O/a 11-8-88.

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 72,402
DCA CASE NO. 87-926

CITY OF ORLANDO,

Petitioner,

vs.

ALAN L. BIRMINGHAM,

Respondent.
_____/

PETITIONER, CITY OF ORLANDO'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Petitioner, City of Orlando, was the Defendant below and shall be referred to variously as Petitioner, "City" or "City of Orlando". Alan L. Birmingham, Respondent here, was the Plaintiff below and shall be referred to as Birmingham. All references to the Record on Appeal will be to the record in the Fifth District Court of Appeals. References to the Record on Appeal will be designated by the symbol (R.) with the page citations to the record immediately following the symbol "R". References to the Appendix will be designated in the same way by the symbol (A.).

Respondent's operative pleading, the Second Amended Complaint (R. 561-565), alleged false imprisonment, unlawful assault and unlawful restraint. A jury trial commenced March 30, 1987 and a defense verdict in favor of the City of Orlando was rendered April 2, 1987 (R. 555-556, 606). No post-trial motions were made by Birmingham. Following a judgment in favor of Petitioner, City of Orlando, Respondent Birmingham appealed to the Fifth District Court of Appeal (R. 701). In an opinion filed March 10, 1988 the Fifth District Court of Appeal reversed the judgment in favor of the Petitioner, City of Orlando, and remanded for a new trial. Birmingham v. City of Orlando, 523 So.2d 647 (Fla. 5th DCA 1988) at page 648. After a Petition for Rehearing En Banc by the City of Orlando was denied (A. ii-vi), Petitioner timely filed a Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court (A. vii). This court accepted jurisdiction (A. viii).

STATEMENT OF THE FACTS

After a judgment in favor of the Defendant/Petitioner, City of Orlando, the Fifth District Court of Appeal reversed and remanded for a new trial due to alleged fundamental error despite no proper objection by Birmingham in the trial court. Birmingham v. City of Orlando, 523 So.2d 647 (Fla. 5th DCA 1988) at page 647-648. Among other things, the Fifth District Court believed that fundamental error resulted from Birmingham's failure to object to instructions, failure to offer instructions, failure to move for a directed verdict and failure to move for a new trial. Birmingham, supra, at page 647. The court also felt fundamental error occurred as a result of jury instructions regarding probable cause and civil disobedience. Birmingham, supra, at pages 647 and 648. The court noted that it usually refuses to reverse such a case because decisions of this kind are frequently tactical matters. Birmingham, supra, at page 647. However, without any testimony on whether the decisions of Birmingham's trial counsel were tactical matters, the Fifth District Court of Appeal found that these were not tactical judgments. Birmingham, supra, at page 647.

Without citing any objective record evidence of alleged jury confusion, the Fifth District Court of Appeal found that an instruction on probable cause "most likely" caused confusion on the part of the jury. Birmingham, supra, at pages 647 and 648. The opinion of the Fifth District Court of Appeal did not discuss the effect of the jury instruction quoted

in footnote 1 on other probable cause instructions which were given to the jury. Birmingham, supra, at pages 647 and 648. By underlining (italicizing) a portion of the instruction, the court apparently considered this portion in isolation without considering the impact of several other instructions. Birmingham, supra, at pages 647-648. The complete instruction on probable cause given to the jury read as follows:

> "Probable cause means a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to justify a cautious man in believing another person to be guilty of a crime. Probable cause is not equivalent to absolute certainty. It does not require proof beyond a reasonable doubt.
>
> You, the jury, must determine the existence of probable cause for making the arrest of the Plaintiff, Alan Birmingham, from the facts as they existed the day of the arrest through the eyes of a reasonable and prudent law enforcement officer at the scene and not hindsight.
>
> In order to have probable cause to believe that another person is committing a crime, the person does not have to actually see the law being violated, but he must be certain that beyond a reasonable doubt there is no question that the crime has been committed. Probable cause is not equivalent with absolute certainty, it does not require proof beyond a reasonable doubt." (R. 543-544).

The probable cause instruction criticized by the lower court was Petitioner's requested jury instruction #12 (R. 623). As proposed by the City of Orlando, the instruction read:

> "In order to have probable cause to believe that another person has committed a crime, a person need not actually see the law being violated, nor must a person satisfy himself beyond any question that a crime has been committed. Probable cause is not equivalent to absolute certainty, and it does not require proof beyond a reasonable doubt."

Birmingham agreed to the wording of this instruction (R. 471)

as originally proposed (R. 623). The instruction as proposed was not read by the trial judge as proposed to the court (compare R. 544 with R. 623). However, neither the City of Orlando nor Birmingham objected or requested reinstruction after the court instructed the jury (R. 550, 551). Reinstruction on probable cause was also not requested in response to the jury's request for a definition of legal cause (R. 553-554).

