13-574

No. _____

Supreme Court, U.S.
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DAVID R. CUMMINS,
Conservator for C.A.P., a minor child,

Petitioner,

versus

BIC USA, INC. and BIC CONSUMER
PRODUCTS MANUFACTURING COMPANY, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this product liability action involving the child-safety feature of a cigarette lighter, the trial court permitted the product manufacturer to introduce testimony that the Consumer Product Safety Commission had never investigated, expressed concern about, taken any enforcement action with respect to or found the particular cigarette lighter in question non-compliant with a consumer product safety rule, even though the Consumer Product Safety Commission had never even been provided information about the particular cigarette lighter design and product defect involved and thus never had an opportunity to test, investigate or take any action against the manufacturer relative to the product defect claimed.

Three questions are presented:

1. Whether the prohibition of 15 U.S.C. § 2074(b) against introduction of evidence of "inaction" by the Consumer Product Safety Commission with respect to the safety of a consumer product in litigation under common law or state statutory law is inapplicable where the Consumer Product Safety Commission has only generally considered a consumer product, even though the specific product design or the alleged defect in that consumer product has never even been specifically considered by the Consumer Product Safety Commission.

QUESTIONS PRESENTED – Continued

2. Whether evidence that the Consumer Product Safety Commission has never investigated, expressed concern about, taken any enforcement action with respect to or found a particular consumer product non-compliant with a consumer product safety rule is relevant at all under F.R.E. 401 and 403 in product liability litigation where the specific product design or the alleged defect in that consumer product has never even been considered by the Consumer Product Safety Commission.

3. Whether, upon finding that the trial court erred in admitting evidence of "inaction" by the Consumer Product Safety Commission, the appropriate standard for measuring whether the trial court's error was harmless is whether the error caused a different outcome at trial, as adopted by the Sixth Circuit Court of Appeals below, or whether the appropriate standard calls for reversal when the appellate court lacks a "fair assurance" that the outcome of the trial was not affected by the evidentiary error.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit whose interest and position may be affected by further review of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, David R. Cummins, Conservator for CAP, a minor child, respectfully prays that a Writ of Certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit, entered on August 14, 2013.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, is reported at *Cummins v. BIC USA, Inc.*, 727 F.3d 506 (6th Cir. 2013), and is reprinted in the appendix hereto, at App. 1-App. 22. The Sixth Circuit affirmed the Order of the United States District Court for the Western District of Kentucky which denied the Petitioner's Motion for a new trial. A copy of that Order is reprinted in the appendix hereto at App. 24. The pre-trial Memorandum Opinion of the United States District Court for the Western District of Kentucky relevant to the issues raised herein is not publicly reported but may be found at *Cummins v. BIC USA, Inc.*, 2011 WL 2633959 (W.D.Ky. 2011), and is also reprinted in the appendix hereto at App. 25-App. 38.

JURISDICTION

An order of the United States Court of Appeals for the Sixth Circuit was entered on August 14, 2013,

affirming the order of the United States District Court for the Western District of Kentucky which denied Petitioner's Motion for a new trial. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND RULES INVOLVED

15 U.S.C. § 2074(b) provides:

"The failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law related to such consumer product."

16 C.F.R. § 1210.3(b)(4) provides:

"The mechanism or system of a lighter subject to this part 1210 that makes the product resist successful operation by children must:

. . .

(4) Not be easily overridden or deactivated."

F.R.E. 401 provides:

"Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence;

and

(b) the fact is of consequence in determining the action."

F.R.E. 403 provides:

"The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

STATEMENT OF THE CASE

This is an action filed against a cigarette lighter manufacturer on behalf of CAP, a minor child, by his court-appointed Conservator to recover damages under Kentucky products liability law and for violation of a consumer product safety rule pursuant to 15 U.S.C. § 2072. The lawsuit was originally filed in Kentucky state court but was removed to the United States District for the Western District of Kentucky pursuant to 28 U.S.C. §§ 1332 and 1441.

