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MAY 28 1998
CLERK, SUPREME COURT
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Chief Deputy Clerk

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' AMENDED BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

The essence of the Plaintiffs' case below was an action grounded in breach of fiduciary duty, 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 qualities. 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 move forward with its pending contract with the United States Navy absent a cash infusion, and in danger of losing their 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, Appellants, ROBERT MURPHY and ROBOTICS I brought the suit below 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 Defendants/Appellees on all counts, excepting a nominal damage award for breach of fiduciary duty against HOWARD HORNSBY individually.

Not withstanding Appellants' counsel's twenty plus years of trial experience (T 3413), he made no objection at closing argument, and now complains of fundamental error. There is none.

A motion for rehearing and rehearing en banc was filed by Appellants on February 26, 1998. Without opinion, the appellate court denied the motion for rehearing and rehearing en banc on March 18, 1998. The Appellants then requested this Court accept jurisdiction on May 4, 1998. No question was certified by the appellate court.

SUMMARY OF ARGUMENT

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

The Petitioners clearly 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 1956. In fact, on simple reading of the opinion authored by Judge Kline of the Fourth District, one will note that, 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 later 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 D448. The Fourth District Court has followed the edicts of the Supreme 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 a black letter rule.

ARGUMENT

Petitioners concede from the outset that the Fourth District recognizes the fundamental error exception to the contemporaneous objection requirement in final argument. Petitioners' brief quotes from the opinion as follows:

> It is not that we condone **improper** or unethical argument, rather it is that we do not think **improper**, but unobjected-to closing argument in a civil case is something which is so fundamental that there should be an exception to the rule requiring an objection. *(Emphasis added)*

Murphy, et al. v. International Robotics Systems, Inc., et al., 23 Fla. L. Weekly D447 (Fla. 4th DCA 1998).

It is of utmost importance to note that the Fourth District characterized the final argument as "improper" as opposed to "pervasive" or fundamental. The Fourth District's opinion examines closely the holdings of other districts and that of the Supreme Court. In footnote number 1 of the Fourth District's opinion, the court analyzes cases of unobjected-to arguments noting the kind and character of the same in each. *Murphy* at D449.

Also, as pointed out by the Court, when Petitioner's counsel was questioned as to why counsel did not object if he felt these arguments were so egregious, he responded that it is his practice to not object because the jury might hold it against his client. *Murphy* at D447. The Fourth District's affirmance of the jury's verdict is in direct keeping with the Supreme Court's ruling in *Castor v. State*, 365 So. 2d 701 (Fla. 1978):

> 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. Delay and unnecessary use of the appellate process results from a failure to cure early that which must be cured eventually.

And, likewise with *Tyus v. Apalachicola N.R.R. Co.*, 130 So. 2d 580 (Fla. 1961):

> As is disclosed by our opinion in *Seaboard Air Line Railroad Co. v. Strickland*,[1] we are committed to the rule that in the ordinary case, unless timely objection to counsel's prejudicial remarks is made, the appellate court will not reverse on review.

Petitioners wrongfully assert that the Fourth District opinion expressly and directly conflicts with the Court's opinion in *Tyus*. This is a misreading of the *Tyus* opinion. The Fourth District Court acknowledged that the Florida Supreme Court quashed the First District's reversal of a plaintiff's verdict in that wrongful death action because of unobjected-to argument, holding that there should have been an objection, and wrote:

> The arguments made by plaintiff's counsel in *Tyus*, which are set forth in the dissent, are as bad as, if not worse, than the arguments in cases which are now being reversed.

See *Murphy* at D448.

This statement clarifies the Fourth District's indication of disagreement with decisions of sister courts. Stated otherwise, the sister courts are reversing on unobjected-to argument which the Fourth District feels is not "so extensive that its influence pervades the trial."

The unobjected-to argument in *Murphy* was analyzed by the District Court as to whether or not the same was "pervasive."

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[1] *Seaboard Air Line Railroad Co. v. Strickland*, 88 So 2d 519 (Fla. 1956)

better position" than an appellate court to determine that if the argument was so prejudicial as to require a new trial. See *Tyus* at 588. A motion for new trial, served October 18, 1996, was denied by the trial judge on December 20, 1996, after oral argument.

Does the Fourth District recognize an exception to the contemporaneous objection rule?

> [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.
> *(Emphasis added)*

See *Murphy* at D448.

Indeed the supposed conflict is implied at best. Such "implied" conflict may no longer serve as a basis for this Court's jurisdiction. The conflict between decisions below must be direct and express. *Dept. of Health & Rehabilitative Services v. National Adopting Counseling Service, Inc.*, 498 So. 2d 888 (Fla. 1986), Art. V, § 3(6)(3), Fla. Const. accord, Fla. R. App. P. 9.030(a)(2)(A)(iv).

CONCLUSION

The Supreme Court should decline to accept jurisdiction of this cause as there is no conflict. The Fourth District could not state more clearly its recognition of the exception when it wrote:

> 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 D448.

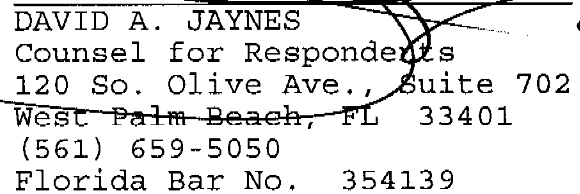
Upon reasoned opinion, review of the case law and facts, the Fourth District found the unobjected-to argument did not meet the exception to the rule cited herein. Absent direct and express conflict in decisions below, this Court must decline jurisdiction.

WHEREFORE, Respondents respectfully request this Honorable Court deny discretionary review.

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 Appellants, 330 Alhambra Cir., Coral Gables, FL 33134, this 27th day of May, 1997.

Respectfully submitted,



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APPENDIX

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Order Denying Plaintiffs' Motions for New Trial and Judgment Not Withstanding the Verdict December 20, 1996	A-3
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