IN THE SUPREME COURT OF FLORIDA
CASE NO. 92,837

ROBERT MURPHY AND TECHNOLOGY
INNOVATIONS INTERNATIONAL, INC.
Petitioners,

-vs-

INTERNATIONAL ROBOTIC SYSTEMS, INC., & HOWARD HORNSBY
Respondents,

PETITIONERS' REPLY BRIEF ON THE MERITS

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REPLY TO STATEMENT OF THE FACTS

The Respondents make just two statements of enough importance that they must be corrected. They represent that the jury "found no credence in the story of Robert Murphy, found no competent evidence of damages . . . ". (Answer Brief, p.2) The first assertion is patently self serving and incapable of objective proof, for the subject of this appeal is whether or not improper trial tactics and comments denied a fair trial, i.e., denied a fair and impartial jury consideration. The second statement is flat wrong. The jury only reached the issue of damages on one issue, and was confused or prejudiced as to that issue also.

REPLY TO THE ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL HAS APPLIED AN ERRONEOUS STANDARD OF REVIEW

After a careful attempt to identify any arguments which counter the case law analysis offered in our Initial Brief at pp. 6-35, the Petitioners conclude that there are only two reply points. One is the Respondents' failure to concede the inconsistencies, incorrect analyses and internal contradictions which undermine the authority of *Hagan v. Sunbank of Mid-Florida,* 666 So. 2d 583 (Fla. 2nd DCA 1996). The Respondents'

only defense of *Hagan* is that it didn't depart from or alter prior case law. The *Murphy* panel, on the other hand, finds the *Hagan* decision to be of such import and weight that "no discussion of unobjected - to closing argument, would be complete without a discussion" of the *Hagan* case. *Murphy* at 590.

The second point worthy of note is the Respondents' delicate attempt to downplay the *Murphy* panels' reliance on *Hagan* (the panel "does not specifically adopt" the new *Hagan* two-step standard) at Answer Brief, p.8. However, the *Murphy* court's unabashed admiration for, and reliance upon, *Hagan* cannot be denied.

The Petitioners recognize that the analysis they made of Florida case law, as to the district court decisions, may seem iconoclastic. It does not appear that the Respondents follow, or at least are not impressed by, the Petitioners' analysis. They simply say that *Murphy* seems to them to be well reasoned. Further reply would serve no purpose.

POINT II

THE DEFENSE CLOSING ARGUMENT WAS ERROR REQUIRING A NEW TRIAL

The Respondents cite *Nelson v. Reliance Assurance Co.*, 368 So. 2d 361 (Florida 4th DCA 1978), a case which expresses, with sarcasm, the "skepticism" with which some appellate judges hear the "agonized cries" of appellants raising issues to

which they did not object at trial. This skepticism is well founded, according to the *Nelson* court, because the court can "assume", that a failure to object "is a judgement play." This naked assumption is elevated to the status of an irrebuttable presumption, "we must now assume.... that silence...is a judgement play." *Id* at 362.

The Respondents' citation to *Nelson* presents another opportunity to examine a fourth district opinion which - whatever one may think of its logic - demonstrates how little attention is given to supreme court precedent. As we attempted to demonstrate in our Initial Brief at pp.8-17, this court has written three decisions on the subject of improper remarks of counsel, in civil cases, where no objection was voiced by the opposing party. They are the *Bagget, Strickland* and *Tyus* cases.

Bagget, we pointed out, repeated without modification the standard for reversal announced in *Akin v. State*, a criminal case. Twenty odd years after *Bagget*, the court wrote a new and demonstrably different standard in *Strickland.* The court cited and quoted other Florida and Federal cases, but sent a clear message that the *Bagget* standard wasn't good law in future civil cases by omitting reference to *Bagget*. Four years later, the court reinforced this point, in *Tyus.* The *Strickland* standard was reaffirmed, verbatim, as the civil case yardstick. *Bagget* was reduced to a footnote without comment. The *Tyus* dissent, which encountered no disagreement from the majority on this point, noted that the *Strickland* (and *Tyus*)standard was more broad

than, was different from, the early *Akin* and *Bagget* standard. Had this court intended to extend the authority of *Akin* and *Bagget* in civil cases, it surely would have found a better way to convey the message than by omitting reference to them and writing new concepts in different words in *Strickland*.

