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.

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENTS' ANSWER BRIEF ON MERITS

DAVID A. JAYNES
Attorney for Respondents
120 So. Olive Ave., Suite 702
West Palm Beach, FL 33401
(561) 659-5050
Florida Bar No. 354139

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

Page

TABLE OF CITATIONS (continued)

Page

TABLE OF CITATIONS (continued)

Page

OTHER AUTHORITIES

STATEMENT OF CASE AND FACTS

The essence of the Petitioners' case below was an action grounded in breach of fiduciary, breach of consultancy agreement, fraud, negligent misrepresentation, and an action to cancel transfer of patents; all arising out of the sale of assets of International Robotic Systems, Inc. (ROBOTICS I) to Laser Holdings Ltd. (LHL).

ROBOTICS I was in the business of developing, primarily for military market, a remotely controlled marine vehicle with stealth technology. The vehicle has been in development since the early 1980s, and is called the OWL.

At the time of the sale of assets, in July, 1992, ROBOTICS I possessed only a prototype OWL, was heavily in debt, unable to complete its contract with the United States Navy absent a cash infusion, and in danger of losing its patents, which were pledged as security for loans.

UTC/UTOS, through their representative, Terry Carroll, who was then involved, inter alia, in helping small companies form alliances with other companies, develop and market new technologies, introduced ROBOTICS I to LHL, which eventually purchased the assets of ROBOTICS I for the sum of $500,000.00 (U.S.) and provided royalty agreements for Messrs. Hornsby and Murphy. There were no other offers to purchase. A new company was formed with same name, (ROBOTICS II). As sales did not live up to expectations, Petitioners, ROBERT MURPHY and ROBOTICS I filed suit for damages.

After a four-week trial, a jury of eight well educated individuals (T 8-146) found no credence in the story of ROBERT MURPHY, found no competent evidence of damages, and found for the Respondents on all counts, excepting a nominal damage award for breach of fiduciary duty against HOWARD HORNSBY individually.

Not withstanding Petitioners' counsel's twenty plus years of trial experience (T 3413), he chose to make no objection to closing argument, and now complains of fundamental error. There is none. The Fourth District Court of Appeal affirmed the verdict upon close scrutiny of the record, particularly closing argument.

A motion for rehearing and rehearing en banc was filed by Petitioners on February 26, 1998. Without opinion, the appellate court denied the motion for rehearing and rehearing en banc on March 19, 1998. The Petitioners then requested this Court accept jurisdiction on May 4, 1998. No question was certified by the appellate court.

SUMMARY OF ARGUMENT

This appeal primarily involves the fundamental error exception to the requirement of contemporaneous objection to closing argument.

The Petitioners misconstrue the opinion written by the Fourth District Court of Appeal. The Fourth District carefully and skillfully examined numerous cases from sister courts, along with those cases of this Court, dating back to 1923. In fact,

on simple reading of the opinion authored by Judge Kline of the Fourth District, one will note, not only did the court consider the nature of remarks which this Supreme Court has held not to be fundamental error, but also reviewed the Court's definition of fundamental error in criminal cases. The District Court was wholly consistent with the Supreme Court rulings, and does not expressly and directly conflict with any decision of another district court of appeal.

As Judge Kline noted, with Judges Farmer and Stevenson concurring, most of the Florida cases in which courts have granted new trials, even though their argument is not objected-to, have required that the argument be "pervasive." *Murphy* at 591. The Fourth District Court has followed the edicts of this Court and found the argument not to be "pervasive." There simply is no conflict with the decisions of the Supreme Court or other district courts. Whether or not the improper argument is "pervasive" is clearly a judgmental decision, and not subject to black letter rule.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL RECOGNIZES THE FUNDAMENTAL EXCEPTION RULE TO UNOBJECTED-TO IMPROPER ARGUMENT, AND APPLIED PROPER STANDARD OF REVIEW

Petitioners erroneously suggest that conflict regarding the standard of review in cases involving improper argument, absent contemporaneous objection, is conceded. Far from it. The Fourth

District Court of Appeal made it clear that they do recognize the proper standard of review, and recently. *William Bryan King, M.D. v. Priscilla Byrd, individually and as Guardian, Friend and Natural Parent of Kenan A. Byrd, a minor*, 23 Fla. L. Weekly D1173 (Fla. 4th DCA May 13, 1998). Therein, the Fourth District Court of Appeal cited *Murphy v. International Robotics Sys., Inc.,* 710 So. 2d 587 (Fla. 4th DCA 1998) as follows:

> Appellant also challenges comments by Plaintiff's attorney in closing argument. Defense counsel made no objections, therefore, the issue is not preserved.

Id.

Appellants in *King* filed a motion for clarification of this statement of law, which was joined by Respondents. Upon consideration, the Fourth District Court of Appeal added the following language in its opinion, filed August 26, 1998:

> Although some of counsel's remarks in closing argument were improper, **we do not deem the unobjected-to comments to rise to the level of fundamental error**. (Emphasis added)

King v. Byrd, No: 97-1384 (Fla. 4th DCA Aug. 26, 1998).

This is an unequivocal statement of the recognition by the Fourth District Court of Appeal of the proper standard of review. Given such, there is no conflict between the Fourth District Court of Appeal and its sister courts.

Further, the Fourth District, never intending the interpretation of its opinion in *Murphy* as now suggested by the Petitioners, stated:

> [W]e do not think we are being inconsistent with our Supreme Court when we all but close the door on allowing the issue to be raised for the first time on appeal.
>
> There is an exception to the contemporaneous objection rule for errors which are deemed fundamental and which can thus be raised for the first time on appeal.

See *Murphy* at 590.

Could the Fourth District Court of Appeal more clearly state its recognition of the rule? Hardly.

Indeed there is no confusion arising from the supposed absence of a consensus standard among the lower courts. The *Murphy* court took great care to analyze the law of unobjected-to proper final argument within the State, particularly the seminal opinions of the Supreme Court in *Baggett v. Davis*, 169 So. 372 (Fla. 1936); *Seaboard Airline Railroad v. Strickland*, 88 So. 2d 519 (Fla. 1956); *Tyus v. Apalachicola N.R.R. Co.*, 130 So. 2d 580 (Fla. 1961); and *Castor v. State*, 365 So. 2d 701 (Fla. 1978).