Without describing how or why the instruction regarding civil disobedience was inadequate to properly guide the jury, the Fifth District Court of Appeal simply stated that the instruction was inadequate. Birmingham, supra, at page 648. The jury did not return a question about the instruction on civil disobedience (R. 553). The jury did not return any question on the meaning of probable cause (R. 553). The only question submitted by the jury was a request for a definition of legal cause of injury (R. 553). In response to this question the jury received a reinstruction on legal cause (R. 553-554). After further deliberation the jury answered a two question Interrogatory Verdict in the negative, finding that Birmingham was not unlawfully imprisoned without probable cause and was not unlawfully assaulted (R. 555-556, 606). In the same Interrogatories the jury also found that there was no legal causal relationship between his imprisonment or his alleged assault and his alleged injuries (R. 555-556, 606). Birmingham agreed to the form of the verdict which combined the liability and legal cause issues (R. 551).

Other pertinent background facts are as follows: on March 25, 1984 Officer Sims of the Orlando Police Department was dispatched to a hit and run accident (R. 431). The hit and run accident involved property damage and Officer Sims initially spoke with a Mr. Jordan who observed a small silver car turn out its lights and flee the scene (R. 432). After a local lookout was broadcasted, Respondent Birmingham arrived at the hit and run accident scene and advised that his son Todd had been involved in a collision (R. 432). It was later determined that Birmingham's son was driving the vehicle which caused the hit and run accident (R. 401). Respondent Birmingham's son was felt to be under the influence of alcohol (R. 416) since impurities of alcohol were smelled on his person (R. 434-435) and Gene Piotrowski advised that he and the younger Birmingham drank a six pack of beer (R. 435). Todd Birmingham's vehicle smelled of the impurities of alcohol (R. 403) and there was evidence of alcohol on the floorboard of the vehicle which Birmingham's son was driving (R. 435). Birmingham's son received his operators license only four or five days before this hit and run accident (R. 134).

After Officer Sims had the younger Birmingham start to perform standard field sobriety tests, Respondent Birmingham interrupted (R. 435-437). Birmingham grabbed his son by the arm and attempted to take him away while the field sobriety tests were going on (R. 437). Officer Sims advised Birmingham he would be just a few minutes with Todd, that Officer Sims had checked with Todd about this physical condition and Todd

was fine (R. 434, 437). Birmingham shouted and was extremely belligerent (R. 437). Before the field sobriety tests Birmingham was given the opportunity to have his son transported by paramedics, but refused this opportunity (R. 309). After field sobriety tests were being performed on his son, Birmingham then became insistent that his son be transported to the hospital (R. 437). Birmingham was warned prior to his arrest that he was interfering with the investigation and was told to back away (R. 311). Birmingham was subsequently arrested after continuing to interfere (R. 405-406). The jury found the arrest was lawful (R. 555-556, 606).

Officer Hackney asked Officer Sims if Birmingham was interfering and Officer Sims advised that he was (R. 438). Birmingham was told that he was going to be arrested for interfering (R. 405). Officer Hackney asked him to place his hands behind his back (R. 405). Birmingham pulled away and resisted the arrest (R. 405). Respondent Birmimgham admitted consuming beer that day (R. 312). Officer Sims testified that he saw Birmingham spin towards Officer Hackney (R. 439). He was taken to a grassy area and placed on the ground (R. 406). Birmingham was then placed on his stomach (R. 406) and his arms had to be pulled behind him to accomplish handcuffing (R. 406). Both Officer Hackney and Officer Bergin helped Birmingham get off of the grass and into a patrol car (R. 407). The jury found the force used was proper (R. 555-556, 606).

At trial Birmingham's credibility was subject to considerable doubt (R. 335-336, 384, 387, 684-687). Birmingham told his physical therapist, Evelyn Crawford, that he intended to stay disabled for litigation purposes (R. 384, 685) and his goal was to live off the money he made in litigation (R. 384, 687). Although Birmingham denied these statements (R. 335-336), Casa Colina records documenting these statements by Birmingham were introduced into evidence (R. 684-687). Evelyn Crawford is a physical therapist for Casa Colina who treated Alan Birmingham for back problems following this incident (R. 380, 382). It appeared to Evelyn Crawford that Birmingham was not concerned about trying to better himself physically (R. 387) and on occasion arrived at physical therapy after drinking alcoholic beverages (R. 387).