In the Initial Brief, at pp.30-31 , we discussed the fourth district's decision in *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016 (Fla. 4th DCA, 1996), the case in which seven of the fourth district's judges appeared, citing *Strickland*, to have accepted the philosophy of the first, third and fifth districts. The *Murphy* court, however, distinguishes *Norman*, describes it as a one of a kind situation, affirms that the fourth district had always "adhered to the position it took in *Nelson*"and that *Norman* doesn't express a change in that adherence. So, *Nelson* is that court's leading case.

Against this backdrop, we examine the legal pedigree of the *Nelson* case. Two points in this short (three paragraph) opinion, are noteworthy. The first is that the court reaches back to cite *Akin*, inexplicably ignoring *Strickland* and *Tyus*. This phenomenon is not unique to *Nelson*. References to *Akin* come and go in the lower court decisions without explanation, and omissions of *Strickland* are, for whatever reasons, fairly common.

More perplexing is the treatment of this supreme court precedent. If one erroneously assumes, as the *Nelson* court apparently did, that *Akin* is the leading

opinion in this area, one must wonder why the court didn't follow it. Instead, *Nelson* cites as authority another fourth district decision, *Haist v. Scarp* 351 So. 2d 1120 (Fla. 4th DCA 1977) and signals its declination to follow the supreme court case, saying "But see *Akin v. State*...".

Second, *Nelson*'s authoritative pronouncement that failure to object is proof positive that the attorney had simply "made a judgement call" on "how the trial is going"also does not withstand examination. It is more probable that silence usually reflects apprehension that the court's ruling will be unpredictable, that an overrule will only exacerbate the problem, and a reluctance to highlight the improper remark by making it a feature for the jury. This motivation, self evidently, is not affected by whether counsel thinks the trial is going well or not. So, what does the *Nelson* court mean? If the trial is going well, don't object, but if it's going poorly, do object? Or is it vice versa? In fact, one can argue that this statement supports the theory that lawyers often remain mute to avoid the riskiness of objection. The *Nelson* theory that lawyers base their objection decisions, not upon whether the remark made is or is not improper, but on the perception of "how the trial is going", necessarily concedes that there are pitfalls to making objections. Otherwise, what is the "judgement call"? The court must mean that either (1) if your case is very strong, go ahead, risk making an objection; if the case is weak, do not take the risk of even greater harm, or (2) if you think you are

winning, don't lose points by objecting, while if you're losing anyway, make the objection; you haven't much to lose. Whichever of these opposite explanations was behind the *Nelson* court's thinking, it is based on an understanding that objections are sharp two edged swords. That defeats the *Nelson* suggestion that, in effect, one can tell whether or not a remark was highly prejudicial simply by whether or not any objection was made; no objection, no prejudice. This also means that *Nelson's* "skepticism" at the "agonized cries" of lawyers on appeal is not justified. The *Nelson* case is not well reasoned; yet it remains the fourth district's leading authority.

The Respondents argue that the repeated attacks on *Murphy* as a "liar" were not the personal opinions of defense counsel, but were justified by reference to facts in evidence. They support this position, however, not by citation to the facts in evidence, but by citation to one hundred pages of closing argument (Answer Brief, 13). They miss the point. The entire defense closing argument consists of UTC's attorney's opinion that Mr. Murphy was untruthful upon point after point. Citing the court to the closing argument does not justify the argument.

Respondents also attempt to mislead the court by citing out of context testimony. They have Murphy's own attorney quoted as saying Mr. Murphy is "stupid...can't be trusted...is lazy * * * is an incompetent." (Answer Brief, 13,14). What they left out is that Murphy's counsel was reading from a secret memorandum written by Murphy's

double dealing business partner, Mr. Hornsby. It was Hornsby who said these things of Murphy. Counsel read directly from Hornsby's memorandum at Tr.303, then paraphrased it, at 304-307. Respondents' attorney would have the court begin at 304, and overlook the quoted statements at 303.

