

Service: Get by LEXSEE@
Citation: 106 W. Va. L. Rev. 819

106 W. Va. L. Rev. 819, *

Copyright (c) 2004 West Virginia Law Review
West Virginia Law Review

Spring, 2004

106 W. Va. L. Rev. 819

LENGTH: 11584 words

ARTICLE: CLOSING ARGUMENTS IN WEST VIRGINIA: A PRACTITIONER'S GUIDE

NAME: Brian J. Headley *

BIO:

* J.D. Candidate, West Virginia University College of Law, May 2004.

SUMMARY:

... A lawyer who accepts the responsibility of trying a case has the affirmative responsibility to clearly understand and follow rules governing closing argument. ... Furthermore, some arguments have been deemed so prejudicial or contrary to the interests of justice that their very existence constitutes plain error. ... Specifically, the Court explained that this suggestion was prejudicial because: 1) the entire damage award was predicated on the mental distress of the plaintiff; 2) the amount requested was mentioned in both the opening and closing arguments; and 3) the jury was not instructed as to how to calculate compensatory or punitive damages. ... " Therefore, even if the comment is not prejudicial in and of itself, such disclosure may contribute to reversal if the jury verdict is not supported by the evidence. ... Prior to trial, CSX proposed a jury instruction that sought to inform the jury of the effects of joint and several liability, arguing that the instruction was necessary for the jury to understand the potential results of their verdict. ... " The use of hypothetical examples in closing argument can also violate the golden rule. ... In other words, to constitute reversible error, the suggestion of insurance coverage or the lack thereof need not be explicit; implicit references are also prohibited. ... Another impermissible argument is one deemed "calculated to inflame." ...

TEXT:

[*819]

I. Introduction

A lawyer who accepts the responsibility of trying a case has the affirmative responsibility to clearly understand and follow rules governing closing argument. ¹

In the presentation of a case to a jury, one must be mindful that ultimate effectiveness is determined by an unbiased group of laymen who are not likely trained in law. Thus, arguments must be presented in a concise, easily understood manner. Although a lawyer may have spun the most impenetrable legal [*820] web, if a jury is unable to follow the logic, the argument is necessarily futile. Again, effectiveness lies in the minds of the jury.

The closing argument is an attorney's final occasion to present his or her client's case to the jury, one last attempt to explain the merits. Closing argument has been described as "the most significant vehicle for in-court attorney communication." ² Indeed, "the closing argument in the hands of a master can attain the loftiest plane of human communication and can move the trier of fact to the speaker's will." ³

Nevertheless, counsel must be aware that although this is an opportunity to speak virtually at will, there are some potential pitfalls that could jeopardize the case. This Note, therefore, is aimed at informing West Virginia practitioners of the existence of these forbidden arguments in civil cases. Part II explains the procedural characteristics, including an examination of closing argument error preservation and the standard of review. Part III details and categorizes those arguments that have been deemed impermissible by the West Virginia Supreme Court of Appeals (the "Court"). Finally, Part IV concludes this Note, offering a brief review of the arguments and some suggestions for practitioners.

II. Procedural Characteristics

Like most other areas of law, closing argument error preservation and review has its own set of rules. Thus, these vastly important procedural characteristics are the aim of this section.

Ordinarily, an objection by the opposing party is necessary to preserve the issue for appeal. ⁴ "A litigant may not silently

acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal."⁵ Failure to make a timely and proper objection to remarks of counsel made in the presence of the jury during the trial of a case constitutes a waiver of the right to raise the question thereafter, either in the trial court or in the appellate court.⁶ One of the primary purposes of this contemporaneous objection rule is to afford the trial court an opportunity to instruct counsel to refrain from further improper comment while subsequently instructing the jury to disregard such conjecture.⁷ **[*821]**

Nevertheless, the general requirement of contemporaneous objection has been relaxed significantly by the enactment of West Virginia Trial Court Rule 23.04(b).⁸ This rule suggests broad limitations on closing arguments and also specifically disfavors objections by counsel.⁹ As a practical matter, the "relaxation" of the contemporaneous objection rule may simply provide the court with a means of justification for its case-by-case determination of whether the argument at issue constitutes reversible error. Therefore, the prudent lawyer should most likely object when faced with an argument that may be questionable.

However, even if an attorney should fail to object, he or she may find solace in the clear potential for judicial activism by the Court. For example, although the Court has suggested that some lines of argument require an objection to preserve the issue, it has nonetheless reversed in the absence of objection.¹⁰ Furthermore, some arguments have been deemed so prejudicial or contrary to the interests of justice that their very existence constitutes plain error.¹¹ Rule 103(d) of the West Virginia Rules of Evidence permits a court to take "notice **[*822]** of plain errors affecting substantial rights although they were not brought to the attention of the court."¹²

Even so, practitioners should not make a practice of relying on the Court to act in the absence of an objection, as it has outwardly expressed a great unwillingness to enact the plain error doctrine except in extreme cases.¹³ In so doing, it has explained that in order to receive the benefit of the plain error doctrine, "there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings."¹⁴ Given these rather stringent requirements, an objection should certainly be made in order to prevent the Court from dismissing the appeal summarily.

Assuming the appeal receives more than a cursory treatment, the standard of review applied by the Court is abuse of discretion by the circuit court in either permitting or disallowing the argument.¹⁵ Although "a trial court has broad discretion in controlling argument before the jury,"¹⁶ such "authority does not go unchecked."¹⁷ Therefore, when the Court finds the lower court has abused its discretion, it will not hesitate to right the wrong that has been committed.¹⁸

III. Impermissible Arguments

This section points out and categorizes some particular arguments that the West Virginia Supreme Court of Appeals has warned against or deemed impermissible. The classifications are presented as a practical method for understanding and should not be viewed as concrete, unyielding demarcations. For the sake of simplicity and clarity, the impermissible arguments have been placed into three broad categories: value arguments, practical effects arguments, and legally unsound arguments. **[*823]**

A. The Value Arguments

This section details those impermissible arguments that relate to damages. In this area, there exist many potential obstacles of which a lawyer must be aware. An overriding theme of this section is that the lawyer who is overly specific regarding requests for damages jeopardizes his or her case. Although some jurors may feel that specific requests or calculation guides aid the decisional process, the Court has consistently found them objectionable, as this section bears out. And because damages are almost always the main goal of a civil suit, this is a most important consideration.

1. Mathematical Formula to Calculate Damages

In *Crum v. Ward*,¹⁹ the Court stated,

In an action for damages for personal injuries, an argument of counsel to the jury based on a mathematical formula, or fixed-time basis, suggesting a money value for pain and suffering is not based on facts, or reasonable inferences arising from facts, before the jury, and constitutes reversible error.²⁰

Such an argument is sometimes referred to as the per diem, unit of time, blackboard, or mathematical formula method for determining the value of pain and suffering.²¹ This line of conjecture, though impermissible, does require an objection in order to preserve the issue for appeal.²²

Crum involved an automobile accident in which the plaintiff was rear-ended by the defendant who was driving a tractor-trailer.²³ Plaintiff's injuries caused her to spend a week in the hospital, and, according to her expert witnesses, she would continue to experience pain and suffering for the remainder of her life.²⁴ Accordingly, plaintiff's counsel presented to the jury a formula that he suggested would adequately compensate the plaintiff for her injuries.²⁵ Plaintiff's counsel was permitted to write on a blackboard that the plaintiff was in the hospital for a total of fifteen days, for which he asked the jury to compensate in the amount of one hundred dollars per day. He then opined that the time **[*824]** between the accident and trial, a period of 301 days, should be worth twenty-five dollars per day. Finally, plaintiff's counsel posited that plaintiff would experience pain, suffering, and an inability to engage in normal activities for the remainder of her life expectancy, an expectancy that was speculated to be a period of 12,676 days based on expert testimony. For this, he requested three dollars per day. Adding these amounts on the blackboard, he came to a total requested amount of \$ 47,053.