Furthermore, his own treating physician, Dr. Stanford, believed that Birmingham did not suffer any objective change in his medical condition as a result of this incident (R. 249). He had a 30% impairment rating both before and after this incident (R. 248-249). In fact, Dr. Stanford refused to write Birmingham a letter saying that he could not work because Dr. Stanford felt he was medically capable of working (R. 246). Birmingham was urged to return to work but refused (R. 246-247). During Alan Birmingham's examination two days after this incident, Dr. Stanford did not see any bruises (R. 246). Birmingham had a tendency for depression and was given medication for depression several years before this incident (R. 93). Prior to this incident, Birmingham had

problems with his nerves and had a somatization disorder with pre-existed the incident (R. 93, 94). A movie showing Birmingham's walking ability which appeared to be normal shortly after this incident was viewed by the jury (city's Exhibit #1, included but not numbered in the record).

SUMMARY OF ARGUMENT

The opinion rendered by the Fifth District Court of Appeal in Birmingham v. City of Orlando, 523 So.2d 647 (Fla. 5th DCA 1988) is a radical departure from well established case law interpreting the fundamental error rule. Based upon express and direct conflict with several decisions interpreting the fundamental error rule and the two issue rule, this court has accepted jurisdiction. The fundamental error rule is a very, very limited exception to the contemporaneous objection rule set forth by Florida Rule of Civil Procedure 1.470(b). This rule of civil procedure requires parties to file written jury instructions and make contemporaneous objections to instructions proposed by the opposing party. A well established body of law has consistently held that Appellate Courts will not consider objections which were not raised at the time of the charge conference since such objections are waived.

The proper limited application of the fundamental error doctrine is when it affirmatively appears from the record that harmful error which unquestionably caused a miscarriage of justice could not have been cured even if timely action by opposing counsel was taken. In this regard the instant opinion authors its own indictment. The opinion in Birmingham specifically finds that proper instructions would have likely produced a different result. Proper instructions could have either been provided by opposing counsel or changed upon timely objection of opposing counsel. The fundamental error doctrine was never intended to protect those who, as in the instant

case, are not concerned enough to either object or offer different instructions and then later appeal after disliking the jury verdict. This extremely liberal interpretation of the fundamental error doctrine by the Fifth District Court of Appeal eviscerates the contemporaneous objection rule. This interpretation encourages frequent presentation of error for the first time during the appellate process after the trial court had no opportunity to hear and resolve the issue below.

When considered in their entirety, the three probable cause instructions fairly state the law on that subject. The jury had no question on either probable cause or civil disobedience. The portion of the probable cause instruction which the Fifth District Court of Appeal felt was erroneous is only a single portion of the total instruction on probable cause and the instruction actually favors Appellant Birmingham. Since the instruction creates an even higher standard than the law requires, the instruction, if erroneous, is completely harmless to Birmingham. Birmingham offered no other definition of civil disobedience and should not be heard to complain about its inadequacy for the first time on appeal.

Application of the two issue rule also provides a proper basis for reversing the Fifth District Court of Appeal's decision and reinstating the judgment in favor of the City of Orlando. The jury could have found, as an independent basis, that there was no legal causal relationship between the incident and the alleged injuries claimed by Birmingham.

Certainly the probable cause instruction had nothing whatsoever to do with the unlawful assault claim and the portion of the judgment in favor of the City of Orlando on that independent claim should have been affirmed. The alleged assault was based upon a claim that excessive force was used and this concept has nothing to do with the probable cause issue.

Lastly, the record does not show Birmingham failed to receive a fair trial. The record fully supports a belief by the jury that Birmingham exaggerated his alleged injuries, intended to live off the money he made in litigation and his goal was to stay disabled for litigation purposes. On this disputed issue, the jury obviously disbelieved Birmingham. Birmingham got a fair trial and it would be manifestly unjust based upon this record to require a new trial. The opinion of the Fifth District Court of Appeal should be reversed and this case should be remanded with instructions to affirm the judgment in favor of the City of Orlando.

ARGUMENT

ISSUE I

IN ERRONEOUSLY APPLYING THE FUNDAMENTAL ERROR RULE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXRESSLY AND DIRECTLY CONFLICTS WITH A PRIOR DECISION OF THE FLORIDA SUPREME COURT AND THE THIRD DISTRICT COURT OF APPEAL.

Without citing a single legal precedent the opinion presently under review states:

> "...he was not given a fair trial because the jury instructions were plainly wrong and misleading. Had the jury been given proper instructions, it is likely a different result would have occurred. It is difficult for us to reverse the judgment when the fault lies very little with the trial judge. The fault lies almost entirely with Appellant's own trial lawyer (not either Mr. Freeland or Ms. Edens, his well qualified appellate lawyers) in failing to object to erroneous instructions, failing to offer proper instructions, failing to move for a directed verdict and in failing to move for a new trial...". Birmingham v. City of Orlando, 523 So.2d 647 (Fla. 5th DCA 1988) at page 647.