Respondents attempt to justify defense counsel's vouching for Hornsby's honesty by inviting the court to read Tr. 2697-2703, (Answer Brief, 19), a reference which proves nothing about Hornsby's honesty. The perfidy of Mr. Hornsby was exposed at trial, so clearly, that when caught, he admitted he was "false and deceitful...to [his] business partner [Murphy]". (Tr. 2447)

Respondents dutifully adopt and repeat the diversionary strategy originated by UTC counsel regarding a document called the "Johnson letter". The strategy goes something like this. Alan and Howard "Red" Johnson are brothers. They hoped to make money selling OWLS. They knew that UTC and Hornsby had agreed to keep Murphy in the dark about potential sales until after Laser Holdings Ltd. acquired the OWL, and the Johnsons likewise agreed not to speak to Murphy. After Laser Holdings completed the purchase, however, Hornsby stonewalled the Johnsons also, and they had no opportunity to sell OWL vehicles. For retaliation, Red Johnson contacted Mr. Murphy and told what he knew. Murphy's business associate, Mrs. Kuhnel, was also present in a meeting with Johnson. Murphy asked Johnson to document his story.

Johnson asked Mrs. Kuhnel to write it up in letter format. She did. So much is not disputed.

Before filing suit, the undersigned took a sworn statement from Red Johnson to affirm the contents of the letter (R 329-396). In discovery, we produced the letter and the statement. The Respondents deposed both Johnson brothers and learned that the contents of the letter were truthful. The Petitioners, however, concluded that we could prove no damages from Hornsby's concealment of prospective sales from Murphy, could not prove that any sales contacts made by the Johnsons would have been productive, so no such damages were sought. With the testimony of the two brothers that UTC, Laser Ltd. and Hornsby had conspired to keep Murphy uninformed, the letter itself had no significance.

But UTC's counsel saw a way for the letter to have a life of its own at trial. Both Johnsons said in deposition that they did not sign the letter, yet a signature was on it. UTC itself would introduce the letter and proclaim that even though the contents were exactly as related by Red Johnson, it was a "forgery". That is how the events unfolded, with UTC's attorney saying "This letter is a lie" although there wasn't any fact in evidence, and none was mentioned, tending to disprove the facts expressed in the letter. He admitted that "we still don't have the slightest idea [i.e., no facts in

evidence] who signed this letter". Nevertheless, "Mr. Murphy created a forged document to use against my client . . . ". (Tr. 3407)

Now Mr. Hornsby ups the ante on improper argument. He states that accusing Murphy of forgery "was wholly supported by the evidence". There being no such evidence, he points to none. He next argues to the court something even more untruthful. He writes that Murphy's counsel told the jury that the letter "was key evidence" and that only in cross examination was it finally revealed that Mrs. Kuhnel "actually created the letter". (Answer Brief, 20) He knows that Murphy's counsel never placed any emphasis on the letter, and certainly never called it a "key" document. Murphy's counsel told the jury, in opening statement, that Johnson had contacted Murphy, later met with him and Mrs. Kuhnel, and that these discussions, not the letter, "started Mr. Murphy and Mrs. Kuhnel" to look into the background of all the [Johnson] information." Hornsby also knows it is untrue that the identity of the person who wrote the letter was only learned in cross examination. Murphy's lawyer informed the jury that Mrs. Kuhnel prepared the letter, at Tr. 297; Hornsby cannot have innocently overlooked this fact, for he later quotes the transcript whereat Murphy counsel referred to Mrs. Kuhnel's preparation of the letter (Answer Brief, 22).

The fourth district's reliance on the *Hagan* case, its misreading of *Tyus* and *Strickland*, and its adherence to the *Nelson* case, have caused it to apply an erroneous

review standard. The Defense closing arguments were so prejudicial as to require a new trial.

