

MOTION FOR MISTRIAL IN ORDER TO PRESERVE ERROR
By Ted Babbitt

Companiononi v. City of Tampa, 35 Fla. L. Weekly S738 (Fla. Dec. 16, 2010) was a case in which the Florida Supreme Court reviewed conflict among districts on the subject of whether or not a party who objects to attorney misconduct during a trial must also move for mistrial when the objection is sustained in order to preserve the issue on a motion for new trial before the trial court.

In that case the City of Tampa objected to numerous instances of alleged attorney misconduct and the trial court sustained the objections but the City Defendant did not move for a mistrial during the trial. The jury found in favor of the Plaintiff whose attorney was alleged to have engaged in numerous instances of misconduct and the City moved for new trial on the grounds that these incidents of misconduct cumulatively deprived the City of a fair trial. The trial court denied the motion even though the trial judge agreed that the cumulative conduct of plaintiff's counsel was so bad and prejudicial that the City had lost its right to a fair trial. The trial judge, however, applied the test of whether this conduct constituted fundamental error and concluded that it did not and found that the conduct was not so extreme so that it would undermine the public's confidence in the judicial system.

The Second District Court of Appeals reversed holding at 26 So. 3d 599 that:

The trial court did not need to consider the issue of fundamental error because

throughout the trial the City objected to opposing counsel's conduct. The trial court apparently concluded that the City's objections were not preserved for the purposes of its motion for a new trial because the City had not moved for a mistrial after the trial court sustained its objections. 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.

This holding conflicted with two other District Courts which had held that in order to preserve the issue of attorney misconduct for a trial court's review in a motion for new trial, there must first have been a motion for mistrial on the part of the moving party. See State v. Benton, 662 So. 2d 1364 (Fla. 3d DCA 1995), State v. Fritz, 652 So. 2d 1243 (Fla. 5th DCA 1995) and Sears Roebuck & Co. v. Jackson, 433 So. 2d 1319 (Fla. 3d DCA 1983).

Based upon conflict jurisdiction, the Supreme Court resolved that conflict against the Second District in Companioni and in favor of the Third and Fifth Districts in Benton, Sears and Fritz, *supra*.

Citing with approval its opinion in Ed Ricke & Sons, Inc. v. Green, 468 So. 2d 908, 910 (Fla. 1985), the Court quoted:

The trial court judge may, in his or her sound discretion, determine whether to rule on a motion for a mistrial immediately or reserve ruling until after the jury deliberations. However, this discretion must be exercised in accordance with precepts of judicial economy. When, as here, the prejudicial comments occur during closing argument, it is quite reasonable for a trial judge to

reserve ruling until after the jury deliberates in the hope that the jurors can rise above the alleged prejudice and cure the error. If the verdict cures the error, the court will save the expenditure of additional time, money and delay associated with a new trial. On the other hand, if the judge, after the verdict, incorrectly grants the motion for mistrial and orders a new trial, that order is reviewable on appeal. The appellate court could then reverse the order granting the new trial and order the trial court to enter a judgment on the jury verdict.

The power of a trial court judge to reserve ruling on a motion for a mistrial will not only conserve judicial resources but may also operate to prohibit a wrongdoer from profiting from his intentional misconduct.

The Court reasoned that the problem with the City and the Second District's analysis was that it allowed a party, in this case the City, to supplant the trial judge's discretion as to whether or not incurable error had occurred with its own option to await the verdict before seeking to have a declaration that incurable error has occurred.

By obtaining a favorable ruling as to inappropriate conduct, trial counsel must make a decision as to whether the conduct is so honourous as to require a stop in the proceedings. Failure to do that constitutes a waiver. At 739, the Supreme Court holds:

The City argues that *Ed Ricke* supports its position that a party can move for a new trial without first moving for mistrial. We disagree. *Ed Ricke* stands for the proposition that a trial judge has a

superior vantage point from which to decide whether granting a mistrial prior to the jury rendering its verdict preserves judicial economy. It does not in any way imply that the parties' attorneys have a superior vantage point and can thus utilize the "wait and see" approach.

Unfortunately, under circumstances when faced with attorney misconduct by opposing counsel, trial counsel is left with a difficult choice. Requesting a mistrial necessarily means an enormous waste of resources and the opportunity for the other side to receive a "preview" of the evidence that has been presented. Nevertheless, the Supreme Court in this case at 740 makes its holding clear.

We hold that when a party objects to instances of attorney misconduct during trial, and the objection is sustained, the party must also timely move for a mistrial in order to preserve the issue for a trial court's review of a motion for new trial. If the issue is not preserved in this manner, then the conduct is subject to fundamental error analysis under this Court's opinion in *Murphy*.

A bright line has been drawn. In order to preserve the right to move for a new trial based on attorney misconduct, it is absolutely necessary that a motion for mistrial be made. The alternative is nothing short of waiver.

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