Significantly, plaintiff's counsel informed the jury that the figures he presented were merely his calculations and that the jury itself was to come up with its own measure of damages based on the evidence.²⁶ Specifically, he told the jury, "I will set my own evaluation and you take your own, but I will set my own and leave it with you as a guide" and "I will place my value and you place your own."²⁷ The jury at trial returned a verdict in favor of the plaintiff for only \$ 11,000.²⁸ Nonetheless, the argument by plaintiff's counsel regarding a set formula was found to be reversible error²⁹ because "there is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries."³⁰ The Court explained that although the verdict should not be disturbed where no

prejudice exists, this rule favoring deference to the trial court's decision could not be applied where such a mathematical formula was erroneously permitted.³¹

There was a split of authority on whether such arguments should be permitted at trial when this case was presented to the Court.³² In fact, the dissenting opinion in Crum outlined the arguments both in favor of and in opposition to advancing such arguments at trial.³³ The majority thought, however, that [*825] the introduction of this argument may have improperly prejudiced the jury's deliberations and thus found this to be reversible error. West Virginia has since remained steadfast in its opposition to such arguments.³⁴

2. The "Racehorse Analogy"

As surprising as it may be, drawing an analogy between the value of losing a racehorse and that of losing a loved one has been a tactic employed in West Virginia on more than one occasion. In *Roberts v. Stevens Clinic Hospital*,³⁵ an action was brought under West Virginia Code section 55-7-6 for the wrongful death of a two-and-a-half year old child resulting from medical malpractice.³⁶ Plaintiff's counsel argued that if a racehorse worth ten million dollars was killed through the defendant's negligence, the measure of damages would be this very amount.³⁷ Plaintiff's counsel also made other comparisons in [*826] seeking an amount sufficient to compensate the parents for their loss, including references to winning the lottery and to the vast sums of money spent on the space program.³⁸ Notably, the jury awarded ten million dollars.

On appeal, the Court decided that the jury could have only concluded that its duty was to evaluate the deceased child's life and apply a monetary value thereto.³⁹ Although no objection was made by the defense, thus technically waiving the error, the Court felt compelled to reduce the jury's award of ten million dollars to three million, concluding that the closing argument was not entirely consistent with the wrongful death statute or the trial court's instructions.⁴⁰

While *Roberts* may have ultimately been decided on the fact that the arguments presented were not in accord with the applicable statute, there is further evidence that a "racehorse analogy" is impermissible. In *Rowe v. Sisters of the Pallotine Missionary Society*,⁴¹ the Court summarily skirted over the issue of the racehorse analogy, stating that the appellant's failure to object at trial effectively waived the issue.⁴² Justice Davis, however, dissented on this point, noting the record reflected that the issue had been properly preserved.⁴³ The dissent went on to specifically cite *Roberts*, adding that the analogy presented here "was expressly disapproved in *Roberts*."⁴⁴ Thus, it is clear that the use of such an analogy may be perilous and could constitute reversible error if properly preserved and appealed.

3. Suggesting a Verdict Amount for Non-Economic Damages

Similar to the preceding class of arguments, this class of argument also deals with suggesting an amount to the jury without any reasonable basis for the amount suggested. The rule was most succinctly stated in *Bennett v. 3 C Coal* [*827] Co.⁴⁵ where the West Virginia Supreme Court of Appeals held, in part, that disclosure to the jury of the amount requested in the complaint as compensation for non-economic damages would result in reversible error where the jury's verdict was obviously influenced by the amount suggested.⁴⁶ The suit was brought over the disturbance of a family gravesite, allegedly brought about by mining subsidence.⁴⁷ Plaintiff's counsel requested that the jury return a verdict in the amount of \$ 500,000 in punitive damages on top of the initial \$ 500,000 requested as compensatory damages because the defendant's acts were done "intentionally, knowingly and willfully."⁴⁸ Defense counsel objected and requested that the jury not be advised of any particular monetary amount.⁴⁹ The trial court overruled the objections, finding the suggestion of such an amount not seriously prejudicial or error per se.⁵⁰

The Court, however, disagreed.⁵¹ Although disclosing to the jury the amount sued for may not always be reversible error,⁵² the better practice is to avoid mentioning such amounts.⁵³ The *Bennett* decision seems to indicate that the Court will review such arguments on a case-by-case basis, as it listed four case-specific reasons why the suggestion of damages in this case amounted to reversible error.⁵⁴ Specifically, the Court explained that this suggestion was prejudicial because: 1) the entire damage award was predicated on the mental distress of the plaintiff; 2) the amount requested was mentioned in both the opening and closing arguments; and 3) the jury was not instructed as to how to calculate compensatory or punitive damages.⁵⁵ Most significant, however, was the fact that the jury was so obviously influenced by the suggestion from plaintiff's counsel.⁵⁶

The Court has clearly recognized that suggesting an amount to the jury should be avoided. However, the simple fact that such a figure is suggested does not necessarily ensure that the verdict will be reversed on appeal. This [*828] logic was best expressed when the Court explained that in "recognizing the proper function of the jury and, also, that damage awards in personal injury actions are necessarily somewhat indeterminate in character and amount, this Court, while not approving exposition of ad damnum clauses to the jury, does not reverse for this impropriety alone."⁵⁷ The Court has, however, cautioned attorneys that "while the impropriety of such argument is not prejudicial per se, it cannot be disregarded in considering the broader question of whether the verdict was excessive when compared with competent proof of damages."⁵⁸ Therefore, even if the comment is not prejudicial in and of itself, such disclosure may contribute to reversal if the jury verdict is not supported by the evidence.

4. Arguments Related to a "Cap" on Damages

Counsel should also be wary of seeking the "cap amount" on damages as the "target" for the jury's award. In *Foster v. Sakhai*,⁵⁹ the trial court ordered a new trial after plaintiff's counsel impermissibly requested that the cap on damages be the very amount awarded by the jury.⁶⁰ Specifically, counsel stated that with regard to damages related to "loss of enjoyment of life, mental anguish, and . . . fright . . ." the Court has instructed that whatever those items you have, a million dollars is the total. It cannot be above a million dollars, so that's the target."⁶¹

On appeal, the issuance of a new trial was reversed, as the Court determined that allowing a new trial on this basis "would produce 'manifest injustice.'"⁶² Noting that "mistrials in civil cases are generally regarded as the most drastic remedy and should be reserved for the most grievous error,"⁶³ the Court thought that the jury was adequately informed and understood that the million dollar figure constituted the upper limit for any award, not a "target."⁶⁴

Even so, the Court explained that it was "concerned that counsel's remarks could potentially be interpreted as a suggestion that the million dollar figure was a floor." ⁶⁵ Therefore, it is likely that, given the proper case and facts, [*829] the Court would find the suggestion of a statutory cap to be prejudicial error and reverse a jury verdict. Furthermore, the rationale of disallowing this line of reasoning would be very similar to the preceding class of arguments and could be justified thereon. It cannot be argued that seeking to recover the "cap amount" and suggesting an amount for non-economic damages are so entirely different that one constitutes prejudicial error while the other does not. Quite simply, the two are too similar to justify such a radical distinction. Thus, counsel would be wise to be cautious in this area. Again, the argument must be based on some competent proof of damages.