The circumstances giving rise to this action occurred on December 17, 2004, when CAP, then less than four years old, returned to his mother's apartment in Greensburg, Kentucky, after having visited with his father overnight. Prior to his return home, CAP found a black, BIC model J-26 cigarette lighter in the rear floorboard of his father's truck and put it

in his pocket. His possession of the lighter went unnoticed by CAP's step-mother and his mother when he arrived home that day. Upon his arrival home, CAP went immediately to his upstairs bedroom. Within minutes CAP's mother heard him scream. She ran to the foot of the stairs, finding to her horror that CAP was standing at the top of the staircase, nearly completely engulfed in flames from his waist up. At trial, CAP explained that after he went upstairs, he had difficulty unbuttoning his shirt and decided to use the lighter to burn the buttons off. CAP successfully operated the BIC cigarette lighter, and ignited the shirt he was wearing.

Upon discovering her burning child, CAP's mother ran to the top of the stairs, attempted to extinguish the fire, scooped CAP in her arms and ran out of the apartment screaming for help. CAP was flown from Greensburg to the Shriner's Burn Center in Cincinnati where he underwent extensive treatment and grafting of his burns over a four-week period. He is permanently disfigured and will require ongoing medical attention for the remainder of his life.

A black BIC model J-26 cigarette lighter was found at the scene and delivered to Greensburg Police Chief John Brady. BIC acknowledged that the subject cigarette lighter was manufactured by BIC in the 26th week of 2004. The child resistant feature on the cigarette lighter recovered by Chief Brady and later introduced in evidence at trial had been removed.

The 2004 version of the BIC model J-26 cigarette lighter used by CAP replaced an earlier design wherein the metal guard or spring serving as the child-resistant mechanism was part of a single one-piece head design. The Petitioner conceded that the prior BIC model J-26 one-piece cigarette lighter design met the safety requirements of 16 C.F.R. § 1210.3(b)(4), requiring that the child safety mechanism chosen by a cigarette lighter manufacturer, "not be easily overridden or deactivated."

As opposed to the older one-piece design, the 2004 version of the BIC model J-26 cigarette lighter separated the metal guard or spring from the rest of the lighter head and inserted the metal guard as a separate piece. When BIC phased the two-piece design into production in approximately 1998, and phased the one-piece design out of production by 2000, no analysis was performed by BIC or the CPSC to determine if the child resistant feature of the two-piece design was more easily deactivated or overridden than the one-piece design. In fact, BIC contended that no internal corporate documents exist from the transition period describing the purpose of the change in design, any benefits of the proposed change or any concerns with the proposed change.

Despite the requirements of 16 C.F.R. § 1210.3(b)(4) that the child resistant feature chosen by BIC for its cigarette lighters not be "easily overridden or deactivated," BIC acknowledged that it was aware that many of its adult consumers purposely remove the metal guard or spring serving as the child resistant

mechanism from its two-piece model J-26 cigarette lighters.

At trial, the Petitioner presented expert testimony as to the ease with which the child safety mechanism could be removed from the BIC two-piece cigarette lighter design. In fact, the evidence showed that no more force was required to remove BIC's child safety mechanism than is required to open a pop-top tuna or soda can. Petitioner's experts offered alternate designs, including BIC's one-piece design, which fully comply with CPSC child safety standards.

The only compelling evidence introduced at trial by BIC was the testimony of former high-level CPSC official Nicholas V. Marchica that the CPSC had never cited BIC, never initiated investigation of the design of BIC's model J-26 two-piece cigarette lighter, and had never requested that BIC modify its two-piece design in any fashion. To support his testimony, and presumably to skirt the prohibition of 15 U.S.C. § 2074(b), BIC introduced test data compiled by an outside testing lab and compliance and inspection reports issued by the CPSC.

However, Marchica was ultimately forced to concede that every one of the reports issued by the CPSC, and upon which he relied, involved ***only*** BIC's ***one-piece*** lighter design, not the two-piece design like the one used by CAP.

Further, BIC admitted that the only document in evidence related to the two-piece lighter design like the one used by CAP was testing data, ***unrelated to***

the requirements of 16 C.F.R. § 1210.3(b)(4), submitted to the CPSC by BIC in 2006. With respect to that testing data, the letter from the CPSC acknowledging receipt of the test data compiled by BIC's private contractor specifically cautioned BIC as follows:

> This acknowledgment of receipt of your reports and its acceptance as being complete pursuant to 16 C.F.R. § 1210.17(b)(1)-(6) is not to be considered by you or any other party as an approval of the lighters or of the reports.

