IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1800

RAMIRO COMPANIONI, JR.

Petitioner,

vs.

CITY OF TAMPA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

At the outset of his brief on the merits, Ramiro Companioni, Jr. (Mr. Companioni) asserts, without any record citation, that a multiple lane change by a truck owned and operated by the City of Tampa (the City) caused Mr. Companioni's motorcycle to collide with a rear corner of the truck. As the facts cited in this brief demonstrate, the evidence simply does not support Mr. Companioni's theory. In addition, the City respectfully suggests that Mr. Companioni's statement of the case and facts does not set forth a fair and complete account of the trial court proceedings and summary of the evidence. Therefore, the City respectfully sets forth this statement of the case and facts.[1]

PROCEDURAL HISTORY

Mr. Companioni sued the City over a motorcycle accident in which Mr. Companioni rear-ended a City truck and was seriously injured. He contended that the City's negligence proximately caused the accident and his injuries. The case was tried before a jury which returned a verdict (R-272-273) finding that the City was liable for damages in the total amount of Nineteen Million Nine Hundred Thirty Two Thousand Dollars ($19,932,000), less the ten (10%) percent comparative negligence the jury attributed to Mr. Companioni.

[1] In order to be consistent with the references in Mr. Companioni's brief, the City will refer to the paginated transcript of the trial testimony by the letter T followed by the referenced page(s). Citations to page numbers of other materials in the record will follow the letter R unless otherwise indicated.

The City filed a motion for a new trial (R-289-299) based on the following grounds: (1) the verdict was excessive; (2) the verdict was contrary to the overwhelming evidence on the question of liability; (3) the verdict was contrary to the law; (4) the verdict resulted from the misconduct of Mr. Companioni's counsel; and (5) the court erred with regard to the jury instructions it gave. The City also filed a motion for remittitur based on the excessive amount of the verdict. (R-297) Subsequent to filing its original motion for new trial, the City learned that two members of the jury had concealed that they were convicted felons and, as permitted by Rule 1.530(b) of the Florida Rules of Civil Procedure, the City filed an amendment to the motion for new trial based on juror misconduct. (R-309-328)

The trial court granted the City's motion for new trial solely on the basis of the juror misconduct. (R-1176-1177) In its order, the trial court expressly refrained from addressing the City's other grounds for new trial. Mr. Companioni appealed the trial court's initial order on the City's motion for new trial. On March 30, 2007, the Second District Court of Appeal reversed the order, concluding that under the circumstances of this case, the fact that two jurors were convicted felons and concealed that fact from the trial judge did not warrant a new trial. See Companioni v. City of Tampa, 958 So. 2d 404 (Fla. 2d DCA 2007). In its opinion, the Second District Court of Appeal agreed with Mr. Companioni's theory that the City was not entitled to a new trial on the basis of the jurors' prior felony

convictions because there had been no showing of actual bias or prejudice or that the City did not receive a fair and impartial trial as a result of the juror misconduct. In addition, the Second District Court of Appeal remanded the proceedings to the trial court for consideration of the unresolved grounds upon which the City's motion for new trial had been based, and other unresolved motions. Id. at 417.

On remand, the trial court, after consideration of additional written and oral argument, entered an order denying defendant's motion for new trial on the City's remaining grounds for new trial, and also denied the City's motion for remittitur. (R-1582-1585) In that order, the trial court found, inter alia, that there was sufficient evidence to support the jury's finding of negligence and damages, and that while the cumulative conduct of plaintiff's counsel, Russell Stahl, was so pervasive and prejudicial that the City's right to a fair trial was impaired, such conduct did not rise to the level that the public confidence in the judicial system would be undermined[2] since, the trial court concluded, there was adequate evidence to support the verdict. Mr. Companioni has not challenged the trial

[2] On appeal, the City did not directly challenge this standard because, when the parties' briefs were filed, this appeared to be (at least in the Second District) the standard for motions for new trial. See Platz v. Auto Recycling and Repair, Inc., 795 So. 2d 1025 (Fla. 2d DCA 2001). At page 30 of its May 23, 2008 initial brief (tab I, constructed volume of briefs), however, the City did note that Platz was substantially based on Murphy v. International Robotics Systems, Inc., 766 So. 2d 1010 (Fla. 2000) and, unlike this case, Murphy involved unobjected-to misconduct.

court's finding that the City's right to a fair trial was impaired,[3] conceding that its conclusion was a discretionary one. Petitioner's Brief, page 3.

The City appealed the trial court's order denying its motion for new trial. On August 28, 2009, the Second District Court of Appeal issued its decision reversing that order. See City of Tampa v. Companioni, 26 So. 3d 598 (Fla. 2d DCA 2009). In its decision, the Second District Court of Appeal held that because the City's counsel "throughout the trial … objected to opposing counsel's conduct" the trial court only needed to consider whether such misconduct deprived the City of a fair trial. Since the trial court did reach that conclusion, the Second District concluded that the City's motion for new trial should have been granted. The Second District Court of Appeal did not address the remaining grounds for the City's motion for new trial. This proceeding ensued.

In his statement of the case and facts, Mr. Companioni has included an argument seeking to downplay his trial counsel's misconduct as something that was "very little out of the ordinary course of a contentious trial …." Petitioner's Brief, page 3. The record refutes that description. He also mistakenly asserts that

[3] Mr. Companioni also has not alleged that there is a distinction between the impairment of a right to a fair trial and the deprivation of a right to a fair trial. In fact, in his jurisdictional brief, he equated the two. See Petitioner's Jurisdictional Brief, page 1, paragraph 2. The Second District Court also equated the two. See City of Tampa v. Companioni, 26 So. 3d 598, 599 (Fla. 2d DCA 2009). The City agrees that the difference in language is not material.

there were no objections to many of the things identified as misconduct by the trial court. In addition, respectfully, he also has exaggerated the substance of the Second District Court of Appeal's opinion as remarkable and conflicting with "scores of decisions" from this Court and district courts of appeal. Petitioner's Brief, page 6. In order to provide a predicate for its argument regarding these and other assertions advanced by Mr. Companioni, the City will include in this statement of the case and facts a description of the misconduct that took place as well as the evidence introduced during trial.[4]

PLAINTIFF'S COUNSEL'S MISCONDUCT

In his January 22, 2008 order denying defendant's motion for new trial and motion for remittitur (R-1582-1585), Circuit Judge Baumann noted that at the start of the trial, the City's attorney moved for a mistrial based on the misconduct of Mr. Companioni's attorney, D. Russell Stahl, during voir dire, and that the Court denied that motion. As the record reflects, even during voir dire, Mr. Stahl asked improper questions and after most of the City's objections had been sustained, Mr. Stahl persisted with the same conduct, forcing the City's attorney to continuously object in front of the prospective jurors. (T-4-6) Mr. Stahl engaged in similar

[4] The description in this brief of plaintiff's counsel's misconduct and the evidence introduced at trial is similar to the corresponding portion of the May 23, 2008 initial brief the City filed with the Second District Court of Appeals in the proceedings resulting in the decision on review. Copies of the briefs filed with the Second District have been included in the record before this Court at tabs I, II and III, constructed volume of briefs.

conduct during his opening statement by, for example, expressing his personal belief regarding anticipated material evidence. The trial court sustained the City's objection and at the City's request, admonished the jury accordingly. (T-17-21)

Judge Baumann further observed in his order (R-1582-1585) that throughout the trial proceedings, Mr. Companioni's "counsel persisted in misconduct that, if considered cumulatively, would have provided the Court with a basis upon which to grant a mistrial. However, Defendant did not renew its motion for mistrial in response to the new instances of misconduct exhibited by Plaintiff's counsel." Judge Baumann concluded that "the cumulative conduct of Plaintiff's counsel was so pervasive and prejudicial that the City of Tampa's right to a fair trial was impaired…." Judge Baumann, however, also found that the conduct "did not rise to a level that the public confidence in the judicial system would be undermined since there was adequate evidence to support the verdict."