In retrospect, it is rather clear that the definition of fundamental error has not changed in any significant way since its first pronunciation in *Bagget*. There Justice Beuford wrote:

> This rule is subject to the exception that, if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in which event, a new trial should be awarded, regardless of the want of an objection or exception.

Supra.

Thereafter, in *Strickland*, the court pronounced:

> . . .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 the 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 the calm and dispassionate consideration of the evidence and the merits by the jury, this court will not afford redress.

Then, in *Tyus*, the court reflected on *Strickland*, committed itself to that rule, and explained:

> In order to employ the exception to the general rule when no objections are made to the alleged prejudicial remarks or conduct, such remarks or conduct need not begin at the outset of a trial and continue intermittently to its conclusion.

Justice Hobson went on to note that it is the collective impact which must be considered.

In summary, *Baggett, Strickland,* and *Tyus* simply say, if the remarks are such as to deny a fair trial, then relief will be given.

Petitioners' strained reading of *Murphy* suggests that the Fourth District does not understand these definitions, yet it is that same court which considers the definition of fundamental error, as stated in *Sanford v. Rubin,* 237 So. 2d 134, 137 (Fla. 1970):

> [E]rror which goes to the foundation of the case on to the merits of the cause of action.

The court further quotes from *Tyus*, which therein emphasized the trial judge, "who was in the milieu of the courtroom throughout the trial", was in a much better position than an appellate court to determine if an argument was so prejudicial as to require a new trial. This point has been noted in other cases and is certainly underscored in a matter such as this. We are not now in a position to observe the demeanor of the witnesses on the stand, the flushing of face, crossing of arms, pushing back from the witness stand, tone of voice, looking away from the examiner, and numerous other non-verbal expressions. Nor are we now privy to the intonations, connotations, body language, and facial expressions used by counsel during final argument.

With regard to those cases which have found fundamental error and reversed, absent contemporaneous objection, the same involved the classic erroneous arguments such as "golden rule"[1], mentioning of insurance, and recitations of personal opinion and

[1] But not always, see *Tremblay v. Santa Rosa County*, 688 so. 2d 985 (Fla. 1st DCA 1997).

of facts not in evidence. Those remarks cited by Petitioners do not approach these arguments in gravity.

Petitioners wrongly suggest that the Fourth District Court of Appeal has adopted an improper standard, crafted by the Second District Court of Appeal in *Hagan v. Sunbank*, 666 So. 2d 580 (Fla. 2d DCA 1996). The *Hagan* court simply analyzed this Court's several holding in *Akin v. State*, 86 Fla. 564, 98 So. 609 (Fla. 1923), *Baggett, Strickland,* and *Tyus.* The *Hagen* court found that the exception requires a two-step analysis. First, is the error pervasive, inflammatory, and prejudicial as to preclude the jury's rational consideration of the case. Second, the trial court must decide whether the error was fundamental. This is a legal decision that the error was so extreme that it could not be corrected by an instruction, if an objection had been lodged, and that it so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial, even when no lawyer took the step necessary to give a party the right to demand a new trial. Again, was a fair trial had?

Judge Kline, in writing the *Murphy* opinion, does not specifically adopt this two-part analysis, as Petitioners would suggest. Even so, had the *Murphy* court adopted this two-part analysis, it would in no way depart from the standard set by this Court, or specifically conflict with those holdings of other

District Courts of Appeal. The *Murphy* court only suggests that perhaps the First, Third, and Fifth District Courts have set the bar too low when determining certain unobjected to argument rises to the level of fundamental error.

The *Murphy* court also notes that argument made by plaintiff's counsel in *Tyus* was as bad as, if not worse, than arguments in cases which are now being reversed.

Petitioners suggest to this Court that *Strickland* sets forth one definition, one standard to measure the merits of a new trial motion, based upon unpreserved error and opposing counsel's closing argument; and then, suggest *Hagan* is almost entirely off point. Yet, it is the *Hagan* case which Petitioners point out, analyses the five Supreme Court opinions concerning this topic. It was this Court in *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970), which defines the term "fundamental error" as

> . . . error which goes to the foundation of the case or goes to the merits of the cause of action.

Id.

Did the *Hagan* court add to, detract from, or alter the definition of fundamental error by suggesting that in determining whether fundamental error exists, it is:

> A legal decision that the error was so extreme that it could not be corrected by an instruction if an objection has been lodged,

> and that is so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial, even when no lawyer took steps necessary to give a party the right to demand a new trial.

Supra.

Certainly not. For isn't fairness of trial in the public's interest in the system of justice fundamental?

POINT II

CLOSING ARGUMENT OF UTC/UTOS WAS NOT FUNDAMENTALLY ERRONEOUS

Petitioners were well represented in this cause by: The Law Offices of R. Stuart Huff, Law Offices of Edward M. Kuhnel, and Law Offices of Michael M. Tobin. In fact, lead trial counsel, R. Stuart Huff, even mentions his trial experience exceeding some twenty years. (T 3413)

It is further important to note that this transcript, some 3,500 pages is replete with objections by Mr. Huff, and also Mr. Wagar, counsel for the Plaintiffs below, at any time they felt the testimony or exhibits objectionable. However, when it came to the final arguments, there was not a single objection by counsel for the Plaintiffs. How is it that Mr. Huff felt objections at final argument would be held by the jury against his client, but not during the taking of evidence? Such tactic is well diluted by the opportunity to move for mistrial at the close of argument, which motion can be made outside the judge's

presence. *Ed Ricke & Sons, Inc. v.* Green, 468 So. 2d 908 (Fla. 1985). Their silence is understandable for a number of reasons addressed below.

The law in Florida is clear that, in the absence of a contemporaneous objection, request for curative instruction, or motion for mistrial, that the complaining party has not properly preserved a claimed error. *Bluegrass Shows, Inc. v. Collins*, 614 So. 2d 626, 627 (Fla. 1st DCA), rev. denied, 622 So. 2d 264 (Fla. 1993). This proposition of law was more recently underlined in the case of *Hicks v. Yellow Freight Systems, Inc.,* 694 So. 2d 869 (Fla. 1st DCA 1997), wherein the court states: "**We emphasize our recent advice to parties seeking reversal upon allegedly improper closing argument, "[I]f counsel intends to appeal to this court, they would be well advised to object.**" See also, *Donahue v. F.P.A. Corp.,* 677 So. 2d 882, 884 (Fla. 4th DCA 1996).