POINT III

THE RESPONDENTS' REPRESENTATION THAT MURPHY AGREED TO THE ERRONEOUS INSTRUCTION ON REASONABLE RELIANCE IS INCORRECT

The Respondents concede that the contradictory and erroneous jury instruction on "reasonable reliance" requires a new trial under the controlling decisions cited at Initial Brief, pp. 42-45. Indeed, they are so aware of the erroneous nature of the instruction that they even suggest that the Petitioners may have agreed to the error in the instruction on tactical grounds; that the Petitioners "had a free shot at the jury. * * * If they lost, they could attempt to capitalize [on the error in giving the incorrect instruction] to get a new trial." (Answer Brief, p. 29).

The Respondents' primary argument is premised on an incorrect concept, not supported in the record, that the Petitioners agreed to giving the wrong instruction. Their fall back position is that Petitioners' counsel did not perceive the error of the instruction at the time of the charge conference. The Respondents are completely in error on both arguments. First, in this case concerning fraudulent representations, the standard instruction regarding the Petitioners' right to rely on the Respondents'

statement without conducting a further investigation was of critical significance, recognized by all of the parties. The giving of a different instruction which directly contradicted the standard instruction is so unusual that it has no explanation other than plain error. The Court, in effect, compromised by giving two irreconcilable instructions to accommodate each party. The result, however, was to give the jury no accurate guidance at all.

To emphasize the advantage that UTC found in the erroneous instruction, its attorney made it a feature of his closing argument. (Tr. 3359-60). Petitioners' attorney, conversely, emphasized the correct, standard instruction in closing argument. (Tr., 3433). As lawyers, of course, we did not have the right to tell the jury that the judge would also give another, directly contradictory instruction, but that judge was wrong in so doing. We certainly perceived, instantly, the major problem that would be created by the erroneous instruction on "reasonable reliance."

Second, the Petitioners never agreed to the erroneous instruction. The Respondents miscite the record, out of context, to support their argument at Answer Brief, p.25. The sequence of events regarding this point was that, initially, the Petitioners submitted proposed jury instructions, including the standard reliance instruction. (Appendix 1). Next, UTC submitted its proposed additions to the Petitioners' jury instructions, including the erroneous instruction. (Appendix 2). The

Court directed counsel to confer, as is usually done, and to seek agreement on the instructions. Mark L. Mallios, Esq. of the Huff firm and Peter Bensinger, Esq., on behalf of UTC, and Mr. Sparler for Hornsby conducted this conference. Most instructions were standards, and were agreed to. A handful of instructions were in dispute and depended upon the Court's rulings. One of them was the Respondents' erroneous instruction on "reasonable reliance" which is contained in Appendix 2. The handwriting thereon is that of Mr. Wager "π Obj.," i.e. "Plaintiff objects." Mr. Wager received these instructions from Mr. Mallios so that Mr. Wager, who was Petitioners'' co-counsel and assistant at trial, would be prepared for the charge conference whenever it occurred. The conference did take place, at almost midnight on the last night of trial. The lawyers and the judge had been continuously at work since morning. (Evening session began at 6:05 p.m., Tr., 3008; about an hour later, with the directed verdict motions still unheard, the judge said, "I am going to make all these rulings tonight, but it would have been a lot better if I had had all these legal arguments a little more in advance. * * * I have no way of spending as much time on these at this stage as I would have * * * I really feel like I can't do a very good job making these rulings, but I will do the best I can." Tr., 3047). Much later, the charge conference begins (Tr., 3140) and concludes ten pages later, at 11:40 p.m. The Court decided to have the conference arguments off the record (Tr., 3140) and to announce his rulings, only, on

the record. After argument on the reasonable reliance instruction, the judge stated "I will give ITC's [sic, UTC's] instruction on reasonable reliance." (Tr., p. 3141). This is the erroneous instruction at issue in this appeal. Not one word suggests that the Petitioners agreed. The more obvious explanation is that the off record discussion consisted of argument regarding the reasonable reliance matter, followed immediately by the announcement that UTC's instruction would be given. Admittedly, it would have been more clear if the Court had added "over the Petitioners' objection" but he did not. Nor did Petitioners' counsel add those words. But the record certainly does not show Murphy's counsel affirmatively agreed to the erroneous instruction and therefore waived that point for appellate review.