B. The Practical Effects Arguments

This class of argument asks jurors to consider the "practical effects" of their decision. In so doing, practitioners place before the jury improper considerations that generally tend to remove the focus from the applicable law and evidence presented at trial to emotional, personal, or technical considerations. Because the Court has indicated that such misguidance of the jury is impermissible, the cautious attorney should avoid these arguments.

1. Arguing the Effects of Joint and Several Liability

Under the doctrine of joint and several liability, "a plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault." ⁶⁶ Expressing this fact to the jury, however, is suspect at best.

In *Lacy v. CSX Transportation, Inc.*, ⁶⁷ plaintiff Lacy was a back-seat passenger in a vehicle driven by her daughter, Cacoe Sullivan. ⁶⁸ During the event in question, Sullivan ran a stop sign, went around a lowered gate arm onto the railroad tracks, and was struck by one of the defendant's trains, which was traveling approximately fifty miles per hour. ⁶⁹ From Sullivan's view, there were two locomotives traveling on the tracks at the same time, one moving faster than the other. ⁷⁰ Plaintiffs' theory of liability regarding CSX was that the railroad was negligent in allowing both fast-moving and slow-moving trains to approach the crossing in question simultaneously on its main-line tracks. ⁷¹ This, the plaintiffs maintained, caused the warning system to be ineffective, as local residents [*830] had become accustomed to prolonged waits based on slow-moving trains. ⁷²

Prior to trial, CSX proposed a jury instruction that sought to inform the jury of the effects of joint and several liability, arguing that the instruction was necessary for the jury to understand the potential results of their verdict. ⁷³ The trial court refused this instruction but decided to allow counsel for the defense to "argue joint and several liability and 'point out the intrigue.'" ⁷⁴ Plaintiffs' counsel objected and was overruled. ⁷⁵ During closing arguments, defense counsel argued that the familial relationship between those involved in the accident would prevent Lacy from seeking to collect from her daughter; therefore, any liability found on behalf of CSX would, in essence, render the railroad totally responsible for the accident. ⁷⁶ Despite this conjecture, the jury determined that Sullivan was ninetyseven percent negligent; CSX was one percent negligent; and, inexplicably, that Lacy and Brooks, mere passengers in the car, were each also one percent negligent. ⁷⁷

Despite a split of authority on whether informing juries of the effects of joint and several liability is permissible, ⁷⁸ the Court held that [*831]

it is generally an abuse of discretion for the trial court to instruct the jury or permit argument by counsel regarding the operation of the doctrine of joint and several liability, where the purpose thereof is to communicate to the jury the potential post-judgment effect of their assignment of fault. ⁷⁹

In so holding, the Court distinguished the rule announced in *Adkins v. Whitten*, ⁸⁰ which allows the trial court to instruct the jury on the law of comparative negligence. ⁸¹

The Court concluded that such argument about potential postjudgment effects of a verdict is unwarranted, as "a defendant cannot be permitted to argue against a finding of fault based upon misleading speculation about the possible ramifications of the doctrine's application." ⁸² Furthermore, the argument at issue ignored the fact that CSX would have a right of comparative contribution against Sullivan, even if it were called on to pay the entire verdict. ⁸³

On appeal, CSX urged that even if this argument should have been disallowed, its admittance was harmless error because the jury nevertheless found it one percent liable. ⁸⁴ However, because the Court was "left with grave doubts about the effect of such argument on the jury's findings in this case," it concluded that this was not harmless error and did warrant reversal. ⁸⁵

Thus, practitioners should refrain from arguing the effects of joint and several liability in closing arguments. Even if the jury is outwardly unmoved by the merits of the argument, the Court is likely to conclude that this is reversible error. Furthermore, this argument may be viewed and interpreted more broadly as a prohibition against "misstatements of law," as it asks the jury to predict occurrences following the judgment and account for considerations irrelevant to the merits of the case. Although most cases involving "misstatements of law" occur in the criminal context, other jurisdictions have recognized that these are [*832] improper during closing argument. While counsel does have a right to explain the law, he or she has a duty to do so correctly. ⁸⁶

2. Golden Rule Arguments

A "golden rule" argument "suggests to jurors that they put themselves in the shoes of one of the parties, and is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence." ⁸⁷ West Virginia adheres to this general rule, as this line of argument has been widely condemned as improper. ⁸⁸ As usual, in order to preserve this error for appeal, an objection is required. ⁸⁹

A common example of an argument found to be improper involves an attorney asking the jury members to place themselves in the position of the plaintiff and award the amount of damages that they themselves would find sufficient. ⁹⁰ The rationale behind disallowing such an argument is that "the function of the jury is to decide according to the evidence, not according to how its members might wish to be treated." ⁹¹ The use of hypothetical examples in closing argument can also violate the golden rule. ⁹²

One should be clear, however, that to be deemed impermissible, the argument must center on financial responsibility and hypothetically request the jury to consider the amount they would wish to receive under similar circumstances. ⁹³ That is to say, it is not improper to request the jury members to use their own common, everyday experiences in order to judge the liability of an [*833] actor. ⁹⁴ Thus, it is permissible to ask the jury to draw upon their own personal experiences and knowledge but impermissible to ask them to do so directly. This creates a confusing, impractical, and rather poorly justified distinction. When asking the jury members to consider their own experiences, is an attorney not simply indirectly requesting that the jury members put themselves in the shoes of the victim? In practice, the outcome is not likely to differ based on the construction of the question placed before the jury. It may, however, jeopardize a trial by subjecting it to reversal based on this technicality. Although a plaintiff's attorney may want the jury to sympathize with his or her client, such requests for sympathy must not cross this delicate line. Asking the jury to "do unto others" is simply not proper.

3. References to Insurance Coverage

Rule 411 of the West Virginia Rules of Evidence is a longstanding rule against referring to the insured status of a party at trial. ⁹⁵ This prohibition has been recognized in numerous opinions. ⁹⁶ In *Graham v. Wriston*, ⁹⁷ the Court explained:

The jury should not be apprised in any way that the defendant is not insured against liability, not only because such fact is immaterial to any proper issue in the case, but also because of the tendency such fact may have to cause the jury out of sympathy for the defendant to relieve him improperly from liability, or to return in favor of the plaintiff a verdict which is inadequate in amount. ⁹⁸

Furthermore, if an attorney clearly implies that his or her client is insured, that too may constitute reversible error. ⁹⁹ In other words, to constitute reversible error, the suggestion of insurance coverage or the lack thereof need not be explicit; implicit references are also prohibited.