As this reviewing Court is limited to the sterile record, one must view the transcript as a whole to dispel any notion that Petitioners' counsel inadvertently overlooked these remarks, which they now claim to be so outrageous as to rise to the level of fundamental error.

The Petitioners, having lost the case below, excepting the one dollar award versus HOWARD HORNSBY, individually, cite a

number of out of context statements claiming entitlement to a new trial.

Nelson v. Reliance Assurance Co., 368 So. 2d 361, 362 (Fla. 4th DCA 1978), gives some insight into such tactics and stated:

> We view, with some skepticism, appellants' agonized cries, that comment by opposing counsel below deprived him of a fair and impartial trial, when not so much as an objection was deemed necessary upon the occasion of the supposed fatal utterances. We must now assume that **silence from *experienced counsel* is a judgment play, predicated on his or her concept of how the trial is going.** As such, the failure to object constitutes intentional trial tactics, mistakes of which are not to be corrected on appeal simply because they backfire.
>
> **Emphasis added.**

With this in mind, courts are reluctant to overturn a verdict and should so refrain in the case of a four-week trial heard by an eight person jury.

Indeed, for Petitioners to show entitlement to reversal and new trial, Petitioners must demonstrate that the error was so persuasive, inflammatory, and prejudicial as to preclude the jury's rational consideration of the case, and that the error was fundamental. *Tremblay v. Santa Rosa County*, 688 So. 2d 985 (Fla. 1st DCA 1997). Therein, the court found the "golden rule" comments by plaintiff's counsel did rise to the level of fundamental error. Such argument was not posed in this matter.

With the foregoing in mind, look at the comments of counsel for UTC/UTOS (not counsel for these Respondents) in light of failure to object, the context in which the comments were made, and whether or not the comments were supported by the evidence.

It has long been the law of this State that where evidence is supportive, then counsel may argue therefrom. Specifically, in *Forman v. Wallshein*, 671 So. 2d 872 (Fla. 3rd DCA 1996), the court found that in a civil case, opposing party may be labeled a "liar" where there is a basis in the evidence to do so. *Watkins v. Sims*, 81 Fla. 730, 88 So. 764, 767 (Fla. 1921):

> It is not proper to attack the credibility of a party to a suit, who testifies in his own behalf, unless such comment is based on facts secured in the evidence, or unless it can be deduced from the witness' appearance and conduct while giving his testimony.

Id.

Clearly, one could assuredly conclude from the evidence that, Mr. Murphy was less than candid. Certainly a conclusion of the jury was that MURPHY's demeanor and reasonableness of testimony gave rise to a suspicion of his credibility, underscored by silence on the part of attorneys for Plaintiffs during final argument. (T3311-3412). Silence for reason that the comments now asserted as fundamentally prejudicial, are not. And please note that counsel for UTC did not, as Petitioners contend, repeatedly express his **personal opinion** that MURPHY, was a liar,

to the contrary, he referred directly to the evidence of same. (IB 38-39) The transcript speaks for itself. (T3311-3412) Of course counsel for Petitioners put the UTC/UTOS argument into clearer context by referring to ROBERT MURPHY, as follows:

> MR. HUFF: ...that MURPHY lies, a congenital liar, has lied all through his life . . . everything he told you is a pack of lies, and so is this lawsuit . . . and by implication, I am totally willing to bet that after twenty years of practice. . . (T 3412-3413)

One can deduce from this record that the remarks of Mr. Beck, on behalf of UTC/UTOS in the context made, were not so inflammatory, as now asserted. No, clearly not, for the tone of this trial was set early and first by Petitioners in **opening statement**:

> MR. HUFF: Things I don't understand, won't need to for this case. Nets and things, one billionth of a thing travels per second, lights up in a rabbit's ear, amazing types of things, supposedly, but it is the very sort of stuff that if you had high school education. . . (T 266)

> MR. HUFF: [H]e (Murphy) is stupid, he can't read, he can't be trusted, he is lazy . . . (T 304)

> MR. HUFF: . . . [T]hat Murphy is an incompetent. But of course we didn't know it at that time and not until two years later. And that spoiled any

chance really for the OWL as well . . . (T307)

This sophisticated jury was not a jury to confuse analogy and hyperbole with intentional, unfounded argument.[2]

In reviewing the cases cited by the Petitioners, the same are not persuasive for a number of reasons. *Muhammad v. Toys "R" Us, Inc.,* 668 So. 2d 254 (Fla. 1st DCA 1996), was a products liability action arising from a child's bicycle accident. Counsel for defendant Toys "R" Us made the following statement: ". . . **does everyone realize that they could have -- they may have already settled with the manufacturer." There was an immediate objection to this disclosure.** We have no objections here. The court noted, in a close question of negligence, even a curative instruction by the court was insufficient to counteract the prejudicial effect of the improper comment. This remark, **objected to**, was sufficient reversible error. A new trial was granted without consideration of any of the other factors raised.

It should also be noted the *Muhammad* court did not reverse this matter based upon a personal anecdote of counsel for the

[2]The jury was also highly educated. It consisted of a former IBM executive, who was the account manager for IBM's operating systems, (T 121); a music buyer with a B.A. from Tufts University, who was in the process of starting her own business, (T 68, 146); a business manager with a B.S. in business administration from NOVA University, who works for Motorola's marketing department, (T 15, 71, 78); a business person with a B.S. in education from Florida State University, who owned several paint stores, (T 14), 70, 129); a computer analyst for a local law firm, who had two years of college at St. Johns College in Maryland, (T 67, 73); a finance manager with two years of college, who underwrites auto insurance, (T 71, 93); a building inspector for Palm Beach County with an A.S. degree from Palm Beach Community College in drafting and design, (T 17, 71, 93); and a homemaker, who took courses at Florida Community College (T 8, 67).

plaintiff, which was an indirect comment on the evidence, nor was the same reversed because of counsel for the plaintiffs' remarks concerning the testimony of the defendant's expert witness.

