

IMPROPER ARGUMENT

By Ted Babbitt

Gianifasani v. Kowalski, 35 Fla. L. Weekly D1924 (Fla. 3rd DCA, Aug. 25, 2010) is a perfect example of how not to argue a case. Kowalski had the misfortune of walking into an elevator and having one of the granite tiles separate from the wall and hit him on the head. The defendants, who owned and had constructed the elevator, wisely admitted liability. That admission did not stop the plaintiff's lawyer from making his central theme from opening statement to closing argument about the failure of the defendants to properly compensate his client and their "corporate arrogance and corporate greed" in creating the unsafe condition. Defendants objected over and over again to this kind of improper argument but their objections were overruled. There were times when Defendants simply did not object and ordinarily failure to object waives improper argument. Murphy v. Int'l Robotics, Sys., Inc., 766 So. 2d 1010 (Fla. 2000). Nevertheless, there comes a time when even unobjected to argument becomes fundamental error and this was one of those cases.

Among other things, counsel's argument included

"This is a case about, a company 420 Lincoln Road that wanted to make a couple of extra dollars."

"Why didn't they just send him to a doctor instead of just kicking him out on the road like a dog and telling him we're giving you nothing. . ."

"Is that doing the right thing? Giving him nothing and telling him to go away?"

And when someone got hurt, they said, you know what, yeah, we made a mistake but we're not going to give you anything.

They just did it. And afterwards we're

giving you nothing. How is that doing the right thing? This is nothing more than corporate arrogance.

What made these kinds of arguments worse was that defendants admitted liability. As the Court stated at Page 1925:

Indeed, because liability was admitted,
This trial should have been a trial
Solely on damages. Instead, it became
A wide-ranging attack on the appellants
Unrelated to the calculations of Kowalski's
Damages.

To make matters worse, plaintiff's counsel made the following argument with respect to his client's damages.

Now, members of the jury, you've got to understand that the brain is what separates people from animals. It's what makes us human. I mean I'm sure you've all hear the expression, well, he may be old but he still has his mind or memories are what make us who we are. If that was a Picasso painting that was in the elevator and it got ripped, no one would argue with paying \$80 million to replace it. Why is it any different when it's a man's brain?

Clearly argument comparing plaintiff's pain and suffering to some valuable object have long ago been held to be improper. Pub. Health Trust of Dade County v. Geter, 613 So. 2d 126, 127 (Fla. 3rd DCA 1993) (an eighteen million dollar Boeing 747 or an eight million dollar SCUD missile.) Carnival Corp. v. Pajares, 972 So. 2d at 979 (Fla. 3rd DCA 2007) (Van Gogh painting). These kind of arguments have been characterized as "value of life" arguments and have consistently been held improper.

While some but not all of these arguments were not objected to by the defendants, the Court finds at 1926 that:

Although “a single improper remark or argument might not be so prejudicial as to require reversal,” *Pajares*, 972 So. 2d at 979, we find here that the cumulative effect of Kowalski’s counsel’s numerous improper comments and arguments operated to deprive the appellants of a fair trial. See *Muhammad v. Toys “R” Us, Inc.*, 668 So. 2d 254, 259 (Fla. 1st DCA 1996) (“[T]he collective import of counsel’s personal injections, and irrelevant and inflammatory remarks, was so extensive as to have prejudicially pervaded the entire trial, precluding the jury’s rational consideration of the evidence and resulting in an unfair trial.”) Accordingly, a new trial is warranted.

A party cannot fail to object to improper argument and expect an automatic reversal. That practice was put to an end in *Murphy v. Int’l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000). Nevertheless, tossing out the window all caution and steaming ahead with clearly improper arguments unsupported by any part of the evidence puts at risk a successful verdict.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.