In footnote 5 of its order, the trial court cited twenty-six transcript excerpts as examples of misconduct by Mr. Stahl. The list included in the trial court's order was not exclusive. The trial transcript reflects that Mr. Stahl's misconduct included without limitation:

- expressing his personal beliefs (T-17-21);
- attempting to curry favor with the jury by, for example, offering a magnifying glass for reviewing photographs (T-236-237);

- repeatedly referring to his non-engineer expert as an engineer, even after an express admonition by the Court not to do so (T-222-223; 504, 543, 546, 549);
- asking his reconstruction expert questions designed to elicit speculation that certain photographs admitted by stipulation into evidence did not in fact reflect what they appeared to reflect but instead, resulted from scratches on the negatives (T-233-236);
- asking his reconstruction witness to comment on the opinions of the City's expert (T-264-266);
- asking a fact witness for the City to comment on the thought process of another fact witness (T-455-456);
- attempting to improperly impeach a fact witness with deposition testimony where the question asked at trial was not asked during the deposition (T-462-464);
- reading materials that were not in evidence during closing argument (T-497);
- repeatedly asking questions designed to elicit narrative responses appealing to the sympathy of the jury (T-56-64; 101-102).

The open-ended questions Mr. Stahl asked Mr. Companioni did in fact elicit lengthy narrative responses obviously intended to induce sympathy and a bias in

favor of Mr. Companioni. Mr. Companioni used those opportunities to, in essence, have a discussion with the jury regarding, among other things, his prior accomplishments as a chef (T-34-35); his prior physical prowess (T-39-44); his patriotism and views on freedom in America (T-42-43); and, the impact of his injuries on other family members (T-58).

As the foregoing examples and the trial transcript in general reflect, the conduct by Mr. Stahl, an experienced trial lawyer who had been practicing law for thirty-four years (T-264), was persistent, outrageous, and demonstrated an absolute disregard for the judicial system and the rulings by the trial court. At one point, immediately after the trial court had sustained objections to Mr. Stahl reading from statements or depositions, Mr. Stahl did so again and when the City's attorney objected, Mr. Stahl stated: "He [the trial judge] didn't tell me not to." (T-499) In another instance, the trial court, incredulous, asked Mr. Stahl how long he had been practicing law after Mr. Stahl attempted to have his expert witness testify about the opinions of the City's expert. (T-264) In another instance, when Mr. Stahl attempted to impeach a witness by asking why he had not, during his deposition, testified to something about which he had not been asked, the trial judge asked: "You know how to do impeachment, right?" (T-463-464)

The trial transcript also reflects that the City's attorney repeatedly raised concerns that after an objection was sustained, Mr. Stahl would ask the same type

of question again, putting the City's attorney in the untenable position of having to continuously object in front of the jury. (See, e.g., T-237-245**)**. In addition to prompting repeated admonitions from the trial judge, Mr. Stahl's conduct prompted the trial judge to observe that the cumulative effect of the misconduct could create a situation where the fundamental fairness of the trial would be flawed and the City could get "a free bite at the apple." (T-240-244)

At page 3 of his brief, Mr. Companioni incorrectly asserts that there were no objections to "many of the things" identified as misconduct by the trial court.[5] In fact, the cold record demonstrates that in connection with the numerous instances of misconduct identified in note 5 of the trial court's order, the City consistently objected except for the trial court's sua sponte admonition to Mr. Stahl for leading his client, in front of the jury, to ask for a break (T-77-79); an instance where Mr. Stahl stated that the City had to prove that Mr. Companioni was speeding or was negligent (T-500); and, an occasion during closing where Mr. Stahl referred to

[5] At pages 3 through 4 of his brief, Mr. Companioni quotes four exchanges between the trial court and the City's counsel. The earliest quoted exchange took place during the morning of the second day of trial. That specific episode involved an effort by Mr. Stahl to curry favor with the jury by inquiring as to whether a magnifying glass might be helpful in viewing certain photographs in evidence. The City's counsel indicated that as of that time his client had not been so prejudiced by that particular instance of misconduct that the circumstance could not be remedied (T-238) Mr. Stahl's misconduct, however, persisted and the City's counsel subsequently stated that the misconduct was "getting cumulative and I want it on the record." (T-268)

materials not in the record in an apparent effort to support his theory of his case. (T-503)

In a few instances, it appears that the City's objection may have been voiced outside of the specific page range referenced in note 5 of the order. For example, the trial court cited page 26, line 17 through page 248, line 25. In fact, the cited page number 26 apparently should have been 246. In addition, it appears that the correct ending page of the excerpt should be either line 25 on page 249 or the first few lines on page 250, which include the City's objection. The only other category of excerpts cited by the trial court that do not encompass objections are the last five cited excerpts, reflecting instances where Mr. Stahl persisted in falsely referring to his accident reconstruction witness as an engineer after the trial court had sustained an objection by the City and instructed Mr. Stahl to refrain from doing so. (T-222-223)

DESCRIPTION OF THE EVIDENCE INTRODUCED AT TRIAL

The evidence introduced during trial demonstrated that the City had sent three vehicles to a segment of Hillsborough Avenue for the purpose of locating water valve covers that had been paved over, in order to facilitate repairs of the City's water system. (T-443-447) Around midday, three City employees commenced driving each of their trucks to a nearby park for their lunch break. (T-

470-471) The three drivers pulled onto Hillsborough Avenue and, Mr. Companioni rear-ended the truck driven by one of the employees, Faustino Pirola.

Mr. Companioni was riding a bright yellow, white and purple motorcycle with a vanity license tag on it that said “Hot Seat.” (T-117-118) The motorcycle also had a “bunch” of decals attached to it. (T-314) The motorcycle was a type of very fast “Super Bike.” (T-315-316) Furthermore, Mr. Companioni admitted that he sometimes had attended informal motorcycle races on Gandy Boulevard in Tampa, although he denied participating in them. (T-116-117)

The City sought to introduce evidence demonstrating that as of the time of the accident, Mr. Companioni's driver's license was suspended and that his driving record included speeding violations and careless and improper driving violations. The trial court, however, sustained Mr. Companioni's objection to the introduction of such evidence. (T-430-439)

As the trial transcript reflects, there was not a single witness who actually saw and recalled the accident.