In other words, even though the data was not related to the issues in this case, on the sole occasion that the data from BIC's child resistance testing of its two-piece design was ever provided to the CPSC, the CPSC made it crystal clear that it did ***not*** independently evaluate the lighter design. Rather, the CPSC simply acknowledged receipt of the test data and cautioned that it was not ***approving*** the design thereby.

Thus, despite the thousands of pages of documents identified and relied upon by BIC, the evidence at trial was uncontradicted that ***at no time*** prior to BIC's manufacture of the two-piece lighter used by CAP or even prior to CAP's injury had the CPSC even been provided child resistance test data concerning the two-piece design, and has still never been provided test results or data bearing on whether the child-resistant feature of the BIC model J-26 two-piece lighter is "easily deactivated or overridden" in violation of 16 C.F.R. § 1210.3(b)(4).

Nevertheless, evidence of the CPSC's "inaction" with respect to BIC's two-piece lighter design was admitted. Marchica's testimony extended over portions of two trial days. BIC's counsel emphasized the lack of remedial action taken by the CPSC against BIC in both his opening and closing statements, arguing persuasively that if the federal agency charged with regulating cigarette lighters had taken no action against BIC with respect to this specific product or the defect claimed by the Petitioner, the jury must conclude that the federal agency approved the product as reasonably safe.

After nine days of trial, the jury returned a verdict finding that BIC had not knowingly or willfully violated a consumer product safety rule and that the BIC cigarette lighter in question was not defective and unreasonably dangerous. A judgment dismissing the Petitioner's claims against BIC was entered thereafter.

After the trial court denied the Petitioner's motion for a new trial, an appeal was taken to the United States Court of Appeals for the Sixth Circuit. On August 14, 2013, the Sixth Circuit Court of Appeals affirmed the judgment in favor of BIC.

In affirming the judgment, the Sixth Circuit acknowledged that Marchica's testimony fell short of establishing that the CPSC had ever specifically considered the ease with which the two-piece guard on the cigarette lighter design could be deactivated or overridden. It further acknowledged that BIC's

evidence did not justify an inference that the two-piece guard was approved or was safe. (App. 16-App. 17). However, the Sixth Circuit concluded that the prohibition of 15 U.S.C. § 2074(b) against the introduction of evidence of "inaction" by the CPSC only applies where the CPSC has *completely* failed to engage in activity on a product.

The Sixth Circuit reasoned that since the CPSC had promulgated numerous regulations related generally to cigarette lighters, it had not *completely* failed to act in relation to the cigarette lighter in question, even though it had taken no action specifically in relation to the BIC two-piece cigarette lighter design or the defect claimed by the Petitioner. The Sixth Circuit failed to even address how Marchica's testimony and BIC's evidence of CPSC "inaction," even if not prohibited under 15 U.S.C. § 2074(b), passed muster under F.R.E. 401 and 403. Thus, the Sixth Circuit held the evidence of CPSC "inaction" admissible.

Concluding that the trial court did not erroneously admit evidence of CPSC "inaction" in regard to the cigarette lighter design involved, and that even if erroneous a new trial was not warranted unless the error affected the outcome of the trial, the judgment for BIC was affirmed.

REASONS FOR GRANTING THE PETITION

The decision below establishes important precedent interpreting the Consumer Product Safety Act, 15 U.S.C. § 2051, *et seq.*, directly in conflict with the Act's purpose. If left standing, manufacturers of unsafe consumer products will be authorized to powerfully misrepresent that the Consumer Product Safety Commission approves their unsafe products, even when the CPSC has been provided no information about the specific product defect in issue, and thus has not even been given the opportunity to pass on the safety of the products. As the Consumer Product Safety Commission has jurisdiction of over 15,000 consumer products, it is of great practical importance that its activity with respect to a consumer product be accurately represented to a jury in frequently recurring product liability litigation.

Upon determining that the Sixth Circuit's interpretation of 15 U.S.C. § 2074(b) was misguided, and thus the trial court's admission of evidence of CPSC "inaction" was erroneous, this Court could then resolve the split among the circuit courts of appeals, and even within some circuits, on the equally important issue of the appropriate analysis for determining whether a trial court's erroneous admission of evidence in a civil trial was "harmless."

