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

PETITIONER'S BRIEF ON THE MERITS

DOMINIC O. FARIELLO, P.A.
609 W. De Leon Street
Tampa, Florida 33606

BRENNAN HOLDEN & KAVOUKLIS, P.A.
115 South Newport Avenue
Tampa, Florida 33606

-and-

PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

BY: JOEL D. EATON
Fla. Bar No. 203513

TABLE OF CONTENTS

PAGE

TABLE OF CASES

PAGE

I. STATEMENT OF THE CASE AND FACTS

On November 22, 1996, Ramiro Companioni, Jr., was riding his motorcycle eastbound on Hillsborough Avenue in Tampa. A water department truck owned and operated by the City of Tampa made a multiple lane change into Mr. Companioni's lane, causing the motorcycle to collide with a rear corner of the truck. Mr. Companioni suffered numerous severe and permanent injuries (R. 8-28).[1/] The case was tried to a jury in March, 2004, before The Honorable Herbert J. Baumann, Jr. (T. 1 *et seq*.). The jury returned a verdict finding both the City of Tampa and Mr. Companioni negligent; apportioning the blame 90% to the City and 10% to Mr. Companioni; and assessing Mr. Companioni's damages at $19,932,000.00 (R. 272-73; T. 570-71). The trial court granted the City's motion for new trial on a single ground (R. 1176-77). The new trial order was thereafter reversed by the district court and the cause was remanded for consideration of the remaining grounds advanced in the motion for new trial. *Companioni v. City of Tampa*, 958 So.2d 404 (Fla. 2d DCA 2007).

On remand, the trial court entered an "Order Denying Defendant's Motion for New Trial and Motion for Remittitur" (R. 1582-85). The trial court stated that Mr. Companioni's verdict was not against the manifest weight of the evidence and that the damages awarded by the jury were not excessive. And in the portion of the

---

[1/] R.: Record on appeal.
T.: Separately paginated transcript of trial testimony at R. 520-1175.

order pertinent to the issue presently before the Court, the trial court stated:

> 3. At the start of the trial, Defendant moved for a mistrial based on the misconduct of Plaintiff's counsel during voir dire, which motion the Court denied. Throughout the remainder of the trial proceedings, Plaintiff'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. Thus, even though there was sufficient misconduct upon which the Court could have granted a mistrial during the trial, Defendant did not contemporaneously ask for a mistrial. In response to Defendant's present request for a new trial, the Court cannot say that the conduct of Plaintiff's trial counsel was such that it damaged "the fairness of the trial" to the extent that "it would undermine the public's confidence in the judicial system." See Hasegawa v. Anderson, 742 So.2d 504, 506 (Fla. 2d DCA 1999). Additionally, because there was evidence to support the jury's verdict, the attorney misconduct by itself is not a sufficient basis to grant Defendant's motion for new trial. See generally, Platz v. Auto Recycling and Repair, Inc., 795 So.2d 1025 (Fla. 2d DCA 2001). In sum, while it is the Court's opinion 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, it 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.

(R. 1583-84; footnotes omitted).

The trial court supported its conclusion that plaintiff's counsel had engaged in misconduct with a footnote containing a number of references to various pages

in the trial transcript. Examination of those pages will reveal that defendant's counsel's complaints were somewhat hyperbolic and that very little out of the ordinary course of a contentious trial actually occurred, but the trial court's conclusion was a discretionary one and it is not particularly pertinent to the issue presently before the Court, so we will not belabor the point. What is pertinent, however, is that there were no objections to many of the things identified as misconduct by the trial court; that the objections that were interposed were all sustained; and that, although the trial court all but invited defendant's counsel to move for a mistrial on at least four separate occasions, counsel deliberately declined to do so:

> [1] THE COURT: Are you moving for a mistrial?
>
> MR. TERRY [defendant's counsel]: Your Honor, I --
>
> MR. STAHL [plaintiff's counsel]: May I say something, please?
>
> THE COURT: I want to hear if he's moving for a mistrial first.
>
> MR. STAHL: Yes, Your Honor.
>
> MR. TERRY: No, Your Honor, I'm not moving for a mistrial at this time because I don't think that my client has been so prejudiced that this cannot be remedied. But I just want [it] to be emphasized that this is a case involving where claims for damages are going to be millions of dollars.
>
> . . . .

