IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,837

ROBERT MURPHY AND TECHNOLOGY
INNOVATIONS INTERNATIONAL, INC.
Petitioners,

-vs-

INTERNATIONAL ROBOTIC SYSTEMS, INC., et.al.
Respondents,

PETITIONERS' AMENDED INITIAL BRIEF ON THE MERITS

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PREAMBLE

The Petitioners Robert Murphy and Technology Innovations International, Inc. were the Plaintiffs below. Robert Murphy is referred to by name, throughout the brief. Technology Innovations International, Inc. is referred to as "Robotics I" a short form of its previous name "International Robotics Systems, Inc." which changed in July 1992 to Technology Innovations International, Inc.

Defendants United Technologies Corporation and United Technologies Optical Systems, Inc. are referred to as "UTC" and "UTOS" respectively.

Defendants Laser Holdings, Ltd. and Howard Hornsby are referred to by name i.e. "Laser" or "Laser Holdings" and "Hornsby."

Defendant International Robotics Systems, Inc. was formerly known as Justwood, Inc. until July 1992. In July 1992 its name was changed to International Robotics Systems, Inc. It is referred to throughout the brief as "Robotics II." This is a different corporation from "Robotics I" which was a Plaintiff below.

CERTIFICATE OF SIZE AND STYLE OF TYPE

The Petitioner's Brief is printed in 12 point Courier New, in compliance with the Court's Administrative Order dated 13 July, 1998.

STATEMENT OF THE CASE AND OF THE FACTS

This lawsuit centered around a small fiberglass remote controlled surveillance boat, named the OWL. In essence, the OWL is a refined, sophisticated overgrown jet-ski which has a very low profile, which can carry a very wide variety of surveillance equipment into hostile environments in which human lives would be in danger. The Plaintiff, Robert Murphy, and the Defendant, Howard Hornsby, jointly developed it, although they dispute the relative importance of the contributions which each made to the development of the OWL.

By 1990, two U.S. patents for the OWL had issued, one in Robert Murphy's name and one in Howard Hornsby's name. They incorporated as International Robotics Systems, Inc. ("Robotics I") and transferred the patents into the new company. (Tr. 518). In the meantime, through the late 1980's and up to 1991, they tried to sell OWLS, to borrow or entice new funds to survive the gestation period, or even to sell the OWL business in total to an established company.

By 1991, the U.S. Navy had strong interest in the OWL and, after a series of performance tests, was prepared to buy an OWL. If things went well, it was expected to be just the first of many such purchases. The tiny company was hard pressed for cash and was on the market at all times. Murphy and Hornsby spoke with AIA, with Boston Whaler, and with Macdonnell Douglas and others about a

sale or a joint venture. (Tr. 581-589). The pending Navy contract was alluring, but there were no guarantees of when, if ever, it would be awarded to Robotics I. (Tr. 588).

UNITED TECHNOLOGIES CORPORATION

This a multi-billion dollar international conglomerate which owns, among other things, Carrier air-conditioning, Otis elevators, and Pratt & Whitney jet engines which is located in West Palm Beach. It is a major figure in the defense industry. A veteran engineer and executive of UTC was Mr. John T. Carroll. He was based in West Palm Beach. Mr. Carroll met with Robotics I and he exhibited great enthusiasm for the potential uses of the OWL. (Tr. 1673). A major portion of the trial focused on UTC's involvement with the OWL. Everyone agrees that in April of 1992, Mr. Carroll introduced Murphy and Hornsby to another Defendant, Laser Holdings, Ltd. of Australia. Robert Murphy contends that UTC did much more than merely act as a match maker in introducing Laser Holdings, that Mr. Carroll continuously promised (but never in writing) that Laser Holdings would be little more than a UTC nominee and not an active participant with the OWL; that UTC would actually fund, promote and market the OWL. There was much circumstantial evidence to support this claim, but the jury found against the Plaintiffs and in favor of UTC on liability. In large measure it came down to Robert Murphy's word as to what UTC had promised and UTC devoted all of its trial energy to attacking Robert Murphy. UTC's grossly

improper argument in this regard is briefed in Point II, *infra*. p. 35. Although the Plaintiffs have settled all their claims against UTC, the Appellee/Defendant Hornsby and his company also shared the fruit of this poisoned tree. We will say as little as possible about UTC to avoid burdening the Court; for whatever the reasons the jury found no enforceable promises were breached by UTC.

Mr. Carroll had become quite friendly with Laser Holdings' president, John Wood. Laser Holdings was a start up Australian high tech company. (Wood depo., p. 299). Everyone agrees that Mr. Carroll called Wood and discussed what he knew about the OWL and the company that owned it. We will strip those discussions to absolute essentials: Mr. Carroll advised Wood to buy the OWL. By April of 1992, Mr. Carroll had advised Wood of the price (approximately $500,000.00 cash plus royalties) and had arranged a meeting with Murphy, Hornsby, Wood, Laser's other main decision maker, lawyer Peter Just, and Mr. Carroll to be held in West Palm Beach. Carroll made his view quite clear and insistent, "We are very close to a very, very good deal" in buying the OWL on these terms. (Tr. 2038-2040).

But how could Laser Holdings plunk down $500,000.00 in a new project? Easy. It would hype a new "strategic alliance" with UTC (which provided major credibility, Wood depo., p. 102) and hype the OWL with its pending U.S. Navy purchase as a launching pad onto the Australian National Stock Exchange, the "big board" of that

country. Laser Holdings would raise millions by selling stock on the OWL purchase. As Mr. Wood put it, he could get a million dollars to finance the OWL purchase, but not "ten cents" to finance a business plan. (Wood depo., p. 97).

Late in the evening of April 12th, the deal had been agreed upon and the OWL and its patents were to be sold to the Australians for $500,000.00 cash, and for royalties split evenly between Murphy and Hornsby over the next five years. Robotics I would sell its assets to a new company to be formed by the Australians, and the new company would take the name of International Robotics Systems, Inc. The old company would remain with Murphy and change its name. Hornsby negotiated a five year employment contract, beginning at $80,000.00 per year. (Tr. 2468). The old company would receive a consultant agreement for Murphy which would pay it between $300,000.00 - $400,000.00 in the next five years. (Plaintiffs' exhibit 5). That agreement is discussed at Point IV *infra*.

The Navy OWL was to be delivered in September 1993, for a total price of $449,000.00. (Tr. 2473-74). Howard Hornsby delivered it six months late (Tr. 2613) and had spent over $1 million dollars of Laser's money in doing so. When he received the $449,000.00 from the Navy, he kept that money also. (Tr. 2654) and another $525,000.00. (Tr. 2613). As Mr. Wood testified, Laser Holdings had zero to show for this investment and it finally ran out of money and into receivership and liquidation.

As we have said earlier, in the period after April the 12th Murphy believed that he would have a position in the sales and marketing of the OWL. Robotics I had a consultancy agreement which was to pay out $300 - 400,000.00 over five years, and which equates to the $80,000.00 a year five year contract which Hornsby had. Laser Holdings told Murphy that after it bought the OWL a gentlemen would come over to meet with Murphy and it discuss his role in marketing. Murphy recalls the man's name was John Troughton. (Tr. 702). Whether Laser Holdings was lying to him at the time or not, Mr. Troughton is the man who they had designated to be the overseer of the company and to be involved in marketing. (Tr. 3291). However, neither Troughton nor anyone else from Laser Holdings ever spoke to Murphy again. He received no part of the consulting agreement payments, and, finally, filed suit.

SUMMARY OF THE ARGUMENT

The fourth district creates conflict with other courts of appeal by misconstruing supreme court precedent and national precedent, and by adopting the opinion of the second district in an incorrectly decided case. Had the fourth district correctly applied the law, a new trial would have been granted.

The verdict was the result of a highly improper and prejudicial closing argument which "pervaded" the trial within the meaning of supreme court and first, third and fifth district decisions and prevented a fair trial.