On direct, Mr. Companioni initially testified that his habit was not to speed, and that he wasn’t speeding at the time of the accident. He further testified that as he was riding in the left lane, he recalled seeing some trucks on the right hand side of the road and that he then braced himself, and stopped. (T-47-50) On cross-examination, however, when confronted with his prior deposition testimony, he

conceded that, in truth, he did not remember anything after turning on to Hillsborough Avenue. (T-120-121) Mr. Companioni further admitted that he could not differentiate between his actual recollections regarding the accident and illusions he had experienced while hospitalized (T-120), and that the only thing he knew about the accident was what somebody else might have told him, or the results of the accident itself. (T-121)

The City's employee, Mr. Pirola, testified during the presentation of Mr. Companioni's case as well as during the City's case. (T-161-188; 466-484) Mr. Pirola testified that his crew left the area on Hillsborough Avenue where they had been working to take their lunch break. (T-470-471) Before pulling onto Hillsborough Avenue, he adjusted his rearview mirror, he looked at his side and rearview mirrors, and also turned around and looked to ensure that there was no traffic coming. (T-473, 477-478) Mr. Pirola testified that he always looked in the mirrors and looked over his shoulder, because he never depended solely on the mirrors. (T-473-474) He looked each time he changed from one lane to another, and determined that the lane was clear. (T-474; 187-188) Mr. Pirola had his turn signals on when he changed lanes (T-474; 187-188), and, an orange sign (R-1366) was posted on the rear of the truck advising that the vehicle made frequent stops. (T-478) Mr. Pirola estimated that he was travelling at no more than twenty to

twenty-five miles per hour (T-158)[6] and that when he changed lanes, he did so gradually. (T-187)

When Mr. Pirola tried to move into the left turn lane, he heard or felt a collision and then felt something dragging. (T-475-476) He initially thought that a barricade had dropped from his truck. (T-475) He stopped his vehicle and saw that the accident had taken place. His truck had been struck on the left part of the rear of the truck. (T-476)

The driver of one of the other three City trucks, John Allen, also testified. Mr. Allen's vehicle had a so-called "arrow board" (R-1456) mounted on it, with a flashing arrow which would alert other motorists of the City vehicles working on the side of the road. (T-447-450) When the City's crew broke for lunch, the other two vehicles began to pull onto the roadway and Mr. Allen then began to drive in the curbside lane until he reached a vacant lot, where he could safely take down the arrow sign. (T-450-451) As the other two vehicles moved onto the roadway, their turn signals were on and the lights on the top of the vehicles were flashing. (T-462) Thus, any motorists coming upon the three City vehicles at the time of the accident would have seen flashing top lights, turn signals, a flashing arrow board directing any such traffic away from the three trucks, and an orange sign warning of frequent stops.

[6] Some of Mr. Pirola's testimony was introduced by Mr. Companioni's counsel by way of deposition.

The only evidence of liability specifically cited by the trial judge in his order (R-1582-1585, n.1) in support of his conclusion that there was sufficient evidence of negligence by a City employee (T-194, lines 4-14; and T-209, line 3 through T-210, line 11) was the testimony of two individuals, Steve and Frank Aguilar, who saw the aftermath of the accident, but did not see either the accident take place or the motorcycle prior to the accident. (T-191-222; 497) Steve and Frank Aguilar testified about how the trucks moved onto Hillsborough Avenue prior to the accident, what they heard, and what they observed after the accident. They testified that the three City trucks moved diagonally on to Hillsborough Avenue (T-194; 208-210), and Steve Aguilar testified that the trucks blocked the street. (T-194) Then, they testified that they heard a bang, or a boom, and saw that an accident had taken place. (T-194, 208)[7]

In addition to the fact witnesses, each side called an accident reconstruction witness. While the City's witness, Charles Benedict, was a licensed Professional Engineer (T-292-293), Mr. Companioni's accident reconstruction witness, Dennis Payne, was not. (T-222-223) Dr. Benedict had performed well over 150 to 200 (T-307) reconstructions involving motorcycles. In addition, he had taken a course

[7] Steve Aguilar gratuitously offered his opinion that there was "no way he [Companioni] could have avoided that" (T-194), but since Aguilar did not see the accident take place, and did not even see the motorcycle prior to the accident, there was plainly no basis for his opinion. See Castro v. Brazeau, 873 So. 2d 516, 517 (Fla. 4th DCA 2004).

at Watkins Glenn Raceway involving the dynamic behavior of sixteen different types of motorcycles. (T-305)

Dr. Benedict expressed his expert opinion that Mr. Companioni was travelling around sixty-five miles per hour or faster[8] when he came up behind the City trucks; that the motorcycle was travelling approximately fifty-five miles per hour when it impacted the back of the truck; that sometime before impact, at or about the same time the truck started to change from the center lane to the left lane, Mr. Companioni, who was behind the truck in the center lane, tried to veer left to go around the truck; and, that Mr. Companioni thrusted down on his brakes causing the motorcycle to move upright and propel Mr. Companioni off his motorcycle and into the back of the truck. (T-304-311) Dr. Benedict also testified that, based on his reconstruction of the accident, the driver of the City's truck would not have been able to see Mr. Companioni or his motorcycle, which had a low profile, because there was a depression in that part of the road where Mr. Companioni was located at the material time. (T-309) Dr. Benedict's accident reenactment photographs and reconstruction diagrams are included in the record at R-1453-1484.

Dr. Benedict testified that had Mr. Companioni been travelling at forty to forty-five miles per hour, he would have been able to avoid the accident

[8] The speed limit was forty-five miles per hour. (T-16)

completely; and, that if Mr. Companioni had simply stayed in the center lane and applied brakes to the near maximum for the motorcycle, he also would have been able to avoid the accident completely. (T-311-312) Dr. Benedict also testified that even going at sixty-five miles per hour, had Mr. Companioni done what a professional or experienced motorcycle rider should have done, he could have avoided the accident and reiterated that had he been going the speed limit, there would not have been any problem at all. (T-341-342; 350-351) Dr. Benedict found no indication of any improper driving by the driver of the City truck, and concluded that the sole cause of the accident was that Mr. Companioni was "driving too fast and doing the wrong things." (T-352)

In contrast to Dr. Benedict's testimony, Mr. Companioni's expert, Dennis Payne, did not offer any opinion as to the actual ground speed of either vehicle at or before impact. (T-226) Instead, he only estimated that the difference in speed between the two vehicles at the time of impact was twenty miles per hour (T-226-227), and that when Mr. Companioni's motorcycle struck the rear of the City truck, it was at a slight angle to the truck. (T-254) In addition, although Mr. Payne commented on what he perceived as an absence of evidence or testimony regarding Mr. Companioni's excessive speed prior to impact (T-261), Mr. Payne did not opine that Mr. Companioni was not speeding. In fact, Mr. Payne did not even testify as to the extent to which Mr. Companioni decreased his speed by braking

prior to impact. During the trial, Mr. Payne never rendered an opinion as to the cause of the accident; and he never rendered any opinion demonstrating that the driver of the City's truck was negligent.[9] (T-223-281) Moreover, as reflected by the trial transcript, neither Mr. Payne nor any other expert was called or recalled to rebut Dr. Benedict's testimony.

