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 REPLY 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**

I. ARGUMENT ........................................ 1

A. 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 ........................................ 1

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT PLAINTIFF'S COUNSEL'S MISCONDUCT "DID NOT RISE TO A LEVEL THAT THE PUBLIC CONFIDENCE IN THE JUDICIAL SYSTEM WOULD BE UNDERMINED" IF A NEW TRIAL WERE NOT REQUIRED ........................................ 4

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE PLAINTIFF'S FAVORABLE VERDICT WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE ........................................ 7

II. CONCLUSION ........................................ 9

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## TABLE OF CASES

**Page**

*Allen v. Hooper*,
126 Fla. 458, 171 So. 513 (1937)........................................................................9

*Brown v. Estate of Stuckey*,
749 So. 2d 490 (Fla. 1999)...............................................................................7

*Canakaris* v. *Canakaris*,
382 So. 2d 1197 (Fla. 1980).............................................................................5

*Clark v. Sumner*,
72 So.2d 375 (Fla. 1954)..................................................................................9

*deJesus v. Seaboard Coast Line Railroad Co.*,
281 So.2d 198 (Fla. 1973)................................................................................9

*Ed Ricke & Sons, Inc.* v. *Green*,
468 So. 2d 908 (Fla. 1985)...........................................................................2, 3

*Engle* v. *Liggett Group, Inc.*,
945 So. 2d 1246 (Fla. 2006)..............................................................................2

*Murphy* v. *Int'l Robotic Systems, Inc.*,
766 So. 2d 1010 (Fla. 2000)......................................................................2, 3, 4

## AUTHORITIES

§316.085(2), Fla. Stat.........................................................................................8

# I. ARGUMENT

Surprisingly, our 18-page brief has provoked a 45-page response -- but only ten of its pages address the legal question presented by the district court's decision and addressed in our initial brief. The remaining 35 pages complain of two post-trial rulings made by the trial court -- that Mr. Companioni's counsel's misconduct did not rise to a level that the public's confidence in the judicial system would be undermined if a new trial were not granted, and that Mr. Companioni's favorable verdict was not against the manifest weight of the evidence. Neither of these rulings are implicated by the district court's decision, and because they are purely discretionary rulings that depend upon the trial judge's superior vantage point, we think it unlikely that the Court will choose to address them on a cold record. We will address them briefly nevertheless, after first replying to the City's 10-page defense of the single ground upon which the district court reversed Mr. Companioni's judgment.

## A. THE DISTRICT COURT ERRED IN CON-CLUDING 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.

Reduced to its essentials, the City's position is this: the handful of objections it made, although insufficient to support appellate review because they were sustained and no motions for mistrial were made thereafter (indeed, the trial court's implicit invitations to move for a mistrial were explicitly declined), were nevertheless sufficient to permit it to wait and see what the verdict would be, and *if* the verdict was adverse to

it, move for mistrial after trial without the need to demonstrate fundamental error. That, of course, is essentially what the district court concluded below -- but, as we trust we demonstrated in our initial brief, that conclusion has been settled to the contrary by dozens upon dozens of decisions that say otherwise. The City purports to find authority supporting its contrary position in this Court's decisions in *Murphy v. Int'l Robotic Systems, Inc.*, 766 So.2d 1010 (Fla. 2000), and *Ed Ricke & Sons, Inc. v. Green*, 468 So.2d 908 (Fla. 1985). Most respectfully, both decisions have been misread. Each fully supports our position here.

In *Murphy*, 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. Rather, the Court retained the fundamental error exception to the contemporaneous objection requirement, but defined fundamental error narrowly -- holding that, in order to obtain a new trial 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).

The City argues that *Murphy* provides a trial court will greater authority than an appellate court to order a new trial for an error that was not properly preserved for review during trial. We do not read *Murphy* that way. Prior to *Murphy*, both trial courts and appellate courts could order new trials for fundamental error. *Murphy*

merely adds a requirement for preservation of a claim of fundamental error as a prerequisite for appellate review. What *Murphy* says is that, in order to raise a claim of fundamental error on appeal, a losing litigant must first preserve the claim for appellate review by filing a motion for new trial raising the issue in the trial court. And if the claim has been properly preserved in that manner, a ruling on the motion will be reviewable in an appellate court for abuse of discretion.