This case was reversed on two premises: 1) the improper remarks about the settling non-party which, in and of itself is reversible error; 2) counsel for Toys "R" Us continued to express his personal views despite continuing objections by counsel for plaintiff. *Id.* Neither of these scenarios is present in the record now before this court. *Owens Corning Fiberglass Corp. v. Morse*, 653 So. 2d 409, 411 (Fla. 3rd DCA), rev. denied, 662 So. 2d 932 (Fla. 1995), cited by Petitioners, involved the situation wherein plaintiff's counsel improperly argued that defendant's counsel, **rather than a party**, had "lied to the jury that he committed a fraud upon the court and the jury." Likewise in *Kass v. Atlas Chemical Company,* 623 So. 2d 525 (Fla. 3rd DCA 1993), it was the plaintiff's counsel who repeatedly argued that **the expert witness** for the defense was a liar, unsupported by the record. Neither *Owens* nor *Kass* above deal with the credibility of the party plaintiff or, for that matter, party defendant. Similarly, Petitioners' reliance on *King v. National Security Fire & Casualty Co.,* 656 So. 2d 1333 (Fla. 4th DCA 1995) is not helpful as the court indicated it was "not proper . . . call[ing] him . . . a liar", **but the case was reversed on other grounds.**

Petitioners further complain that counsel for UTC/UTOS, **not counsel** for HORNSBY and ROBOTICS II, prejudiced the jury by labeling MURPHY a criminal tax cheater, without any evidence (IB 34). However, final argument by counsel for UTC/UTOS contains *no* reference to "criminal tax cheater." (T 3346-48) In fact, Mr. Beck stated, "Maybe they did it some way legal . . ." (T 3348)

Next, the argument by counsel for UTC/UTOS that the consultancy agreement was a tax dodge and that MURPHY does not like to pay taxes is supported by the record. See testimony of HORNSBY (T 2639); Terry Carroll (T 1730); John Wood at deposition (T 2289, D 39-41).

Now, for arguments sake, if the jury was at some point prejudiced; this prejudice, if any, was abrogated by Mr. Huff in final argument where, in rebuttal, he stated:

> MR. HUFF: Let's put to bed this ridiculous things about the loan agreement, based on common sense. According to UTC, if you take money in as income on the consultancy agreement, that's tax free income a as long as you use it to pay off the loan, and therefore, Kuhnel, according to them, he's always the culprit in the back, came up with this tax scam. I want you all to be at ease because you were told you might be aiding and abetting tax fraud. Those are not easy charges to take. I want you to be at ease because, as UTC would have

> it, that’s exactly the opposite of the way it works.

(T 3413-14)

> . . .[A]nd tax fraud, we handled that one, I think.

(T 3437)

There is flippant argument by Mr. Beck concerning the loan/consultancy agreement on behalf of UTC/UTOS which is thereafter addressed by Mr. Huff, noting his flippancy by labeling the same “ridiculous.” Any supposed error, again was not objected to contemporaneously, is certainly not fundamental and waived by failure to properly preserve.

Petitioners attempt to make much of UTC/UTOS' counsel's two references to MURPHY's "lottery ticket." (IB 38) Petitioners rely upon *BellSouth Human Resources Admin., Inc. v. Colatarci,* 641 So. 2d 427 (Fla. 4th DCA 1994), *Fowler v. N. Goldring Corp.,* 582 So. 2d 802, 803 (Fla. 1st DCA 1991), and *Stokes v. wet 'N Wild, Inc.,* 523 So. 2d 181, 182 (Fla. 5th DCA 1988). These cases are uninstructive for they involved contemporaneous objections to the remarks at issue and therefore were not decided under the fundamental error standard applicable here. When viewed in light of the evidence presented in this case, two references to the "lottery ticket" do not amount to fundamental error. And, of

course, counsel for Petitioners joined in the analogy by referring, in closing rebuttal, to MURPHY's lottery ticket. (T 3412)

Next, UTC/UTOS' counsel's comments on Ed Kuhnel's failure to testify were proper. Mr. Kuhnel was available -- he sat in the first row of the gallery throughout the trial, as did Deborah Kuhnel. He even took photographs of the jury. (T1697) So long as the witness is available, it is entirely proper for counsel to comment in closing argument on the failure of a party witness to testify and to urge upon the jury the inference that had the witness appeared his testimony would have been adverse to the party with whom he is associated. See *Fino v. Nodine*, 646 So. 2d 746, 750-51 (Fla. 4th DCA 1994); *Geiger v. Mather of Lakeland, Inc.,* 217 So. 2d 897, 898 (Fla. 4th DCA 1968); cert. denied, 225 So. 2d 528 (Fla. 1969). Do we not think the jury would be interested in Mr. Kuhnel's explanation of the loan/consultancy agreement tax savings plan?

Petitioners' next argument appears to state it was improper for UTC/UTOS' counsel to comment on plaintiffs' counsels' failure to ask certain questions of Mr. Carroll about the May 12, 1992 viewgraph presentation (UTX 20A). UTC/UTOS put Mr. Carroll on the stand and, among other topics, questioned him extensively about the May 12, 1992 presentation materials. (T 1740-65)

UTC/UTOS counsel spent twenty-five transcript pages asking Mr. Carroll questions about the presentation materials.

Plaintiffs' counsel, on the other hand, did not ask Mr. Carroll a single question about the key document, all the while urging at closing that Carroll is the defrauder and perjurer. It was entirely proper for UTC/UTOS' counsel to point that out to the jury. Mr. Beck did not suggest as in *Owens*, that counsel was lying, only that if, as he argued that Mr. Carroll was not worthy of belief he didn't demonstrate that by cross-examination. It was before the jury that Mr. Huff did not question Mr. Carroll about the presentation materials. Mr. Beck simply pointed this out in closing.

Petitioners' reliance on *Cohen v. Pollack*, 674 So. 2d 805 (Fla. 3rd DCA 1996) is misguided, for reason improper argument there was objected to and a motion for mistrial made. **Not the case here**. Without objection, we have no yardstick with which to measure the remarks cited in the case at bar as fundamental error. However, the Petitioners are also wrong that the transcript citations fall under the ruling of *Cohen*:

> (a) . . . BOB MURPHY has said false things about a good and decent man . . . (IB 37) (T 2697)

This hardly suggests to the jury that everything Terry Carroll said was true.