[2] THE COURT: . . . And, Mr. Terry, I take it that there is no motion at this point for a mistrial, correct?

MR. TERRY: No.

. . . .

MR. TERRY: In fairness to my client who is spending a lot of money to try this case, I'm not going to ask for a mistrial at this time.

. . . .

[3] THE COURT: Do you have a motion?

MR. TERRY: No, I have no motion.

THE COURT: All right.

MR. TERRY: But it's getting cumulative, and I want it on the record.

. . . .

[4] THE COURT: Yes, well, I sustained. So -- and you have no other motions I take it, Mr. Terry?

MR. TERRY: No, Your Honor.

(T. 238, 245, 268, 456).

The City perfected a timely appeal to the District Court of Appeal, Second District (R. 1600-07). To the extent pertinent here, the City recognized in both its initial brief and in its reply brief that, by failing to move for a mistrial after its

objections had been sustained, it had not properly preserved the issue of counsel's misconduct for further review -- and that it therefore needed to demonstrate that the misconduct amounted to "fundamental error." It argued that, as a matter of law, counsel's misconduct amounted to fundamental error because it damaged the fairness of the trial to the extent that public confidence in the judicial system would be undermined. The district court did not endorse this argument. Rather, it reversed Mr. Companioni's judgment and remanded for a new trial on a ground that had not been raised or addressed by the parties.

Following the only two decisions we have been able to find in the long history of this state's jurisprudence, the district court held that, once an objection has been sustained, a motion for mistrial must be made "in order to preserve the issue for appellate review," but "a motion for mistrial is not a prerequisite to moving for a new trial" (slip opinion, p. 2). And it concluded as follows:

> Here, the trial court erroneously concluded that the City had not preserved its objections to opposing counsel's misconduct. Consequently, it applied the wrong standard when it evaluated the City's motion for a new trial. Under the correct standard, the trial court would not need to consider whether counsel's conduct was so egregious that failure to grant a new trial would undermine the public's confidence in the justice system. Rather, it only needed to consider whether opposing counsel's misconduct deprived the City of a fair trial. Having found that it did, the trial court should have granted the City's motion. Accordingly, we reverse and remand for a new trial.

(Slip opinion, p. 3).

In essence, the district court concluded that, after trial, a trial court has greater authority than an appellate court to order a new trial for an error that was not properly preserved for further review. As we will demonstrate in the argument that follows, this conclusion conflicts with scores of decisions from this Court, from other district courts of appeal -- indeed, from decisions of the Second District itself -- and because it permits a losing litigant to sandbag the prevailing party with a contention waived during trial and raised for the first time after trial, we are confident that it is simply wrong.

II. ISSUE ON DISCRETIONARY REVIEW

WHETHER THE DISTRICT COURT 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.

III. SUMMARY OF THE ARGUMENT

Our argument will be short enough that to summarize it here would amount to little more than unnecessary repetition, at the Court's expense. Respectfully requesting the Court's indulgence, we turn directly to the merits.

IV. ARGUMENT

THE DISTRICT COURT 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 "contemporaneous objection requirement" has long been a staple of Florida's jurisprudence. *See Aills v. Boemi*, case no. SC08-2087 (Fla. Feb. 25, 2010) (and decisions cited therein); *Akin v. State*, 86 Fla. 564, 98 So. 609 (1923). *See generally Murphy v. Int'l Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000). If a contemporaneous objection is overruled, the point has been preserved for further review; if the objection is sustained, the objecting party has obtained all that he has requested, and more is required:

> [W]hat happens if there is a contemporaneous objection and the trial court finds that there has been an improper comment and sustains the defendant's objection. In that event, the rule is also clear. The defendant must move for mistrial if he wishes to preserve his objection, and he will not be allowed to await the outcome of the trial with the expectation that, if he is found guilty, his conviction will be automatically reversed.

