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 BRIEF ON JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

As the Second District Court of Appeal observed in its August 28, 2009 opinion,[1] this proceeding arises from the trial court's denial of the motion for new trial and remittitur of respondent, the City of Tampa (the City). The motion for new trial was based in part upon the City's assertion that opposing counsel had engaged in misconduct throughout the trial. The trial court agreed, finding 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." Nonetheless, the trial court denied the City's motion, reasoning that the City had not moved for a mistrial and that the misconduct was not so extreme that "it would undermine the public's confidence in the judicial system."

The Second District Court of Appeal reversed the trial court's denial of the City's motion for new trial because throughout the trial the City did object to opposing counsel's conduct. Thus, the Second District Court of Appeal concluded that the trial court did not need to consider whether counsel's conduct was so egregious that failure to grant a new trial would have undermined the public's confidence in the justice system. Instead, the trial court only needed to consider whether opposing counsel's misconduct deprived the City of a fair trial.

[1] Contrary to note 1 of Companioni's Jurisdictional Brief, his statement of the case and facts goes beyond the face of the Second District Court of Appeal's opinion. The City, however, will confine its statement to those matters reflected by that opinion.

Therefore, because the trial court had found that the City was deprived[2] of a fair trial, the Second District Court of Appeal concluded that the trial court should have granted the City's motion for new trial.

II. SUMMARY OF THE ARGUMENT

Companioni contends that the Second District Court of Appeal's holding expressly and directly conflicts with decisions rendered by this Court and other district courts of appeal. The City respectfully suggests that Companioni is wrong, and that there is no such conflict and no basis for Companioni to properly invoke this Court's jurisdiction.

In his jurisdictional brief, Companioni asserts that the Second District Court of Appeal's decision in this case conflicts with the appellate decisions holding that a trial court has no greater authority than an appellate court to order a new trial for an unpreserved error. He urges this Court to accept jurisdiction to clarify this issue. He disregards the fact that this Court already effectively did so in 2000 in Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000). There, this Court expressly held that a party may seek relief from unobjected-to improper closing arguments by way of motion for new trial, but that a party may not first challenge such improper arguments on appeal. Id. at 1027. Thus, this

[2] The trial court utilized the word "impaired" rather than "deprived" but the City suggests there is no material difference, and Companioni himself has equated the terms. See Companioni jurisdictional brief at 1, where Companioni states that the trial court agreed that the City had been deprived of a fair trial.

Court has already recognized in a civil case that a trial court has broader authority than an appellate court to order a new trial based on an unpreserved error.

Significantly, all but two of the cases cited by Companioni predate Murphy. Both of those cases, however, are criminal cases which Murphy does not encompass, and one case is a Second District case which, as Companioni acknowledges at page 8 of his brief, could not provide a basis for this Court's jurisdiction even if it did conflict with the decision in this case.

III. ARGUMENT

THE DISTRICT COURT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER DISTRICT COURTS OF APPEAL.

Companioni contends that the Second District Court of Appeal's decision expressly and directly conflicts with other decisions of this Court and of other district court of appeal as to whether a trial court has any greater authority than an appellate court to order a new trial for an unpreserved error. Companioni further contends that this Court should accept jurisdiction to resolve the "current confusion" regarding this issue. It is noteworthy that Companioni has not even attempted to argue that the Second District Court of Appeal's specific holding – that a motion for new trial should be granted where a party is deprived of a fair trial as a result of repeated improper comments to which objections were

interposed – conflicts with any decision of this Court or another district court of appeal.

There is no direct and express conflict upon which to base this Court's jurisdiction nor can there be any confusion regarding the issue framed by Companioni. In 2000, this Court, in a thorough and detailed opinion, expressly addressed the respective roles of the trial court and the appellate court with regard to improper but unobjected to closing arguments in Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000). This Court plainly and unequivocally stated:

> As explained more fully below, we hold that relief may not be granted in a civil case based on improper, but unobjected-to, closing argument unless such argument is first challenged and judicially evaluated in the trial court.

Id. at 1012-1013 (emphasis added). This Court subsequently reiterated its holding that "a civil litigant may not seek relief in an appellate court based on improper, but unobjected-to closing argument, unless the litigant has at least challenged such argument in the trial court by way of a motion for new trial even if no objection was voiced during trial." Id. at 1027 (emphasis added). This Court receded from four of its prior decisions to the extent that they supported the proposition that improper but unobjected to closing arguments in a civil case may be challenged for the first time on appeal, and further disapproved any decisions issued by district courts of appeal to the extent they stand for such a proposition. Id.

As a result of its holding in Murphy, this Court plainly recognized that a trial court does, in fact, have broader authority than an appellate court to grant a new trial based on unpreserved error. Specifically, and in accordance with this Court's holding, a party can raise for the first time in a motion for a new trial a challenge for improper but unobjected-to closing arguments, but must demonstrate fundamental error pursuant to the four-part test described in its opinion to prevail on such a challenge.[3] A party, however, cannot challenge an improper but unobjected-to closing argument for the first time on appeal. In adopting this approach, this Court expressly recognized that the trial judge is in the best position to determine the propriety and potential impact of allegedly improper closing argument. Id. Thus, this Court has already made it clear that, at least with regard to unobjected-to closing arguments, a trial court can and does have greater authority than an appellate court to order a new trial for an unpreserved error.