The trial judge gave the jury an instruction, at the defendant's request, which directly contradicted the correct instruction given at plaintiff's request.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL IN *MURPHY* HAS DEPARTED FROM SUPREME COURT PRECEDENT, HAS ADOPTED A SECOND DISTRICT PRECEDENT, WHICH WAS IN ITSELF INCORRECTLY DECIDED, AND HAS THUS APPLIED AN ERRONEOUS STANDARD OF REVIEW

Conflict regarding the standard of review in cases involving improper arguments of counsel, where no contemporaneous objection was made, between the Fourth district and the First, Third and Fifth districts is conceded. *Murphy v. International Robotics Systems,* 710 So. 2d 587 (Fla. 4th DCA 1998)at 588.

This Brief suggests that, throughout the district courts, there is no consensus on appropriate standards, that a much quoted phrase, "fundamental error" has lost through overuse any uniform meaning, and that the district courts in citing each other repeatedly have created a body of law adrift from the seminal supreme court cases.

A. THE CONFUSION ARISING FROM THE ABSENCE OF A CONSENSUS STANDARD AMONG THE LOWER COURTS.

"The sole issue on appeal was whether a new trial was required because of the inflammatory and prejudicial remarks made by defense counsel during his closing argument . . . recent case law from the various district courts has provided little guidance on the

question of when unpreserved error justifies reversal." *D'auria v. Mendoza*, 673 So.2d 147 (Fla. 5th DCA 1996), Judge Antoon, concurring specially in a *per curiam* decision. [e.s.]

"[W]e must face the difficult issue of the scope or standard of review which should apply . . .[W]e are again concerned that there is no clear path through the plowed field". *Wasden v. Seaboard Coast Line R. Co.*, 474 So. 2d 825 (Fla. 2nd DCA 1985) at 829.

"Confusion, if not conflict, exists concerning the tests that trial courts should apply in granting or denying a new trial based on preserved [sic] or fundamental error in closing argument and the standards of review that appellate courts should apply . . . ". *Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So. 2d 583 (Fla. 2nd DCA 1996).

And, in *Murphy*, this uncertainty among the lower courts comes to a head. "[W]e keep getting appeals in which attorneys cite from the First, Third and Fifth districts involving this issue, and urge us to follow them . . . [We are] writing to explain why we do not agree with the decisions of our sister courts". * * * "[W]e do not follow the decisions of the other district courts of appeal . . ." * * *"[W]e do not think we are being inconsistent with our supreme court, when we all but close the door on allowing this issue to be raised for the first time on appeal." *Murphy* at 587.

B. THE SUPREME COURT CASE THAT SHOULD HAVE ELIMINATED THE CONFUSION IF IT HAD BEEN FOLLOWED: *STRICKLAND*

Three supreme court cases have discussed the standards for new trial motions based upon improper closing arguments of counsel, in civil cases. The earliest case (in 1936) repeats verbatim the language of a prior criminal case, and the latest case (in 1961) repeats verbatim the standard from *Seaboard Air Line R.R., Co. v. Strickland*, 88 So. 2d 519 (Fla. 1956). Therefore, there is arguably only one standard ever approved by the supreme court, unless "fundamental error", discussed *infra*, page 18, should be added to the equation as a separate consideration. This Brief discusses first the supreme court standards, and then what the courts of appeal have wrought.

In 1936, this court decided *Baggett* v. *Davis*, 169 So.372 (Fla. 1936), which is apparently the first civil case involving improper closing argument. Although the district courts have occasionally cited *Baggett* as authority for the civil case standard of review in "unpreserved" closing argument cases, a close reading indicates that (1) *Baggett* verbatim reiterates the standard from a criminal case and (2) it isn't clear that the *Baggett* court reversed the jury verdict based upon the improper closing remarks at all. The court gave no indication that it intended to set civil precedent concerning the grounds for reversal. This point is reinforced by

the fact that the court, in the next two civil cases decided, did not return to cite the standards of *Baggett*.

The *Baggett* case involved several alleged trial errors, of which two were remarks made by counsel in closing argument. The first remark was that the jury should not worry about the defendant having to pay any verdict awarded, because "he will not be out anything, and that same will not cost him a cent." No objection was voiced. Whether or not this was a veiled reference to Mr. Baggett having insurance, can't be ascertained from the opinion; the word "insurance" is not to be found. It is more likely that the plaintiff meant to falsely imply that Mr. Baggett had insurance, even though he did not, as will be apparent from the next two paragraphs.

The supreme court found this comment to be improper, by analogizing it to a remark made in *Akin* v. *State*, 98 So. 609 (Fla. 1923), saying "this remark of counsel was similar in its probable effect upon the jury to the first remark of counsel objected to in the case of *Akin v. State.*"

That remark from *Akin* was that (1) the defendant had other indictments pending against him, which would not be pursued and (2) that if convicted, he would probably only get a small fine, perhaps no more than five cents. This court found both statements to be improper; there was no record evidence of other indictments and the trial court could not, as represented, have imposed a fine in lieu

of imprisonment. The *Akin* court noted that a verdict normally couldn't be set aside for improper remarks unless contemporaneous objection had been made, but,

> This rule is subject to the exception that, if the improper remarks are of such character that either [sic] rebuke nor retraction may entirely destroy their sinister influence, in such event a new trial should be awarded regardless of the want of objection or exception. (numerous citations, all to non-Florida cases, omitted).
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> * * *
>
> Any attempt to pervert or misstate the evidence or to influence the jury by the statements of facts or conditions not supported by the evidence should be rebuked by the trial court, and, if by such misconduct a verdict was influenced, a new trial should be granted. (citation to Florida criminal cases omitted). *id* at 613

The court said that it was not completely clear that the improper remarks of the prosecutor, including the ones we described above, came within this exception, but it did reverse and grant a new trial.

Thus, fourteen years later, the *Baggett* court found the remarks about Mr. *Baggett* not having to pay one cent of any possible jury award "similar in its probable effect upon the jury to the first remark of [the prosecutor] objected to [i.e. on appeal; there was no objection at trial] in the case of *Akin* v. *State* . . ." the remarks about other indictments and a possible 5 cent fine.

The *Baggett* court reprinted verbatim the *Akin* standard for review, the standard that is the genesis of the concept of "neither

rebuke nor retraction may entirely destroy [the improper remark's] sinister influence." The court reversed the judgment against Mr. Baggett "for the errors pointed out herein." As there were two other errors found, one an erroneous admission of testimony, *id* at 376, and one an erroneous jury instruction, *id* at 377, it is likely, but not certain, that the improper closing argument was included in the errors that required reversal. As this Brief will point out, the supreme court did not again employ *Akins'* standard of sinister influences incapable of cure, but the district courts, usually without citation to either *Akin* or *Baggett*, occasionally revived either "sinister" or "rebuke nor retraction" in different combinations to create new definitions.

Twenty years after *Baggett,* this court reviewed its first case of improper remarks by counsel, unaccompanied by other assignments of error, as grounds for reversal without contemporaneous objection. In *Strickland,* the plaintiff was a railroad employee injured on the job. Plaintiff's counsel introduced at trial a letter from railroad headquarters regarding Mr. Strickland's injuries. The letter expressed that the railroad's general counsel and its doctor derived "amusement" and "hearty laughter" from the fact that a different doctor who had examined Strickland concluded that his injuries were not as serious as Strickland contended.

The plaintiff's attorney used the expressions of mirth at Strickland's plight to anger the jury and prejudice it against the

hard hearted railroad executives. He called his own doctor witness to the stand and asked him if he thought Strickland's injury were "a joking matter" or threw him "into fits of laughter." He told the jurors in closing that he could envisage the railroad's chief surgeon and general counsel sitting in their office "laughing", feet on their desks, saying "Isn't this a big joke? Strickland has hurt his back... ." Counsel said he didn't think it was a joke, and that he'd "like to wipe that smile off [general counsel's] face, he who had never "worked with his hands or his back..." *id* at 522, like Mr. Strickland did.