Simpson v. State, 418 So.2d 984, 986 (Fla. 1982). *Accord Clark v. State*, 363 So.2d 331, 335 (Fla. 1978); *Roundtree v. State*, 362 So.2d 1347, 1348 (Fla. 1978); *Holton v. State*, 573 So.2d 284, 288 n. 3 (Fla. 1991).

Because that point is settled in this Court, it is settled everywhere, even in the Second District. *See, e.g., Hasegawa v. Anderson*, 742 So.2d 504, 506 (Fla. 2d DCA 1999); *Eichelkraut v. Kash n' Karry Food Stores, Inc.*, 644 So.2d 90, 92 (Fla. 2d DCA 1994); *Newton v. So. Fla. Baptist Hospital*, 614 So.2d 1195, 1196

(Fla. 2d DCA 1993); *Hagan v. Sun Bank of Mid-Fla., N.A.*, 666 So.2d 580, 587-88 (Fla. 2d DCA 1996); *Cameron v. Sconiers*, 393 So.2d 11, 12 (Fla. 5th DCA 1981).

At issue in *Ed Ricke & Sons, Inc. v. Green*, 468 So.2d 908 (Fla. 1985), was whether trial courts have the authority to reserve ruling on a motion for mistrial until after the jury returns a verdict. This Court held that trial courts do have that authority. The Court was careful to note, however, that it was not relaxing the contemporaneous objection requirement:

> We refuse to change the general procedure that must be followed in order for a party to preserve a motion for a mistrial for appellate review. Unless the improper argument constitutes a fundamental error, a motion for mistrial must be made "at the time the improper comment was made." *Clark v. State*, 363 So.2d 331 (Fla. 1978).

468 So.2d at 910.

In the instant case, all the objections made by the City's counsel were sustained; the trial court all but invited motions for mistrial; and counsel deliberately declined to request a mistrial, preferring to go to verdict on the state of the record as it existed. On that state of the record, counsel's objections were not preserved for further review, and unless plaintiff's counsel's conduct amounted to fundamental error, an appellate court could not and would not reverse and order a new trial. That point is also thoroughly settled. *See, e. g., Aills v. Boemi*, case no. SC08-2087 (Fla. Feb. 25, 2010) (and decisions cited therein);

Murphy v. Int'l Robotic Systems, Inc., 766 So.2d 1010 (Fla. 2000); *Mercury Ins. Co. of Fla. v. Moreta*, 957 So.2d 1242 (Fla. 2d DCA 2007); *Newton v. So. Fla. Baptist Hospital*, 614 So.2d 1195 (Fla. 2d DCA 1993); *Zuniga v. Eisenger*, 954 So.2d 634 (Fla. 3d DCA 1007); *Nissan Motor Corp. in U.S.A. v. Padilla*, 545 So.2d 274 (Fla. 3d DCA 1989); *Honda Motor Co., Ltd. v. Marcus*, 440 So.2d 373 (Fla. 3d DCA 1983); *Nelson v. Reliance Ins. Co.*, 368 So.2d 361 (Fla. 4th DCA 1978); *Nadler v. Home Ins. Co.*, 339 So.2d 280 (Fla. 3d DCA 1976).

A principal reason for this thoroughly settled rule is both compelling and obvious, and has often been expressed with colorful colloquialisms designed to bring home the point with some force. *Walt Disney World Co. v. Althouse*, 427 So.2d 1135, 1136 (Fla. 5th DCA 1983), is representative:

> Had counsel for Althouse requested a mistrial when the juror-witness contact was discovered, either before or after Farina testified, perhaps he would have been entitled to one. However, counsel for Althouse elected to let the trial proceed. This decision must be given its due conse-quences. Althouse cannot be allowed to proceed on a "heads I win; tails you lose" basis.

