

The Tax Cuts and Jobs Act

Top 10 Changes You Need to Know

1. Rate brackets change, but we still have 7 different brackets (not the 3 that were promised).
 - a. Rates start at 10% and go up to 37%.
2. Standard deduction roughly doubles to \$12,000 for single and \$24,000 for joint. Deduction for personal exemptions are eliminated.
3. State and local tax deduction is capped at \$10,000.
4. Mortgage interest deduction is limited on first \$750,000 of mortgage debt and deduction for home equity loan interest is eliminated.
5. Miscellaneous Itemized Deductions are completely eliminated.
 - a. If you're an employee and have unreimbursed business expense, talk to your boss about being reimbursed for them, even if it reduces your pay.
6. Deduction for Qualified Business Pass-Through Income. Small business owners can deduct up to 20% of net income from certain pass-through businesses.
 - a. Service businesses excluded from this, unless income falls below certain thresholds:
 - i. Single threshold is \$157,500 with full phase out at \$207,500.
 - ii. Joint threshold is \$315,000 with full phase out at \$415,000.
 - b. Applies only to business owners, not employees. So, it may pay to be self-employed now.
7. Elimination of the "Pease" limitation on itemized deductions. Old rule – up to 80% of most itemized deductions are lost when AGI exceeds \$313,800. New rule – phase out is eliminated.
8. Child Tax Credit reform
 - a. Current \$1,000 CTC is increased to \$2,000.
9. AMT – not gone, but modified to increase exemption and phase out.
10. Estate taxes – Exemption for estate and gift taxes doubled to \$11.2 million per taxpayer.

**KEEPING YOUR VERDICT:
CASE LAW UPDATE ON PROPER CLOSING ARGUMENT**

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Celene Humphries is a founding shareholder of Brannock & Humphries, an eleven-lawyer firm dedicated exclusively to appellate practice and trial support and with offices in Tampa, Tallahassee and Sarasota. Brannock & Humphries has been twice named as the top-rated, small litigation firm in Florida (firms of two to ten lawyers) by the Florida Business Edition of Super Lawyers (2011 and 2015).

Ms. Humphries has been an appellate specialist for nearly her entire legal career, and is board certified by The Florida Bar as a specialist in appellate practice. Only about *one fifth of one percent* of the lawyers in the state has received that certification. Her experience includes litigating appellate matters in all five Florida District Courts of Appeal, the Florida Supreme Court, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. In all, Ms. Humphries has been lead or sole counsel in more than 250 appeals. She has also tried more than 50 cases as appellate counsel, arguing critical legal issues before and during trial.

She is recognized by numerous “Best Lawyer Lists,” including Best Lawyers in America, Chambers USA, Florida Trend Legal Elite, and Super Lawyers. She has been repeatedly named to the list of 100 top practitioners in Florida and the top 50 female practitioners by Super Lawyers, and is included in Florida Trend’s Hall of Fame. She also holds the highest rating obtainable from Martindale-Hubbell (AV preeminent). In addition, the Florida Justice Association awarded Ms. Humphries the S. Victor Tipton Award for superior achievement in legal writing and commitment.

Ms. Humphries is an active member and contributor of the Florida Justice Association. She is the current Chair, and a former Chair of the FJA’s appellate section. She is also a long-term officer of the FJA’s appellate section, and an involved and committed member of the FJA’s amicus committee. Ms. Humphries is the originator and long-time chair of the FJA’s recurring Case Law Insider seminar, featuring the insight and analysis of FJA appellate lawyers on appellate decisions that are important to FJA members.

In addition, Ms. Humphries actively participates in organizations that promote excellence in the law and she holds leadership positions in those organizations. She is the longtime Chair and a speaker at the annual Appellate Board Certification Review Course, the President of the Second District Court of Appeal Historical Society, and is a Master of the Cheatwood Inn of Court. She has also served as Chair of the Judicial Nominating Committee for the Second District Court of Appeal, and Chair of the Hillsborough County Bar Association’s appellate section. Previously, Ms. Humphries served in leadership positions on the Florida Bar Appellate Rules Committee and the Florida Bar Appellate Section’s Executive Council.

Ms. Humphries has authored and co-authored many articles, seminar materials and peer-reviewed chapters in books published by The Florida Bar. She also frequently delivers seminars on a variety of topics, and has appeared as a guest lecturer at two Florida law schools.

KEEPING YOUR VERDICT: CASE LAW UPDATE ON PROPER CLOSING ARGUMENT

Closing arguments are the culmination of the trial. They are the moment where you finally get to look directly at the jury again. You pull all the facts together and persuasively explain why your injured client or the family you represent for the wrongful death of their loved one deserves justice.