There is no dispute that Mr. Companioni was seriously injured as a result of the subject accident. Nonetheless, the City suggests that the evidence regarding damages, discussed in some detail in the initial and reply briefs it filed with the Second District Court of Appeal (tabs I and III, constructed volume of briefs), did not support the enormous amount of the jury's award.

SUMMARY OF ARGUMENT

Mr. Companioni has framed the sole issue on review as whether a trial court has greater authority than an appellate court to order a new trial for an unpreserved error. This Court has unequivocally decided that issue in Murphy. There, this Court held that even where, unlike this case, there had been no objections to counsel misconduct, a trial court could consider such misconduct for the first time

[9] In its order denying the City's motion for new trial, the trial court stated that each expert presented testimony on how the accident occurred, and cited excerpts from the transcript of the trial proceedings. The City respectfully suggests that the trial court was incorrect as to Mr. Payne, and that the transcript excerpts it cited (T-260-261, 281), do not reflect any explanation by Mr. Payne regarding how the accident happened but, rather, an attempt by Mr. Payne to "prebut" certain aspects of Dr. Benedict's anticipated testimony.

on a motion for new trial upon a showing that the failure to grant a new trial would undermine the public's confidence in the judicial system. On the other hand, Murphy also holds that an appellate court may not consider unobjected-to misconduct for the first time on appeal.

In reality, Mr. Companioni has challenged the Second District Court of Appeal's decision for recognizing a standard different from Murphy – whether a party was deprived of a fair trial – where that party did object to counsel misconduct. The City asserts that the Second District's decision was correct. Alternatively, the City asserts that the record demonstrates that even under the more stringent Murphy standard, it was entitled to a new trial.

Finally, in addition to the counsel misconduct issue, the record demonstrates that the City would be entitled to a new trial for reasons other than that ruled upon by the Second District Court of Appeal including, primarily, the fact that Mr. Companioni's evidence could not support the verdict. This Court has previously observed that once it acquires conflict jurisdiction, it has the discretion to resolve other properly raised issues as well.

ARGUMENT

I. STANDARD OF REVIEW

Because Mr. Companioni's sole issue on review involves a pure issue of law, the standard of review on that issue is de novo. See Laboratory Corporation of America v. McKown, 829 So. 2d 311, 313 (Fla. 5th DCA 2002).

If this Court undertakes to review the other bases for the trial court's denial of the City's motion for new trial which the City included in its briefs below but which were not addressed by the Second District Court of Appeal, an abuse of discretion standard would apply. See Greens To You, Inc. v. Gavelek, 967 So. 2d 318, 320 (Fla. 3d DCA 2007) (a trial court's ruling on a motion for new trial implicates an abuse of discretion standard). When an order on review is an order granting a new trial, it takes an even greater showing of error for reversal. Id. Here, however, the order on review is an order denying a motion for a new trial.

The City notes that historically, when a motion for new trial is based on evidentiary issues, the abuse of discretion standard is broadly applied as the trial court is in the best position to review the evidence received at trial. See Krolick v. Monroe, 909 So. 2d 910, 913 (Fla. 2d DCA 2005). When the error is an error of law, however, application of the standard is much more limited because the reviewing court is on a more equal footing with the trial court. Id. As this brief will illustrate, the facts upon which the City relies are substantiated by the cold

record in this case and do not involve weighing the credibility of witnesses. Therefore, the City respectfully suggests that the abuse of discretion standard should be applied in a restricted manner with regard to the sufficiency of the evidence.

II. THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT THE FUNDAMENTAL ERROR STANDARD AS DESCRIBED IN MURPHY DOES NOT APPLY WHERE THE AGGRIEVED PARTY OBJECTED TO OPPOSING COUNSEL'S MISCONDUCT.

In his brief, Mr. Companioni has attempted to frame the sole issue on this conflict review as whether the Second District Court of Appeal erred in concluding that a trial court has greater authority than an appellate court to order a new trial for an error that was not properly preserved for review during trial. The City respectfully suggests that this issue already has been settled by this Court in Murphy v. International Robotics Systems, Inc., 766 So. 2d 1010 (Fla. 2000), probably the single most significant case in connection with this proceeding. There, this Court concluded that the trial court does, indeed, have greater authority to order a new trial for improper closing argument where the aggrieved party does not even object to such improper closing argument.[10] Specifically, this Court expressly held that a trial court may consider unobjected-to improper closing

[10] Although Murphy deals with improper closing arguments, neither party has contended that it would not apply to misconduct which takes place during other phases of a trial.

arguments for the first time on a motion for new trial but that absent such a motion, an appellate court may not do so. Id. at 1028.

The proposition that a trial court has greater authority to provide certain relief is not remarkable. In a variety of circumstances, including many circumstances implicated by an order on a motion for new trial, a trial court's ruling may only be reversed on appeal for an abuse of discretion. As this Court recognized in Murphy, this is required because the trial judge has a "superior vantage point" to determine the propriety and potential impact of allegedly improper conduct. Id. at 1031.

In his brief, Mr. Companioni also suggests that the Second District Court of Appeal somehow departed from, in his words, a "sea of contrary authority." In doing so, he has conflated at least three different concepts: (a) the contemporaneous objection requirement; (b) preservation of grounds for appeal; and, (c) preservation of grounds for a new trial. Here, because the City did contemporaneously object to opposing counsel's misconduct, the case law discussing the need for and salutory purpose of the contemporaneous objection requirement does not directly bear upon the resolution of the issues now before this Court. Similarly, this case does not involve an issue raised for the first time on appeal. The issue here is the extent to which the City adequately preserved the

matter of counsel misconduct for consideration by the trial court on a motion for new trial.

An examination of the 59 cases cited, often within "string" cites, in Mr. Companioni's brief reflects that the substantial majority of the cases do not even involve circumstances present here, i.e., a trial court's consideration of a motion for new trial where contemporaneous objections were interposed to an opposing counsel's misconduct. Furthermore, the vast majority of cases cited by Mr. Companioni pre-date the Murphy opinion in which this Court reconciled prior case law regarding the applicable standards at the trial and appellate stages of a case for cases involving unobjected-to improper conduct by counsel. Also, several of the cases he has cited are criminal cases which involve different policy considerations and were therefore expressly excluded from the scope of the Murphy decision. 766 So. 2d at 1013, n.2. In addition, a number of cases cited by Mr. Companioni do not involve counsel misconduct at all but, rather, address such matters as the improper admission of prejudicial testimony and improper verdict forms or jury instructions.