Additionally, in closing argument, counsel commented on a demonstration the jury had seen, requested by the plaintiff, at the railroad yards which recreated the work conditions in which Mr. Strickland was injured. Counsel repeatedly stated his personal observations of what had been seen in the demonstration and that there was no doubt in his mind that the railroad was negligent. Finally, he observed that the railroad had "pulled every sly trick in the books" in this case. *id* at 523. No objections were made to any of the plaintiff's examination or closing arguments. This court nevertheless reversed the verdict and granted a new trial, announcing the standard that has never since been altered,

> While we are committed to the rule that in the ordinary case, unless timely objections to counsel's prejudicial remarks are made, this court will not reverse the judgment on appeal, however, this ruling does not mean that if prejudicial conduct of that character in its collective impact of numerous incidents, as in this case,

> is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, this court will not afford redress. * * * [T]he prejudicial remarks of counsel, including the statements made in argument amounting to testimony in the case, require a new trial. [The conduct of attorneys during trial] must always be so guarded that it will not impair or thwart the orderly processes of a fair consideration and determination of the cause by the jury.[1]

The final supreme court decision in the civil case trilogy is *Tyus v. Apalachicola Northern Railroad Co.,* 130 So. 2d 580 (Fla. 1961). We will discuss *Tyus,* but begin with the most important observation. It repeats verbatim the standard we have quoted from Strickland; therefore, but for the fact that the results were different, *Strickland* and *Tyus* may be considered as one in their holdings.[2]

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[1] The court cited to *Tampa Transit Lines, Inc., v. Corbin,* 62 So. 2d 10 (Fla. 1952) as supporting the principles stated. We reduce *Corbin* to a footnote because the improper comments of counsel were objected to, to distinguish them from the main cases on point in this Brief. Furthermore, *Corbin* did not attempt to articulate a clear standard for reversal as *Strickland* did. It is interesting to note, however, that the following comments were found to be "highly prejudicial", (1) that the attorney had known the plaintiff for years and that she had been healthy before her accident (2) that the defendant had high priced attorneys with offices in a bank building, (3) that the defendant had attorneys on retainer to fight any claims regardless of how just, (4) that the bus fare used to be five cents and had now gone up to ten cents, (5)that the bus company's officers would go to hospitals such as the Mayo Clinic if they were ill and (6) that the bus company was spending a large amount of money to defend the law suit

[2] *Tyus* did, however, clarify that in order to be "pervasive" the remarks need not be interspersed throughout the trial; the improper remarks made in closing were "not so extensive that [their] influence pervaded the trial." *Tyus,* 587-588.

In the *Tyus* case we again find a plaintiff's attorney beating up on the railroad. The plaintiff's husband was hit and killed by a train at a railroad crossing. Judge Klein, in the *Murphy* opinion, has paraphrased very well the improper remarks in closing argument made by Mrs. Tyus' attorney, and there is no reason to expand on that. We further agree with Judge Klein that the *Tyus* attorney's remarks, "are as bad as, if not worse, than the arguments in cases which are now being reversed". *Murphy* at 589, but do not agree that the first, third and fifth district courts who are doing the reversing are wrong, and the fourth district is right.

This Brief will later discuss why we contend that the present decision is wrongly decided and that the Fourth District's assertion of its consistency with supreme court precedent is incorrect, but at this juncture we will compare *Baggett, Strickland* and *Tyus* and summarize the present impact of the three cases on the law of Florida as this court has stated it.

First, *Baggett* with its substantially different standards (sinister influences incapable of cure) was based on *Akin,* a criminal case, and neither case was cited as authority in *Strickland.* This couldn't have been an oversight; the court specifically and intentionally announced a different civil case standard, and noted the precedent for this standard in two prior civil cases *(Seaboard Air Line RY. v. Smith,* 53 Fla. 375, 43 So.

235 (Fla.1907), and *Corbin, supra* at note 1). Indeed the court went beyond Florida precedent and quoted at length a United States Supreme Court case, a lower federal court case, and cited another federal appellate decision. *Strickland* at 524. Under these circumstances, the omission of reference to *Baggett* can only be intentional.

Second, in *Tyus* the majority opinion relegates *Baggett* to a footnote without discussion. The dissent discussed Baggett, noted that the case "followed the definition used in a criminal case" (*Akin*) and distinguished it from the definition later adopted in *Strickland*. (*Baggett* "did not define the objection [sic, "exception" must have been intended] in the broad terms as in" *Strickland*). *Tyus*, at 591. The dissent exhibited no interest in reviving the *Baggett* definition either, nor in working parts of it into the *Strickland* definition.

This intentional departure from *Baggett's* definition of "sinister influences" incapable of cure by rebuke or retraction, in favor of a "highly prejudicial" standard, was well reasoned. "Sinister" is not a word that lends itself readily to improper remarks in closing arguments. Lawyers in most of the cases one reads, either gratuitously insult the opposing witnesses or lawyers, vouch for the witnesses they like, offer their own opinions of the merits, allude to "facts" not in evidence, identify their opponents with the Ford Pinto, Agent Orange or other infamous

defendants, make golden rule arguments, express calculated sham grief for their client, tell the jurors that they (the lawyers) have gone sleepless for weeks over anguish for their client's sad condition, call opposing witnesses and employees "jokers", "good soldiers", "country club doctors", "liars", demean the opponents' case as ridiculous, outrageous, blame their opponents for bringing cases that overcrowd the courtrooms, and characterize the case as merely plaintiff's attempts to win the lottery.[3] But the words "sinister influence" don't equate, to articulate people, to these varied and highly improper comments. For that matter, "sinister" didn't really fit the *Akin* or *Baggett* situations either. One lawyer falsely stated that Mr. Akin might get off with a five cent fine if convicted; the other lawyer, apparently falsely, stated that Mr. Baggett wouldn't have to pay one cent of any judgment entered against him. The word "sinister" does not connote falsity.

Likewise, the *Baggett* definition, requiring the trial court to speculate as to which remarks could have been entirely neutralized in their prejudicial effects had objection been made, and which remarks could not have been neutralized, presents a strained and rather artificial rule, which may well be why it was abandoned in *Strickland*, and, when the issue came up again, abandoned again in *Tyus*.

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[3] Several of these offenses are found in one case, *Murphy*, the present case.

From this review of the Supreme Court cases one must conclude that one definition, one standard, exists to measure the merits of a new trial motion based on unpreserved error in opposing counsel's closing argument, *Strickland*'s. It is workable and understandable and yet sufficiently flexible to be uniformly applied. There is a certain amount of irony, therefore, in the expressions of confusion regarding proper standards to apply among the district courts (*supra* 7), none of which have expressed any difficulty in following *Strickland* or *Tyus* and, indeed most of which opinions do not even cite to *Strickland* and *Tyus*. And, as this Brief will point up, the courts have reached back to *Baggett,* even *Akin*, retrieved "sinister" and other pieces from those opinions, and sown the very confusion of which they complain.

One example is the *Hagan* case, *supra* 7. It is the case that most heavily influenced the *Murphy* decision. It is the only decision which the undersigned has found that purports to have analyzed the five supreme court cases we have just discussed. As it pertains to those cases, *Hagan* is almost entirely off point, and we will discuss *Hagan* at greater length. However, analysis of the *Hagan* case must be preceded by a discussion of "fundamental error", a phrase which has never appeared in a supreme court civil case regarding improper closing argument, yet is referenced nine times in the Murphy opinion as if it were the *sine qua non* of closing argument review standards.

C. "FUNDAMENTAL ERROR": A DISTINCT CONCEPT LOSES MEANING THROUGH MISUSE.

The supreme court wrote *Akin, Baggett, Corbin, Strickland* and *Tyus* without needing to employ the phrase "fundamental error" in the opinions. Many of the lower courts, on the other hand, seem to find it essential to describe many varieties of reversible errors as fundamental errors.

The supreme court has defined fundamental error at least once in a civil case, and the district courts are aware of that. The difficulty is that either they don't understand the definition (as admitted by one member of the *Murphy* panel, *infra*, page 21), they don't attempt to apply the supreme court definition, or they write creative new definitions which have little or no similarity to the supreme court definition (see discussion of the *Hagan* case, *infra*, page 24).