A similar sentiment is expressed in *Nissan Motor Corp. in U.S.A. v. Padilla*, 545 So.2d 274, 276 (Fla. 3d DCA 1989):

> The reason for the contemporaneous motion requirement is to preclude an attorney from sandbagging the court and his opponent by postponing his motion in belief that the outcome will be favorable, reserving an option to make the motion for the first time after the trial when the preliminary assessment has proved wrong. . . . By waiting for the jury to return a verdict before

> complaining of the improper judge-jury contact, Nissan waived its right to object.

Similar sentiments are contained in a number of additional decisions. *See, e. g., Saxon v. Chacon*, 539 So.2d 11, 12 (Fla. 3d DCA 1989) (where counsel declined to move for a mistrial after trial court all but invited him to do so, "having gambled and lost when the jury returned an adverse verdict, he cannot now be heard to ask belatedly for a new trial"); *Cameron v. Sconiers*, 393 So.2d 11, 12 (Fla. 5th DCA 1980) (to allow a party to complain for the first time after verdict would be to give him an inappropriate "second bite at the apple"); *Robbins v. Graham*, 404 So.2d 769, 771 (Fla. 4th DCA 1981) (to allow a party to raise a complaint for the first time after trial would give the party "an unearned additional bite at the apple"); *Nadler v. Home Ins. Co.*, 339 So.2d 280, 282 (Fla. 3d DCA 1976) (counsel cannot be permitted "to adopt a 'wait and see' attitude" concerning irregularities at trial); *Nelson v. Reliance Ins. Co.*, 368 So.2d 361, 362 (Fla. 4th DCA 1978) ("The failure to object constitutes intentional trial tactics, mistakes of which are not to be corrected on appeal simply because they backfire").

This sentiment is shared by the Second District. *See, e. g., Robinson v. Bucci*, 828 So.2d 478, 482 (Fla. 2d DCA 2002) ("[H]aving gambled and lost when the jury returned an adverse verdict, he cannot now be heard to ask belatedly for a new trial"); *Millar Elevator Service Co. v. McGowan*, 819 So.2d 145, 153 (Fla. 2d DCA 2002) (the contemporaneous objection requirement "promotes judicial

economy and prevents 'a party from rolling the dice with the jury, confident that an unvoiced objection will garner a new trial if the verdict is unfavorable.'"); *Lowe Inv. Corp. v. Clemente*, 685 So.2d 84, 85 (Fla. 2d DCA 1996) (same); *Hargrove v. CSX Transportation, Inc.*, 631 So.2d 345, 346 (Fla. 2d DCA 1994) (same).

In the instant case, the district court acknowledged all of the foregoing when it recognized that once an objection has been sustained, a motion for mistrial must be made "in order to preserve the issue for appellate review," but it then concluded that "a motion for mistrial is not a prerequisite to moving for a new trial." In essence, it concluded that, after trial, a trial court has greater authority than an appellate court to order a new trial for an error that was not properly preserved for further review during trial. Given the principal reason why an appellate court cannot review an unpreserved error raised for the first time after trial -- that counsel cannot be permitted to forego making contemporaneous objections and then sandbag his opponent after trial in the event of an adverse verdict -- one would have thought that a trial court was similarly constrained from ordering a new trial in that circumstance. And that has been the conclusion of a legion of cases that have addressed the issue. Most respectfully, the district court's decision is a lonely wave in a sea of contrary authority, and we respectfully submit that it is simply wrong.

The leading decision, from the capable pen of the late Judge Daniel S.

Pearson, put the point this way:

> We know of no reason why a trial court should be given any greater power than an appellate court to grant a new trial based on a claimed but unpreserved error. The discretion which is said to be vested in a trial judge to grant a new trial and to which we give deference stems from his unique ability to determine, upon further reflection, whether, for example, he was correct in overruling or sustaining some objection, denying a mistrial, or giving or refusing to give a requested instruction, and whether, if incorrect, his ruling may have affected the fairness of the trial. This discretion, however, is to be exercised only with respect to preserved errors.