Mr. Companioni appears to rely primarily upon four cases: Sears Roebuck & Co. v. Jackson, 433 So. 2d 1319 (Fla. 3d DCA 1983); County of Volusia v. Niles, 445 So. 2d 1043 (Fla. 5th DCA 1984); Eichelkraut v. Kash N' Karry Food Stores, Inc., 644 So. 2d 90 (Fla. 2d DCA 1994); and, State v. Fritz, 652 So. 2d

1243 (Fla. 5th DCA 1995). None of these cases support Mr. Companioni's argument.

In Sears, unlike this case, the Third District Court of Appeal addressed unobjected-to comments of counsel. Moreover, because there were no contemporaneous objections, the court evaluated whether the comments constituted fundamental error which it described in part as comments "so inflammatory as to extinguish the plaintiffs' right to a fair trial …." Id. at 1321. It did not require an additional finding that the error so damaged the fairness of the trial that the public's interest in our system of justice required a new trial.

Niles did not involve improper conduct by opposing counsel but instead, addressed the concept of "induced error." 445 So. 2d at 1048. The City respectfully suggests that the Niles case does not add to Mr. Companioni's argument. Indeed, in his brief, Mr. Companioni merely repeated a quotation from Niles which had previously appeared in Sears.

In Eichelkraut, the Second District Court of Appeal recognized that a new trial may be based on unobjected-to comments in certain limited circumstances but again did not utilize the fundamental error formulation later articulated by this Court in Murphy. Instead, the court stated that a new trial may be based on unobjected-to misconduct where such conduct was "so pervasive, inflammatory,

and prejudicial as to preclude the jury's rational consideration of the case." 644 So. 2d at 93.

In Fritz, another pre-Murphy case, the Fifth District Court of Appeal similarly did not apply the Murphy fundamental error formula in reviewing a criminal case which, in any event, would have been excluded from the scope the later Murphy decision. 766 So. 2d at 1013, n.2.

In short, much if not most of Mr. Companioni's analysis is based on pre-Murphy case law. Some of those cases apply a fundamental error definition similar to what the trial court found in this case, i.e., the impairment of a party's right to a fair trial. Furthermore, Mr. Companioni's suggestion that Murphy undermines the City's position in this case is plainly wrong given that, unlike this case, Murphy expressly addressed unobjected-to arguments.

In Murphy, this Court canvassed and analyzed decisions from various federal and state jurisdictions regarding the issue of improper, unobjected-to closing arguments. This Court observed that courts from other jurisdictions, particularly state courts, have adopted varied approaches. 766 So. 2d at 1025. Similarly, there appears to be a split of authority with regard to the specific issue implicated here – the applicable standard governing a motion for new trial based on improper conduct where contemporaneous objections but not a motion for mistrial had been interposed. Compare Bisset v. Village of Lemont, 457 N.E. 2d

138, 140-41 (Ill. App. 1983) (plaintiff's timely objections to improper conduct were sufficient to preserve the error for purposes of seeking a new trial) with Steele v. Evenflo Company, Inc., 147 S.W. 3d 781, 792 (Mo. App. 2004) (after objections were sustained, motion for mistrial was required to preserve issue for subsequent request for new trial.)

This Court also discussed in Murphy the policy issues underlying the standard of review for unobjected to improper arguments. The Court cited several policy concerns weighing against an exception to the contemporaneous objection requirement including: (1) objections can deter opposing counsel from making further improper arguments thus preventing cumulative improper conduct; (2) the contemporaneous objection requirement prevents counsel from engaging in "sandbagging" tactics; (3) objections provide the trial judge who is in the best position to evaluate an improper argument with the optimal opportunity to stop such argument when it is made; and (4) objections help prevent confusion that can stem from appellate courts making "cold record" decisions regarding improper closing arguments. 766 So. 2d at 1026. Juxtaposed against the foregoing policy concerns is the "overarching concern that a litigant receive a fair trial and that our system operate so as to deserve public trust and confidence." Id.

Here, of course, the policy considerations underlying the contemporaneous objection requirement were satisfied because contemporaneous objections were, in

fact, made. The City further suggests that imposing the Murphy standard to motions for new trial unless each contemporaneous objection is coupled with a motion for mistrial would not significantly enhance those policy benefits.

Mr. Companioni's main criticism of the Second District's view that the trial court's finding that the City had been deprived of a fair trial supported the City's right to a new trial appears to be that the Second District's holding allowed the City to take a "wait and see" approach. The City respectfully suggests that, in fact, at least since this Court's decision in Ed Ricke, such an approach has been found acceptable. See Ed Ricke & Sons, Inc. v. Greene, 468 So. 2d 908 (Fla. 1985). There, this Court held that trial courts have the authority to reserve ruling on a motion for mistrial until after the jury returns a verdict. Moreover, the Court held that a party moving for a mistrial may couple it with a request that a court reserve ruling on the motion. Id. at 909-10. As this Court explained, by honoring such a request, a trial court can often serve the goal of judicial economy. Specifically, a verdict could conceivably "cure" the error, saving the court the expenditure of additional time, money, and delay associated with a new trial. Id. at 910. In addition, this Court noted that the procedure could also operate to prohibit a wrongdoer from profiting from his intentional misconduct. As this Court stated:

> Unfortunately, it is common practice for some trial attorneys to make prejudicial remarks during closing argument when the posture of his case is doubtful. In these instances, the opposing counsel is forced to make a motion for mistrial. The trial court will then order a new trial.

> Thus, the offending counsel has a second opportunity to try the case and the aggrieved party has little solace but the afforded remedy of beginning all over again. Now that it is clear that a trial judge may wait until after the jury deliberates before ruling on a motion for mistrial, the incentive to intentionally make prejudicial remarks during closing argument will be minimized.

Id. at 910.

The Court in Ed Ricke did refuse to change the general procedure that requires a motion for mistrial to preserve error "for appellate review." (emphasis added) The Court stated that unless the improper argument constituted fundamental error, a motion for mistrial must be made at the time the improper comment was made. It is noteworthy that the Court specifically referenced preservation for appellate review, however. It is also noteworthy that as previously discussed, at the time Ed Ricke was decided, fundamental error was described at least in some cases as error that resulted in the extinction of the right to a fair trial. In fact, as this Court noted in its Murphy decision, prior to that decision, different Florida courts had articulated different standards in addressing unobjected-to closing arguments including whether such arguments gravely impaired a calm and dispassionate consideration of the evidence and merits of the case, or whether the improper argument was, in effect, incurable. 766 So. 2d at 1027.