This opinion from the Fifth District Court of Appeal specifically finds that proper instructions (which could have been provided by opposing counsel or changed upon timely objection of opposing counsel) would have "likely" produced a different result. Birmingham, supra, at page 647. With that finding it is impossible for true fundamental error to have occurred because the alleged error would have been cured by timely action of opposing counsel.

The Fifth District's interpretation of the fundamental error rule is directly contrary to the very heart and core of this doctrine which is an extremely limited exception to the contemporaneous objection rule. Contrary to the Fifth District Court of Appeal's very liberal reasoning, fundamental

error does not occur simply because of counsel's failure to take action. Fundamental error can only occur where the harmful error results in a miscarriage of justice and could never have been prevented despite all diligent efforts taken by opposing counsel.

If allowed to stand, the instant decision would not only undermine thorough trial advocacy but would also encourage deliberate violations of Florida Rule of Civil Procedure 1.470(b). Rule 1.470(b) requires parties to file written jury instructions and to make contemporaneous objections to jury instructions proposed by the opposing party. A long line of cases has properly and consistently held that Appellate Courts will not consider objections to instructions which were not raised at the time of the charge conference. Such objections are waived. See Eli Witt Cigar and Tobacco Co. v. Matatics, 55 So.2d 549 (Fla. 1951); Lollie v. General Motors Corporation, 407 So.2d 613 (Fla. 1st DCA 1981) pet. for rev. den. 413 So.2d 876; Indian River Construction Company, Inc. v. City of Jacksonville, 350 So.2d 1139 (Fla. 1st DCA 1977); High, Clarke and Feneis, Inc. v. Public Service Mutual Insurance Company, 238 So.2d 169 (Fla. 3d DCA 1970) cert. den. 243 So.2d 419; Sharpsteen v. Keesler, 178 So.2d 623 (Fla. 3d DCA 1965) and Smith v. Tantlinger, 102 So.2d 840 (Fla. 2d DCA 1958).

An obvious public policy reason for this rule is to avoid belated arguments by disgruntled parties who cry foul after disliking the jury verdict. When "fundamental error" is raised

the trial court is not even given the opportunity to rule on a timely objection by the disgruntled party. It is absolutely essential that timely objections to instructions be made so that trial courts can settle charges in an orderly manner without hindsight flyspecking by the verdict loser. A party who did not become concerned about instructions before the verdict was rendered should not be heard to complain after disliking the outcome. Without rules of this kind adversaries could tactically choose not to object in order to have an argument for a new trial if the outcome was not in their favor.

The instant opinion directly and expressly conflicts with Wagner v. Nottingham Associates, 464 So.2d 166 (Fla. 3d DCA 1985) pet. for reh. den. 475 So.2d 696 which held that fundamental error could not be raised on appeal to cure defects resulting from erroneous jury instructions where contemporaneous objections were not made at trial. Wagner at 169, 170. Wagner properly applied the Doctrine of Fundamental Error and limited its application to those exceptional circumstances where it affirmatively appeared that error could not have been cured even if timely objection was made. Since a timely objection in Wagner would have cured the defect, the judgment below was affirmed.

This court should follow Wagner, reverse the Fifth District Court of Appeal and remand with instructions to reinstate the judgment in favor of Petitioner, City of Orlando. There can be absolutely no question that the alleged errors in the probable cause instruction and the unspecified ambiguity in

the civil disobedience instruction could have been cured by an appropriate timely objection. Furthermore, other jury instructions, if felt appropriate by Birmingham's counsel, could have been offered.

Wagner properly noted that fundamental error is only appropriate where it affirmatively appears that opposing counsel could not have cured the harmful error if proper measures were timely taken. This equitable doctrine properly comes into play only when nothing could be done to avoid the harmful error no matter what measures were taken by opposing counsel. When properly used in this limited fashion, the fundamental error doctrine avoids harsh unjust results. However, this doctrine is not appropriate in circumstances, such as the instant case, where the alleged errors could clearly have been avoided by proper timely action on the part of opposing counsel. The fundamental error doctrine is intended to protect those who could not avoid the harmful error even by the most diligent of methods, not those who sit on their hands when some minor effort on their part would have cured the problem. As it stands presently, the opinion in Birmingham v. City of Orlando is a radical departure from well established case law and should be reversed.

