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 JURISDICTION

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I. STATEMENT OF THE CASE AND FACTS

The petitioner, Ramiro Companioni, Jr., sued the City of Tampa for injuries he sustained when his motorcycle struck the rear of a City truck.[1/] During the course of the trial, Mr. Companioni's trial counsel engaged in misconduct, to which the City's counsel objected. The objections were sustained. The City's counsel was satisfied with these rulings and chose not to move for a mistrial. Mr. Companioni received a favorable verdict. The City then filed a motion for new trial, contending that the cumulative effect of Mr. Companioni's counsel's misconduct deprived it of a fair trial.

The trial court agreed that the City had been deprived of a fair trial by counsel's misconduct. Nevertheless, following a long line of authority from both this Court and the Second District, it concluded that the City's election not to move for a mistrial after its objections had been sustained failed to preserve the issues for further review. It then evaluated the unpreserved issues under the four-part test of this Court's recent decision in *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000), and concluded that counsel's misconduct was not so extreme that "it would undermine the public's confidence in the judicial system." The motion for new trial was therefore denied.

The City appealed to the District Court of Appeal, Second District, which held that the trial court had applied the "wrong standard" in evaluating the City's motion -- and it reversed Mr. Companioni's judgment and ordered a new trial. The district court

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[1/] The statement of the case and facts is taken from the face of the decision sought to be reviewed (App. 1-3).

acknowledged that, after an objection has been sustained, it is necessary to move for a mistrial in order to preserve the issue for further review, but it drew a distinction between further review in an appellate court and further review by a trial court. And it announced that the City's objections had been preserved for consideration in a motion for new trial: "Although a party whose objection is sustained must move for a mistrial in order to preserve the issue for appellate review, a motion for mistrial is not a prerequisite to moving for a new trial" (App. 2). In effect, the district court held that a trial court has greater authority to order a new trial for an unpreserved error than an appellate court would have.

As we will demonstrate in the argument that follows, this holding is in express and direct conflict with decisions of this Court and other district courts of appeal holding that a trial court has no greater authority than an appellate court to order a new trial for an unpreserved error.

II. SUMMARY OF THE ARGUMENT

The district court's decision is in express and direct conflict with decisions of this Court and other district courts of appeal holding that a trial court has no greater authority than an appellate court to order a new trial for an unpreserved error. And because the decision permits counsel to remain silent when a motion for mistrial is required to preserve an objection that has been sustained, to await the outcome of the trial, to withhold his request for a retrial if he has prevailed, and to raise his motion for mistrial in the form of a motion for new trial if the jury has returned an adverse verdict,

it drastically undermines the "contemporaneous objection rule" and the several salutary purposes the rule is designed to serve. We respectfully submit that these multiple conflicts are deserving of this Court's resolution, and we urge the Court to grant review to that end.

III. ARGUMENT

THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL HOLDING THAT A TRIAL COURT HAS NO GREATER AUTHORITY THAN AN APPELLATE COURT TO ORDER A NEW TRIAL FOR AN UNPRESERVED ERROR.

The "contemporaneous objection rule" is a staple of Florida's jurisprudence. This Court knows it well. And this Court recently made it clear that a new trial cannot be granted by either a trial court or an appellate court for an error that was not preserved by an appropriate objection during trial unless the error satisfies the stringent four-part test that was applied by the trial court in the instant case. *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000).

It is also thoroughly settled that, if an objection is sustained, the objecting party must move for a mistrial and obtain an adverse ruling before the objection is preserved for further review -- that the failure to move for a mistrial after an objection has been sustained constitutes a waiver of the objection:

> . . . [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); *Holton v. State*, 573 So.2d 284, 288 n. 3 (Fla. 1991).

There has never been any question that this rule applies in the appellate courts of this state. The issue raised by the decision sought to be reviewed is whether a *trial court* is bound by this rule as well. Can a trial court grant a motion for new trial for an objection that has been waived by a failure to move for a mistrial after an objection has been sustained? In the decision sought to be reviewed, the Second District has held that a trial court has that authority, notwithstanding that an appellate court does not. The Fifth District has squarely held to the contrary -- that a trial court has no greater authority than an appellate court to order a new trial in that circumstance.