Sears Roebuck & Co. v. Jackson, 433 So.2d 1319, 1322 (Fla. 3d DCA 1983). *Accord Kmart Corp. v. Hayes*, 707 So.2d 957, 957-58 (Fla. 3d DCA 1998); *Saxon v. Chacon*, 539 So.2d 11, 12 (Fla. 3d DCA 1989).

The Fifth District has followed suit:

> Timely objection is as much a predicate for the grant of a new trial by the lower court as it is a predicate for reversal on appeal . . . . Hence, as was recently pointed out in the case of *Sears, Roebuck & Co. v. Jackson*, 433 So.2d 1319 (Fla. 3d DCA 1983):
>
> > We know of no reason why a trial court should be given any greater power than an appellate court to grant a new trial based on a claimed but unpreserved error. The discretion which is said to vested in a trial judge to grant a new trial and to which we give deference stems from his unique ability to determine, upon further reflection, whether, for example, he was correct in

> overruling or sustaining some objection, denying a mistrial, or giving or refusing to give a requested instruction, and whether, if incorrect, his ruling may have affected the fairness of the trial. This discretion, however, is to be exercised only with respect to preserved errors.

County of Volusia v. Niles, 445 So.2d 1043 (Fla. 5th DCA 1984). The Second District has itself endorsed this principle: "[t]imely objection is as much a predicate for the grant of a new trial by the lower court as it is . . . for reversal on appeal." *Hargrove v. CSX Transportation, Inc.*, 631 So.2d 345, 346 (Fla. 2d DCA 1994).

And there are literally dozens of decisions in which trial courts have granted motions for new trial for unpreserved errors and been reversed on appeal because, just like an appellate court, absent fundamental error, they lacked the authority to do so. *See, e. g., Lee v. Oceans Casino Cruises, Inc.*, 983 So.2d 791 (Fla. 3d DCA 2008); *Martinez v. Poly-Ply Corp.*, 883 So.2d 327 (Fla. 3d DCA 2001); *Bulkmatic Transport Co. v. Taylor*, 860 So.2d 436 (Fla. 1st DCA 2003); *Hutchinson Island Club Condominium Ass'n, Inc. v. DeGraw*, 774 So.2d 37 (Fla. 4th DCA 2001); *Lucas v. Mast*, 758 So.2d 1194 (Fla. 3d DCA 2000); *Conklin Shows, Inc. v. Llanes*, 733 So.2d 595 (Fla. 3d DCA 1999); *Celentano v. Banker*, 728 So.2d 244 (Fla. 4th DCA 1998); *Kmart Corp. v. Hayes*, 707 So.2d 957 (Fla. 3d DCA 1998); *Goutis v. Express Transport, Inc.*, 699 So.2d 757 (Fla. 4th DCA 1997); *Affolter v.*

Virginia Key Marina, 601 So.2d 1296 (Fla. 3d DCA 1992); *Sanchez v. Bengochea*, 573 So.2d 992 (Fla. 3d DCA 1991); *Rety v. Green*, 546 So.2d 410 (Fla. 3d DCA 1989); *Saxon v. Chacon*, 539 So.2d 11 (Fla. 3d DCA 1989); *Brumage v. Plummer*, 502 So.2d 966 (Fla. 3d DCA 1987); *Papcun v. Piggy Bag Discount Souvenirs, Food & Gas Corp.*, 472 So.2d 880 (Fla. 5th DCA 1985); *Walt Disney World Co. v. Althouse*, 427 So.2d 1135 (Fla. 5th DCA 1983); *Robbins v. Graham*, 404 So.2d 769 (Fla. 4th DCA 1981); *Bishop v. Watson*, 367 So.2d 1073 (Fla. 3d DCA 1979); *Rose's Stores, Inc. v. Mason*, 338 So.2d 1323 (Fla. 4th DCA 1976); *Gatlin v. Jacobs Construction Co.*, 218 So.2d 188 (Fla. 4th DCA 1969).