The instant decision also expressly and directly conflicts with Pinder v. State, 396 So.2d 272 (Fla. 3d DCA 1981). In Pinder the court held that the fundamental error rule applies only when it clearly and affirmatively appears from the record that the result would not have been affected by the failure

to object. Pinder at page 273, footnote 3. Timely and appropriate objection to either the probable cause or civil disobedience instructions would have brought any questions regarding these matters to the attention of the trial court and could have easily resulted in the elimination of any alleged defects in those instructions. Instead, Birmingham agreed to the challenged instruction on probable cause as proposed by the city (R. 471). Timely objection certainly could have changed the format of these instructions and the fundamental error doctrine is plainly inapplicable. Birmingham did not criticize the adequacy of the civil disobedience definition at trial which was based on Webster's Dictionary (R. 474).[1] At best the objection to the civil disobedience instruction was an insufficient general objection. See Middelveen v. Sibson Realty, Inc., 417 So.2d 275 (Fla. 5th DCA 1982) pet. for reh. den. 424 So.2d 762 at page 276-277. There can be no doubt that the underlined language (italicized in the official printing at page 648) of the probable cause instruction could certainly have been eliminated by the court if timely proper objection was made at the time the instruction was read.

The court did not read the critical probable cause instruction in the form which was proposed by the City of

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[1]The civil disobedience instruction read: "Civil disobedience is refusal to obey governmental demands or commands." (R. 546).

Orlando. As proposed by the city (R. 623), the instruction read:

> "In order to have probable cause to believe that another person has committed a crime, a person need not actually see the law being violated, nor must a person satisfy himself beyond any question that a crime has been committed. Probable cause is not equivalent to absolute certainty, and it does not require proof beyond a reasonable doubt." (The words underlined are different than those read by the court.)

Birmingham agreed to the langauge of this instruction as originally proposed (R. 471, 623). However, neither the city nor Birmingham objected to this instruction as read or requested reinstruction on the issue of probable cause after the court instructed the jury (R. 550, 551). Reinstruction on probable cause was also not requested in response to the jury's question pertaining only to a definition of legal cause (R. 553-554). Fundamental error did not occur since the alleged error could have been completely cured by a timely objection or request for reinstruction. This matter was obviously not a concern of Birmingham until an unfavorable verdict was rendered.

The Florida Supreme Court case of Smith v. State, 521 So.2d 106 (Fla. 1988) supports the conservative view of the fundamental error doctrine expressed in Wagner and Pinder. This decision appears to reject the very liberal interpretation of the fundamental error doctrine espoused by the Fifth District Court of Appeal in the instant case. In Smith the Florida Supreme Court refused to apply the Doctrine of Fundamental Error even when the court acknowledged inadequacy of an old standard criminal jury instruction on insanity. Even though

this court felt the insanity instruction was inadequate, fundamental error did not occur because no objection was made to the instruction and it was not so flawed that the Defendant was deprived of a fair trial. Smith at page 108. In Smith this court limited the Doctrine of Fundamental Error to those rare cases where a jurisdictional error appears and the interests of justice present a compelling demand for application of the doctrine. Smith at page 108.

Neither prerequisite exists in the instant case. Jurisdictional error did not occur. Secondly, the interests of justice and the record in the case at bar literally cry out for reversal and reinstatement of the judgment in favor of the City of Orlando. If the jury believed Birmingham at all (and there was good reason to severely doubt his credibility) the jury found he exaggerated this claim for the purpose of profiting from this litigation. Birmingham told Evelyn Crawford, his physical therapist, he intended to stay disabled for litigation purposes (R. 384, 685) and it was his goal to live off the money he made in litigation (R. 384, 687). Although Birmingham denied these statements (R. 335-336) the jury apparently chose not to believe his testimony. He was poorly motivated in physical therapy and not concerned about trying to better himself physically (R. 387). Casa Colina's written records fully supported Evelyn Crawford's testimony (R. 684-687). Since it was very clear that Birmingham had the same impairment before the accident that he had following the accident (R. 248-249), the jury

undoubtedly found that there was no legal causal relationship between this incident and the Respondent's alleged injury. The jury carefully considered the instructions on legal cause which they requested to define (R. 553-554) and asked no questions whatsoever on the subject of probable cause or false imprisonment. Unquestionably no reversible fundamental error occurred. Based upon this record the interests of justice would best be served by reversing the opinion of the Fifth District Court and reinstating the original judgment in favor of the City of Orlando.

ISSUE II

A. IN FAILING TO CONSIDER ALL OF THE JURY INSTRUCTIONS AS A WHOLE THE INSTANT OPINION DIRECTLY AND EXPRESSLY CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL.

In order to determine the propriety of a challenged instruction, all jury instructions must be considered in their entirety and not in isolated portions. Chambers v. Nottebaum, 96 So.2d 716 (Fla. 3d DCA 1957) at page 722. This court has mandated that all instructions must be examined before reversible error can be found. See Dowling v. Loftin, 72 So.2d 283 (Fla. 1954) at page 285. Even though part of an instruction may appear erroneous, reversal is not justified where the law is fairly stated when the complete charges are considered. See Florida East Coast Railway v. Lawler, 151 So.2d 852 (Fla. 3d DCA 1963) at page 854. As this court indicated in Grimm v. Prudence Mutual Casualty Company, 243 So.2d 140 (Fla. 1971), if, as a whole, the law is fairly stated, portions of instructions singled out for attack will avail Appellate nothing. Grimm at page 143. Crosby v. Stubblebine, 142 So.2d 358 (Fla. 2d DCA 1962) at page 359 also suggested that the evidence must be considered to determine if prejudicial error existed. When the evidence in this record is examined, an adequate basis to affirm the judgment clearly exists.