I. The Sixth Circuit Below Has Incorrectly Interpreted An Important Provision Of The Consumer Product Safety Act In Conflict With The Purposes Of That Act, Creating The High Likelihood That Misrepresentation Of The Work Of The Consumer Product Safety Commission Will Recur.

The Consumer Product Safety Commission was created to protect the public against unreasonable risks of injuries associated with consumer products.[1] More than 15,000 consumer products are regulated by the CPSC.[2] In addition to imposing civil fines for violations, the CPSC has the authority to order the recall of unsafe products.[3]

In 2010, an estimated 38,573,000 people sought medical attention for an injury related to a consumer product.[4] An estimated 35,900 deaths related to a consumer product occurred in 2008.[5]

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[1] 15 U.S.C. § 2051(b)(1).

[2] *See* U.S. Consumer Prod. Safety Comm'n, Regulated Products, http://www.cpsc.gov/businfo/reg.html (last visited October 23, 2013).

[3] 15 U.S.C. § 2069 (providing for civil penalties); 15 U.S.C. § 2071 (providing for injunctive enforcement and seizure upon action brought by the Commission).

[4] Schroeder, T. (2012) Consumer Product-Related Injuries and Deaths in the United States: Estimated Injuries Occurring in 2010 and Estimated Deaths Occurring in 2008. Washington, DC: Consumer Product Safety Commission.

[5] *Id.*

As a direct result of the millions of injuries and tens of thousands of deaths related to consumer products annually, products liability litigation in state and federal courts has increased exponentially over the years. From September 30, 2011, to September 30, 2012, more than 43,000 product liability lawsuits claiming personal injury were filed in the federal courts of the United States alone.[6]

It is certainly reasonable to assume that a significant number of the tens of thousands of product liability lawsuits filed in state and federal courts every year involve consumer products regulated by the CPSC. It is equally reasonable to recognize the powerful nature of evidence, particularly testimony from former high-ranking officials of the CPSC, that the very agency in charge of regulating a consumer product has taken no action to require redesign or recall of that product and thus must have "approved" the product as non-defective.

Yet, in instances where the CPSC is completely unaware of a particular design change in a regulated product or has had no opportunity to even consider a particularly claimed product defect, the inference of product approval by the CPSC by evidence of CPSC "inaction" is terribly misleading to the jury. On the one hand, if the evidence of the CPSC's election not to

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[6] Administrative Office of the U.S. Courts, 2012 Annual Report of the Director: Judicial Business of the United States Courts Tbl. C-11 (2012).

take action is based on actual CPSC testing or analysis of the claimed product defect, the evidence is clearly probative of the product defect issue. On the other hand, without product testing or analysis of the claimed defect by the CPSC, the powerful inference of product approval from the agency's inaction is really no more than evidence that the claimed defect is simply something that the agency has been unable to pay attention to, and not relevant to the issues which commonly arise in product liability litigation.

Likely for this precise reason, in passing the Consumer Product Safety Act in 1972, Congress included 15 U.S.C. § 2074(b) which provides that, "[t]he failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law related to such consumer product."

However, the Sixth Circuit Court of Appeals below has completely eviscerated 15 U.S.C. § 2074(b) by holding that it has no application in litigation regarding any consumer product, whether or not regulated by the CPSC, with respect to which the CPSC has taken ***any*** "action."

In this case, the Sixth Circuit candidly admitted that BIC's evidence fell short of establishing that the CPSC ever passed specifically on the ease with which the two-piece guard could be deactivated or overridden and thus did not justify an inference that the two-piece guard was approved or was safe. Despite

this finding, which should have led the Sixth Circuit to hold that BIC's evidence of CPSC "inaction" was inadmissible under 15 U.S.C. § 2074(b), and not even relevant under F.R.E. 401, the Sixth Circuit affirmed the trial court's admission of BIC's evidence and expressly permitted the inference of CPSC approval it had already acknowledged was ***not*** justified by the evidence.