The *Murphy* panel correctly observed that the supreme court defined fundamental error as "error which goes to the foundation of the case, or goes to the merit of the cause of action", in *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). In *Sanford*, three Miami Beach firemen eventually, after multiple appeals spanning a decade, won job reinstatement. Then they obtained awards of statutory attorneys' fees. More appeals followed regarding the amount of fees awarded. At oral argument, the government lawyer "asserted for the first time that the provisions of the City's Civil Service Act . . . was [sic]

unconstitutional...". *Sanford* at 136. This court allowed the fee awards to stand against a contention that it was fundamental error. The fees issue didn't go to the merits of the case, which were "the right of petitioners to retain their employment and receive compensation for the time of their suspension. . . " . *id* at 137.

Having identified the supreme court definition of fundamental error as applied in a civil case, however, the Murphy panel treats that precedent in a curious manner; (1) it mentions fundamental error nine times, signaling that fundamental error has a prominent role in deciding cases like the present one (2) yet does not discuss whether the improper remarks of the defense attorney in this case went to the foundation or merits of the plaintiff's cause of action, and (3) implies that fundamental error isn't applicable to closing arguments anyway, with the somewhat inscrutable phrase that the belated constitutional challenge raised in *Sanford* "was, to our way of thinking, more egregious than improper argument of counsel." *Murphy* at 590. The *Murphy* panel also sends mixed signals about its understanding of fundamental error in other portions of the opinion. It alludes to a finding of "fundamental error in criminal cases", citing *Grant v. State*, 194 So. 2d 612, 613 (Fla. 1967). The word "fundamental" is not in that opinion; the prosecutor made a golden rule type argument which this court called "highly prejudicial and inflammatory" which is in effect a *Strickland* standard. No mention was made of whether the remarks

went to the foundation or merits of the case, which would be a *Sanford* standard.

The *Murphy* panel also refers to the function of fundamental error as that "which can thus be raised for the first time on appeal". *Murphy* at 590. If that were the standard, it would not justify such prominence in the present case, for the highly prejudicial remarks of defense counsel were all raised before appeal, in a new trial motion.(R. 1790-92)

One member of the *Murphy* panel, Judge Farmer, two years ago expressed his own search for the meaning of fundamental error, a journey which led him through "innumerable" definitions of the term, including the *Sanford* definition, and ended with him finding his most satisfactory definition within the pages of American Jurisprudence. "We have reviewed innumerable definitions of the phrase 'fundamental error'...",[and] The [definition] that suits us best [is],"

> A reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. * * * Am. Jur., Appeal and Error, §549.

Judge Farmer noted the verbal differences between this court's definition of fundamental error in a civil case, *Sanford*, and an early definition this court provided in a criminal case "the error must have reach[ed] down to the legality of the trial itself to the extent that a verdict of guilty could not have been obtained

without the assistance of the error alleged." *Hamilton v. State*, 88 So. 2d 606 (Fla. 1956). Examining the *Sanford* definition, Judge Farmer commented,

> The [supreme] court has never really explained what it meant by 'error which goes to the foundation of the case or goes to the merits of the cause of action.' The term 'foundation' conceivably relates to jurisdictional defects. As to 'error that goes to the merits of the cause of action,' I believe (although I cannot find anything definitive to prove it) that the court had in mind what it has held in criminal cases: i.e., to be fundamental error, the court must be able to say without hesitation that without the error asserted the merits of the case would not have been decided as they were. [Both Judge Farmer quotes are from *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1026 (Fla. 4th D.C.A.1996)].

Judge Farmer must not be alone in his uncertainty over application of the supreme court *Sanford* definition of fundamental error, although one might question his decision to reject it in favor of American Jurisprudence, and might disagree with his conclusion that *Sanford's* fundamental error can only arise when the court can say with certainty that but for the prejudicial remarks, the other side would have won. That seems a nearly impossible standard to impose on trial - much less appellate - courts.

Is the *Sanford* concept of prejudice which "goes to the merits of the cause" truly incomprehensible, or does it simply mean that a majority of improper comments fall under the standard, but that such comments which also improperly undermine the merits can be additionally considered as fundamental error? Golden rule

arguments, for example, almost never go to the legal merits or elements of a cause of action. Nor does calling on the conscience of the community, or demeaning a witness' testimony or stating personal opinions or even accusing opposing counsel of hiding evidence. These and most other improper remarks should be viewed under *Strickland* standards.

Our case perhaps presents an example in which two different standards can be applied. The defense counsel called the plaintiff a "liar" time and again, called the plaintiff's witnesses "a crazy cast of characters", vouched for the truthfulness of defense witnesses and, characterized the whole case as an attempt to cash in a lottery ticket. *Infra* pp. 38. Although this last accusation conceivably attacks the merits of the plaintiff's case as well, these remarks, we think, should be reviewed under *Strickland* standards. In clear contrast, however, are the closing remarks about the consulting agreement, which the plaintiff sued upon as one of his causes of action. Both the plaintiff and the present defendants signed it, after review by their attorneys. With no record support, defense counsel called it a "phony" agreement and drove home his opinion (stated as a fact) that it was a "tax fraud" to which the jurors "would be accessories after the fact." *Infra* p. 37. These are not merely *Strickland* improprieties, they also go to the heart of the merits, the validity vel non of the consulting agreement itself. They are fundamental error.

Perhaps we have missed the point, but it seems that the supreme court has two different concepts which are compatible, and that one of them, fundamental error, while applying to relatively few cases, should not be deprived of meaning by becoming short hand for *Strickland* type, highly prejudicial remarks.

As noted, two years ago Judge Farmer candidly said what probably many other district judges privately felt, that he found the meaning of fundamental error to be elusive. The Murphy panel, however, including Judge Farmer, now expresses no doubt about its understanding of the concept. Having incorrectly identified fundamental error with *Grant v. State, supra* 19, they also incorrectly identified it with *Tyus,* ("considering the nature of the remarks which the supreme court held **not to be fundamental error** in Tyus..."). *Murphy* at 590.

Perhaps the fourth district in *Murphy* has found closure on this issue ("we do not agree with our sister [first, third, fifth district] courts") by opting to adopt wholecloth a second district decision which creates a novel definition of fundamental error, incorporates the new definition into a new two-step standard of review and indicates that it is premised on an analysis of *Akin, Baggett, Strickland* and *Tyus.* The *Murphy* opinion grants preeminent status to this case ("No discussion of unobjected-to closing argument would be complete without a discussion of *Hagan vs. Sun Bank of Mid-Florida, N.A.") Murphy* at 590. But the *Hagan* case is

replete with inconsistencies, incorrect analyses and unsupported propositions of law. However well intended it may have been, any credit given the *Hagan* case as attaining definitive status in the area of improper remarks of counsel is questionable.

D. THE *HAGAN* CASE: NEW DEFINITIONS JOIN THE MILIEU

The *Hagan* decision concedes that "[f]undamental error is extraordinarily difficult to define . . ." 666 So. 2d at 584, then gives an explanation of fundamental error which, while morally inspiring, is so impractical and abstract as to add to the difficulties. Fundamental error, according to *Hagan*, exists (and presumably is to be applied) when "the public's interest in our system of justice would be seriously weakened if the courts failed to give relief as a matter of grace for certain, very limited and serious mistakes." *id.* Understandably, *Hagan* cites no authority for this definition. It also immediately begs the question, if the doctrine is reserved for a few "very limited and serious mistakes", what are those mistakes? It should also be noted that *Sanford*'s inquiry into "the foundation or merits" of the case is ignored.

