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

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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:

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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