

OBJECTION DURING FINAL ARGUMENT, THE FINAL WORD

By Ted Babbitt

For years the District Courts of our State have had different opinions as to whether or not improper comments in final argument to which there was no contemporaneous objection could constitute the basis of a new trial. These disagreements are exemplified by the Third District's decision in Borden v Young, 479 So.2d 850 (Fla. 3<sup>rd</sup> DCA 1985, rev. denied 488 So.2d 832 (Fla. 1986) and Murphy v International Robotics Systems, Inc., 710 So.2d 587 (Fla. 4<sup>th</sup> DCA 1998). The Third District joined with the First and Fifth Districts and adopted a policy that the best way to curb improper argument was to allow appellate review of such argument even when objections were not timely raised. The Fourth District, on the other hand, in the words of Judge Klein in Murphy "all but closed the door" on appellate review in civil cases to unobjected to comments in final argument.

Those conflicting District Court opinions were recently resolved in Murphy v International Robotic Systems, Inc, 25 F.L.W. S610A (Fla. August 17, 2000). That case was essentially a contract dispute regarding the manufacturing of an underwater vehicle called an OWL. During final argument, the defense attorney repeatedly used the term "BS detector" stating that if the jury found for the plaintiff on one of the claims that the jury would be "accessories after the fact, to

tax fraud” and accused the plaintiffs of attempting to cash in on “a lottery ticket.” After a verdict for the defendants the trial court refused to grant a new trial based upon these comments and others to which no objection had been timely raised and the Fourth District affirmed. Based upon the conflict between that case and the decisions of the First and Third Districts, the Supreme Court took jurisdiction and established a new rule with respect to appellate review of unobjected to improper statements in final argument.

In a long and scholarly opinion authored by Justice Lewis, the Court established a four prong test for appellate review of unobjected to final argument. The Court concluded that in order for a trial court to grant a new trial on the basis of improper statements in final argument to which no timely objection had been raised, the party challenging the argument must show that it was improper, harmful, incurable and so damaged the fairness of the trial that the public’s interest in our system of justice required a new trial.

On the first test, that the challenged argument must be improper, the Court reflects on what is and is not improper:

The purpose of closing argument is to help the jury understand the issues in a case by ‘applying the evidence to the law applicable to the case.’ *Hill v State*, 515 So.2d 176, 178 (Fla. 1987). Attorneys should be afforded great latitude in presenting closing argument, but they must ‘confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence.’ *Knoizen v Bruegger*, 713 So.2d 1071, 1072 (Fla. 5<sup>th</sup> DCA 1998); see also

*Venning v Roe*, 616 So.2d 604 (Fla. 2d DCA 1993). Moreover, closing argument must not be used to ‘inflamm[e] the minds and passions of the jurors so that their verdict reflects an emotional response . . . rather than the logical analysis of the evidence in light of the applicable law.’ *Bertolotti v State*, 476 So.2d 130, 134 (Fla. 1985).

In discussing this subject, the Court discusses what is not improper argument. Examples of that include calling the witness a liar when there is sufficient evidence in the record to justify that statement. Also, the use of the personal pronoun “I” or words like “I think” or “I believe” are not, as pointed out by the Court, impermissible expressions of personal opinion but merely figures of speech. The Court points out that it is trial counsel’s duty to analyze the evidence and present reasonable interpretations and inferences based upon that evidence to the jury.

In reflecting upon the second prong of the four prong test that the argument must be harmful, the Court explained just what that means

Harmfulness in this context also carries a requirement that the comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury. Passing remarks of little consequence in the scope of a lengthy trial should find little sympathy if no contemporaneous objection is voiced. The extensiveness of the objectionable material is a factor to be considered in the harmfulness analysis. In sum, the improper closing argument comments must be of such a nature that it reaches into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments.

Clearly a passing remark in a lengthy trial is not the kind of harmfulness the Court had in mind. The statement has to be so bad that the trial court

concludes that the verdict could not possibly have been reached if it weren't for the improper comments.

The burden of establishing this four pronged test is obviously high. In addition to the argument being improper and harmful, it must also be determined to be incurable. The Court explains that phrase as well:

Should a complaining party establish that the unobjected-to closing argument being challenged is both improper and harmful, the party must then establish that the argument is Incurable. Specifically, a complaining party must establish that even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict.

It is hard to imagine an argument in a civil case that meets this test. Certainly a single statement in a lengthy trial can almost always be cured by the Court instructing the jury to disregard it. When taken together with the Court's definition of harmfulness, very few improper arguments would pass muster under the Court's new test.

The final requirement that the argument must be such that it so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial is even more stringent. The Court explains it as follows:

Should a complaining party establish that the unobjected-to argument being challenged was improper, harmful and incurable, the party finally must also establish that the argument so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial.

See *Hagan*, 666 So.2d at 586; Klein, *Baby with the Bath Water*, 26 Fla. St.U.L.Rev. at 122-23; *ct. Goldfuss*, 679 N.E. 2d at 1104 (holding that in civil cases, the plain error doctrine is applicable 'only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.' Although we do not specifically limit the types of improper argument that may fit within this category, we recognize that the category necessarily must be narrow in scope. For example, closing argument that appeals to racial, ethnic, or religious prejudices is the type of argument that traditionally fits within this narrow category of improper argument requiring a new trial even in the absence of an objection.

The significance of this last prong in the four prong test is brought home by the example used. Arguments that do not rise to the level of racial, ethnic or religious prejudice simply do not meet this prong of the test. What does all this mean? The Supreme Court has settled the dispute between the Fourth District, the First, the Third and the Fifth by finding that while it is still possible to appeal based upon unobjected to improper argument in a civil case, the chances of prevailing on that basis are indeed slim. The Court puts it as follows:

Although we have not absolutely 'closed the door' on appellate review of unpreserved challenges to closing argument, we have come as close to doing so as we believe consistent with notions of due process which deserve public trust in the judicial system.

The bottom line is that in Florida if you don't object on a timely basis to an argument that you consider improper, you have probably waived the right to a new trial on that basis.

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