Despite the "extraordinary" difficulty of defining fundamental error, the *Hagan* court instructs trial judges confronted with new trial motions based on unobjected to closing arguments to decide "whether the error was fundamental", and that the public's trust in the American system of justice would be undermined if the verdict were allowed to stand. There is no assistance offered to a trial

judge in deciding what sort of closing remarks in a trial, if made known to the public (which virtually never happens), would damage the general population's confidence in the legal system. This two step analysis from *Hagan* is an invitation - indeed a mandate - to highly subjective, difficult, uninformed ad hoc decisions which must eventually be measured against the appellate court's perception of the public's tolerance for unethical lawyer's remarks.

It is not that *Hagan* simply overlooked *Sanford;* it quotes the case briefly. Rather, *Hagan* was unwilling to recognize *Sanford*'s fundamental error definition as being anything other than another way of stating the *Strickland, Tyus* standard. (*Tyus* is "the leading case **defining fundamental error** in closing argument...") 660 So. 2d 586, although the supreme court never mentioned fundamental error in *Tyus*. *Hagan* also perceives no distinction between *Akin, Baggett's* sinister influences standard and the *Strickland, Tyus* test (*Tyus* "does not appear to change the *Akin* test; it is merely a restatement." *id.)* This ignores not only the obvious linguistic differences, but also ignores the fact that three justices - without any disagreement by the other four on this point - said that the new test was broader, i.e., was not a restatement. *Tyus,* at 591.

Hagan states, correctly of course, that the *Akin* standard was utilized in *Baggett,* but also states, erroneously, that "the same

rule" was followed in *Strickland*, although "no effort was made to explain how it differed from the 'highly prejudicial' standard." *id.* This statement appears irreconcilable with *Hagan*'s view that *Tyus* is a mere restatement of *Akin*, for if that were correct there would be no "difference" to explain.

Hagan also offers, in three successive paragraphs, three different ways of describing what we have been calling the *Strickland* standards. One definition is "pervasive, inflammatory and prejudicial".(e.s.) In the next paragraph the definition is shortened to "exceptionally prejudicial" (perhaps implying, without explaining, that pervasive when combined with inflammatory, becomes "exceptionally" prejudicial). In the next paragraph, however, the former two phrases are again restated as "pervasively prejudicial". The word "inflammatory", which certainly has a different meaning than "pervasive" or "prejudicial",is omitted. Lawyers who are doing a motion for new trial may choose what best suits their position from among three non identical descriptions of what the *Hagan* court meant, we assume, to be just one standard.

And *Hagan* creates a new rule, a two step analysis for trial judges, which is made up of one part (mostly) *Strickland*, one part *Akin* and one part *Hagan* itself - based on its own new definition of fundamental error. The trial court should first determine if the improper remarks were so "pervasive, inflammatory, [which is not to be found in *Strickland*] and prejudicial as to preclude the jury's

rational consideration of the case." But if the court finds that these *Strickland* type standards are satisfied, it cannot, as one would have thought, award a new trial under *Strickland*. It must then conduct a second test to decide whether the error was fundamental. To decide that, the court has to decide that the error was not capable of being cured [from *Akin*] and that it affected the fairness of the trial to the degree that "the public's interest in our system of justice justifies a new trial...". *Hagan* at 586.

This new two step rule is both internally and inherently inconsistent. If *Tyus*, which is based on *Strickland*, "defined fundamental error" as *Hagan* opines, and if fundamental error justifies a new trial, which is universally conceded, then a finding that the *Strickland* standards are met ends the inquiry. There is no reason to add a second step consisting of the *Akin* rule plus the even more elusive "undermines the public's confidence in our legal system" test.

And in spite of the obvious attempt made in *Hagan* to define terms and to clear up confusion through analysis of supreme court and other precedents, *Hagan* concludes with a sentence that shakes the premises of the entire opinion, "[E]ven a golden rule argument is not sufficiently 'sinister' to fall automatically to the level of fundamental error." *Hagan* at 588. All that went before is undone by this sentence. Golden rule arguments are exceptionally

common. If fundamental error encompasses only a group of "very limited and serious mistakes" (*Hagan* at 584) how could this most commonplace of lawyer transgressions - golden rule remarks - possibly be thought of as not only potential, but perhaps as "automatic" fundamental error?

Golden rule arguments are not sinister by their nature. Why identify them as potentially "sinister" at all? Judge Farmer, of the *Murphy* panel, might be surprised that golden rule arguments would ever be spoken of as so sinister as to automatically constitute fundamental error. As he stated in a 1996 opinion,

> I will concede that I frankly do not understand a rule that condemns all golden rule arguments as error... . * * * A blanket condemnation of all golden rule arguments on the rationale used in this state denigrates the common sense of those who serve on juries. * * * I would be prepared to allow some golden rule arguments, subject to the control of the judge on the scene to discern whether there is some palpable unfairness in the contention. *Cleveland Clinic Florida v. Wilson* 685, So. 2d, 15,16 (Fla. 4th DCA 1996), concurring specially.

And what has become of the new *Hagan* two step test which requires evaluating the public's interest in our system of justice as part of the fundamental error analysis? It cannot be seriously contended that the public's confidence would be shaken if it knew that a golden rule argument had been made without a later reversal. The public would not perceive golden rule arguments as even offensive. The *Hagan* court, for authority for this golden rule statement, merely cited to another district court case, which

perhaps not coincidentally, was from the fourth district. In *Budget Rent A Car Systems, Inc. v. Jana,* 600 So. 2d.466,468 (Fla. 4th DCA 1992) it is said that the closing remarks of an attorney did "not rise to the sinister level of fundamental error ..." although they violated the golden rule. But *Jana* is a short opinion, which does not purport to have thoroughly studied supreme court precedent on the subject. That is what *Hagan* purports to do, and that is why the sentence under examination raises questions.

One final statement in *Hagan* is also dubious. The court says that if new trials are granted because of improper remarks as a method of enforcement of attorney discipline, "the parties lose the verdict of their chosen jury." *Hagan* at 584. The question is not whether the parties agreed upon the jurors. The party who was victimized by improper argument, which induced an adverse verdict and is moving for new trial, is not "losing" the verdict; it is voluntarily shedding an unwanted verdict.

Because of its incorrect analysis of supreme court precedent, its unprecedented new definition of fundamental error, and its new two step test, the *Hagan* decision adds to the confusion it deplores. It has received an extended discussion, which no other district court case will receive in this Brief, because it is so influential on the thinking of the *Murphy* panel.

A. IN ADDITION TO THE ADOPTION OF HAGAN, THE MURPHY OPINION MISCONSTRUES TYUS AND INCORRECTLY ANALYZES THE LAW OF THE OTHER COURTS IN THE UNITED STATES

There are some statements in *Murphy* which cause one to think that the reasoning of the case may reflect more the panel's reasoning than the broader spectrum of fourth district philosophy, although the court denied en banc reconsideration, and there are statements which, if correctly considered, might have changed the result.

Two years ago there was sentiment in the fourth district to join the views held by the first, third and fifth districts; in fact, several judges thought they had joined the other courts. In *Norman v. Gloria Farms, supra* 21, the vote on *en banc* review generated robust debate. Five judges joined the opinion of the court which clearly and unequivocally found that counsel's remarks "due to the nature of the remarks, their collective import and their pervasiveness throughout closing argument,...constitute fundamental error. See *Strickland.*" Two more judges concurred specially, that they would "go even further than the panel...and follow the practice of the Third District, as expressed in *Borden, Inc. v. Young,* 479 So. 2d 850 (Fla. 3rd DCA 1985),rev. denied, 488 So. 2d 832 (Fla. 1986)." 668 So. 2d 1024. Judge Farmer, joined by one judge, expressed disagreement with the panel for being "motivated by cases primarily from the Third District." 668 So. 2d 1032. Judge Stevenson, of the *Murphy* panel, took neither side, but wrote to express his view that the question was of "exceptional

importance". 668 So. 2d 1033. Judge Klein, author of the *Murphy* opinion, was the only judge not participating in the vote.