> (b) [N]ow, (HOWARD HORNSBY) made some mistakes in his life but one thing he didn't do was lie about the business they had. (IB 37)

This comment is a fair statement upon the evidence that Robert Murphy and Deborah Kuhnel falsified the business plans to show more past business than IRS I actually experienced. (T 2697-2703)

> (c) Mr. Hornsby . . . told the truth about that. Bob Murphy couldn't bring himself to do that. (IB 37)

Again, Mr. Beck was simply making proper comments upon the evidence. Likewise, *Riggins v. Mariner Boat Works, Inc.,* 545 So. 2d 430 (Fla. 2d DCA 1989), is not helpful. Once again at trial the plaintiff's counsel objected to the argument and the case was a close question of liability.

Was MURPHY shown to lack credibility? Let us review the "Johnson Letter". UTC/UTOS put both the Johnson brothers on the stand by reading in their deposition testimony. (T 3005-06) This testimony established that the Johnson Letter was a forgery. 'The name "Alan Johnson." is signed to the Johnson Letter, but Alan Johnson denied signing it. See Testimony of Alan Johnson by deposition. (D 48) His brother, Red Johnson, testified that he had never even seen the Johnson letter, until shortly before his deposition. So there was no way he could have signed it., see

testimony of Red Johnson by deposition. (D 100) Thus, UTC/UTOS' counsel's characterization of the Johnson Letter as a forgery was wholly supported by the evidence and reasonable inference therefrom.

This is the very document which Plaintiffs suggested was key evidence. (T 297-98) Through cross-examination of MURPHY, it was established that he and his associate, Ms. Kuhnel, wife of Petitioners' co-counsel, actually created the Johnson Letter. (T 776-778). (No, the letter was not used, as in *Strickland,* as a factual basis. It was used effectively to impeach MURPHY's credibility.) The record provides ample support for the remarks of UTC/UTOS' counsel that Petitioners cite as improper. (IB 39)

Petitioners rely on *Baptist Hospital v. Rawson*, 674 So. 2d 777 (Fla. 1st DCA 1996). Actually the case is unsupportive as *Baptist Hospital* is a medical malpractice case with a paraplegic plaintiff; naturally involving tremendous emotions and a close question of liability. *Baptist Hospital* also relies on *Scared Heart Hospital v. Johnson*, 650 So. 2d 676 (Fla. 1st DCA), rev. denied, 659 So. 2d 1989 (Fla. 1995), likewise a medical malpractice case. Both of those actions were brought to the First District Court of Appeals and, interestingly, Frederic G. Levin, was counsel for appellee in each action. It was clear to the court in both cases that Mr. Levin's comments were egregious,

in violation of Rule 4-3.4(e) of the rules regulating The Florida Bar. The numerous comments contained with the *Baptist* case, *Id.,* were counsel's assertion of personal knowledge of facts, statements of personal opinion, which Mr. Levin acknowledged, were in violation of the aforementioned rule.

While the First District imputed counsel Levin's comments as sufficiently egregious, there is nothing in the record below which would demonstrate fundamental error as defined in *Baggett*. And, of course, as recently stated: "**An argument on appeal where opposing counsel's remarks were so egregious as to be of the type contemplated by *Baggett* would generally be sorely lacking in credibility where there is no objection . . .**" *Weise v. Repa Film International, Inc.,* 683 So. 2d 1128 (Fla. 4th DCA 1996).

Not only have Petitioners now settled with the putative offending party, UTC/UTOS, but the Petitioners invited the nature and tone of the trial, as clearly evidence by the following comments on opening statement:

> MR. HUFF: Things I don't understand, won't need to for this case. Next and things, one billionth of a thing travels per second, lights up in a rabbit's ear, amazing types of things, supposedly, but it is the very sort of stuff that if had a high school education. . .(T 266)
>
> MR. HUFF: And Mrs. Kuhnel typed up a letter at Johnson's request,

outlining what Johnson had told to Murphy, the story of them conspiring in one way or another, for whatever reasons, to keep you from having this information, to keep you out of the circle of information. And that letter was signed by Mr. Johnson. And he later gave a sworn statement under oath as well that all of those things had happened. (T 297-98)

MR. HUFF: [Murphy] is stupid, he can't read, he can't be trusted, he is lazy. . . (T 3404)

And then again at closing:

MR. HUFF: Everything [Murphy] told you is a pack of lies and so is this lawsuit, too, and by implication I am totally willing to abet that after 20 years of practice --

MR. BECK: I object to that, your Honor. That's improper argument.[3]

COURT: Sustained.

MR. HUFF: [Murphy] is after his lottery ticket now, isn't he? Well, it is for good reason that the law allows the plaintiff to argue last and I can't remember a better example of that than this. And I'm going to tell you some funny things as well, too, some things are serious but let's keep on the idiotic for just a minute, some things that just make no sense.

Let's put to bed this ridiculous thing about the loan agreement,

[3] Only objection made by any party during closing argument.

based on common sense. According to UTC, if you take money in as income on a consultancy agreement, that's tax free income as long as you use it to pay off a loan, and therefore Kuhnel, according to them, he is always the culprit in the back, came up with this tax scam. I want you all to be at ease because you were told you might be aiding and abetting tax fraud. Those are not easy charges to take. I want you to be at ease because as UTC would have it, that's exactly opposite of the way it works.

One cannot take consultancy money as income and then pay no taxes because it pays down a loan. It is exactly the opposite. When you take home your paycheck, you pay taxes on it. The fact that you turned around and pay the bank you owe, that's not deductible. Interest and other things are. of course, that's exactly the opposite of the way it is and that's a little bit idiotic. (T 3413-14)

MR. HUFF: [Y]ou all are on the verge of becoming felons yourselves. The loan agreement to Laser surely wasn't structured by Mr. Kuhnel to save taxes, because I just told you, it doesn't. (T 3415)

MR. HUFF: I don't know what adjective was used, either idiotic, phony, a lie, crazy, funny, or something like that. Doesn't seem like it. Doesn't seem like were trying mislead you at all on that. (T 3416)

> MR. HUFF: [Carroll] didn't have to look me in the eye and you all and try and explain that he really didn't mean it. Sure he did. (T 3425)
>
> MR. HUFF: . . .[M]y client is a congenital liar . . . (T 3435)
>
> MR. HUFF: Tax fraud, we handled that one I think. (T 3437)

Aside from the failure of the Petitioners' attorneys to object to argument, which is now characterized as inflammatory, the Court could have, likewise, stepped in to restrain comments of counsel, which assert personal belief, and the justness of the cause and credibility of the parties as witnesses at trial, as well as counsel's personal knowledge of the facts and issues. *Hillson v. Deeson*, 383 So. 2d 732, 733 (Fla. 3rd DCA 1980) Indeed this rule has governed the courts of Florida for many years. *St. Petersburg Coca Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670 (Fla. 1950) The Honorable Edward Fine, an experienced trial judge, who presided below, chose not to restrain counsel, which non-action clearly speaks to propriety of the closing arguments.