Even so, the Court has recognized that where the word "insurance" is inadvertently mentioned at trial and not by design of the plaintiff or his counsel, [*834] this will not necessarily constitute reversible error. ¹⁰⁰ Furthermore, an attenuated connection between a statement at trial and the issue of insurance coverage will be insufficient for reversal. ¹⁰¹ As with most of the other impermissible arguments, an objection is ordinarily required in order to preserve the issue for appeal. ¹⁰²

Nevertheless, where one party introduces his or her financial status, the other party is free to rebut the assertion with evidence of insurance coverage that is contrary to the prior testimony. For example, in *Wheeler v. Murphy*, ¹⁰³ the Court held that the trial court had abused its discretion by refusing to permit evidence of the tortfeasor's liability insurance to rebut the tortfeasor's proffered evidence of meager finances. ¹⁰⁴ Thus, it appears that if a party voluntarily places the matter in dispute, the general prohibition against evidence of insurance coverage is abrogated.

4. Arguments Calculated to Inflamm

Another impermissible argument is one deemed "calculated to inflame." The general rule was stated in the seminal *Crum* case, ¹⁰⁵ where the Court announced:

While great latitude is allowed argument of counsel, they should not be permitted to excite and inflame the minds of the jury against one of the litigants, nor appeal to their passions and prejudices, and if, when such an argument is made at the trial court is appealed to, it fails to take proper steps to correct its ill tendencies, and an exception is taken at the proper time, it is good ground for reversing the judgment and setting aside the verdict. ¹⁰⁶

[*835] In application, this appears to be an equitable rule designed to prevent the jury from deciding the case on something other than neutral facts.

For example, in *Peck v. Bez*, ¹⁰⁷ plaintiff's counsel told the jury during closing argument: "You get a fellow [the defendant] like that who has filched out eighty thousand dollars from the people over there [the plaintiffs]." ¹⁰⁸ Defense counsel then objected, to which the trial court remarked to the jury, "Counsel I think possibly have more or less leeway in regard to things like that. I do not believe that any statement would be misconstrued by the jury." ¹⁰⁹ On appeal, the Court found these remarks were clearly "designed to prejudice the jury" and reversed on this error. ¹¹⁰ Further, the Court noted that "the conduct of counsel was improper and tended to violate the dignity and integrity of the trial court . . . and went beyond the scope of the issues which were before the court and the jury." ¹¹¹

Similarly, in *Groves v. Compton*, ¹¹² the Court reversed, finding it error for defense counsel to state during closing argument that additional parties were not in the lawsuit because they were friends of the plaintiff. ¹¹³ In so doing, the Court reiterated its established rule that "it is improper for counsel to argue to the jury why a party has not been brought into the lawsuit or that an absent party is solely responsible for the accident since the evidence surrounding such a party's liability has not been fully developed." ¹¹⁴ Furthermore, the comment at issue was contrary to a prior stipulation agreed to by the defense. ¹¹⁵

Ultimately, the trial court has discretion in determining when counsel's comments warrant a new trial, and it will not be reversed absent an abuse of this discretion. ¹¹⁶ For example, in *Mackey v. Irisari*, ¹¹⁷ the Court concluded that although the remark "may not have been appropriate," it did not inflame or [*836] prejudice "the jury to the extent which would mandate reversal." ¹¹⁸ This type of appeal seems best reserved for outrageous cases or used as a last resort.

Notably, a wide range of arguments exist that could fall under this category. Many such arguments are frequently encountered in criminal law but could have a carryover application under the right circumstances. In this vein, other jurisdictions have ruled that it is impermissible for an attorney to attack opposing counsel in closing, ¹¹⁹ to state personal opinions or beliefs as to issues in the case, ¹²⁰ or to question a witness's credibility by using inflammatory language. ¹²¹ The latter is representative of a situation in which a lawyer may be engaged in a wholly permissible line of argument yet get reversed on appeal for being "inflammatory" before the jury. Because of the potential for confusion and an inability of attorneys to meaningfully edit their arguments to excise potentially "inflammatory" language, the Court should more concretely explain the strictures of this

prohibition. Without such revision, this impermissible argument appears to only provide a broad catch-all without any true definition or any significant likelihood of consistent results.

C. Legally Unsound Arguments

This class of arguments preys on the jury's ignorance of the legal process. There are many issues intentionally decided outside the jury's presence, and it is impermissible for an attorney to breach this confidentiality. Any attempt to persuade the jury by presenting arguments that have previously been [*837] addressed by the court should be strictly avoided, as the introduction of such arguments may only serve to confuse the merits of the case.

1. Arguing Facts Not in Evidence

Arguing outside of the evidence is the most common source of objection during closing argument. ¹²² "Though wide latitude is accorded counsel in arguments before a jury, such arguments may not be founded on facts not before the jury, or inferences which must arise from facts not before the jury." ¹²³ The widely accepted rule, stated more succinctly, is that although attorneys are afforded wide latitude, that latitude should have some logical nexus in deduction or analogy to the evidence and facts. ¹²⁴ Therefore, even in the context of closing arguments, counsel must be cautious to avoid making arguments based on facts not reasonably placed before the jury. This rule is quite important; inferences to be drawn from the facts in a case have been referred to as "the key to making an effective closing argument." ¹²⁵

In *Gardner v. CSX Transportation Company*, ¹²⁶ the defendant sought to reverse the trial court's ruling that had prevented the defendant from arguing to the jury that it could infer that the plaintiff's conduct was intentional. ¹²⁷ At issue in the case was the plaintiff's car, which had stalled on the defendant's railway crossing and was hit by a train. ¹²⁸ Counsel for the defense sought to argue that the plaintiff had intentionally placed his car on the tracks because the vehicle may have had more value in this demolished state than it did when it was operational. ¹²⁹ Specifically, the argument sought to be advanced by defense counsel was that "the tragic 'coincidence' that this vehicle happened to stall directly astraddle these railroad tracks at the precise moment a train was approaching is in and of itself cause to question the motive of plaintiff Belcher." ¹³⁰ Counsel also mentioned that the plaintiff had admitted filing and receiving a claim on the damaged automobile. ¹³¹ However, the Court found that the trial [*838] court had not erred in prohibiting such an argument, finding that this line of reasoning was "not supported by any facts presented to the jury." ¹³²

Simply put, "a jury will not be permitted to base its findings of fact upon conjecture or speculation." ¹³³ Thus, closing arguments based on facts or evidence not presented at trial or on unreasonable inferences may prove the basis for prejudicial error and reversal on appeal. This argument is objectionable because the purpose of closing argument is to persuade the jury with the evidence admitted at trial. ¹³⁴ Unsupported remarks amount to unsworn testimony that is not subjected to cross-examination, an idea contrary to the West Virginia justice system.