The Respondents do not mention this record reference in their brief. Instead, they direct the Court to another colloquy nine pages and several rulings later for "proof" that the Petitioners' agreed to the erroneous instruction. The statement made by Mr. Wager at transcript p. 3149 was that, "This one has been agreed to, reasonable reliance, and the next one is yours." Whatever one makes of this sentence, it does not state that the Petitioners had changed positions and agreed with the erroneous instruction. The only sensible interpretation is that Mr. Wager was saying that "one" instruction had been agreed to and that was the Petitioners' correct, standard reasonable reliance instruction. The Respondents did not oppose this standard, they

only wanted to nullify it with their contradictory, erroneous instruction. Then Mr. Wager says, "The next one is yours" which means the erroneous instruction which was read by the court directly after the correct instruction. (Tr. 3451). There was no agreement to the erroneous instruction.

POINT IV

THE RESPONDENT, ROBOTICS II, OWNED AND CONTROLLED BY MR. HORNSBY, BREACHED THE CONSULTANCY AGREEMENT

The Respondents do not deny that the consultancy agreement required, by its terms, payment of up to $400,000.00 over five years and that nothing was paid. Their defense is in three parts; each of which is unsupported by their record cites, or by the weight of the evidence. The first defense is that the agreement was not meant to be enforced as it was a "wash" for a "loan" of $300,000.00 made as part of the $500,000.00 which Laser Holdings, Ltd. paid to Murphy and Hornsby.

Their sole "proof" of this is Mr. Hornsby's testimony that Murphy wasn't to do any consulting and wasn't to receive a penny from the agreement. This testimony is not surprising considering that it was Hornsby's company, Robotics II, which had assumed the obligation and wanted to avoid payment. They also ignore the testimony we cited in Initial Brief, 46-47, proving that Murphy, Laser Holdings and UTC did expect Murphy would have an ongoing role in sales and marketing. Hornsby, the self-

admitted "deceitful" business partner, cut Murphy out of the future income after closing, while Hornsby enjoyed an $80,000.00 per year contract (Tr. 2468,2896); which equaled the $400,000.00 which Murphy was to receive in five years under the consulting agreement.

The Respondent's sole argument on this issue is simply self serving Hornsby testimony. The Defendants set up this tactic, to pull out the "tax fraud" comments in closing argument. UTC affirmed the bona fides of the consultancy agreement in its pleadings "Plaintiffs were to be paid a minimum of $300,000.00 over five years to act as consultants..." Answer and Affirmative Defenses of UTC, defense #2, R. 1124-1135. They never mentioned the agreement in their two hour opening statement. They saved their highly improper remarks, and their changed position, for closing. Had the jury not been unfairly distracted and prejudiced by the "tax fraud" to which they would "be accessories" argument they would have found for the Plaintiffs on this count.

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.

Respectfully submitted,

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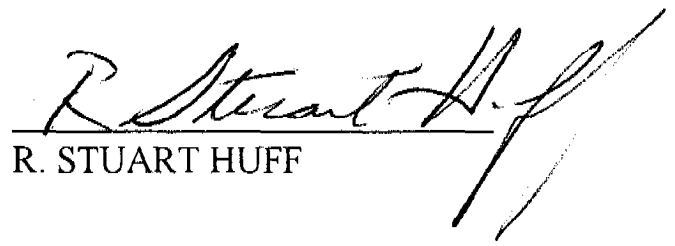
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief was mailed this 27 day of October, 1998 to David Jaynes, Esq., 120 South Olive Avenue, Suite 702, West Palm Beach, FL 33401.



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