Given that the arguments do not reach the limited exception of "fundamental error", that Petitioners failed to object and preserve the issue for appellate review, failed to produce

competent evidence of damages, and released the supposed offending party, the verdict must be affirmed.

POINT III

THE COURT DID NOT ERROR IN GIVING A SPECIAL INSTRUCTION ON "REASONABLE RELIANCE" AGREED TO BY PETITIONERS, ANY "ERROR" WAS INVITED BY PETITIONERS

Petitioners are not entitled to a new trial based on the reasonable reliance jury instruction, 9A for three reasons discussed below:

1. Invited Error:

Petitioners' contention that they objected to the instruction on reasonable reliance (IB 44) is not supported by the record. Petitioners cannot cite such support. No, rather Petitioners **agreed** to the instruction at the charge conference: (T 3140-3169)

And specifically:

> COURT: I will deny this instruction. That's UTC's number one. What else do we have here? Any other special instructions?
>
> WAGAR: One more. This one has been agreed to, **reasonable reliance**, and the next one is yours.

(T 3148-49) **Emphasis added.**

The doctrine of invited error was reiterated by this Court in *Gupton v. Village Key & Saw Shop*, 656 So. 2d 475 (Fla. 1995) as:

> . . . [A] party cannot successfully complain about an error which he or she is responsible for, or ruling which he or she has invited trial court to make.

Petitioners cannot now complain of a special jury instruction to which they agreed at trial. *Held v. Held*, 617 So. 2d 358, 359-60 (Fla. 4th DCA 1993), *Fuller v. Palm Auto Plaza, Inc.*, 683 So. 2d 655 (Fla. 4th DCA 1996).

2. <u>Waiver Failure to Object</u>:

Petitioners waived any objection to the jury instruction on reasonable reliance because they failed to object to it at the charge conference. Florida Rule of Civil Procedure 1.470(b) states:

> Not later than at the close of the evidence, the parties shall file written requests that the court charge the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the charges to be given. At such conference all objections shall be made and ruled upon and the court shall inform counsel of such general charges as it will give. **No party may assign as error the giving of any charge unless he objects thereto at such time** or the failure to give any charge unless he requested the same. The court shall charge the jury after the arguments are completed.

Emphasis added

Florida law requires contemporaneous objection to improper jury instructions. *Castor v. Florida,* 365 So. 2d 701, 703,(Fla., 1978) Therein: "Where the alleged error is giving or failing to give a particular jury instruction, we have invariably required the assertion of a timely objection." Moreover, an objection to a jury instruction must "be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Id.* The objection must "direct the attention of the trial judge to the purported error in a way that will allow him to respond in a timely fashion." *Id.*

This Court has explained the basis for this rule:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.

Id.

Another important reason for the requirement of a contemporaneous objection is that, without it, counsel could use the appellate process to compensate for failed trial strategy, effectively giving a party two bites at the apple. The Fourth District characterized the problem:

> [A] common theme accompanying the majority of the points raised on appeal was the failure of [counsel] to raise timely and

> contemporaneous objections to the 'matters which are now claimed to be offending, improper and prejudicial. In the absence of a timely objection (especially to matters which do not rise to the level of fundamental error), a reviewing court is left to speculate whether or not the initial failure to object was simply cleverly devised trial strategy which backfired.

D'Amico v. State, 582 So. 2d 123, 124 (Fla. 4th DCA), rev. denied, 591 So. 2d 180 (Fla. 1991).

Prior to the charge conference, Plaintiffs and Defendants served their proposed jury instructions.

At the charge conference, the Court included the additional "reasonable reliance" instruction upon Petitioners agreement to use the same. (T 3149) Of course had they chosen to, any objection must state specific grounds which was not done. *Middelveen v. Sibson Realty, Inc.,* 417 So. 2d 275 (Fla. 5th DCA 1982).

Petitioners should not now be allowed to object to the reliance instruction for the first time on appeal. Their failure below has not preserved the issue for intelligent review on appeal. Accordingly, Petitioners have waived this objection and invited any error.

Moreover, at trial, when UTC/UTOS counsel read the "reasonable reliance" instruction in closing argument,

plaintiffs' counsel did not object. (T 3359) Nor did plaintiffs' counsel ever request a clarifying instruction to resolve the supposed conflict.

The only instance in which a party can escape its failure to contemporaneously object to a jury instruction is where there is "fundamental error." To be "fundamental error," the asserted error must amount to a "denial of due process." *Castor,* at 703-704. Hence, "fundamental error" is a "rare and limited exception" to the rule requiring contemporaneous objection. *D'Amico,* at 123. It should be applied only in rare instances of "error going to the foundation of the case or the merits of the cause of action" and where the "interests of. justice" compel an exception to the rule. *Farrow v. State,* 573 So. 2d 161, 163 (4th DCA 1990). Moreover, the Fourth District has noted that "[f]rankly, some of the recent fundamental error cases suggest that the idea is being used far too routinely." For, as stated in *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970), ". . . the appellate court should exercise its discretion under the doctrine of fundamental error very guardedly."

3. Trial Tactics:

Petitioners' counsel made a tactical decision to argue from the "reliance -- fraudulent misrepresentation" instruction rather than object-to the inclusion of the same instruction. This

tactical choice not to object at trial during closing provides clear grounds for waiver.

Petitioners' failure to object at anytime to the instruction raises two possibilities. The first is that plaintiffs' counsel perceived during the charge conference or at trial the potential for conflict in the instructions but remained silent on the theory that plaintiffs had a free shot at the jury. If they won, they would continue to hold their tongues. If they lost, they could attempt to capitalize on the alleged conflict in the instruction in an effort to get a new trial. The same tactic applied to final argument.

