ruled on a matter within the four corners of the record and the arguments presented. [Certified Copies of Appellate Papers at 207-13 (Initial Brief at 39-45)]. Regardless, however, the Court is authorized and concerned with correcting any inaccurate statement of the law contained in a district court of appeal decision that conflicts with prior decisions of this Court and other district courts of appeal. *See, e.g., Wells v. State*, 132 So. 3d 1110, 1112-13 (Fla. 2014); *The Florida*

Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988).

After concluding the trial court abused its discretion in denying the request for a curative instruction, the question for the district court was whether the failure to dispel the prejudicial effect of Plaintiff's counsel's improper comments via a curative instruction was harmless under the *Special* test. The burden was on Plaintiff to prove that there is no reasonable possibility that the error complained of contributed to the verdict. *Special*, 160 So. 3d at 1253.

Specifically, the comments criticizing Dr. Hurbanis as a mismatched expert followed by Plaintiff's counsel's attack on defense counsel for hiring Dr. Hurbanis, in the context of Plaintiff's last minute abandonment of her shoulder injury claim and successful in limine motion to preclude Defendant from mentioning it, was "disingenuous and improper." *See Vickers*, 237 So. 3d at 415. As such, the comments were highly prejudicial and Defendant sought a curative instruction after the trial court sustained his objection at sidebar. Rather than acting to dispel the harm, the trial court denied the request.

Plaintiff's only response is to assert that the comment was isolated, he did not complete the comment and he quickly moved on to other argument. Respondent's Answer Brief at 28. None of these are legally sufficient mitigating grounds to support a finding that there is no reasonable possibility that the error contributed to the

verdict. As the district court observed, the closing argument attacking defense counsel, was disingenuous and improper, and not to be condoned. 237 So. 3d at 415.

Examining the facts, this highly improper and prejudicial attack on defense counsel in relation to hiring the sole defense expert who offered testimony concerning past and future medical treatment could not possibly have been harmless. *See Special*, 160 So. 3d at 1253. Moreover, the harm was magnified by the fact that Plaintiff's counsel immediately launched into an attack of Dr. Hurbanis qualifications as a "shoulder and knee" expert despite her successful motion in limine on the withdrawn shoulder injury claim.

By its language and citation to pre-*Special* case law, the district court applied the wrong test for harmless error. The decision cites to *Bakery Associates, Ltd. v. Rigaud*, 906 So. 2d 366 (Fla. 3d DCA 2005), for the standard of review applicable to the failure to give a curative instruction after sustaining an objection to improper closing argument. However, in *Bakery*, the trial court gave a requested instruction after sustaining an objection to one improper attorney statement, in addition to overruling plaintiff's other objections. *Id*. at 367. After trial, the aggrieved party moved for a mistrial asserting the curative instruction did not cure the prejudicial effect of the comment and the other objections were improperly overruled. *Id*. Applying its broad discretion, the trial court agreed and granted a new trial. *Id*. On

appeal, the district court ruled that the lower tribunal abused its discretion because the improper comments were not so highly prejudicial and inflammatory that a new trial was warranted, implicitly finding that the curative instruction defused the prejudice the court acted to alleviate. *Id*.; *see also Domino's Pizza, LLC v. Wiederhold*, 2018 WL 2165224, at 9 (Fla. 5th DCA May 11, 2018) (stating the more stringent harmless error test announced in *Special* did not apply because the trial court gave a curative instruction).

Rather than focus on the trial error arising from the failure to give the curative instruction, the district court focused on the closing argument itself and determined that the improper comments "were not so highly prejudicial and inflammatory as to deny Vickers a fair trial." 237 So. 3d at 415. As the district court's decision illustrates, confusion exists in applying *Special* to rulings related to improper closing argument comments. Where, as here, an objection to improper attorney argument is sustained, a request for a curative instruction is denied, and the ruling is held to be erroneous, application of the *Special* harmless error test must follow. *See 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").

Because the district court did not apply the *Special* test and focus its harmless error analysis on the effect of the error on the trier of fact by evaluating whether there was no reasonable possibility that the error could have effected the jury, its decision conflicts with this Court's decisions and those of other district courts of appeal. The district court's error, in turn, resulted in the inconsistent application of the harmless error rule and deprived Defendant of equal justice under the law.

C. Erroneously overruled objections during closing argument requiring reversal.

Contrary to Plaintiff's assertion, Defendant's briefing in the Fifth District included as an appellate issue the trial court's error in overruling an improper closing argument objection disparaging Dr. Hurbanis and asserted application of the *Special* harmless error test. [Certified Copies of Appellate Papers at 207-13 (Initial Brief at 39-45 ("With preserved error, a new trial is required unless the beneficiary of the error can prove there is no reasonable possibility it contributed to the verdict. *See Special*, 160 So. 3d at 1253-57."))]. The argument presented below focused on cumulative error resulting from the multiple improper closing arguments. Nevertheless, the ruling on this objected-to argument is relevant to the Court's review and included within the conflict issue before the Court if it agrees that Defendant's objection should have been sustained. *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.").

II.

THE FIFTH DISTRICT APPLIED THE CORRECT STANDARD IN REVERSING PLAINTIFF'S AWARD OF FUTURE LOSS OF EARNING CAPACITY DAMAGES

Although not encompassed within this Court's conflict jurisdiction, Plaintiff asks the Court to exercise its discretion to review the Fifth District's ruling reversing the award of future loss of earning capacity damages and remanding for remittitur or a new trial. Defendant urges the Court to reject Defendant's invitation on both jurisdictional and substantive grounds.

On the merits, the district court's decision is eminently correct. The district court did not foreclose Plaintiff's right to recover future loss of earning capacity damages, but held the damages evidence insufficient as a matter of law to support the amount awarded.

> Here, the evidence presented revolved around Thomas's fear of losing her job rather than any diminished capacity to continue her employment; such fear is speculative and cannot serve as a proper basis for these damages.

Vickers, 237 So. 3d at 414.

Florida law is well-established that an award of lost earning capacity damages must be based on the jury's consideration of factors establishing a diminished ability to labor and a monetary standard against which the jury can measure any future loss. *See, e.g., Rasinski v. McCoy*, 227 So. 3d 201, 204 (Fla. 5th DCA 2017). Plaintiff both failed to present evidence of a diminished capacity or a monetary standard. Among other factors, Plaintiff's evidence demonstrates she continued to be employed in her pre-accident job, received regular raises and obtained work accommodations. Her entire theory of recovery was based on her fear that she would lose her job if she elects to have neck surgery in the future. Because Plaintiff did not produce evidence that future surgery would completely disable her from gainful employment and her fears surrounding future job security amounted to pure speculation, there was no competent evidence from which the jury could calculate an award with reasonable certainty. *Id*.; *W.R. Grace & Co.–Conn. v. Pyke,* 661 So. 2d 1301, 1302, 1304 (Fla. 3d DCA 1995).

The district court correctly held that the trial court abused its discretion in denying Defendant's motion for new trial or remittitur on damages for lost earning capacity.

CONCLUSION

Based upon the foregoing facts and legal authorities, Petitioner, William Vickers, respectfully requests that this Court apply the *Special* harmless error test, reverse the final judgment and remand for a new trial on all issues.

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 11th day of June, 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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