2. Denial of Motion for Directed Verdict

It is highly improper for counsel to argue before the jury that the court denied opposing counsel's motion to direct a verdict or that the court submitted the case to the jury after considering the losing party's motion. ¹³⁵ In the absence of corrective action, such a tactic is viewed as highly prejudicial, thereby necessitating the issuance of a new trial. ¹³⁶

In West Virginia, this rule was recognized in *Arnoldt v. Ashland Oil* ¹³⁷ when the Court explained that "counsel is prohibited from arguing to a jury that the court has denied a party's motion for directed verdict or that the court submitted the case to the jury after considering and rejecting such a motion." ¹³⁸ In this case, plaintiff's counsel, over the defendant's objection, essentially revealed to the jury that the defense counsel had moved the court to dismiss the suit, which Judge Kaufman denied. ¹³⁹ Thus, reasoned plaintiff's counsel, "we've met the burden, at least for your consideration." ¹⁴⁰ Plaintiff's counsel also made mention of the fact that none of the members of the jury were trained in the law or had experience as jurists. ¹⁴¹ This clear attempt to appeal to the jury on the basis of the judge's expert opinion of the case was held to be reversible error. ¹⁴² [*839]

In general, it would be wise to refrain from informing the jury of a judge's rulings. The language in *Arnoldt* makes clear that the Court looks quite unfavorably upon arguments suggesting the jury follow the "expert's" lead. This rule is sound, as it truly seems unfair for an attorney to apprise the jury of a judge's ruling. Without legal training, the opportunity for misunderstanding is great.

3. Argument Counter to In Limine Ruling

Although not limited only to closing arguments, an attorney's violation of the trial court's ruling on an in limine motion may serve as reversible error. The Court in *Honaker v. Mahon* ¹⁴³ stated as much when it ruled that "a deliberate and intentional violation of a trial court's ruling on a motion in limine, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict." ¹⁴⁴ Furthermore, the Court stated such a violation may constitute plain error, thus alleviating the necessity for objection on the matter to preserve the issue on appeal. ¹⁴⁵

However, the trial court's decision will, nonetheless, be afforded significant deference and will only be reversed if counsel's remarks are "reasonably calculated to cause, and probably did cause" the jury to enter an improper judgment in the case. ¹⁴⁶ Additionally, counsel for either the plaintiff or defendant would be well advised not to violate such a ruling. In addition to potentially jeopardizing the outcome of the case at hand, the West Virginia Supreme Court of Appeals has reminded trial courts that a party who violates a motion in limine is subject to all legally available sanctions, including contempt. ¹⁴⁷

There is a split of authority in federal and state courts on whether a motion in limine preserves an error for appeal or whether further objection is necessitated. ¹⁴⁸ However, in *Wimer v. Hinkle*, ¹⁴⁹ the West Virginia Supreme Court [*840] concluded that an objection is not ordinarily necessary. ¹⁵⁰ Even so, if there is a "significant change in the basis for admitting the evidence," an objection may be required. ¹⁵¹ As a practical consideration, it may be wise to object again at trial so as to avoid the possibility that the Court would find "significantly changed circumstances" and refuse to hear the argument on appeal.

Overall, it appears this rule is sound. An argument counter to an in limine ruling ultimately constitutes arguing facts not in evidence. Further, even if counsel disagrees with the judge's pretrial ruling, it seems best to argue that point on appeal, if necessary, rather than compound the problem.

IV. Conclusion

Overall, impermissible arguments in West Virginia offer the Court an invitation to engage in line-drawing. Where the Court feels the case has been decided justly, it need only cite the "considerable discretion" afforded the trial court or note that the argument at issue was not "sufficiently prejudicial" to warrant a new trial. However, where the Court wishes to reverse the result reached below, it will not hesitate in finding an argument "speculative," "inflammatory," or "prejudicial." Thus, it becomes difficult to predict with any degree of certainty whether the Court will find a particular argument to be reversible; this area of the law will most definitely be decided on a case-by-case basis. Nevertheless, it may be wise to add an appellate argument based upon the opposition's closing on the chance that the Court may find that a particular set of facts and circumstances tends to produce "manifest injustice."

Practitioners should be aware that many of the cases that include an appeal concerning the substance of summation address the issue in no more than a few sentences with little to no analysis.¹⁵² Thus, many of the outrageous antics that one may expect to find addressed by the Court are likely dealt with at the trial court level and elicit no discussion on appeal. In any event, it would be [*841] most helpful if the Court would engage in a more thorough analysis of these issues when presented. Absent such analysis, it simply appears that the Court acts as an ultimate fact-finder.

Legal Topics:

For related research and practice materials, see the following legal topics:

[Criminal Law & Procedure](#) > [Appeals](#) > [Reversible Errors](#) > [Evidence](#)
[Torts](#) > [Damages](#) > [Compensatory Damages](#) > [Pain & Suffering](#) > [Emotional & Mental Distress](#) > [General Overview](#)
[Torts](#) > [Damages](#) > [Punitive Damages](#) > [Conduct Supporting Awards](#)

FOOTNOTES:

¹ Gary D. Fox, *Objectionable Closing Argument: Cases and Solutions*, Fla. B.J., Dec. 1996, at 43.

² Valerie P. Hans & Krista A. Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 *Ind. L.J.* 1297, 1303 (1993).

³ H. Mitchell Caldwell et al., *The Art and Architecture of Closing Argument*, 76 *Tul. L. Rev.* 961, 965 (2002).

⁴ *Yuncke v. Welker*, 36 S.E.2d 410 (W. Va. 1945).

⁵ Syl. Pt. 1, *Maples v. W. Va. Dep't Commerce*, 475 S.E.2d 410 (W. Va. 1996).

⁶ *Id.*

⁷ See, e.g., *Boyd v. French*, 147 F.3d 319, 328-29 (4th Cir. 1998).

⁸ *Rowe v. Sisters of the Pallotine Missionary Soc'y*, 560 S.E.2d 491, 502 (Davis, J., dissenting).

⁹ See W. Va. Trial Ct. R. 23.04(b). In pertinent part, the rule provides:

Counsel may refer to the instructions to juries in their argument, but may not argue against the correctness of any instruction. The court in its discretion may reread one or more of the instructions. Counsel may not comment upon any evidence ruled out, nor misquote the evidence, nor make statements of fact dehors the record, nor contend before the jury for any theory of the case that has been overruled. Counsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection. No portion of a lawbook shall be read to the jury by counsel.

Id.

¹⁰ See, e.g., *Roberts v. Stevens Clinic Hosp.*, 345 S.E.2d 791, 798-99 (W. Va. 1986) (reducing a jury award from ten million to three million dollars despite defense counsel's failure to object at trial).

¹¹ See, e.g., *Honaker v. Mahon*, 552 S.E.2d 788, 795 (W. Va. 2001). This practice differs from that found in other states in which there is a bright-line rule that if there is no objection, the error is waived. See, e.g., *Copeland v. City of Yuma*, 772 P.2d 1160, 1162-63 (Ariz. Ct. App. 1989); *Kempner v. Schulte*, 885 S.W.2d 892, 894 (Ark. 1994); *Rego Co. v. McKown-Katy*, 801 P.2d 536, 540 (Colo. 1990); *Whitley v. Gwinnett County*, 470 S.E.2d 724, 730 (Ga. Ct. App. 1996); *Johnson v. Emerson*, 647 P.2d 806, 811 (Idaho Ct. App. 1982) (finding that objection to improper closing argument is timely if made before case is submitted to the jury); *Siler v. City of Kansas City*, 505 P.2d 765, 766 (Kan. 1973) (finding that improper closing argument was not available as basis for reversing judgment where counsel for the party seeking relief did not object, request a curative instruction, or move for a mistrial based on such improper argument); *Cooper v. United S. Assurance Co.*, 718 So. 2d 1029, 1037-39 (La. Ct. App. 1998).

¹² W. Va. R. Evid. 103(d).