This trial took four weeks of the Court's and jurors', time and energy. It would be a monumental waste of judicial resources to permit a new trial on the basis of a purported conflict not earlier revealed to the Court. This Court should not reward such gamesmanship.

Another more likely possibility, is that all the way through the return of the verdict, Petitioners' counsel, like the Court and Respondents' counsel, did not perceive any conflict in the instructions. Having lost at trial, Petitioners' counsel scoured the record in the hope of finding error. Finding none, they set forth a supposed conflict in the instructions, and also erroneously suggest they objected to the instruction. But

Petitioners' counsel's own failure to perceive the conflict or object until after they lost is powerful confirmation that the instructions did not conflict and did not mislead or confuse the jury such that it affected their verdict in this case.

Petitioners cite, in support of their contention, the case of *Poole v. Lowell Dunn & Co.,* 573 So. 2d 51 (Fla. 3rd DCA 1990); and *Valiz v. American Hospital, Inc.,* 442 So. 2d 226 (Fla. 3d DCA 1982). These cases are not helpful in any respect as in each the appellant objected to the erroneous jury instruction.

Of interest, and closely on point, is of *City of Orlando v. Birmingham,* 539 So. 2d 1133 (Fla. 1989). The jury questioned other matters, including breach of fiduciary duty, in deliberations but, understanding the reasonable reliance instructions, did not question the same. (T3500-3527) The *Birmingham* case arose out of the appellant's charge of interference with a police investigation and alleged forcible arrest, which gave rise to his suit for personal injury, assault, and false imprisonment.[4] The district court indicated that had the jury been given the proper instructions, it is likely a different result would have occurred. The court indicated their usual refusal to reverse a case such as this because, "more often

[4] On appeal to the District Court, it was held that the appellant was not given a fair trial because the instructions were "plainly wrong and misleading."

than not, they attribute the decisions of an attorney in trial to tactical decisions -- conscious deliberate refusal to object, or not call a particular witness or make a particular legal argument."

However, one of the errors in the jury instructions concerned probable cause involving warrant for arrest in a felony case, though the case at bar involved a misdemeanor, for which probable cause arrest is clearly different. Despite this clearly erroneous jury instruction, this Court, upon review of the opinion below held:

> It is essential that objections to jury instructions be timely made so the cases can be resolved expeditiously. In the absence of a timely objection, the trial court does not have the opportunity to rule upon a specific point of law. Consequently, no issue is preserved for appellate review.
>
> **In this case, the failure of the trial court to give the proper jury instruction does not constitute fundamental error.** Respondent cannot now be heard to complain about defense lawyer's failure to object to the trial court instruction. **Furthermore, because of the absence of a timely objection to the instructions, we find the district court improperly addressed the issue that was not preserved for appellate review.**
>
> **Emphasis added.**

In conclusion, this Court quashed the decision of the district court and upheld the trial court's denial of new trial. There is no case more closely on point than *Birmingham*, *Id.*

The Petitioners failed to object to the instruction, indeed agreed to the special instruction and have not preserved the error for review.

POINT IV

THE FINDING THAT NEITHER HOWARD HORNSBY NOR ROBOTICS II BREACHED THE CONSULTANCY AGREEMENT IS CORRECT ACCORDING TO THE MANIFEST WEIGHT OF THE EVIDENCE AND NOT THE PRODUCT OF JURY CONFUSION OR IMPROPER CLOSING ARGUMENT

A directed verdict on the "consultancy agreement claim" was entered in favor of HORNSBY as he was not a party to the supposed agreement. It was between MURPHY and LHL the corporation. (Closing Book Exhibit UTX 1A-RR)

The jury found that ROBOTICS II did not breach the consultancy agreement based upon either or both of the following:

1. The consultancy agreement was a wash for the "loan" of $300,000.00 to ROBOTICS I, so as to avoid taxes. In fact, it was co-counsel for the Petitioners, Edward Kuhnel, who devised this loan/consultancy agreement tax savings plan. (T 2692-2694)

2. The jury was aware that MURPHY had no ability to act as a consultant, particularly on the international front (T 1387),

never offered to do so, did not do so, and never complained of anyone's alleged failure to abide by the "agreement."

Naturally with this "tax avoidance", MURPHY was not required to provide any consulting work and never provided any consulting work. And of course the record is devoid of any evidence that MURPHY complained to HORNSBY, ROBOTICS II or LHL that there was a breach of this supposed agreement. This is clearly reasonable as MURPHY, as a client of Edward Kuhnel in 1992, year of the sale, and at trial in 1996, knew there was no true consultancy agreement. Recall Mr. Kuhnel prepared the argument, and was available to testify, but did not. As did Terry Carroll (T 1729-30), John Wood. (D 39-41), and HOWARD HORNSBY. (T 2692-94)

Again, as noted in argument at Point I, this intelligent jury of eight, having observed the witnesses for some four weeks, sided with the competent and substantial evidence of UTC/UTOS and these Respondents, found that there was no breach of the consultancy agreement or more likely determined one never existed. This finding is abundantly supported by the record, of proceedings below and cannot now be reversed. The function of this court is not to reweigh the evidence and substitute its view for that of the jury. *Toll v. Waters*, 189 So. 393 (Fla. 1939).

It is not the function of the appellate court to re-evaluate evidence or substitute judgment of the jury. If there is any

competent evidence to support verdict, it must be sustained regardless of opinion on appeal as to correctness. *Helman v. Seaboard Coast Line Railroad Co.,* 349 So. 2d 1187 (Fla. 1977).

The verdict in every respect should be affirmed on either of two basis:

1) The trial transcript and exhibits in evidence provided an abundance of evidence upon which the jury's verdict was based. For example, review the numerous instances of impeachment of MURPHY contained in the astute cross-examination by Mr. Beck on behalf of UTC/UTOS (T 768-9), (T 773-85), (T 809-14), (T 815), (T 817), (T 820-22), (T 846), (T 855), (T 882-884), (T 615, 961, 967-70), and on to illustrate why the jury found his testimony incredible.