In arguing to the contrary, Companioni has ignored this Court's express holding in Murphy. Moreover, he has substantially relied on criminal cases notwithstanding the repeated admonishment in the Murphy opinion itself that it only addressed civil cases. 766 So. 2d at 1012, 1016, 1023, 1027, 1028, 1030.

[3] In Murphy, this Court outlined its four-part test for fundamental error applicable in instances of unobjected-to closing arguments as follows: 1) the argument must be improper; 2) the argument must be harmful; 3) the argument must be incurable; and, 4) the argument must have so damaged the fairness of the trial that the public's interest in our system requires a new trial. 766 So. 2d at 1028-1030.

Indeed, in Murphy this Court expressly stated that its decision did "not affect the law in criminal cases regarding improper, but unobjected-to, closing argument." Id. at 1012, n. 2.

In addition to relying on criminal cases, all but two of the district court of appeal cases cited by Companioni predate Murphy and, consequently, to the extent they conflicted with Murphy, were plainly overruled. The only two cases that were decided after Murphy were Robinson v. State, 989 So. 2d 747 (Fla. 2d DCA 2008), a criminal case which Companioni does not contend conflicts with the decision in this case and which, in any event, as a Second District case, could not support an exercise of this Court's jurisdiction as Companioni acknowledged at page 8 of his brief; and, State v. Cameron, 837 So. 2d 1111 (Fla. 4th DCA 2003), a criminal case involving an allegedly erroneous jury instruction which the court concluded was a "moot concern" due to the evidence admitted during trial.

In his brief, Companioni notes that in Nigro v. Brady, 731 So. 2d 54 (Fla. 4th DCA 1999), which was cited in the Second District Court of Appeal's decision in this case, the Fourth District Court of Appeal stated that its decision conflicted with State v. Fritz, 652 So. 1243 (Fla. 5th DCA 1995). Companioni focused on the statement in Nigro that the preservation rule applicable to raising issues on appeal did not apply to motions for new trial. Both Nigro and Fritz were decided prior to this Court's decision in Murphy. The City respectfully suggests that had the Nigro

court had the benefit of the Murphy opinion, it would not have perceived a conflict for at least two reasons.

First, in Murphy, this Court expressly limited its decision to civil cases and its statement that its decision did not affect the law in criminal cases regarding improper but unobjected-to closing argument in and of itself would have obviated any potential conflict between Nigro, a civil case, and Fritz, a criminal case. This is more than a technical distinction, particularly because the four-part Murphy test in determining whether an error is fundamental does not apply in criminal cases. Instead, in a criminal case, there is fundamental error if a defendant is deprived of a fair trial.[4] See, e.g., Martinez v. State, 981 So. 2d 449, 457 (Fla. 2008) (erroneous jury instruction results in fundamental error where defendant is deprived of a fair trial). Therefore, a comparison of criminal and civil cases in this context would be akin to comparing apples with oranges.

Second, in Murphy, this Court specifically held that a civil litigant may not initially seek relief in an appellate court based on an improper, but unobjected-to closing argument, but that the litigant could challenge such argument by way of a motion for new trial at the trial court level. Thus, it did allow for the review of an unpreserved error by way of new trial, but precluded an initial review of an

[4] In Fritz, the Fifth District Court of Appeal found that there was no fundamental error.

unpreserved error on appeal. Consequently, had Murphy applied to criminal cases, it would have resolved any perceived conflict between Nigro and Fritz.

Finally, Companioni suggests that the Second District Court of Appeal's decision conflicts with this Court's 1985 decision in Ed Ricke & Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985). Ed Ricke, however, addresses an issue not involved in this case, i.e., whether trial courts have the authority to reserve ruling on a motion for mistrial until after a jury returns a verdict. Moreover, the excerpt from the Ed Ricke opinion quoted in Companioni's brief required a motion for mistrial to preserve that motion "for appellate review." (emphasis added)[5] Here, of course, the issue involved the scope of review on a motion for new trial rather than on appeal.

[5] In Ed Ricke, this Court noted that such a motion was not necessary where an improper argument constitutes fundamental error. 468 So. 2d at 910. Ed Ricke predated Murphy's four-part fundamental error formulation in the context of unobjected-to argument. At the time Ed Ricke was decided, the judicial description of fundamental error in civil cases included an error that extinguished a party's right to a fair trial. See, e.g., Sears Roebuck & Co. v. Jackson, 433 So. 2d 1319, 1322 (Fla. 3d DCA 1983), disapproved in part by Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000). The trial court below concluded that occurred here. Thus, because the law has changed, Companioni's comparison of Ed Ricke with this case could not support his jurisdictional argument.

IV. CONCLUSION

Contrary to Companioni's contention, there is no conflict between the Second District Court of Appeal's decision below and decisions of this Court or other district courts of appeal. Therefore, there is no jurisdictional basis for this Court's review of the decision below.

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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