Indeed, there are more than a dozen decisions from the Second District that rely upon *Sears Roebuck & Co. v. Jackson* and its progeny, and which say the same thing -- that absent fundamental error, a trial court cannot grant a post-trial motion for new trial for an error that was not properly preserved during trial. *See, e. g., Harlan Bakeries, Inc. v. Snow*, 884 So.2d 336 (Fla. 2d DCA 2004); *Publix Super Markets, Inc. v. Griffin*, 837 So.2d 1139 (Fla. 2d DCA 2003); *Robinson v. Bucci*, 828 So.2d 478 (Fla. 2d DCA 2002); *Millar Elevator Service Co. v. McGowan*, 819 So.2d 145 (Fla. 2d DCA 2002); *Platz v. Auto Recycling & Repair, Inc.*, 795 So.2d 1025 (Fla. 2d DCA 2001); *Hasegawa v. Anderson*, 742 So.2d 504 (Fla. 2d DCA 1999); *Hagan v. Sun Bank of Mid-Fla., N.A.*, 666 So.2d 580 (Fla. 2d DCA 1996); *Hargrove v. CSX Transportation, Inc.*, 631 So.2d 345 (Fla. 2d DCA 1994); *Anderson v. Watson*, 559 So.2d 654 (Fla. 2d DCA 1990); *Cronin v. Kitler*,

485 So.2d 440 (Fla. 2d DCA 1986); *Gregory v. Seaboard System Railroad, Inc.*, 484 So.2d 35 (Fla. 2d DCA 1986); *Wasden v. Seaboard Coast Line Railroad Co.*, 474 So.2d 825 (Fla. 2d DCA 1985).

There is even a Second District decision that reaches *exactly* the opposite conclusion reached by that court in the instant case. In *Eichelkraut v. Kash n' Karry Food Stores, Inc.*, 644 So.2d 90 (Fla. 2d DCA 1994), defendant's counsel objected to a portion of plaintiffs' counsel's closing argument and requested a curative instruction. The objection was sustained and a curative instruction was given. Defendant's counsel did not thereafter move for a mistrial. The plaintiffs received a favorable verdict; the defendant moved for a new trial for the improper argument; and the trial court ordered a new trial. The Second District reversed and ordered reinstatement of the plaintiffs' judgment, holding that defendant's counsel's failure to move for a mistrial waived the objection, and that the trial court had no authority to order a new trial for the unpreserved error.

State v. Fritz, 652 So.2d 1243 (Fla. 5th DCA 1995), is to the same effect. In that case, defense counsel's objections to closing argument were sustained; no motions for mistrial were made; the trial court found the closing arguments improper; and it granted the defendant's motion for new trial. The district court reversed, the with the following explanation:

> The law is clear that, in order to preserve a claim based on improper prosecutorial conduct, defense counsel must object, and if the objection is sustained he must then request a curative instruction or mistrial; he cannot await

the outcome of the trial to seek the relief of a new trial.

652 So.2d at 1244.

For similar cases in which an objection was sustained but no motion for mistrial was made, and a new trial order was reversed as a result, *see State v. Benton*, 662 So.2d 1364 (Fla. 3d DCA 1995); *Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So.2d 580 (Fla. 2d DCA 1996); *Gatlin v. Jacobs Construction Co.*, 218 So.2d 188 (Fla. 4th DCA 1969).

It was in the face of all this authority that the district court concluded below that a trial court has the authority to order a new trial, even though an appellate court could not. It bottomed this conclusion upon the Fourth District's decision in *Nigro v. Brady*, 731 So.2d 54, 56 (Fla. 4th DCA 1999), in which that court "concluded that the preservation rule which applies to raising issues on appeal does not apply to motions for new trial."[2/] The Second District also followed *Nigro v. Brady* on this point in *Robinson v. State*, 989 So.2d 747 (Fla. 2d DCA 2008). But these three decisions are the *only* decisions we have been able to find that reach this conclusion -- and given the overwhelming number of decisions addressed above that reach a contrary conclusion, we respectfully submit that

[2/] Although a conflict with *State v. Fritz*, *supra*, was acknowledged on the face of the Fourth District's decision, review was not sought. The present status of *Nigro v. Brady*, which declined to follow *State v. Fritz*, is problematical in the Fourth District. More recently, *State v. Fritz* was cited with approval for a proposition contrary to *Nigro* in *State v. Cameron*, 837 So.2d 1111, 1112 (Fla. 4th DCA 2003).