The Florida Supreme Court in Grimm quashed the District Court of Appeal decision and remanded the case for further proceedings. The Supreme Court there found error in the District Court's failure to apply the rule requiring examination of all jury charges. Likewise, the Fifth District Court of

Appeal in the instant case erroneously failed to discuss the impact of other jury instructions on probable cause which the City of Orlando submits fairly stated the law on that issue. In addition to the instruction criticized by the Fifth District Court of Appeal,[2] the jury was also instructed:

> "Probable cause means a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to justify a cautious man in believing another person to be guilty of a crime. Probable cause is not equivalent to absolute certainty. It does not require proof beyond a reasonable doubt.
>
> You, the jury, must determine the existence of probable cause for making the arrest of the Plaintiff, Alan Birmingham, from the facts as they existed the day of the arrest through the eyes of a reasonable and prudent law enforcement officer at the scene and not hindsight." (R. 543).

These instructions are fully supported by the cases of State v. Varnedoe, 443 So.2d 201 (Fla. 3d DCA 1983) at page 202; State v. Keen, 384 So.2d 284 (Fla. 4th DCA 1980) at page 286; State v. Knapp, 294 So.2d 338 (Fla. 2d DCA 1974) at page 341 cert. den. 302 So.2d 415; Russell v. State, 266 So.2d 92 (Fla. 3d DCA 1972) cert. den. 271 So.2d 140 at page 93; Trivette v. State, 244 So.2d 173 (Fla. 4th DCA 1971) at page 175; Thompson v. Taylor, 183 So.2d 16 (Fla. 1st DCA 1966)

" [2] In order to have probable cause to believe that another person is committing a crime the person does not have to actually see the law being violated, but he must be certain that beyond a reasonable doubt there is no questions (sic) that the crime has been committed. Probable cause is not equivalent with absolute certainty. It does not require proof beyond a reasonable doubt." Birmingham, supra, at page 648.

cert. den. 189 So.2d 632 at page 19; and Moore v. United States, 296 F.2d 519 (Fla. 5th Cir. 1961) at page 520. The probable cause instructions, when considered in their entirety, fairly state the law on the subject of probable cause.

It is noteworthy that the text of the present opinion found only one of the several instructions on probable cause was wrong. Birmingham, supra, at page 648. Even in that instruction the Fifth District Court of Appeal found only a portion to be incorrect which it underlined (italicized) in footnote 1 of the opinion. Birmingham, supra, at page 648. It is evident from the underlined (italicized) language that the portion of the instruction which the Appellate Court found was incorrect favors only Respondent Birmingham. Birmingham, supra, at page 648. This jury instruction actually imposes a much higher standard upon Petitioner, City of Orlando, than the law requires. The jury was instructed that a police officer "...must be certain that beyond a reasonable doubt there is no questions (sic) that the crime has been committed." Birmingham, supra, at page 648. If any error exists, it was harmless at best and certainly no sufficient basis for reversal. Actually, probable cause is a much lower standard which requires only a reasonable ground of suspicion supported by circumstances sufficient to warrant a cautious man in believing the accused to have committed a crime. See Russell v. State, 266 So.2d 92 (Fla. 3d DCA 1972) cert. den. 271 So.2d 140 at page 93, Keen, Varnedoe, Trivette, Knapp, Thompson and Moore, supra.

When the error asserted favors the adverse party Appellant, no harmful reversible error can be claimed, especially when no proper objection was timely made. For example see Atlantic Food Supply Co. v. Weldon, 10 So.2d 817, 152 Fla. 54 (Fla. 1942). There, portions of the instructions in an automobile negligence case which might have caused confusion and were alleged to be conflicting were actually favorable to the Appellant. Consequently, the error, if any, was harmless and the judgment was affirmed. Atlantic Food Supply Co. at page 817. This same logic undoubtedly applies to the case at bar. The Motion for Rehearing made by the City of Orlando, which was denied, pointed out that the instruction which the court found erroneous actually favored Birmingham (A. ii-vi).

