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

PETITIONERS' AMENDED BRIEF ON JURISDICTION AND APPENDIX

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STATEMENT OF THE CASE AND FACTS

This lawsuit centered around a small fiberglass remote controlled surveillance boat, named the OWL, which can carry a 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 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, yet the tiny company was hard pressed for cash and was on the market at all times.

United Technologies Corporation is a multi-billion dollar international conglomerate. It is a major figure in the defense industry. A veteran engineer and executive of UTC was Mr. John T. Carroll. 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. Laser Holdings

ultimately bought the OWL in July of 1992. 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, which devoted all of its trial energy to attacking Robert Murphy's word. UTC's grossly improper argument in this regard was one of several points raised on appeal.

Although the Plaintiffs settled, post-trial, all of their claims against UTC, Defendants, Hornsby and his company also shared the fruit of this poisoned tree.

The tone of the improper argument was set early and clearly by defense counsel,

> ...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)

Although the above crude comments may not have crossed the line into reversible argument, UTC crossed the clear line into

improper and prejudicial argument. One of the Plaintiffs' claims was for breach of a consulting agreement. The consultancy agreement contemplated that the Plaintiff Robotics I would be paid consulting fees over a five year period. None of the monies were paid. 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, yet 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....
>
> Now, your **B.S. detectors** should be **going berserk** at this point. ...(Tr.3346, 3348).

U.T.C. improperly prejudiced the jury against Murphy [but not his partner, Hornsby] by labeling him a criminal tax cheater, without any evidence. 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,

> **[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.

Murphy was repeatedly castigated as a liar,

> So we have this ridiculous story from Bob Murphy... **so he lies about it under oath** and says that Terry Carroll pulled it back...(Tr. 33660)
>
> ***
>
> 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 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...** (Tr. 3406)

And as fundamentally improper as it was for counsel to attack Murphy by calling him a liar, it was just as impermissible to express his personal opinion by vouching for the credibility of his client and other witnesses;

> 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)

UTC also attacked the integrity of Plaintiffs' lead trial counsel and challenged him to defend his "failure" to ask certain questions,

> 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 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 explain why he asked -or omitted- questions which, defense counsel told the jury, had been obligatory.

Murphy was also wrongly accused of fabricating evidence for his case,

[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, UTC nevertheless accused Murphy of perjury, and a fraud on the court and jury by creating a forged document.

The Fourth District did not say that the above comments were not so egregious that their influence did not pervade the trial, thereby gravely impairing a calm dispassionate consideration of the evidence by the jury, which is the correct standard of review. The Fourth District evaded that consideration by holding that virtually no error could ever occur, in a closing argument in a civil case, which would amount to fundamental error. (App.1) Rehearing and rehearing *en banc* were denied. (App.2).

SUMMARY OF ARGUMENT

The Fourth District's opinion expressly and directly conflicts with decisions of other district courts and of the Supreme Court on the same point of law. This Court has jurisdiction to review the decision.

ARGUMENT

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

The Fourth District's statement all but eliminates the

fundamental error doctrine as applied to closing arguments in civil cases. This position is directly and expressly at odds with that of the First, Second, Third, and Fifth District Courts of Appeal, and the Supreme Court, all of which have applied the fundamental error doctrine to closing arguments in civil cases. See *Seaboard Air Line R.R. Co. vs. Strickland,* 88 So.2d 519, 523 (Fla. 1956), and the cases collected in the court's opinion at 23 Fla.L.Weekly, D 447,449, n.1. The Fourth District acknowledged the express and direct conflict by stating it was writing the opinion "to explain why we do not agree with the decisions of our sister courts" which have applied the fundamental error exception to the general rule requiring contemporaneous objection. 23 Fla.L.Weekly, D 447. The opinion also expressly and directly conflicts with this Court's statements in *Tyrus v. Apalachicola N. R.R. Co.,* 130 So.2d 580 (Fla. 1961),

> This rule [contemporaneous objection] is subject to the exception that if the prejudicial conduct in its collective import 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 , a new trial should be awarded regardless of the want of objection.
>
> ***
>
> In order to employ the [fundamental error] exception to the general rule where no objections are made to alleged prejudicial remarks or conduct, such remarks or conduct need not begin at the beginning of a trial and continue

intermittently to its conclusion. Id. 587

The Fourth District uses phrases such as "we [do not] condone improper or unethical argument", 23 Fla. L. Weekly, D 447 in discussing the remarks made. The Court even suggests that it knows of examples of the Florida Bar initiating its own investigations of unethical arguments which it learned from reading an opinion and that such independent action is the preferred way to curb unethical argument rather than to penalize the offender by granting a new trial. Such disciplinary procedures, assuming they sometimes arise, do nothing to correct the outcome of the trial[1].

Finally, the Fourth District's reasoning relies heavily upon an assumption that the trial courts will consistently, correctly sustain objections during closing argument thus neutralizing the effect of repeated improper statements. The reality of trials may more likely be that judges are reluctant to sustain such objections. In fact, the Fourth District, itself, just four years ago, commented critically on the frequent failure of judges to respond to objections to improper

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[1] The Academy of Florida Trial Lawyers comments on this case in this month's Journal and asks facetiously "Does anyone know or have any record on what punishment was given by The Florida Bar or the Supreme Court to the apparently many lawyers who have been investigated for improper argument? (App. 3)

closing arguments. *BellSouth Human Resources v. Colatarchi*, 641 So.2d 427(Fla.4th DCA 1994). In those frequent situations, the objector has lost, and the jury may see the overruled objection as indication that the Judge agrees with the offender's argument.

The Fourth District's opinion that improper closing argument alone, in a civil case, can not amount to fundamental error runs contrary to this Court's *Tyrus* opinion, and those of the other Courts of Appeal. There is admitted express and direct conflict. The Court has jurisdiction to review the opinion below. Rule 9.030 (a)(2)(A)(iv), Fla. R. App. P.

CONCLUSION

The Fourth District has candidly stated its disagreement with other Appellate Courts. The Supreme Court has not addressed this issue since 1961;uncertainty is widespread on this extremely commonplace problem. The Court should review the decision to correct the conflict created by the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Brief has been furnished by Federal Express this 4th day of May, 1998, to: **David A. Jaynes, Esquire**, Counsel for Respondents, 120 South Olive Avenue, West Palm Beach, Florida 33401

_____
Mark L. Mallios