IN THE CIRCUIT COURT FOR THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. 02-14638 CA 8

OTIS, J. MCDUFFIE,

Plaintiff,

vs.

JOHN W. URIBE, M.D.

Defendant.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY

Plaintiff Otis J. McDuffie, through undersigned counsel, responds to the notice of filing supplemental authority submitted by Defendant on August 27, 2010, in support of his motion for new trial on August 27, 2010.

Defendant has proffered to the Court the decision of *Fasani v. Kowalski*, 2010 WL 3324701 (Fla. 3d DCA Aug. 25, 2010), as a supplemental authority "relat[ing] to the issue of fundamental error caused by improper closing argument." Defendant's reliance on *Fasani* is misplaced.

Applying the dicta in *Fasani* to stifle unobjected-to argument in a case like *McDuffie* where, unlike *Fasani*, there is ample record evidence for the arguments and where the arguments are relevant, would be nothing short of Kafkaesque. Such an application is not sustainable under Florida law.

In *McDuffie*, Dr. Uribe lied under oath, and he admitted to that lie in the middle of trial. It was not just any lie. It was a lie that went to the heart of his liability defense at trial: his blaming

Mr. McDuffie's loss on Dr. Mills.[1] What's more, on multiple points all delineated in detail in McDuffie's closing argument, Dr. Uribe's testimony, his experts' testimony, and much of the record evidence at trial contradicted and undermined Defendant's arguments. In short, there was record evidence of fabricated defenses, misleading arguments, and lies.

The evidence of the defense's fabrications, misleading arguments, and lying are stubborn facts borne out for any fair reader of the trial record in this case. Ignoring this evidence does not make it disappear. Confronting it, however, is the solemn obligation of trial counsel; so, too, is arguing it to the jury. And that is exactly what plaintiff's counsel in *McDuffie* did.

In stark contrast to the inflammatory, irrelevant, unsupported, and almost entirely objected-to comments in *Fasani*, plaintiff's counsel's comments here (entirely un-objected-to, with one exception) were relevant and meticulously grounded in the record at trial.[2] Unlike *Fasani*, McDuffie's closing argument contained no irrelevant references or appeals to extraneous matters such as Picasso paintings, greed as a motive, or the economic status of the parties.[3]

Uribe's defense counsel, with 35 years of trial experience, was awake and alert at counsel table during closing argument. He did not object because he knew the record did, indeed, support plaintiff's counsel's argument. **Remarkably, Uribe has never argued to this Court that plaintiff's counsel's comments during closing argument were irrelevant or unsupported by the record at trial. Uribe has not made this showing for one reason: he cannot. The evidence is all there. The record supports each and every one of the comments made during closing argument.**

---

[1] Plaintiff served a Motion for Sanctions for Fraud on the Court in response to the Uribe lie on April 25, 2010. The Court denied Plaintiff's Motion.

[2] *See* Plaintiff's Memorandum in Opposition To Defendant's Motion for Judgment in Accordance with Motions for Directed Verdict and Alternative Motion for New Trial dated July 28, 2010, pp. 65-104; T. 30, T. 32.

Again, this is in stark contrast to *Fasani*, where the defendant successfully showed the comments were irrelevant and unsupported by the record. In *McDuffie*, Defendant has failed to meet the first prong of Justice Fred Lewis' clearly articulated requirements set forth in *Murphy v. Int'l Robotic Systems, Inc.*, 766 So. 2d. 1010 (Fla. 2000) (characterizations and conclusions, such as calling a witness or party a "liar" are not "improper" where "the evidence supports" the characterization or where the conclusion may "reasonably be drawn from the evidence"), and likewise failed to demonstrate how *Fasani* can be applied here.[4]

In a case like *McDuffie*, plaintiff's counsel is duty bound to expose the lies, uncover misleading arguments, and shine bright lights on fabricated defenses. Applying *Fasani* under such circumstances would be hostile to our system's commitment, through the adversarial process, to extinguishing falsehood in favor of truth. Applying *Fasani* to this case would be fundamentally wrong and unfair. Paraphrasing the words of Justice Lewis and the *Murphy* court, applying *Fasani* to this case would so damage the fairness of our system of justice that it could not be tolerated.

As the truth often does, McDuffie's closing argument hit hard. But it was far from error, and nowhere close to fundamental error. The defendant's motion for new trial should be denied.

RUSSOMANNO & BORRELLO, P.A.
Attorneys for Plaintiff
Museum Tower – Penthouse 2800
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 373-2101
Fax: (305) 373-2103

By: _____
Herman J. Russomanno (Fla. Bar No. 240346)
Robert J. Borrello (Fla. Bar No. 764485)

RATZAN & RUBIO, P.A.
200 South Biscayne Blvd., 54th Floor
Miami, Florida 33131
Telephone: (305) 374-6366
Fax: (305) 374-6755

By: _____
Stuart N. Ratzan (Fla. Bar. No. 911445)

[3] By comparison, Uribe and his counsel made multiple improper references to Uribe's financial condition and to the financial impact a verdict would have on him. [T. 28:27; T. 31:50, 54]

[4] In light of this, Plaintiff submits along with this pleading a revised Proposed Order Denying Uribe's Motion for New Trial.

Joel D. Eaton, Esquire
PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
Telephone: (305) 358-2800
Fax: (305) 358-2382

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was faxed and mailed on this 30th day of August, 2010, to: Charles Michael Hartz, Esquire, Attorney for John W. Uribe, M.D., George Hartz Lundeen, 4800 Le Jeune Road, Coral Gables, Florida 33146, and Wendy F. Lumish, Esquire, Carlton Fields, P.A., Attorneys for John W. Uribe, M.D., 4200 Miami Tower, 100 Southeast Second Street, Miami, Florida 33131.

Robert J. Borrello