The Sixth Circuit's interpretation of 15 U.S.C. § 2074(b) leads in the illogical result that by simply responding to a consumer's inquiry about a consumer product, whether a product is regulated by the CPSC or not, the CPSC will be deemed to have "acted" and thus opened the gauntlet for introduction of evidence at trial that because the CPSC did not mandate a design change or product recall the jury can infer CPSC approval of the product. Certainly, this could not have been the intent of Congress in including 15 U.S.C. § 2074(b) in the Consumer Product Safety Act.

The incongruity of the Sixth Circuit's decision with the basic purposes behind the establishment of the CPSC becomes clear by reference to a single exhibit introduced by BIC at trial. Presumably to show that the CPSC actually enforces the child safety standards for cigarette lighters promulgated in 16 C.F.R. § 1210, BIC introduced an October 29, 1996, CPSC Press Release announcing the forced recall of certain cigarette lighters that were manufactured and sold with ***no*** child safety mechanisms. (App. 39). The lighters had been sold nationwide for nearly two years prior to the recall.

Applying the Sixth Circuit's interpretation of 15 U.S.C. § 2074(b), had a child been injured or killed by use of one of the dangerous cigarette lighters later subject to the recall, filed a product liability suit against the manufacturer and brought that case to trial within the two-year window prior to the recall, the manufacturer of the unsafe lighter would have been able to present evidence to the jury that the CPSC must have approved the safety of the lighter because up to that point it had not ordered a recall. Clearly, such a result could not have been intended by Congress in adopting 15 U.S.C. § 2074(b), but it is precisely the result required by the Sixth Circuit's opinion below.

Where the factual issue here was whether BIC's two-piece cigarette lighter design was "easily deactivated or overridden," and thus defective and unreasonably dangerous, the fact that the CPSC knew virtually nothing about the design and had thus taken no remedial action toward the design has no tendency to make the operative fact more or less probable. Even under a liberal standard of relevance, evidence of CPSC "inaction" was **not** relevant under F.R.E. 401 and therefore was inadmissible, whether the Petitioner's claim was under common or state statutory law, or brought pursuant to a federal statute.

The Sixth Circuit's decision below was simply wrong, sets a dangerous precedent for existing and future products liability cases and should be corrected by this Court.

II. The Circuits Are Divided Over The Appropriate Standard For Measuring Whether A Trial Court's Error Was "Harmless."

A. This Case Squarely Presents The Conflict.

Upon determining that the trial court erroneously admitted evidence of CPSC "inaction," the question remains as to whether the error was substantial enough to merit a new trial for the Petitioner. In other words, was the trial court's error "harmless." A Federal Rule of Civil Procedure, a Federal Rule of Evidence, and a statute in the United States Code all attempt to define non-constitutional harmless error analysis in civil cases.[7] In each, errors are deemed harmless unless they "affect the substantial rights of the parties." Guidance on harmless error analysis is provided in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), where this Court stated that, "if one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not

[7] F.R.Civ.P. 61 provides that, "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." F.R.E. 103(a) provides that, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ." 28 U.S.C. § 2111 provides that, "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

affected." However, beyond that statement, the question of general harmless error analysis has been left open for interpretation.

The lack of a decisive interpretation of harmless error analysis for non-constitutional errors by this Court has resulted in several different standards among the circuits, and even in differing standards within some circuits, including the Sixth Circuit.

The Sixth Circuit below cited its prior opinion in *Morales v. American Honda Motor Co., Inc.,* 151 F.3d 500, 514 (6th Cir. 1998), for the proposition that any evidentiary error in this case was harmless, not justifying a new trial, unless the error, "would have caused a different outcome at trial." (App. 6). However, the *Morales* harmless error analysis had already been squarely rejected by another panel of the Sixth Circuit in *Beck v. Haik*, 377 F.3d 624, 634-635 (6th Cir. 2004) *overruled on other grounds by, Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009), which held that the proper harmless error analysis, "calls for reversal when the appellate court lacks a 'fair assurance' that the outcome of a trial was not affected by evidentiary error."