Since unpreserved errors have never been reviewable in appellate courts, except for fundamental error, we fail to see how simply adding a requirement for preservation of a claim of fundamental error provides greater authority to a trial court than an appellate court would have to order a new trial for fundamental error. Most respectfully, *Murphy* is consistent with everything we have argued here, and the City's suggestion that it supports the district court's decision is not well taken.

The City's reliance upon *Ed Ricke & Sons* fares no better. The decision does not permit a litigant to withhold its motions for mistrial, wait and see what the verdict will be, and then, *if* it loses, move for a mistrial after trial without the need to demonstrate fundamental error. The decision permits a trial court to *reserve ruling* on a motion for mistrial made at the time the impropriety occurs; it does not relax the requirement for a contemporaneous motion:

> 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."

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, a motion for new trial could not be granted. 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*. Most respectfully, 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.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT PLAINTIFF'S COUNSEL'S MISCONDUCT "DID NOT RISE TO A LEVEL THAT THE PUBLIC CONFIDENCE IN THE JUDICIAL SYSTEM WOULD BE UNDERMINED" IF A NEW TRIAL WERE NOT REQUIRED.**

In what amounts to a "right for the wrong reason" argument, the City contends that, even if it were required to scale the formidable obstacle presented by *Murphy*

because of its lack of preservation of the issue of plaintiff's counsel's misconduct, the trial court abused its discretion in denying its motion for new trial. To prevail on that contention, the City must convince this Court that counsel's conduct 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 -- and that no reasonable person would have ruled otherwise. *See Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980). Given that the City's counsel declined to move for a mistrial after any of its objections were sustained; that it expressly declined to move for a mistrial after being all but invited to do so on four different occasions; and that it was content to wait for the jury to return a verdict in the case despite counsel's conduct, we question the sincerity of its contention at this late stage of the proceeding.

In any event, we ask the Court to examine the several instances of "misconduct" upon which the City has staked its case, which appear at pages 6-7 of its answer brief. Because we do not believe the issue is a close one, we will not test the Court's patience by addressing each one of them at the Court's expense. We note simply that, in our judgment, they reflect little more than a lack of trial skills on the part of plaintiff's counsel. There is nothing that could reasonably be called highly prejudicial to the City's position on the facts, or inflammatory, or incurable, or that was so damaging to the fairness of the trial that the public's confidence in our system of justice requires a new trial.

The City appears to recognize as much because it falls back upon several "poison the well" arguments that have no place in this proceeding. It points out that

two of the jurors were convicted felons. That, however, is entirely irrelevant because the district court held in a prior appeal that this fact did not entitle the City to a new trial. It points out that Mr. Companioni's driving record was less than stellar. That, however, is irrelevant because his driving record was *excluded* from evidence at trial. It points out that plaintiff's trial counsel was convicted of a felony and subsequently disbarred. That, however, is irrelevant because these unfortunate events occurred *after* trial. And it points out that plaintiff's counsel repeated a conversation that a juror had with Mr. Companioni *after* trial. That, however, is irrelevant because the conversation did not impeach the verdict (and could not permissibly have impeached the verdict) and was pure hearsay as well. It is also irrelevant that, because the City is a governmental entity, its taxpayers might have to respond to a legislative claims bill for some or all of Mr. Companioni's damages.

Most respectfully, because each of these desperate "poison the well" arguments is entirely irrelevant to what happened at the trial of this case, and therefore entirely irrelevant to the issue of whether a new trial was required by plaintiff's counsel's conduct at trial, it was unprofessional for the City's counsel to parade them before the Court. Indeed, we believe it was unethical for counsel to do so, and a motion to strike this aspect of the City's brief would probably be in order. The Court has better things to do than referee a lengthy debate about such an ancillary matter, however, so we will trust the Court to focus on the merits and disregard the City's improprieties. We will leave it to the Court's discretion to determine if sanctions would be appropriate. And we respectfully submit that, if the City's "right for the wrong reason" argument is to be

reached by the Court, it should be declared meritless.