In *State v. Fritz*, 652 So.2d 1243 (Fla. 5th DCA 1995), 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, 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. *State v. Fritz* was followed on this point in *State v. Benton*, 662

So.2d 1364, 1365 (Fla. 3d DCA 1995). Most respectfully, the conflict with these two decisions is undeniable.

The Second District's decision in the instant case was bottomed upon and can be traced back to 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/] Although the conflict with *State v. Fritz* was acknowledged on the face of the Fourth District's decision, review was not sought. There are therefore two Districts in this state in which a trial court possesses greater authority than an appellate court to order a new trial for an unpreserved error -- the Second and the Fourth.[3/]

There are also two Districts in this state in which trial courts do *not* possess greater authority than an appellate court to order a new trial for an unpreserved error -- the Third and the Fifth. 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

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[2/] Note that this conclusion was reached prior to this Court's decision in *Murphy v. International Robotics, supra.* The Second District also followed *Nigro* on the point in *Robinson v. State*, 989 So.2d 747 (Fla. 2d DCA 2008).

[3/] Even in the Fourth District, the status of *Nigro v. Brady*, which declined to follow *State v. Fritz*, is problematical. More recently, *State v. Fritz* was cited with approval in *State v. Cameron*, 837 So.2d 1111, 1112 (Fla. 4th DCA 2003).

> 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). Most respectfully,

the conflict between the Second and the Fourth Districts, on the one hand, and the Third and the Fifth Districts, on the other, is undeniable.

Curiously, there is at least one Second District decision on the books that is also in direct conflict with the decision sought to be reviewed.[4/] 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.

[4/] The Second District has also cited *County of Volusia v. Niles*, *supra*, with approval for the proposition that "[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).

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. *See also Newton v. South Florida Baptist Hospital*, 614 So.2d 1195, 1196 (Fla. 2d DCA 1993) (failure to move for a mistrial after objection is sustained constitutes a waiver of the objection); *Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So.2d 580, 585 (Fla. 2d DCA 1996) (same).[5/] The *Eichelkraut* decision was not acknowledged in the decision sought to be reviewed. While an *intra*-district conflict of this sort cannot support an exercise of this Court's jurisdiction, it certainly demonstrates that there is an enormous amount of confusion in this area fully justifying review of the *inter*-district conflicts on the point that also exist.

Although these conflicts should be sufficient to motivate the Court to resolve the widespread confusion in this area, there is an additional conflict deserving of this Court's review. 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 rule":

[5/] *Hagan, Eichelkraut* and *Sears Roebuck* were recently disapproved by this Court, 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 v. International Robotic Systems, Inc.*, 766 So.2d 1010, 1031 n. 24 (Fla. 2000). This limited disapproval does not affect the cases for the points they have been cited above.

> 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 a 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 stark contrast, in the decision sought to be reviewed, the Second District has held that counsel aggrieved by the misconduct of opposing counsel is *not* required to move for a mistrial at the time the misconduct occurs. Rather, he can await the outcome of the trial, withhold his request for a retrial if he has prevailed, and raise his motion for mistrial in the form of a motion for new trial if the jury has returned an adverse verdict. This is contrary to this Court's requirement in *Ed Ricke & Sons* that motions for mistrial are required at the time the impropriety occurs and cannot be withheld until the result is in -- and it drastically undermines the "contemporaneous objection rule" and the several salutary purposes the rule is designed to serve. We respectfully submit that these multiple conflicts are deserving of this Court's resolution, and we urge the Court to grant review to that end.

IV. CONCLUSION

This Court plainly has jurisdiction, and review should be granted to resolve the current confusion caused by the conflicting decisions of this Court and the several district courts of appeal.

Respectfully submitted,

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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.

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JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 5th day of October, 2009, 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*.

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