2) Moreover, Petitioners submitted no proof of damages beyond guesswork or mere speculation: One can only conclude, excepting the fiduciary damage award, that Plaintiffs failed their burden in proving damages beyond mere guess or speculation. (T 1385, 1399-1408)

For example, the difficulty of military marketing was made by examining the history of a vaguely similar device, called the Night Hunter, manufactured by Perry Offshore. Two were sold in sixteen (16) years. Its price was approximately $100,000 as opposed to $449,000.00 for the OWL, according to William Girodet,

who worked on the project since 1980. (T 1553-54) Ace Sarich, a retired Navy seal commander and U.S. Naval Academy graduate, with many years of governmental contracting experience, testified it could take 3 to 5 years to "get going" selling OWLs. (T 2266) Peter Fiegel testified that any government procurement is a lengthy process. (T 1399-1400)

Of course, when LHL bought the OWL in July, 1992, it was only a prototype, hardly ready for military marketing. (T 1308) After purchase, it was basically like starting up a new company. The company moved to new offices, had to produce exacting molds for the OWL Mark II, purchased accounting software for government contracting, and hired additional personnel. (T 2730-2734) The "new" company was only two years old when MURPHY filed the suit below.

Edward Fine, Circuit Court Judge, commented upon the speculative proof of damages in his order denying Petitioners' motion for new trial and judgment notwithstanding the verdict, entered December 20, 1996; therein he stated:

> The directed verdicts: The Court felt very strongly that the proof of damages were too speculative to support a verdict based upon the law as set forth in *Halliburton Co. v. Eastern Cement Corp.*, 672 So. 2d 844 (Fla. 4 DCA 1996). However, the Court considered it to be too risky to grant a directed verdict on any of the grounds listed in a trial this long and complex without reviewing the actual

> transcript. The Court's memory cannot equal actually being able to review this large transcript and the Court was not willing to say based on its recollection alone and its notes that any of these motions should be granted.

Judge Fine's feeling a directed verdict on damages was "too risky" is certainly understandable given four weeks of trial and over 3,500 pages of transcript.

In *Halliburton*, supra, the court distinguished the claim of lost profits between established businesses and **those not yet begun**; and relied on *Twyman v. Roell*, 123 Fla. 2, 166 So. 215 (Fla. 1936), and the rule:

> . . . if there is a yardstick or measure of damages by which prospective profits may be determined . . . they may be allowed if proven . . .

The Petitioners' case fails this burden in two respects:

A. There is no yardstick or measure of damages. Recall that when the assets of ROBOTICS I were sold to LHL the new OWL Mark II had not yet been built, not even the molds for construction. In fact, when LHL started funding the project it was just like starting a new company (T 2730-2734). Now if it is the Appellants claim that the Perry Ocean "Night Hunter" project is the "yardstick" and there is no other, it sold two in 16 years. (T 1553-54) Of course MURPHY received royalty checks for two OWLs. (T 743-4) (T 2899-2900) (T 2635)

B. The Petitioners submitted no competent, credible evidence upon which the jury could arrive at an amount of damages with reasonable certainty.

In that light, the damages testimony on the anticipated production of OWLs is:

> HUFF: Let me ask you, sir, if you remember, did Mr. Terry Carroll of UTC ever discuss with you or project at all a number of OWLs that he thought might be produced and sold over the five-year period of time, any sort of projections?
>
> MURPHY: Terry Carroll at UTC said he **thought** thousands **should** be sold, or would be sold. (T 693)

Emphasis added. MURPHY did not opine as to sales prospects with any degree of certainty, as he claimed in the July letter, UTX 13B. Nor did Eric Caplan, of Boston Whaler, only speculation. (T 1071-1073)

Mike Hollingworth, in the electronics business dealing with the Department of Defense, and U.S. Treasury offered only expectations and speculation as to future sales. (T 1150-1201) And Peter Fiegel had no opinion concerning the domestic market.

> BECK: I don’t know. Do you think Mr. Murphy could have managed to sell 300 to 500 of these boats if only he had been in charge?

FIEGEL: Domestically, internationally or both?

BECK: Internationally.

FIEGEL: I don’t think so. (T 1387-88)

Ace Sarich, of Marine Acoustics Inc., with 20 years of experience in military acquisitions testified (T 2144-47):

HUFF: Would it still be your testimony that it takes a long, long time, from three to five years, before you could expect to begin to see additional orders?

SARICH: Additional orders, you could see limited numbers depending on how you structure the program, but a procurement would take three to five years before you see any s significant quantity because of everything else that has to go along with it.(T 2248)

Peter Fiegel agrees with this (Mr. Sarich’s) estimate. (T 1402-1403) And, of course there was no U.S. requirement for the OWL. (T 2158)

Sarich continued:

HUFF: Is it your testimony that you’re not surprised that since 1991 all together one OWL has been sold and one more has been ordered?

SARICH: I’m not surprised, I’m not unsurprised. There is a lot of people out there that are trying to sell products, so my answer is that’s the way it is.

(T 2264)

HUFF: . . .[D]id you ever tell . . .Robert Murphy . . . that it would take you three to five years to expect to really get going on selling very many of the OWLs?

SARICH: Any number of times. (T2266)

Other record testimony is no more helpful and, in sum, the Appellants simply proved no damages.

CONCLUSION

The decision of the Fourth District Court of Appeal should be affirmed in all respects.

This is opportunity for this Court to set forth that, absent contemporaneous objection, any unobjected-to error in closing argument is waived. Further, that such trial tactics will not be rewarded with a new trial, as in this case, when the result is adverse.

There is no competent or credible evidence upon which the jury could base an award of damages, gives rise to another basis to affirm the Fourth District opinion.

The Petitioners agreed to the reasonable reliance instruction on the record and failed to preserve any such error.

Lastly, the successful impeachment of Mr. Murphy gives adequate basis for the jury to find no breach of an alleged consultancy agreement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy the foregoing has been furnished by U.S. Mail to R. STUART HUFF, ESQUIRE and MARK L. MALLIOS, ESQUIRE, co-counsel for the Petitioners, 330 Alhambra Cir., Coral Gables, FL 33134, this 2nd day of October, 1998.

Respectfully submitted,

_____

DAVID A. JAYNES
Counsel for Respondents
120 So. Olive Ave., Suite 702
West Palm Beach, FL 33401
(561) 659-5050
Florida Bar No. 354139