Nigro, Robinson, and the decision under review are simply wrong.

In any event, it would appear that the issue presented here has already been resolved by this Court's recent decision in *Murphy v. Int'l Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000).[3/] In that case, the Fourth District had concluded that it was unwilling to recognize even a fundamental error exception to the contemporaneous objection requirement, at least in the context of improper closing arguments. This Court was not willing to go that far. It retained the fundamental error exception to the contemporaneous objection requirement, but defined fundamental error narrowly -- holding that, in order to obtain a reversal on appeal for unpreserved errors during closing argument, it was necessary for the losing litigant to file a motion for new trial and demonstrate that the argument was improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial. *Accord Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1271 (Fla. 2006).

Given all that we have said above, no good reason suggests itself why this definition of fundamental error should not apply beyond the context of closing

---

[3/] In *Murphy*, the Court disapproved several of the decisions upon which we have relied in this brief -- *Hagan*, *Eichelkraut*, *Wasden*, *Goutis*, and *Sears Roebuck & Co. v. Jackson* -- but *only* to the extent that they "stand for the proposition that a trial court's grant of a new trial based on unobjected-to closing argument [after applying *Murphy's* four-part test] should be subject to a de novo standard of review on appeal." *Murphy*, 766 So.2d at 1031 n. 24. The Court held instead that a trial court's determination of fundamental error was reviewable for abuse of discretion. This limited disapproval does not affect the cases for the points they

arguments, to other errors that were not properly preserved and were therefore waived before verdict. Perhaps the City can suggest one, but we cannot think of any. Clearly, having failed to preserve the issue of counsel's misconduct during trial, the City was required to convince the trial court after trial that the misconduct amounted to fundamental error, and it failed to do so. Instead, the trial court ruled that it could not "say that the conduct of Plaintiff's trial counsel was such that it damaged 'the fairness of the trial' to the extent that 'it would undermine the public's confidence in the judicial system'" -- i. e., that the misconduct did not rise to the level of fundamental error, as defined by *Murphy*.[4/] Most respectfully, given all we have said above, this was the "correct standard" to apply to the City's belated, unpreserved, post-trial effort to sandbag Mr. Companioni's verdict after the fact, and the district court plainly erred in concluding otherwise.

V. CONCLUSION

It is respectfully submitted that the district court erred in concluding that the trial court applied the wrong standard in analyzing the City's motion for new trial.

---

have been cited above.

[4/] The trial court's language was borrowed from *Hasegawa v. Anderson*, 742 So.2d 504, 506 (Fla. 2d DCA 1999), which borrowed it in turn from *Hagan v. Sun Bank of Mid-Fla., N.A.*, 666 So.2d 580, 586 (Fla. 2d DCA 1996). In *Murphy*, this Court's requirement that "the argument must be such that it so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial" was borrowed from *Hagan* as well. 766 So.2d at 1030. The trial court therefore applied the *Murphy* test, albeit in a roundabout way.

The district court's decision should be quashed, and the cause should be remanded to the district court with directions to affirm Mr. Companioni's judgment.

Respectfully submitted,

DOMINIC O. FARIELLO, P.A.
609 W. De Leon Street
Tampa, Florida 33606

BRENNAN HOLDEN & KAVOUKLIS, P.A.
115 South Newport Avenue
Tampa, Florida 33606

-and-

PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By:_____
JOEL D. EATON

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

_____

JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 8th day of March, 2010, to: Richard M. Zabak, Esq., Gray Robinson, P.A., Suite 2200, 201 N. Franklin Street, Tampa, FL 33601; and to William J. Terry, Esq., Terry & Dato, P.A., 315 E. Kennedy Blvd., Fifth Floor, Tampa, FL 33602, *Attorneys for Defendant, Respondent*.

_____

JOEL D. EATON