The City respectfully suggests that as a practical matter, in this case a motion for mistrial accompanied by a request that the trial court reserve ruling as permitted by Ed Ricke would not and should not have changed what actually took

place at trial, i.e., postponement of the trial court's consideration of the City's request for a new trial until after the jury returned its verdict. At least one District Court of Appeal has expressly recommended that trial courts reserve ruling on motions for mistrial in appropriate circumstances since the jury could still return a verdict acceptable to the aggrieved party. See Bellsouth Human Resources Administration, Inc. v. Colatarci, 641 So. 2d 427, 430 (Fla. 4th DCA 1994). There is certainly nothing in the record in the instant case to suggest that the trial judge would have done otherwise here. Moreover, the City further suggests that the standard for granting a new trial based on objected-to misconduct (not accompanied by a motion for mistrial) in accordance with the Second District's decision below – i.e., whether a party was deprived of a fair trial - would be best applied in considering a motion for new trial after a jury returns its verdict. Although the trial judge is in a position to observe the misconduct as it occurs, his or her ability to determine whether such misconduct actually impaired a party's right to a fair trial would, in most instances, be enhanced by the judge's consideration of the jury's verdict. Indeed, in circumstances involving the cumulative effect of pervasive misconduct, such as this case, it would often be difficult to apply the foregoing standard prior to the conclusion of trial.

Mr. Companioni has failed to articulate why an innocent party should not be permitted to avail itself of a so-called "wait and see" approach where its adversary

has created an unfortunate trial atmosphere by engaging in improper conduct. Furthermore, Mr. Companioni cannot credibly complain that he would have been ambushed by an order granting the City a new trial given the trial court's warnings to his attorney that he was risking precisely that result. (T-240-244)

The Second District's approach also satisfies the other reasons underlying the contemporaneous objection requirement. Specifically, by objecting to counsel's misconduct, the City attempted to deter further improper conduct and facilitated the trial court's repeated efforts to rein in Mr. Stahl. The City's objections followed later by its motion for new trial also resulted in the trial court incorporating its observations and conclusions in the record, eliminating any need for the Second District to make a "cold record" decision regarding the improper conduct. Murphy, supra, at 1026. Finally, Mr. Companioni has not advanced a rationale for imposing the identical stringent fundamental error definition set forth in Murphy for unobjected-to misconduct upon a party which did diligently make contemporaneous objections throughout the course of a trial.

III. EVEN IF THE MURPHY STANDARD APPLIED HERE, THE MISCONDUCT OF COMPANIONI'S COUNSEL WOULD REQUIRE A NEW TRIAL.

The trial court denied the City's motion for new trial based on its conclusion that, although Companioni's counsel's misconduct was "so pervasive and prejudicial that the City of Tampa's right to a fair trial was impaired," because the City did not move for a mistrial except after one early instance of misconduct, the

City needed to demonstrate that the fairness of the trial was damaged to the extent that it would undermine the public's confidence in the judicial system. The trial court found that the attorney misconduct did not rise to that level and stated as the only basis for that conclusion its view that there was adequate evidence to support the verdict. (R-1582-1585)

For the reasons previously stated, the City submits that the Second District correctly concluded that the trial court had applied the wrong standard in denying the City's motion for new trial. Even if properly applied here, however, the City further submits that the record plainly demonstrates that standard was satisfied. Specifically, if the verdict were allowed to stand, given the totality of the circumstances, the public's confidence in the judicial system inevitably would be undermined.[11] The circumstances supporting this conclusion follow.

First, two jurors who were convicted felons – and who concealed that fact from the trial court – participated in reaching the verdict against the City. See Companioni v. City of Tampa, 958 So. 2d 404 (Fla. 2d DCA 2007). Second, as discussed in this brief, the jury found the City liable notwithstanding the absence of any eyewitness testimony regarding the accident, the unrefuted testimony of the

[11] This issue involves the same misconduct the City discussed in the first argument of its brief. Although the Second District Court of Appeal did not expressly resolve this aspect of the counsel misconduct issue in its opinion, as discussed later in this brief, rather than remanding this or other issues to the Second District, this Court can exercise jurisdiction over and resolve those issues.

City truck driver demonstrating no negligence on his part, and the lack of any testimony by Mr. Companioni's expert as to negligence or causation. Third, although not admitted into evidence by the trial court, the record, which is available to the public, reflects that Mr. Companioni's driving record included several speeding violations as well as careless and improper driving violations, and that he should not even have been driving on the day of the accident as his driving license was suspended. (T-429-437) Fourth, counsel for Mr. Companioni, Russell Stahl, an attorney then licensed to practice by this Court, engaged in the pervasive and prejudicial misconduct which, as the trial court found, impaired the City's right to a fair trial. The adverse impact of the foregoing circumstances on the public confidence in the judicial system is compounded by the fact that soon after the trial of the underlying case, Mr. Stahl was convicted on several charges involving lewd and lascivious conduct. See Stahl v. State, 972 So. 2d 1013, 1014 (Fla. 2d DCA 2008). In addition, Mr. Stahl was disbarred. See The Florida Bar v. Stahl, 963 So. 2d 228 (Fla. 2007).

In addition to the foregoing, according to an assertion by Mr. Companioni during the October 19, 2007 hearing on the City's motion for new trial, after the trial, one of the jurors told Mr. Companioni that she wanted to give him $50 million but did not do so because she thought the judge would reduce the verdict. October 19, 2007 hearing transcript (R-1611 et seq.), page 84. That statement

reinforces the conclusion that the verdict was indeed the product of sympathy and passion rather than a finding based on a rational consideration of the evidence, and that at least one juror attempted to return as large a verdict as possible which, in her stated view, would withstand judicial scrutiny. See Florida Publishing Co. v. Copeland, 89 So. 2d 18, 20 (Fla. 1956) (where the record demonstrates that a verdict was the product of sympathy, passion, prejudice, mistake or other unlawful cause, the trial court has a duty to order a new trial). The undermining of the public's confidence is further exacerbated by the fact that the defendant is a public entity and the taxpayers would ultimately bear the burden of an adverse judgment. Although the City's exposure is presently limited pursuant to the sovereign immunity provisions of Section 768.28, Florida Statutes, opposing trial counsel has voiced his intention to seek a claims bill from Florida's legislature (February 21, 2008 hearing transcript, R-1611 et seq., pages 6-11) which, if enacted, could result in an enormous burden on the taxpayers in these economically difficult times.

In its order (R-1582-1585), the trial court concluded that because there was evidence to support the jury's verdict, attorney misconduct by itself was not a sufficient basis to grant the City's motion for new trial. As argued later in this brief, the City disagrees that the evidence at trial supported the jury's verdict. The City also respectfully disagrees with the foregoing proposition itself. Since the insufficiency of evidence constitutes a basis for a new trial, there would be no need

for the extensive case law analyzing counsel misconduct if it could not serve as a separate and independent basis for a new trial.