Thus in 1996, seven judges on the Fourth district believed that the "highly prejudicial" *Strickland* test, citing to that case, alone required reversal. But on the *Murphy* panel there is expressed disagreement with the first, third and fifth districts. Judge Farmer, for one member, may be said to be among the most outspoken advocates in Florida of, almost, no holds barred closing arguments. See comments in *Norman* at 1032. (Closing is the time for "unrestrained skewering of an opponent's ideas.") His view and the adoption of *Hagan* and its two step test, appears to have decided the present case, but may not reflect the sentiments of the entire court.

Next, the *Murphy* panel may have been misled by its own misunderstanding of *Tyus*. It references "the nature of the remarks which the supreme court held not to be fundamental error in *Tyus*" without realizing that *Tyus*, at the district court level, was not decided on that issue. Although it says that the district court "had reversed... **because of unobjected-to argument...**" *Murphy* at 589, 590. [e.s.], the fact is that the district court reversal "was based on a complete lack of competent evidence to support the verdict." 114 So. 2d 38. "[A] directed verdict should have been entered...[I]t is unnecessary to labor at length the second ground of appeal relating to prejudicial remarks of counsel made during

closing arguments." 114 So. 2d 37. The district court commented *in dicta* that the remarks "standing alone" required reversal even though the trial judge had given an instruction to disregard them. Yet even with the finding of no evidence to support the verdict, the supreme court split 4-3 in deciding to order reinstatement of the judgment on the jury's verdict. The *Murphy* panel misunderstands the full background of the two *Tyus* decisions.

In *Strickland*, however, the case based exclusively on improper remarks of counsel, this court was unanimous in ordering a new trial. The *Murphy* panel's misperception of the differences between *Strickland* and *Tyus* may have partially induced the decision.

Finally, the *Murphy* panel is clearly influenced by what it believes to be a nationwide majority rule that agrees with it, which prohibits raising unobjected-to comments as new trial grounds, "So far as our research indicates, no other courts in this country allow improper argument to be raised for the first time on appeal in civil cases." at 591. While we have neither space nor time to write a brief within a brief on that statement, a cursory review of digested cases indicates that, in addition to the Federal cases cited in *Strickland*, many other states permit closing argument remarks to be later raised even without objection. See e.g., *Carslon* v. *BMW Indus. Service, 744 P. 2d 1383, 1389, (Wyo. 1987); Isbell v. Smith*, 558 So. 2d 877, 882 (Ala. 1989); *Hake v. Soo Line Ry. Co.*, 258 N.W. 2d 576, (Minn.1987); *Webb v. Angell*, 508

N.E. 2d 508, 512 (Ill. 1987); *Ryan v. Blakey*, 389 N.E. 2d 604,615 (Ill. App. 1979) and *Smith v. Blakey*, 515 P. 2d 1062,1067 (Kan. 1973)[4] One would confidently speculate that every state and all Federal courts follow some rule along *Strickland*, or perhaps even *Baggett*, views. One cannot explain why the *Murphy* panel could find no cases.

Your petitioners clearly understand the reasons given by the second and fourth (or, at least the *Murphy* panel) districts for the importance of objecting, at trial, to improper remarks in closing arguments. But these reasons are founded on three assumptions (1) that trial judges will almost always rule correctly on such objections, and, more importantly, that jurors put out of their minds that which the trial judge agrees is improper, (2) that remarks which fail to draw up an objection must not have been very prejudicial, and (3) that the best way to eradicate improper closing argument is to enforce objections by denying relief to the party who failed to object.

We suggest that these assumptions are unsound. First, perusal of dozens of cases shows very erratic trial judge reaction to objections made during closing argument. One is as likely to hear "overruled, this is just argument" as not. Trial lawyers know this, and they know that making objections highlights and emphasizes for the jury the very prejudice the improper remark had

[4]The identical names in these cases is not an error.

intended. They also know that the jury takes its cues from the judge, and that an overruled objection sends the message that the trial judge, too, believes the offensive remark has some merit. Furthermore, there is no evidence that jurors erase from their minds the prejudicial effects of improper arguments, even if the court tells them to disregard it. As one court expressed it, in earthy words "[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good."[5]

Second, the impropriety of prejudicial remarks is capable of objective review. The courts since *Akin* have obviously been deciding, from a cold record, which comments require reversal and which do not. The notion that the prejudice instilled by a particular remark can best be determined by the decision of a trial attorney to object or remain silent, isn't well reasoned.

Third, the idea that the best way to reduce the recurrence of improper comments is to make the innocent party the policeman to the courts, denying him or her any relief unless they took their chances on an objection, is neither fair nor is it the best rule. There is another approach which the second and fourth districts are unwilling to try: the elimination of improper arguments by enforcement of a strict rule putting the offending lawyer at peril of a new trial, without putting the burden on the victim. An Ohio

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[5] *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1158, N.1 (Fla. 5th DCA 1994), citing *O'Rear v. Fruehauf*, 554 F. 2d 1304 (5th Cir. 1977)

judge made an interesting observation. He wrote of the unending problem of trial lawyers using varied comments to suggest to juries that the defendant has insurance. The comments, he complained, were too often held to be "inadvertent," although these same able lawyers, he noted, never seemed to say inadvertent things which harm their own case. He concluded, "If all the courts sent all of these cases back, these inadvertencies would magically disappear from trial practice in about three months."[6] As the following point demonstrates, the other districts are more in tune with this reasoning.

POINT II

DEFENDANTS' UTC AND UTOS'S CLOSING ARGUMENT WAS ERROR REQUIRING A NEW TRIAL AS TO ALL DEFENDANTS, EVEN WITHOUT OBJECTION

The Courts in the first, third and fifth districts have repeatedly given fair warning that improper closing arguments will not be tolerated, even absent objection, where the prejudicial effect of the argument "is so extensive that its influence pervades the trial, gravely impairing the jury's calm dispassionate consideration of the evidence." *Muhammad v. Toys "R" Us, Inc.*, 668 So.2d 254, 258 (Fla. 1st DCA 1996). The Defendants UTC/UTOS's closing argument is a veritable anthology of arguments that have previously been condemned, compelling new trial. As the argument was so improper as to deny the Plaintiffs a fair trial, Defendants

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[6] *Osborne v. Yong D. Song*, Lexis 3248 (Ohio App 1993) Judge Grey in dissent.

IRS and Hornsby benefitted as well and a new trial must be awarded as to all Defendants despite Hornsby and IRS's lack of participation in the offending argument. See *Owens Corning Fiberglass Corp. v. Morse*, 653 So.2d 409, 412 (Fla. 3rd DCA 1995) (New trial awarded against all defendants based upon improper argument of only one defendant.)

> The tone of the improper argument was set early and clearly,[I]t is, I think,impossible to articulate the kinds of factors you should be looking at, but everybody has antennas where they can tell whether somebody's being honest and straightforward with them. I sometimes think of it as a **B.S. detector**. . . . if you put eight people together, eight adults,their **B.S. detectors** kind of work together and you can tell who is telling the truth. . . (Tr. 3321)
>
> [B]ut we have a lot more than that for you to look at to confirm what I think will be your own **B.S. detectors** on who is telling the truth up there . . . .(Tr. 3323)

Although the above comments are crass and demeaning to the system, those comments, by themselves, may not have crossed the line into reversible argument. But it didn't take UTC long to cross the clear line into improper and prejudicial argument. One of the Plaintiffs' claims was for breach of a consulting agreement. The consultancy agreement(*supra*,4) contemplated that the Plaintiff Robotics I would be paid consulting fees over a five year period. None of the monies were paid. Robotics I also had a independent loan agreement to repay. There was no expert testimony that suggested that income under the consultancy agreement would not

have to be reported to tax authorities, or would not be taxed. Without any testimony on the subject, UTC accused the Plaintiffs of tax fraud and, in one of the most remarkable assertions, threatened the jurors that they too would be committing a crime by awarding the Plaintiffs any money,

> We also have heard a lot about the consultancy agreement.
> * * *
> I do want to spend a few minutes on this, though, because this claim is truly outrageous. **This claim asks you to be accessories, after the fact,** to tax fraud. . . .
> * * *
> This was a tax dodge, **I said tax fraud.** Maybe they did it some way legal . . ..
> * * *
> What we have here is a phony consultancy agreement in order to dodge taxes. . . .
> [T]his is an agreement we didn't sign or know anything about and it is a phony tax dodge agreement and we are supposed to pay him $300,000.00 for it.
> Now, your **B.S. detectors** should be **going berserk** at this point. . . . (Tr. 3346, 3348)

Having improperly prejudiced the jury against Murphy (but not his partner, Hornsby) by labeling him a criminal tax cheater, without any evidence, UTC then evoked fears in an unknowing jury that they too, by coming back with a verdict in favor of the Plaintiffs, would be "accessories" to the fabricated crime. This sort of argument, directed straight at the prejudices and fears of the jury, exceeds all bounds of propriety.