### C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE PLAINTIFF'S FAVORABLE VERDICT WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In its next "right for the wrong reason" argument, the City contends that the jury's liability finding was against the manifest weight of the evidence and that the trial court therefore abused its discretion in denying its motion for new trial. Because the standard of review for such a contention is abuse of discretion, the City must convince this Court that no reasonable person would have ruled as the trial court did. *Brown v. Estate of Stuckey*, 749 So.2d 490 (Fla. 1999). Most respectfully, the lengthy jury argument that the City has made in its brief does not shoulder that difficult burden. From the evidence adduced at trial, viewed in the proper light -- favorably to the verdict, as it must be -- the City's liability for the accident that crippled Mr. Companioni is fairly obvious.

The accident happened on Hillsborough Avenue, a thoroughfare consisting of three thru lanes and a fourth, median lane for left turns. Three City water department trucks were parked in the curb lane (T. 180, 193). For their lunch break, in order to reach a park roughly half a mile ahead, which would require a left turn, the drivers of the trucks began gradually moving diagonally from lane to lane, right to left, at very slow speed (T. 180-87, 470-82). One eyewitness, standing on the sidewalk in front of his plumbing shop, estimated their speed at 3 to 5 m.p.h. and described the trucks as a

"wagon train" that "blocked the whole Hillsborough Avenue" (T. 193-94). A second eyewitness, standing in the same place, confirmed these facts and added that he had said at the time, "I can't believe they're blocking the whole Hillsborough" (T. 209-10, 219-20). This witness also "would swear to God" that the trucks did not have their turn signals on (T. 220). Neither witness saw or heard the approaching motorcycle, but each heard a loud crash and then observed that a motorcycle had hit the back of the lead truck -- and each observed Mr. Companioni lying in the roadway, bleeding profusely (T. 193-95, 218-21).

If the City thinks it is being clever in stating that these two gentlemen were not "eyewitnesses," it may do so if it wishes, but they were certainly the next best thing (and their testimony was consistent in many respects with the testimony of the driver of the truck with which Mr. Companioni collided). The jury was certainly entitled to believe their testimony -- and it did. The City protests that it was "undisputed" that the driver of the truck with which Mr. Companioni collided looked and did not see the motorcycle, but that is hardly dispositive of the liability issue. The motorcycle was obviously there to be seen, and the driver just as obviously changed lanes into the lane into which Mr. Companioni was approaching, at a very slow speed, when it was not safe to do so.

The driver's lane change was undeniably a violation of §316.085(2), Fla. Stat.:

> No vehicle shall be driven from a direct course in any lane 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 completely made with safety and without interfering with the safe operation of any vehicle approaching from the same direction.

And because this statute was undeniably violated, the jury was well within its rights to conclude that the City was negligent and to apportion the blame for the accident 90% to the City and 10% to Mr. Companioni. *See Allen v. Hooper*, 126 Fla. 458, 171 So. 513 (1937) (violation of a traffic regulation is prima facie evidence of negligence); *Clark v. Sumner*, 72 So.2d 375 (Fla. 1954) (same); *deJesus v. Seaboard Coast Line Railroad Co.*, 281 So.2d 198 (Fla. 1973) (same).

Indeed, if the case were retried a dozen times, it is doubtful that the City would ever be exonerated entirely of blame. We therefore respectfully submit that the trial court did not abuse its discretion in concluding that the jury's finding of liability was not against the manifest weight of the evidence -- and if this "right for the wrong reason" argument is to be reached by the Court, it should be declared meritless.

## II. CONCLUSION

It is respectfully submitted once again that the district court erred in concluding that the trial court applied the wrong standard in analyzing the City's motion for new trial. The City's "right for the wrong reason" arguments should not be reached, and if reached, should be declared meritless. 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 13th day of May, 2010, to: Richard M. Zabak, Esq., Monterrey Campbell, Esq., Brian K. Oblow, Esq., Gray Robinson, P.A., Post Office Box 3324, Tampa, FL 33601-3324; and to Jerry M. Gewirtz, Esq., Chief Assistant City Attorney, City of Tampa, 5th Floor, City Hall, 315 East Kennedy Blvd., Tampa, FL 3302, *Attorneys for Respondent*.

________________________________
JOEL D. EATON