Further, express and direct conflict with Middelveen v. Sibson Realty, Inc., 417 So.2d 275 (Fla. 5th DCA 1982) pet. for reh. den. 424 So.2d 762 plainly exists. Middelveen is another Fifth District Court of Appeal case addressing the failure to properly object to jury instructions. There, directly contrary to the holding in the instant case, the Fifth District Court of Appeal found there was no specific and distinct objection made during the charge conference and therefore no issue on those jury instructions was preserved for appellate review. Middelveen at page 277. The Fifth District Court of Appeal flatly rejected the type of objection described as "I wish to object to the Plaintiff's instruction number three", holding that the trial court had not been given the opportunity to rule on a specific point of law and no

genuine issue was created or preserved for appellate review. Middelveen at pages 276-277. In the instant case the Fifth District Court of Appeal did not cite or distinguish Middelveen. Nonetheless, no satisfactory distinction between Middelveen and the instant case is supported by the record. The law was fairly stated when all instructions are considered and the Fifth District Court of Appeal erred in reversing the judgment in favor of the City of Orlando.

B. IN FAILING TO APPLY THE TWO ISSUE RULE TO THE INSTANT CASE, THE OPINION UNDER REVIEW EXPRESSLY AND DIRECTLY CONFLICTS WITH GONZALEZ v. LEON, 511 So.2d 606 (Fla. 3d DCA 1987) AND OTHER CASES.

The touchstone of the two issue rule is the theory that reversal is improper where no error is found as to one of several issues because the Appellant is unable to establish prejudice. See Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978) at 1186. Middelveen, supra, at page 276. As the court in Gonzalez v. Leon, 511 So.2d 606 (Fla. 3d DCA 1987) stated in footnote 1, when parties consolidate several issues into a single question they run the risk that they may be unable to show harmful error where challenged instructions pertain only to one issue of several which are consolidated into a single question. Gonzalez involved a discussion about the propriety of causation jury instructions in a medical negligence case. There an alleged erroneous instruction related only to the issue of causation. The verdict asked in a single question whether there was negligence on the part of the Defendant which was a legal cause of injury. Under the two issue rule the verdict could therefore be supported by a finding of either no negligence or no legal cause. Because the verdict could be supported on an independent basis (no negligence) affirmance was required in Gonzalez even if a causation instruction was inappropriate. Gonzalez at page 607. This same rational applies to the present case.

Birmingham has the burden of showing harmful error as required by Fla. Stat. §59.041 (1987), Colonial Stores, Inc., supra at page 1186 and Variety Children's Hospital v. Perkins,

382 So.2d 331 (Fla. 3d DCA 1980) at page 334. Birmingham has not carried this burden since an independent basis exists for affirming the judgment.

In the instant jury verdict several specific issues were consolidated into two separate and independent questions (R. 555-556, 606). Both were answered by the jury in the negative which resulted in a verdict for Petitioner, City of Orlando. The first question was actually three issues in one: Was the Plaintiff, Alan Birmingham, (1) unlawfully imprisoned; (2) without probable cause; (3) which was a legal cause of injury to him? (R. 555-556, 606). The second question in the Interrogatory verdict submitted to the jury also consolidated separate issues: Was the Plaintiff, Alan Birmingham, (1) unlawfully assaulted; (2) which was a legal cause of injury to him? (R. 555-556, 606).

When the two issue rule is properly applied to these facts, the judgment in favor of the city should have been upheld. On both questions the jury could certainly have found no legal causal relationship between this incident and the Respondent's alleged damages. If the questions on probable cause and legal cause were posed separately and the jury specifically found no probable cause, Birmingham might have an argument assuming the challenged instruction was the only one given on the issue. However separate questions were not posed and Birmingham specifically agreed to the verdict form combining these questions (R. 551). The jury received no instruction on nominal damages and therefore the only damages

which were appropriate for jury consideration were compensatory damages.

There was ample evidence in this regard for the jury to believe either that no legal causation existed or that Birmingham suffered no compensable injury. A movie showing Birmingham's walking ability, which appeared normal shortly after this incident, was shown to the jury (city's Exhibit #1 not numbered but included in the record). Respondent Birmingham admitted to Evelyn Crawford, his physical therapist, that his goal was to stay disabled for litigation purposes (R. 384, 685). Birmingham also admitted to Evelyn Crawford that his goal was to live off the money he made in litigation (R. 384, 687). In his physical therapist's opinion Birmingham was not concerned about trying to better himself physically (R. 387). Although Birmingham denied these statements (R. 335-336), the jury obviously chose not to believe him. Furthermore, his own treating physician, Dr. Stanford, believed that Birmingham did not suffer any objective change in his medical condition as a result of this incident (R. 249). He had a 30% impairment rating both before and after this incident (R. 248-249). In fact, Dr. Stanford refused to write Birmingham a letter saying that he could not work because Dr. Stanford felt he was medically capable of working (R. 246). During Birmingham's examination two days after this incident, Dr. Stanford did not see any bruises (R. 246). Birmingham had a tendency for depression and was given medication for depression several years before this incident

(R. 93). Prior to this incident Birmingham had problems with his nerves and had a somatization disorder which pre-existed the incident (R. 93, 94). It is obvious that the jury carefully considered the legal causation issue since they requested reinstruction on it (R. 553-554).