IV. THE JURY'S VERDICT WAS, AT A MINIMUM, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In its decision which is the subject of this proceeding, the Second District Court of Appeal did not address the aspects of the trial court's ruling on the City's motion for new trial aside from the misconduct of opposing counsel. Nonetheless, this Court has previously held that once it acquires jurisdiction over a cause to resolve a conflict issue, it may, in its discretion, consider other issues properly raised and argued before this Court. See Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982); Hall v. State, 752 So. 2d 575, 577-78 n.2. (Fla. 2000) (once Court has conflict jurisdiction, it has jurisdiction to decide all issues necessary to a full and final resolution). Should this Court disagree with the City's prior arguments and find it necessary and appropriate to exercise its discretion to consider any other unresolved issues here, the briefs of the parties which were filed with the Second District Court of Appeal during the underlying proceedings have been included in this Court's record at tabs I, II and III, constructed volume of briefs. Nonetheless, the City will specifically address again in this brief one of the issues not resolved by the Second District Court of Appeal, i.e., that the jury's verdict was, at a minimum, against the manifest weight of the evidence. Otherwise, the City respectfully references the arguments in the briefs it filed with the Second District

regarding another unresolved basis for its appeal, i.e., that the amount of the jury's verdict was excessive.

The record in this case demonstrates that there was simply not sufficient evidence presented at trial which would support a verdict of liability against the City;[12] and, even if there were, the verdict would be contrary to the manifest weight of the evidence. As the record reflects, there was not a single witness who actually saw and recalled the accident. Even Mr. Companioni conceded that he did not remember anything that happened after he turned onto Hillsborough Avenue, the street on which the accident took place. (T-120-121)

The only other witnesses called by Mr. Companioni who were at the accident location when the accident occurred were the Aguilar brothers and Mr. Pirola, the driver of the City truck involved in the accident.[13] The Aguilar brothers testified that they did not see the accident and, as Mr. Companioni's counsel acknowledged during closing argument, did not even see Mr. Companioni or his motorcycle prior to the accident. (T-497) Mr. Pirola, on the other hand, testified that when he changed lanes, he did so gradually; he looked in his mirrors and over

[12] Although the City did not move for a directed verdict based on the insufficiency of the evidence issue, the issue was preserved by the City's motion for new trial. See Scarfone v. Magaldi, 522 So. 2d 902, 903-904 (Fla. 3d DCA 1988).

[13] Mr. Companioni's counsel also read a brief excerpt from the driver of another City truck, Leonard Foster, who estimated that when the trucks were pulling out on to the roadway, they were travelling at five to fifteen miles per hour. (T-160)

his shoulder and verified that the lane into which he was moving was clear; he used his turn signals; and, that an orange sign warning other motorists of frequent stops was posted on the rear of his truck. (T-187-188; 473-478) The driver of one of the other trucks testified about the flashing arrow sign on his truck as well as flashing lights and turn signals on the trucks. (T-447-462) The foregoing testimony was unrefuted.

Although Mr. Companioni called Dennis Payne as an expert witness, Mr. Payne did not render any opinions regarding the cause of the accident or any opinions suggesting that Mr. Pirola, the driver of the City's truck, was negligent. Mr. Payne commented on his perception that there was not any evidence or testimony showing that Mr. Companioni was speeding. (T-261) Mr. Payne, did not opine that Mr. Companioni was <u>not</u> speeding. Moreover, Mr. Payne testified prior to the City's expert, Dr. Benedict, who did testify that Mr. Companioni was speeding (T-304-311) and explained the basis for his opinion. Mr. Companioni did not recall Mr. Payne or call any other witness to rebut Dr. Benedict's testimony. As the record reflects, Mr. Payne primarily opined as to the difference in the speed of the City's truck and Mr. Companioni's motorcycle upon impact; and that in Mr. Payne's opinion, the vehicles were at a slight angle to one another at impact. (T-226-227; 254) He did not opine as to the actual ground speed of either vehicle. (T-226)

The fact that Mr. Companioni was the rear driver in a rear-end collision is material. Under Florida law, in that circumstance, there is a rebuttable presumption that the negligence of the rear vehicle operator caused the accident. See Clampitt v. D.J. Spencer Sales, 786 So. 2d 570, 572-73 (Fla. 2001). As this Court noted in Clampitt, this rule is useful because obtaining proof of the elements of breach of the duty of care and causation is difficult when a driver who has been rear-ended knows that he was rear-ended but does not know why. Consequently, the rear driver has the burden of providing a substantial and reasonable explanation as to why he was not negligent. Id. Furthermore, the law requires all drivers to maintain an adequate spacing between each of them and a lead vehicle. "Failure to maintain such a zone is normally the sole proximate cause of injuries and damage resulting from the collision of a vehicle with an object ahead." Id. at 575-76 (emphasis added).

Although this presumption has ordinarily been applied in cases where the rear vehicle operator is the defendant, the Fourth District Court of Appeal has recently observed that the presumption also applies where the rear driver is a plaintiff. See Cevallos v. Rideout, 18 So. 3d 661 (Fla. 4th DCA 2009). There, the Court rejected the plaintiff's contention that the presumption does not apply to a rear-driver plaintiff because a lead driver defendant could be comparatively negligent. As the Court explained, the presumption is that the rear driver's conduct

is the "sole proximate cause" of the accident. Id. at 663 (emphasis added, citations omitted). See also Department of Highway Safety and Motor Vehicles v. Saleme, 963 So. 2d 969 (Fla. 3d DCA 2007) (presumption applied in case involving a rear driver plaintiff).

In Saleme, the Third District Court of Appeal noted that there are three specific fact patterns which may rebut the presumption that the rear driver's negligence caused the accident: (1) affirmative testimony regarding a mechanical failure; (2) affirmative testimony of a sudden and unexpected stop or unexpected lane change by the lead vehicle; and, (3) evidence that a vehicle has been illegally and therefore unexpectedly stopped. Id. at 972. There is absolutely no evidence of any of the foregoing in this case. To the contrary, the City's evidence, which was substantially unchallenged, refutes the existence of any of the foregoing fact patterns.

The evidence in this case is substantially similar in several material respects to the evidence in Saleme, supra. For example, as in Saleme, there was no evidence here of a sudden lane change. Moreover, even if there had been such evidence, as explained in Saleme, a sudden lane change is analogous to a sudden stop which requires, in addition to the abrupt stop itself, evidence that the sudden stop could not have been reasonably expected by the rear driver in order to rebut the applicable persumption. Id. at 975. In this instance, there was no such

evidence. In fact, the unrefuted evidence here demonstrated that any reasonably attentive rear driver would have seen flashing lights atop the City trucks, flashing turn signals, a sign warning of possible frequent stops, and a flashing arrow sign so that any sudden lane change, had one occurred, should have been reasonably anticipated by a rear driver.

Mr. Companioni's theory of the case, as reflected by closing arguments, was that all he had to prove was that the City truck "changed lanes when it was being over taken by another vehicle whether it was not the [sic] safe to do so. And that the City does't [sic] use reasonable care in doing that." (T-492) In so arguing, Mr. Companioni's counsel was paraphrasing a portion of the jury instruction which was later given that violation of a statute constitutes evidence of negligence. Specifically, Mr. Companioni's attorney paraphrased, inaccurately, Section 316.085, Florida Statutes. The trial court instructed the jury that such statute provides:

> No vehicle shall be driven from a direct course in any lane or on any highway until the driver has determined that the vehicle is not being approached or passed by any other vehicle in the lane or on the side to which the driver desires to move, and that the move can be made completely – or excuse me – the move can be made completely with safety and without interfering with the safe operation of any vehicle approaching from the same direction.