Besides the calculated threat to the jury, that it would be participating in tax fraud, UTC also played to the jury's fears of "runaway verdicts and frivolous lawsuits". UTC repeatedly likened the Plaintiffs' claim to a game of lottery,

> **[B]ob Murphy wants to cash in a lottery ticket in this litigation.** It is not right and that's the kind of man he's been throughout this case. (Tr. 3368)
>
> * * *
>
> He can get on with his life and maybe he can get rich if his lottery ticket cashes in. **His lottery ticket didn't cash in, so he bought another one when he paid his filing fee to put this complaint in.** (Tr. 3375)

This was a remarkable example of an argument that improperly appeals to the public's perceived prejudices against frivolous law suits and their effect on an overburdened justice system. But it does more. It tells people who don't have any yardstick to measure the relative merits or frivolity of a broad sample of lawsuits that this one is frivolous in the opinion of a lawyer who does possess such knowledge. It says, "There is (in my opinion) no thought, deliberation, effort or justice in my opponent's case. He's just rolling dice."

Not satisfied to rest with this improper castigation of the Plaintiffs' case, UTC counsel repeatedly expressed his personal opinion that Plaintiff Robert Murphy himself was a liar. He signaled at the outset of closing argument that attacks on Murphy's character would be the theme of the next two hours, "That's what I'm going to be focusing on today." (Tr. 3316). This sort of argument has been frequently condemned as improper. UTC's counsel flouted this rule time after time in argument to the jury,

> So we have this ridiculous story from Bob Murphy . . . **so he lies about it under oath**. . . (Tr. 3366)
>
> * * *
>
> It is absolutely not believable one ounce . . . **Bob Murphy has said false things** about a good and decent man

> because Bob Murphy wants to **cash in a lottery ticket** in this litigation . . . (Tr. 3367, 3368)
>
> * * *
>
> And this isn't a document that somebody concocted two months ago to phony up to put in this case. This was a document written at the time. **That document wouldn't exist if Bob Murphy had told the truth** about that, in fact, he had never signed this Memorandum of Understanding. . . . it is **pretty clear that Bob Murphy was not telling the truth** about that. (Tr. 3398)
>
> * * *
>
> **[H]e won't tell the truth. He thinks he can equivocate rather than come clean and tell the truth.** . . (Tr. 3401, 3402)
>
> Bob Murphy at the closing took the stock from Mr. Baker and took the stock from Mr. Hornsby without telling them and **he lied about it under oath.** (Tr. 3402)
>
> * * *
>
> [O]ne of the big points in the case that **Murphy didn't tell the truth** about is the whole business with the business plans. . . . (Tr. 3403)
>
> * * *
>
> **[T]hose were Bob Murphy lies,** his fingerprints were all over them. (Tr. 3405)
>
> * * *
>
> [B]ob Murphy **didn't tell the truth to Mr. Thorton and then he didn't tell the truth to you** when he denied having told Mr. Thorton that he had a contract. (Tr. 3406)

And as improper as it was for UTC's counsel to attack Murphy by calling him a liar, it was just as impermissible for UTC's counsel to express his personal opinion by vouching for the credibility of his client and other witnesses. See, *Cohen v. Pollack*, 674 So.2d 805 (Fla. 3rd DCA 1996). UTC counsel improperly argued as follows:

> Bob Murphy was not relying on **Terry Carroll**. Bob Murphy has misused Terry Carroll in this case for his own, cynical ends. Bob Murphy **has said false things** about a **good and decent man** . . . (Tr. 3368)

* * *

> [N]ow, [Howard Hornsby] made some mistakes in his life but **one thing he didn't do was lie about the business they had.** (Tr. 3404)

* * *

> Mr. Hornsby . . . **told the truth** about that. Bob Murphy couldn't bring himself to do that. (Tr. 3352)

When UTC's counsel did not directly call a witness a liar or a fraud, he implied that the testimony was contrived by Murphy and dishonestly presented. As to Eric Caplan, who was not a good friend of Murphy's, this was said, "He had his good friend, Mr. Caplan, come in and Mr. Caplan suggested [testimony which supported Murphy]." (Tr. 3405). For good measure, in case the ad hominem attacks on individual witnesses was not sufficient, UTC threw the broad net of untrustworthiness overall of the Plaintiff's witnesses, as follows, "You have heard some pretty crazy characters take the stand to testify about very marginal, tangential issues . . .." (Tr. 3356). Of course, Messrs. Carroll and Hornsby were necessarily excluded from that crazy group, because UTC informed the jury that they were "good and decent" and had "told the truth."

UTC also attacked the integrity of Plaintiffs' lead trial counsel, R. Stuart Huff, and challenged him to defend his "failure" to ask certain questions. In fact, the specific challenge was to explain why something was <u>not</u> in evidence,

> Then Mr. Huff cross examined him for a day and a half and you know how many questions Mr. Huff asked about that document in a day and a half? Zero. He **did not ask Terry Carroll one single question about these presentation materials** and now that Terry Carroll has

> gone back to Taiwan and isn't here to defend his good name . . . (Tr. 3336)
>
> You know you **owe it to someone when you're going to say that about him to confront them with your proof and look him in the eye and ask him questions about it so that he can answer those questions, but Mr. Huff didn't ask one single question about these materials** when Terry Carroll was here in the United States ready to defend himself and to answer any questions he had, not one. (Tr. 3337)

These sort of comments are not comments on the evidence in the case. They challenged opposing counsel to step down from his role as attorney and improperly testify on his own behalf. *Riggins v. Mariner Boat Works, Inc.*, 545 So.2d 430 (Fla. 2nd DCA 1989). They used again the tactic of telling the jury, and implying that lawyers would know such things, that the other lawyer "owed" [ethically] something to the witness. They are also similar to the comments made in *Owens Corning Fiberglass Corp v. Morse*, 653 So.2d 409 (Fla. 3rd DCA 1995), that the plaintiff's attorney was guilty of "trickery" and "hiding the ball" which constituted "fundamental error." *Owens Corning Fiberglass Corp., at* 411. Ironically enough, it was UTC that put the subject document into evidence, and presented Carroll's testimony. That didn't stop UTC from accusing Murphy's attorney of being unethical for not initiating the questions he "owed it" to Carroll to ask.

From the opening bell, Murphy was demeaned as a "carnival barker" (no evidence) who sold "vegamatics" (never happened) who was in general a cheap hustler. And exactly like the Plaintiffs'

attorney did in *Strickland*, defense counsel put a letter in evidence for the sole purpose of prejudicing the jury,

> **[T]his letter, the letter is a lie. It is a phony, and then Mr. Murphy lied about the lie when he is in court . This letter, we still don't have the slightest idea who signed this letter.**
>
> * * *
>
> [I]t is a forgery.
>
> [B]ut we **don't have any testimony about who forged** Alan Johnson's signature, none whatsoever.
>
> Now that's not a good thing to do but **it is a worse thing to lie under oath** and **that's what Mr. Murphy did.** . . . This was Murphy's baby and **he wouldn't tell the truth under oath. Mr. Murphy created a forged document to use against my client and then he lied to you under oath about that document.** (Tr. 3407-3410)

Having admitted that it had no evidence that Murphy "forged" anything, and despite the fact that Murphy did not attempt to "use" the letter at all, UTC nevertheless accused Murphy of perjury, and a fraud on the court and jury by creating a forged document. This argument is so egregious that it deserves reversal. See *Hammond v. Mulligan*, 667 So.2d 854 (Fla. 1st DCA 1996); *George v. Mann*, 622 So.2d 151, 152 (Fla. 3rd DCA 1993); *Owens Corning Fiberglass Corp. v. Morse*, 653 So.2d 409 (Fla. 3rd DCA 1995); *Kass v. Atlas Chemical Company*, 623 So.2d 525, 526 (Fla. 3rd DCA 1993) (Stating that testimony was "phony" and witness a "liar" was "fundamental error.")