As to the first question on the verdict form, the jury could have found alternatively either (1) Birmingham was not unlawfully imprisoned; (2) probable cause existed or (3) there was no legal causal relationship between this incident and the Plaintiff's alleged injuries (R. 606). As to question two, the jury could have alternatively found (1) Birmingham was not unlawfully assaulted or (2) there was no legal causal relationship between the alleged injury and the alleged assault (R. 606). Consequently, Birmingham cannot establish either harmful error or prejudice as a result of any jury instructions regardless of whether they pertain to probable cause or civil disobedience. An independent alternative basis clearly supports the judgment in favor of the City of Orlando.

Furthermore, the instruction regarding probable cause had nothing whatsoever to do with the unlawful assault theory. Without any question, the defense verdict and judgment in the unlawful assault claim should have been affirmed even without consideration of the two issue rule. When the two issue rule is considered, it becomes manifestly evident that error was committed by the Fifth District Court of Appeal in reversing the unlawful assault portion of the judgment since it clearly has a separate and independent basis.

The case at bar offers this court with a unique opportunity to address both the limits of the fundamental error rule and the limits of the two issue rule. This court's guidance and clarification of these two very important concepts will be of tremendous assistance to appellate courts and trial courts alike. Without further clarification, the limits of the fundamental error rule remain fuzzy and indistinct. This court should hold that the fundamental error doctrine has no application to those situations which could have been cured by appropriate action of opposing counsel. To hold otherwise would be to allow the exception (the fundamental error doctrine) to completely eviscerate and engulf the rule (contemporaneous objections required by Rule 1.470[b]). The opinion under review inappopriately encourages trial counsel to avoid objection to any instruction proposed by an adversary in order to set up an appellate point on matters which would otherwise be completely unappealable. This ruling encourages attorneys to do nothing during trial and then appeal on the fundamental error basis when the outcome is not as desired. Such a result is contrary to both logic and sound public policy.

If the decision under review is interpreted as finding fundamental error in failures to move for a directed verdict and a new trial, these failures are again the variety which could have been cured by timely action on the part of opposing counsel. The Affidavit attached to the Motion for Rehearing (A. v-vi) shows that Plaintiff's trial counsel, Ronnie Walker, is a board certified civil trial lawyer, a Florida Academy

of Trial Lawyer diplomate and a member of various other legal organizations. If the court believed that insufficiencies in Birmingham's representation led to a bad result for Birmingham, Birmingham is still left with a full and complete remedy - a remedy against his counsel for alleged malpractice.

The instant opinion cites absolutely no case for the proposition that a civil verdict should be reversed for a new trial because of inadequate counsel. No new trial motion on this or any other issue was even submitted by Birmingham. This court should never permit such an issue to be a ground for a new trial in a civil case. Fundamental freedoms are not at issue in civil cases which do not involve incarceration or criminal sanctions. If inadequacy of civil counsel is allowed to be raised as a "fundamental error", this court will put its stamp of approval on a crushing appellate debacle. Already overburdened appellate courts will now have many issues raised for the first time on appeal which could have and should have been handled by timely action in the trial court. Parties can sit back, do nothing and await the verdict, confident that fundamental error will bail them out if the result is not the one preferred. Such practices cannot be tolerated and should not be encouraged by this court. Where, as here, timely action by opposing counsel could have cured all of the errors now asserted, innocent opposing parties should not be saddled with the expense and inconvenience of new trials which should have and could have been avoided. This court should reverse, remand and instruct the Fifth District Court

of Appeal to reinstate the judgment in favor of the City of Orlando.

CONCLUSION

Fundamental error in this case did not occur. When the instructions are considered in their entirety they fairly state the law. Under the two issue rule an independent basis exists for affirmance of the judgment in favor of the City of Orlando.

It is important for the Florida Supreme Court to determine the proper limitations of the fundamental error rule in order to avoid confusion from the appellate cases which are now in direct and express conflict. As a matter of sound public policy this court should hold that the fundamental error doctrine does not apply to situations where, as here, timely action by opposing counsel could have eliminated the alleged error. The court may also want to address the applicability of the two issue rule to cases of this kind. The interest of justice would best be served by reversing the opinion of the Fifth District Court of Appeal and remanding with instructions to affirm the judgment in favor of the City of Orlando.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 12th day of August, 1988 to James Freeland, Esquire, Deborah C. Edens, Esquire, 126 East Jefferson Street, Orlando, Florida 32801.

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