The disparity in harmless error analysis is not limited to the Sixth Circuit's intra-circuit conflict. Rather, as recognized in *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1252 n.39 (10th Cir. 1988) *overruled on other grounds as recognized by, Allison v. Bank One-Denver*, 289 F.3d 1223, 1248 (10th Cir. 2008), a sharp conflict among the circuits

exists, noting that, "We recognize that the circuits are divided on the appropriate standard of review to apply in gauging the effect of an error in a civil case." The conflict was also noted by the District of Columbia Circuit in *Williams v. U.S. Elevator Corp.*, 920 F.2d 1019, 1023 n.5 (D.C. 1990).

Essentially, three fundamentally different approaches for harmless error analysis have emerged. One such approach holds that errors are not harmless unless it is "highly probable" that they did not affect a party's substantial rights. The "highly probable" analysis was adopted by the Third Circuit in *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924-927 (3d Cir. 1985).

Another approach provides that an error is harmless if the jury's verdict is "more probably than not" untainted by the error. This "more probably than not" approach is used by the Seventh Circuit (*Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (7th Cir. 1985)), the Eighth Circuit (*McIlroy v. Dittmer*, 732 F.2d 98, 105 (8th Cir. 1984)), the Ninth Circuit (*Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983)), and the Tenth Circuit (*U.S. Industries, Inc. v. Touche Ross & Co., supra*).

However, recently the Seventh Circuit appears to have shifted its approach, adopting a more demanding analysis, similar to that of the Third Circuit, by finding error harmless only if the aggrieved party can demonstrate that there is a "significant chance" that

the error had a substantial effect on the jury's verdict. *Jordan v. Binns*, 712 F.3d 1123, 1137 (7th Cir. 2013).

The third approach rejects a trial court's error as harmless only where the appellate court can say with "fair assurance" that the judgment below was not substantially swayed by the impermissible introduction of evidence. This seemingly less demanding approach is used by the First Circuit (*Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997)), the Fourth Circuit (*Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999) (*en banc*) *abrogated on other grounds by*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-99 (2003)), the Fifth Circuit (*Conway v. Chemical Leaman Tank Lines*, 525 F.2d 927, 929 n.3 (5th Cir. 1976)), a panel of the Sixth Circuit (*Beck v. Haik*, *supra*), the Eleventh Circuit (*Aetna Casualty and Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986)), and the District of Columbia Circuit (*Williams v. U.S. Elevator Corp.*, 920 F.2d 1019, 1023 n.5 (D.C. 1990)).

While purporting to adopt the "fair assurance" standard of analysis, the Second Circuit adds a twist, explaining that, "We have altered the standard for civil cases, however, by requiring the appellant to show that the error was not harmless, rather than requiring the appellee to show that the error was harmless. Thus, an evidentiary error in a civil case is harmless 'unless [the appellant demonstrates that] it is likely that in some material respect the factfinder's judgment was swayed by the error.'" *Tesser v. Board*

of Educ. of City School Dist. of City of New York, 370 F.3d 314, 319 (2d Cir. 2004).

As the Sixth Circuit below relied upon a harmless error standard which required reversal only if the Petitioner could demonstrate that absent the trial court's error a different outcome would have been achieved, and other panels in the same Circuit have rejected that harmless error standard in favor of the facially less stringent standard upholding a jury's verdict only if it could say with "fair assurance" that the outcome was ***not*** affected, this case squarely presents the conflict among the various circuits in their struggle to apply the appropriate analysis for measuring whether or not trial court error in a civil case is harmless.

B. The Decision Below Reflects Widespread Uncertainty Over The Proper Analysis Of The Harmless Error Standard And This Uncertainty Is Recurring And Of Great Practical Importance.

Few issues are of more practical importance to appellate courts and the trial court bar in general than the appropriate standard for reviewing trial court errors. In fact, the standard of review defines the entire framework for the appellate court's consideration of a trial court's evidentiary error.

As evidenced by the stark conflict among the circuits, and even intra-circuit conflict in some instances, the issue of the appropriate analysis of the

harmless error standard is in disarray. Inexplicably, in a country that champions uniformity in the application of its laws, an entirely different result in similar cases involving identical trial court errors could result in different outcomes simply due to differing views of the appropriate standard for analysis of whether a trial court's error was harmless.

Only a resolution by this Court can lay to rest the clear confusion surrounding harmless error analysis.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted to consider those issues identified herein.

Respectfully submitted,

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