¶13 As previously noted, however, this "great unwillingness" may ultimately depend on the underlying merits of the case, rather than a technical objection requirement, as this somewhat amorphous area of the law is subject to judicial activism. See Roberts, 345 S.E.2d at 798-99.

¶14 Syl. Pt. 7, State v. Miller, 459 S.E.2d 114 (W. Va. 1996). This doctrine has equal application in civil cases. E.g., Honaker, 552 S.E.2d at 795 (applying this same test in a dispute arising from an automobile accident).

¶15 See, e.g., Lacy v. CSX Transp., Inc., 520 S.E.2d 418, 427 (W. Va. 1999).

¶16 Dawson v. Casey 364 S.E.2d 43, 47 (W. Va. 1987).

¶17 Lipscomb v. Tucker County Comm'n, 527 S.E.2d 171, 174 (W. Va. 1999).

¶18 Rollyson v. Jordan, 518 S.E.2d 372, 383 (W. Va. 1999).

¶19 122 S.E.2d 18 (W. Va. 1961).

¶20 Id. at 20, Syl. Pt. 5.

¶21 Id. at 23.

¶22 Id. (noting that, although the argument was both timely and sufficiently objected to by defense counsel, the trial court allowed this line of argument).

¶23 Id. at 20-21.

¶24 Id. at 22-23.

¶25 Id.

¶26 Id.

¶27 Id. at 22.

¶28 Id. at 20. It should be pointed out, however, that the effect of contributory negligence was also at issue in the case, so the jury award may have been reduced proportionately. Id.

¶29 Id. at 27.

¶30 Id. at 24.

¶31 Id. at 23-24.

¶32 See, e.g., Olsen v. Preferred Risk Mut. Ins. Co., 354 P.2d 575 (Utah 1960).

¶33 Crum, 122 S.E.2d at 31-33 (Haymond, Pres., dissenting).

The reasons . . . in opposition to such argument are in substance: (1) That there is no evidentiary basis for converting pain and suffering into monetary terms; (2) that it is improper for counsel to suggest a total amount for pain and suffering, and therefore wrong to suggest per diem amounts; (3) that to do so amounts to the attorney giving testimony and expressing opinions and conclusions on matters not disclosed by the evidence; (4) that juries frequently are misled by such argument to make excessive awards and that admonitions of the court that the jury should not consider such argument as evidence do not erase all their prejudicial effect; and (5) that after such argument a defendant is prejudiced by being placed in the position of attempting to rebut an argument which is not based on the evidence, that if he does not answer in kind the argument of counsel for the plaintiff he suffers from its effect on the jury, and that if he so answer he impliedly approves that type of argument in evaluating a monetary recovery for pain and suffering as an element of damages.

Id. at 32-33 (Haymond, Pres., dissenting).

The reasons stated in the same opinion in favor of such argument are in substance: (1) That it is necessary that the jury be guided by some reasonable and practical considerations; (2) that a trier of facts should not be required to determine the matter in the abstract or to do so by a blind guess; (3) that the absence of a yardstick at least makes questionable the contention that the suggestion of a monetary amount misleads the jury; (4) that the argument that the evidence fails to provide a foundation for per diem suggestion is unconvincing because the jury must, by that or some other process of reasoning, estimate and allow a proper amount for pain and suffering or other like element of damages; (5) that the suggestion by counsel that the evidence as to pain and suffering justifies allowance of a certain amount, in total or per diem figures, does no more than present one method of reasoning which the trier of facts may employ to aid him in making a reasonable and sane estimate; (6) that such per diem argument is not evidence and is used only as an illustration and suggestion; (7) that the asserted danger of such suggestion being mistaken for evidence is an exaggeration, and that such danger, if present, can be dispelled by an instruction by the court; and (8) that when counsel for one side has made such argument opposing counsel is equally free to suggest his own amounts as inferred by him from the evidence relating to the condition for which damages are sought.

Id. at 33 (Haymond, Pres., dissenting) (citing Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959).)

¶34 See, e.g., Foster v. Sakhal, 559 S.E.2d 53, 67 (W. Va. 2001); Hewett v. Frye, 401 S.E.2d 222, 225-26 (W. Va. 1990).

¶n35 345 S.E.2d 791 (W. Va. 1986).

¶n36 Id. at 793.

¶n37 Id. at 799.

¶n38 Id. In total, it seems that counsel presented several different situations that involved great sums of money in order to impress upon the jury that a multi-million dollar verdict may not be out of line with the parents' actual loss.

¶n39 Id.

¶n40 Id. at 798-99.

¶n41 560 S.E.2d 491 (W. Va. 2001).

¶n42 Id. at 501 n.6.

¶n43 Id. at 501. (Davis, J., concurring in part, dissenting in part). Justice Davis went to great lengths to spell out exactly how the objection had been made, the ruling of the trial court, and how the objection was within the requirements of Rule 23.04(b). Id. at 502-03 (Davis, J., concurring in part, dissenting in part). This situation is indicative of a practitioner's difficulty in knowing exactly what is required and what is sufficient for preservation. Thus, as a practical matter, lawyers should strive for clarity and thoroughness in order to avoid meeting the same fate as the appellants in Rowe.

¶n44 Id. at 502.

¶n45 379 S.E.2d 388 (W. Va. 1989).

¶n46 Id. at 397.

¶n47 Id. at 390.

¶n48 Id. at 395. This argument was presented by plaintiff's counsel in both his opening statement and closing argument.

¶n49 Id.

¶n50 Id. at n.7.

¶n51 Id. at 397.

¶n52 See Jordan v. Bero, 210 S.E.2d 618, 619 (W. Va. 1974).

¶n53 Id.

¶n54 Bennett, 379 S.E.2d at 397.

¶n55 Id.

¶n56 Id.

¶n57 Jordan, 210 S.E.2d at 629; see, e.g., Ferguson v. R.E. Ball & Co., 173 S.E.2d 83 (W. Va. 1970); Peck v. Bez, 40 S.E.2d 1 (W. Va. 1946); Nees v. Julian Goldman Stores, Inc., 154 S.E. 769 (W. Va. 1930); Looney v. Norfolk & W. Ry. Co., 135 S.E. 262 (W. Va. 1926); Keathley v. Chesapeake & Ohio Ry. Co., 102 S.E. 244 (W. Va. 1919).

¶n58 Abdulla v. Pittsburgh & Weirton Bus Co., 213 S.E.2d 810, 823 (W. Va. 1975).

¶n59 559 S.E.2d 53 (W. Va. 2001).

¶n60 Id. at 65.

¶n61 Id. (emphasis added).

¶n62 Id. at 66.

¶n63 Id. at 65-66 (citing Pasquale v. Ohio Power Co., 418 S.E.2d 738, 742 (W. Va. 1992).)

¶n64 Id. at 66.

¶n65 Id.

¶n66 Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679, 684 (W. Va. 1982).

¶n67 520 S.E.2d 418 (W. Va. 1999).

¶n68 Id. at 423. The other passengers in the car were Richard Brooks (Sullivan's fiancée) and the couple's infant son, who sat in the back with Ms. Lacy. Id.

¶n69 Id.

¶n70 Id. at 423-24.

¶n71 Id. at 424.