Tactics and strategies are the pattern from which trials are shaped. They are necessary and proper, unless utilized to distract

the jury from the issues to the extent that the result is unjust. That was the result intended and accomplished, but it wasn't the product of a fair trial on the issues.

Finally, UTC repeatedly ridiculed the Plaintiffs' case and witness testimony with pejorative comments and phrases, the likes of which have been found to require a new trial.

UTC during closing argument stated: "I do want to spend a few minutes on this, though, because **this claim is truly outrageous.**" (Tr. 3346), "Now, your **B.S. detector should be going berserk** at this point." (Tr. 3348), ". . . I am going to spend a little time on this because **this claim by Bob Murphy is truly absurd.**" (Tr. 3359), "So we have this **ridiculous story** from Bob Murphy" (Tr. 3367), " **ludicrous** testimony" (Tr. 3367), "It is absolutely **not believable one ounce.**" (Tr. 3367), "It is **absurd.**" (Tr. 3368), "It is **crazy.**" (Tr. 3373), "I also thought is was offensive, for Mr. Feigel to get up there and **spin this crazy tale** . . ." (Tr. 3385), "Then we had this **idiotic font story.** . . ." (Tr. 3404).

The Plaintiffs were denied a fair trial and now must be granted a new trial.

POINT III

THE COURT ERRED IN GIVING A SPECIAL INSTRUCTION ON "REASONABLE RELIANCE," AT DEFENDANTS' REQUEST WHICH DIRECTLY CONTRADICTED THE STANDARD INSTRUCTION WHICH WAS ALSO GIVEN

During the trial, the Court directed the parties to meet through counsel to discuss jury instructions. Counsel did meet and

at the meeting the Plaintiffs proposed using Florida Standard Jury Instruction M-I 8 for the claims of fraud and negligent misrepresentation. The standard instruction provides at paragraph "b" the following:

> RELIANCE - FRAUDULENT MISREPRESENTATION: The Plaintiffs may rely on a false statement, even though its falsity could have been discovered had Plaintiffs made an investigation. However, Plaintiffs may not rely on a false statement if they knew it was false or its falsity was obvious to them. [E.S.]

The Defendants requested that they be allowed to substitute a special instruction on reliance, in place of the standard instruction, which read as follows:

> REASONABLE RELIANCE: Reliance placed upon a representation must be justified under the circumstances. Where one claims that fraudulent representation had been made to him, he is charged with knowledge of all facts that he could have learned through diligent inquiry. Participants in a normal business transaction are not entitled to rely upon opinions, judgments or legal views expressed by an opposing party. [E.S.]

The Plaintiffs objected to the Defendants' special instruction in substitution for the standard, so the Defendants then requested that it be read in addition to the standard. The Plaintiffs again

objected and told the Defendants' counsel that he would have to argue the matter to the Court . The Court 's ultimate resolution was to give both instructions, after a discussion off the record.

The Defendants' instruction had its roots in an old line of cases that had, since 1980, been discredited and receded from as Florida law, which held that a defrauded plaintiff could not rely upon a false statement made to him, if its falsity could have been ascertained had the plaintiff made an investigation. See for example, *Potakar v. Hurtak*, 82 So.2d 502 (Fla. 1955). But an opposite view was expressed in *Upledger v. Vilanor, Inc.*, 369 So.2d 427 (Fla. 2nd DCA 1979) which relied upon the Restatement (Second) of Torts. In *Upledger*, the Court held that "the representee is not precluded from recovery simply because he failed to make an independent investigation of the veracity of the statement." *Id.* 430. In 1980, the supreme court was called upon to resolve this conflict in *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980). There, the supreme court referred to the "two divergent lines of authority on this issue which have developed in Florida." *Id.* 996. The Court adopted the view expressed in the Restatement and in *Upledger* that there was no duty to investigate.

The Court gave the jury the standard instruction on reliance, but immediately thereafter, it read the Defendants' incorrect and contradictory special instruction to the jury. (Tr. 3451).

The incorrect instruction was given at the insistence of the Defendants. UTC seized upon it, and made it a feature for the jury in its closing arguments. Of the approximate twenty eight (28) instructions given to the jury, the Defendants mentioned very few, one of which was the incorrect instruction on reliance. (Tr. 3359-60).

We cannot now prove how the erroneous instruction may have impacted the jury's deliberations; neither can it be said by Mr. Hornsby that the erroneous instruction had no adverse impact on the overall deliberations or on one or more of the issues.

The contradictory instructions, on a critical element of the Plaintiffs' case, entitle the Plaintiffs to a new trial.

POINT IV

THE FINDING THAT NEITHER HOWARD HORNSBY NOR ROBOTICS II BREACHED THE CONSULTANCY AGREEMENT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS A PRODUCT EITHER OF JURY CONFUSION OR OF THE IMPROPER CLOSING ARGUMENT

By the admission of every witness, Murphy expected to stay with the new company involved in sales, promotion, and marketing of the OWL. Mr. Wood stated that he anticipated that Murphy would have been in sales and that Laser "supported that." (Wood depo., p. 308). Mr. Carroll, of UTC, testified that Robotics I "had very good people" meaning both Murphy and Hornsby. (Tr. 1673) and that he also expected Murphy to be involved in sales and marketing. (Tr. 2008). Finally, Murphy himself expected that his future would be in sales and marketing with the OWL. (Tr. 655).

In contemplation of Murphy, just as Hornsby, being a part of the OWL's development in the future, a Consultancy Agreement was entered into in which Robotics I (the old company which Murphy would keep) would be paid an amount of not less than $300,000.00 nor more than $400,000.00 for consultant services in the five years after the closing. (Plaintiffs' exhibit 5). However, as it turned out, Murphy was never allowed to consult or to provide any services. (Tr. 2610).

At the closing, two different versions of the closing documents were executed. The documents given to Murphy were virtually identical to the second set, but did not include the document whereby Hornsby's new company (Robotics II) assumed all of Laser Holdings liability to pay on the consultancy agreement. One can now surmise that this would have been Hornsby's way of assuring that Murphy's role was under Hornsby's control; Robotics II took charge of the consultancy agreement and the payments to Murphy. The jury found that neither Hornsby nor Robotics II breached the consultancy agreement. This may well have been a result of the contradictory instruction on reliance on misrepresentations or the inflammatory and improper closing argument of UTC counsel.

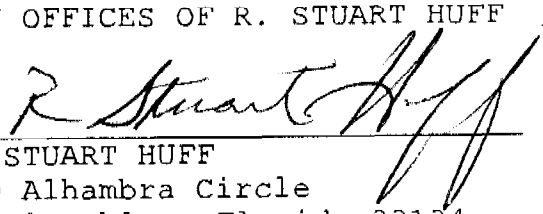
CONCLUSION

The decision of the court of appeals should be reversed and the case should be remanded for a new trial on all counts as to Defendants Robotics II and Mr. Hornsby except breach of fiduciary.

The Plaintiffs should also receive a new trial as to damages only against Mr. Hornsby for breach of fiduciary and a new or separate trial for damages only against the Defendant Laser Holdings.

Respectfully submitted,

LAW OFFICES OF R. STUART HUFF

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Amended Initial Brief was mailed this 14th day of September, 1998 to David Jaynes, Esq., 4100 S. Dixie Hwy., Suite C, West Palm Beach, Florida 33405.

R. STUART HUFF