(emphasis added). (T-556-557)

There was absolutely no evidence that the City truck drivers violated the foregoing statute, or that any such alleged violation caused the accident. Moreover, during his closing argument, plaintiff's counsel glossed over the emphasized language, and did so for a reason – there was no evidence whatsoever that Mr. Companioni was operating his motorcycle safely just prior to or at the time of the accident. Without such evidence, Mr. Companioni could not have proven that the City violated the statute and, in any event, could not and did not prove causation.

During his closing argument, Mr. Companioni's counsel also argued, incorrectly, that the City had not proven that Mr. Companioni was speeding. (T-546) The City respectfully disagrees given Dr. Benedict's detailed testimony. More importantly, however, the argument by Mr. Companioni's counsel suggests that the City was obligated to prove that Mr. Companioni caused the accident while, of course, it was Mr. Companioni's burden to prove by the greater weight of the evidence that the City was negligent and that such negligence caused the accident. See Gooding v. University Hospital Bldg., Inc., 445 So. 2d 1015, 1018 (Fla. 1984). Plainly, Mr. Companioni did not do so.

Castro v. Brazeau, 873 So. 2d 516 (Fla. 4th DCA 2004) is instructive. Castro involved an automobile accident. The defendant, Brazeau, had moved for a summary judgment contending that the record demonstrated that he was not

negligent. The plaintiff, Castro, contended that there were material disputed facts because one of the passengers in Castro's car testified during a deposition that based on the crash damage to Castro's vehicle, Brazeau had to have been speeding at the time of the accident. Id. at 517. That passenger, however, had not seen Brazeau's vehicle before the accident occurred. Id. Consequently, the Fourth District Court of Appeal concluded because the passenger was not qualified as an expert, and because he did not see Brazeau's vehicle prior to impact, the passenger's deposition testimony was not competent evidence, and did not create an issue of disputed fact. Id.

Like the passenger in Castro, neither of the Aguilar brothers saw Mr. Companioni's motorcycle before the accident took place. Moreover, neither brother saw the accident itself but instead, heard noise caused by the accident and saw its aftermath. Therefore, their testimony could not support a valid verdict in favor of Mr. Companioni.

In Castro, the Fourth District Court of Appeal observed that the plaintiff did not file the affidavit of an accident reconstruction expert. Id. at 518. Here, although Mr. Companioni called an accident reconstruction expert, Dennis Payne, to testify, Mr. Payne did not testify as to the cause of the accident and presented no evidence proving that the City was negligent.

During closing argument, Mr. Companioni's counsel tacitly acknowledged that Mr. Payne's testimony did not constitute proof that the City was negligent.[14] Specifically, Mr. Companioni's counsel argued that he had proven Mr. Companioni's case "with people who saw it [the accident]," and that "you need an accident reconstruction if you didn't have anybody who saw the accident." (R-1095-1096) But in his next breath, Mr. Companioni's counsel also acknowledged that neither of the Aguilars saw Mr. Companioni's motorcycle before the accident. He argued, however, that they did see the City's truck cross diagonally into the "median" (i.e., turn lane). (T-497) Counsel's argument reinforces the conclusion that he was asking the jury to return a verdict based on speculation rather than the evidence.

Mr. Companioni's claim, in essence, is based on a res ipsa loquitur type theory, i.e., that because the accident took place at or about the time the City's truck was changing lanes, the accident must have been caused by the City. The trial court, however, did not give a res ipsa loquitur jury instruction. Indeed, it could not have done so given the nature of this case. See Abrams v. Nolan Brown Cadillac Co., 228 So. 2d 131, 132 (Fla. 3d DCA 1969) (res ipsa loquitor is not available in automobile negligence cases). Similarly, a verdict cannot result from

[14] Companioni's counsel also conceded that the testimony of his own expert was, in at least one material respect, wrong. Specifically, during closing, he acknowledged that his own expert was wrong in testifying that markings on the motorcycle's tires did not result from the accident. (T-549)

the stacking of inferences by the jury. If a party depends on inferences to be drawn from circumstantial evidence as proof of one fact, it cannot construct further inferences upon the initial inference to establish additional facts unless the original, basic inference is established to the exclusion of all other reasonable inferences. See Nielsen v. City of Sarasota, 117 So. 2d 731, 733 (Fla. 1960).

Furthermore, it is fundamental that negligence may not be inferred from the mere happening of an accident alone. See Cooper Hotel Services, Inc. v. MacFarland, 662 So. 2d 710, 712 (Fla. 2d DCA 1995). As the Supreme Court explained in Gooding v. University Hospital Bldg., Inc., 445 So. 2d 1015, 1018 (Fla. 1984) (quoting Prosser, Law of Torts § 41 (4th ed. 1971):

> On the issue of the fact of causation, as on other issues essential to his cause of accident for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Given the record evidence and the fact that the underlying accident was a rear-end collision, the jury's finding of liability could have been based on nothing more than speculation and conjecture. In fact, a comparison of Dr. Benedict's testimony with Mr. Payne's testimony plainly demonstrates that the City's theory of non-liability was far more plausible. Specifically, the evidence, at a minimum,

strongly suggests that at or about the same time as the City truck was changing lanes, Mr. Companioni attempted to swerve around the City truck, and that as a result of excessive speed, improper reaction and/or other miscalculation, he was unsuccessful in doing so. Nonetheless, regardless of whether Dr. Benedict's testimony were accepted or rejected, what remains clear is that Mr. Companioni did not introduce evidence sufficient to support a verdict in his favor.

Alternatively, and at a bare minimum, the verdict was against the manifest weight of the evidence. The driver of the City truck, Mr. Pirola, testified that when he changed lanes, he did so gradually (T-187), he had his turn signal on, he checked the mirrors and looked over his shoulder, and he determined that the lane into which he was moving was clear. (T-473-478; 187-188) His testimony was not disputed by any fact or expert witness. "[W]here the testimony on the pivotal issues of fact is not contradicted or impeached in any respect, and no conflicting evidence is introduced, these statements of fact cannot be wholly disregarded or arbitrarily rejected." Izquierdo v. Gyroscope, Inc., 946 So. 2d 115, 118 (Fla. 4th DCA 2007) (citation omitted). There, the Fourth District Court of Appeal reversed a trial court order denying a motion for new trial, observing that notwithstanding the deferential abuse of discretion standard, an appellate court should reverse the trial court where there was no rational basis in the evidence to support a jury verdict. Id.

As reflected by Izquierdo, a trial court's denial of a motion for new trial can and should be reversed where a verdict is contrary to the evidence. Here, the record demonstrates that the jury's finding of liability was, at a minimum, against the manifest weight of the evidence. Therefore, in addition to the stated basis for the Second District's underlying decision, the trial court's denial of the City's motion for new trial was otherwise erroneous.

CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court affirm the Second District Court of Appeal's decision, and award such other relief as appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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