¶n72 Id. Plaintiffs alleged that CSX's flawed warning system "resulted in the activation of the crossing's flashing lights and gate arms when no trains were in hazardous proximity." Id. Apparently, plaintiffs attempted to justify Sullivan's actions by asserting that in lieu of waiting an inordinate amount of time for the crossing's gate arms to go up, her evasive maneuvers were reasonable due to previous encounters with slow moving trains.

¶n73 Id. at 426. The requested instruction stated: "You are instructed that West Virginia recognizes the principle of law known as joint and several liability, which provides that any party against whom a finding of negligence is made can be held responsible for the entire verdict." Id. at 426 n.9.

¶n74 Id. at 426.

¶n75 Id. Objections were made both prior to trial and then again immediately before closing arguments. Id.

¶n76 Id. at 427. In pertinent part, counsel argued, "This is not a case where we have two plaintiffs suing two defendants. This is a case in which the family is trying to get money from the railroad. Tanya Lacy doesn't want anything from her daughter." Id. The attorney continued, explaining that a finding that CSX was even one percent negligent would mean that the plaintiffs could collect the entire damage award from the defendant. Id. Thus, counsel warned:

So when you go back into that jury room and fill out this verdict form, any finding on the part of CSX, 1 percent, 10 percent, 50 percent, 100 percent, it's the same thing. One percent is, in essence, telling CSX, you are completely and totally responsible for this accident. So you have two choices . . . , you can find this accident was solely Cacao Sullivan's fault, or solely CSX's fault, because any split and they're going to come looking for us.

Id.

¶n77 Id. at 426.

¶n78 Compare Kaeo v. Davis, 719 P.2d 387, 396 (Haw. 1986); Luna v. Shockey Sheet Metal & Welding Co., 743 P.2d 61, 64-65 (Idaho 1987); DeCelles v. State ex rel. Dep't of Highways, 795 P.2d 419, 421 (Mont. 1990) (permitting attorneys to inform juries about joint and several liability effects, as juries are then likely to be more conscientious about assigning responsibility to defendants), with Gehres v. City of Phoenix, 753 P.2d 174, 176-77 (Ariz Ct. App. 1987); Fernanders v. Marks Constr. of S.C., Inc., 499 S.E.2d 509, 510-11 (S.C. Ct. App. 1998); Dranzo v. Winterhalter, 577 A.2d 1349, 1356 (Pa. Super. Ct. 1990) (emphasizing that consideration of joint and several liability is irrelevant to the jury's fact-finding purpose).

¶n79 Lacy, 520 S.E.2d at 431.

¶n80 Adkins v. Whitten, 297 S.E.2d 881 (W. Va. 1982) (allowing circuit courts to instruct the jury on effects of comparative negligence).

¶n81 Lacy, 520 S.E.2d at 429.

¶n82 Id. at 431.

¶n83 Id. at 430 (citing Syl. Pt. 3, Haynes v. City of Nitro, 240 S.E.2d 544 (W. Va. 1977) ("One joint tortfeasor is entitled to contribution from another joint tortfeasor, except where the act is malum in se.")).

¶n84 Id. at 431.

¶n85 Id. at 432.

¶n86 Michael J. Ahlen, The Need for Closing Argument Guidelines in Jury Trials, 70 N.D. L. Rev. 95, 105 (1994) (noting that, in closing argument, the lawyer may not misstate the law).

¶n87 Craig Lee Montz, Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases, 28 Ohio N.U. L. Rev. 67, 102 (2001).

¶n88 See Ellison v. Wood & Bush Co., 170 S.E.2d 321, 327 (W. Va. 1969) (citing Keathley v. Chesapeake & Ohio Ry. Co., 102 S.E. 244, 249 (W. Va. 1919)).

¶n89 Landers v. Ohio River R.R. Co., 33 S.E. 296, 300 (W. Va. 1899) ("It should be made to appear that the accused requested, and was refused, an instruction to the jury to disregard the unauthorized statements of the counsel.") (quoting Syl. Pt. 2, Young v. State, 19 Tex. App. 536 (1885)).

¶n90 See, e.g., Keathley, 102 S.E. at 249. The argument in Keathley was: "You gentlemen of the jury, put yourselves in the place of the plaintiff. In estimating damages, take into consideration what amount, under such circumstances, would compensate you if you were a young man in the bloom of health, with your wife, about to start on the sea of life." Id.

¶n91 P. Lorillard Co. v. Clay, 104 S.E. 384, 390 (Va. 1920).

¶n92 Montz, *supra* note 87, at 104.

¶n93 See Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* 501 (2d ed. 1997) (finding it is improper to ask the jury to put itself in the shoes of any of the parties, since this is a direct appeal to the juror's emotions).

¶n94 Montz, *supra* note 87, at 105.

¶n95 W. Va. R. Evid. 411.

¶n96 See *Bradfield v. Bd. of Educ.*, 36 S.E.2d 512, 516 (W. Va. 1945); *Lynch v. Alderton*, 20 S.E.2d 657, 659 (W. Va. 1942); *Fleming v. Hartrick*, 141 S.E. 628, 629 (W. Va. 1928); *Atkins v. Bartlett*, 132 S.E. 885, 887 (W. Va. 1926); *Wilkins v. Schwartz*, 132 S.E. 887, 889 (W. Va. 1926); *Moorefield v. Lewis*, 123 S.E. 564, 565 (W. Va. 1924).

¶n97 120 S.E.2d 713 (W. Va. 1961).

¶n98 *Id.* at 718.

¶n99 *Kaiser v. Hensley*, 318 S.E.2d 598, 601 (W. Va. 1983).

¶n100 *Adkins v. Smith*, 98 S.E.2d 712, 716 (W. Va. 1957).

¶n101 *Pack v. Van Meter*, 354 S.E.2d 581, 589 (W. Va. 1986). Here, plaintiff's counsel remarked, referring to the collective intelligence of the jury, that "we think she put her hands in good hands." *Id.* at 589 n.13. The trial court found this to be a reference to Allstate Insurance's slogan, "You're in good hands with Allstate," and ordered a new trial. *Id.* at 589. On appeal, the Court found this reference to be too attenuated to warrant a new trial. *Id.*

¶n102 *Id.*; see also *Johnson v. Dep't. of Motor Vehicles*, 318 S.E.2d 616 (W. Va. 1984); *Smith v. Holloway Constr. Co.*, 289 S.E.2d 230 (W. Va. 1982); *Loar v. Massey*, 261 S.E.2d 83 (W. Va. 1979).

¶n103 452 S.E.2d 416 (W. Va. 1994).

¶n104 *Id.* at 425.

¶n105 *Crum v. Ward*, 122 S.E.2d 18 (W. Va. 1961).

¶n106 *Id.* at 26 (quoting 2 M.J., *Argument and Conduct of Counsel* § 17).

¶n107 *Peck v. Bez*, 40 S.E.2d 1 (W. Va. 1946).

¶n108 *Id.* at 10.

¶n109 *Id.*

¶n110 *Id.*

¶n111 *Id.* at 10-11.

¶n112 280 S.E.2d 708 (W. Va. 1981).

¶n113 *Id.* at 712.

¶n114 *Id.* (citing *Gilbert v. Gulf Oil Corp.*, 175 F.2d 705 (4th Cir. 1949)); see also *City of Wheeling v. John F. Casey Co.*, 74 F.2d 794 (4th Cir. 1935); *Rapacki v. Pabst*, 400 N.E.2d 81 (Ill. App. Ct. 1980); *Mulvey v. Ill. Bell Tel. Co.*, 294 N.E.2d 689 (Ill. 1973). This line of argument could easily be characterized as a separate category, and some jurisdictions recognize it as such. See, e.g., *Bourette v. Dresser Indus. Inc.*, 481 A.2d 170 (Me. 1984).

¶n115 *Peck*, 280 S.E.2d at 712.

¶n116 *Bd. of Educ. v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796, 811 (W. Va. 1990).

¶n117 445 S.E.2d 742 (W. Va. 1994).

¶n118 *Id.* at 752. The comment at issue was in reference to a cap on damages and was that

the Legislature did say that for that portion [the noneconomic loss], it cannot exceed one million dollars. And that's a shame that happened recently, because if ever there was a case that called out for a verdict of several million dollars, this is it. And it makes me sad that that happened right before this case.

Id.; see also *Skibo v. Shamrock Co.*, 504 S.E.2d 188 (W. Va. 1998); *C.W. Dev., Inc. v. Structures, Inc.*, 408 S.E.2d 41 (W. Va. 1991); *Parsons v. Norfolk & W. Ry Co.*, 408 S.E.2d 668 (W. Va. 1991) (arguing that the plaintiff's only means of recovery was through the Federal Employers Liability Act was held insufficient to warrant a new trial where the court prevented further comment and where there was no mention of workers' compensation benefits).

¶n119 See Montz, *supra* note 87, at 105-06. Specifically, the Supreme Court of Ohio has held that accusing the opposition of engaging in "half-truths," "untruths," "threatening witnesses," and referring to an adversarial witness as a "second-class expert" constituted reversible error in a medical malpractice action. See *Pesek v. Univ. Neurologist's Ass'n Inc.*, 721 N.E.2d 1011 (Ohio 2000).

¶n120 See State v. Stephens, 525 S.E.2d 301, 306 (W. Va. 1999) (reversing conviction where trial court denied defendant's motion for mistrial after prosecutor suggested to the jury that defense counsel believed the defendant was guilty). For application in civil cases, see, for example, Dejesus v. Flick, 7 P.3d 459 (Nev. 2000). See also Lubet, supra note 93, at 496 (quoting Model Rules of Prof'l Conduct R. 3.4(e)).

¶n121 Montz supra note 87, at 114.

¶n122 Id. at 102.

¶n123 Jenrett v. Smith, 315 S.E.2d 583, 591 (W. Va. 1983) (quoting Syl. Pt. 3, Crum v. Ward, 122 S.E.2d 18, 19 (W. Va. 1961)).

¶n124 E.g., Wright & Ford Millworks v. Long, 412 So. 2d 892, 893 (Fla. Dist. Ct. App. 1982).

¶n125 Montz, supra note 87, at 96 (quoting James H. Seckinger, Closing Argument, 19 Am. J. Trial Advoc. 51 (1995)).

¶n126 498 S.E.2d 473 (W. Va. 1997).

¶n127 Id. at 485.

¶n128 See id.

¶n129 Id.

¶n130 Id.

¶n131 Id.

¶n132 Id.

¶n133 Syl. Pt. 1, Oates v. Cont'l Ins. Co., 72 S.E.2d 886, 887 (W. Va. 1973); see also Adams v. Sparacio, 196 S.E.2d 647, 652 (W. Va. 1973).

¶n134 See Lubet, supra note 93, at 496.

¶n135 See P.A. Agabin, Annotation, Propriety and Prejudicial Effect of Counsel's Argument or Comment as to Trial Judge's Refusal to Direct Verdict Against Him, 10 A.L.R.3d 1330, 1332 (1966).

¶n136 See id. at 1335.

¶n137 412 S.E.2d 795 (W. Va. 1991).

¶n138 Id. at 809 (citing Agabin, supra note 135, at 1332).

¶n139 Id. at 810.

¶n140 Id.

¶n141 Id. at 809.

¶n142 Id. at 810.

¶n143 552 S.E.2d 788 (W. Va. 2001).

¶n144 Id. at 796.

¶n145 Id. at 795. The Court went on to list the necessary elements in order to constitute plain error, including the existence of "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Id.

¶n146 Foster v. Sakhal, 559 S.E.2d 53, 67 (W. Va. 2001).

¶n147 Honaker, 552 S.E.2d at 797 n.8. Plaintiff's counsel apparently sought to alert the Court of a growing trend by defense counsel to interject prejudicial remarks in closing arguments in order to get "a losing case" thrown out at plaintiff's expense. Id.

¶n148 Compare Rojas v. Richardson, 703 F.2d 186 (5th Cir. 1983) reh'g granted and vacated by 713 F.2d 116 (1983) (stating motion in limine does not preserve error for appeal); Northwestern Flyers, Inc. v. Olson Bro. Mfg. Co., 679 F.2d 1264 (8th Cir. 1982); Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980); United States v. Helina, 549 F.2d 713 (9th Cir. 1977); People v. Stewart, 189 Cal. Rptr. 141 (Ct. App. 1983); Douglas v. Lombardino, 693 P.2d 1138 (Kan. 1985); Maricle v. Spiefel, 329 N.W.2d 80 (Neb. 1983); State v. Leslie, 471 N.E.2d 503 (Ohio Ct. App. 1984); Zehner v. Post Oak Oil Co., 640 P.2d 991 (Okla. Ct. App. 1981); Dailey v. Wheat, 681 S.W.2d 747 (Tex. App. 1984); State v. Lesley, 672 P.2d 79 (Utah 1983), with Am. Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321 (3d Cir. 1985) (motion in limine preserves error for appeal); Sheehy v. S. Pac. Transp. Co., 631 F.2d 649 (9th Cir. 1980); Reyes v. Mo. Pac. R.R. Co., 589 F.2d 791 (5th Cir. 1979); United States v. Williams, 561 F.2d 859 (D.C. Cir. 1977); Loof v. Sanders, 686 P.2d 1205 (Alaska 1984); State v. Lujan, 666 P.2d 71 (Ariz. 1983); HarleyDavidson Motor Co. v. Daniel, 260 S.E.2d 20 (Ga. 1979); State v. Foster, 674 P.2d 587 (Or. 1983); State v.

Kelly, 685 P.2d 564 (Wash. 1984).

¶n149 379 S.E.2d 383 (W. Va. 1989).

¶n150 Id. at 386.

¶n151 Id.

¶n152 See, e.g., Given v. Field, 484 S.E.2d 647, 652 (W. Va. 1997); Perdomo v. Stevens, 476 S.E.2d 223, 225 n.5 (W. Va. 1996).

Service: **Get by LEXSEE®**

Citation: **106 W. Va. L. Rev. 819**

View: Full

Date/Time: Friday, October 30, 2009 - 4:08 PM EDT

[My Lexis™](#) | [Search](#) | [Research Tasks](#) | [Get a Document](#) | [Shepard's®](#) | [Alerts](#) | [Total Litigator](#) | [Transactional Advisor](#) | [Counsel Selector](#)
[History](#) | [Delivery Manager](#) | [Switch Client](#) | [Preferences](#) | [Sign Out](#) | [Help](#)



LexisNexis®

[About LexisNexis](#) | [Terms & Conditions](#) | [Contact Us](#)

Copyright © 2009 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.