There's been an uptake in appellate decisions scrutinizing what you say to press your clients' case to the jury. This has become such an important issue that three appellate lawyers (Philip Burlington, Christopher V. Carlyle, and Barbara Green) now work together to publish a regular article in the FJA's Journal addressing closing arguments. This outline borrows from that good work, and addresses additional issues I've seen in appeals of my own on this very critical topic.

Please study carefully. And remember, our job as appellate lawyers in this role (offering trial advice) is to inform you so you can make knowing decisions when planning the strategy for your case. We don't pretend to know what works, or how the magic with the jury happens. But, when you work up your case, you need to know what roadblocks may be waiting on the other side of victory so you can maneuver around them when it counts, at trial.

Analytical references for calculating pain and suffering

Every trial lawyer struggles with discussing the amount of damages for noneconomic elements like pain and suffering, mental anguish, inconvenience, loss of capacity for enjoyment of life and loss of companionship. The Florida Standard Jury Instructions for both personal injury and wrongful death tell the jury that "there is no exact standard" for measuring the amount of noneconomic damages and that the amount "should be fair and just in light of the evidence." FSJI 501.2, 502.2. These instructions place the burden on counsel to help the jury figure out what is "fair and just in light of the evidence." One method that many attorneys use is the "per diem" argument. A per diem argument suggests to the jury that "a designated sum may be arrived at by considering a stated figure per day, or other period, multiplied by the life expectancy." *Perdue v. Watson*, 144 So. 2d 840, 843 (Fla. 2d DCA 1962).

This topic is the subject of a helpful article by Philip Burlington, Christopher V. Carlyle and Barbara Green in the September/October 2015 edition of the FJA Journal.

Bottom line: A per diem argument is permitted so long as it is clearly presented as a suggestion (not as evidence), there is evidence in the record to support it, and it does not contain arguments that run afoul of some other rule. Courts have repeatedly approved of the use of a mathematical computation for calculating pain and suffering on a per diem basis. *See, e.g., Perdue v. Watson*, 144 So. 2d 840 (Fla. 2d DCA 1962).

The courts reason that latitude is afforded here because there is no fixed rule or standard for determining these non-economic damages. *Ratner v. Arrington*, 111 So. 2d 82 (Fla. 3d DCA 1959). Unlike economic damages, there is no market price to look too.

But, counsel must make clear that the formulas are just a suggestion or illustration, not evidence. *Allred v. Chittendon Pool Supply, Inc.*, 298 So. 2d 361 (Fla. 1974); *Ratner*. If there's a danger that the argument will be mistaken for evidence, the trial court can dispel that with a jury instruction, telling the jury not to consider as evidence. *Ratner*. But, that instruction by the trial court cannot be exaggerated or overly emphasized. *McDaniel v. Prysi*, 432 So. 2d 174 (Fla. 2d DCA 1983).

A tricky question is whether there is sufficient evidence to support a per diem argument. *Payne v. Alvarez*, 156 So. 2d 659 (Fla. 1st DCA 1963), offers guidance on this point. At a minimum, there needs to be evidence that the Plaintiff is in pain at all times and that the injury is permanent so that the pain will likely continue, plus evidence of the plaintiff's life expectancy.

Last, be wary of other rules regarding closing argument. In *Payne*, plaintiff's counsel asked the jury in opening statement and closing argument "to think about what you would pay someone for one day of what you will hear she has to go through and for the rest of her life." 563 So.2d at 183-84 (court's emphasis). The 4th DCA held that the argument was not an improper golden rule argument because it asked the jury to think about what they should pay someone for their injuries, not "what they might wish to receive ..." Determining what to pay someone to compensate for their damages is exactly what the jury is supposed to do. The plaintiff "merely asked them to consider this on a per diem basis, which is permissible and has long-standing use in personal injury trials." 563 So.2d at 184.

A recent decision from the Third DCA, *Philip Morris USA, Inc. v. Cuculino*, 165 So.3d 36 (Fla. 3d DCA 2014), may be misused by some defense lawyers to argue that a per diem argument is improper. The argument in *Cuculino* was much more than a per diem argument. It compared people who are paid “astronomical sums” for the time they work, such as actors, professional athletes and expert witnesses making \$750/hour, to the plaintiff, whose job was now “suffering from progressive heart disease.” It asked, “Who in their right mind would want to trade places with Mr. Cuculino and take this job?” “Would someone do it for a million dollars an hour? Probably not. Would someone do it for anything? Probably not.” *Cuculino* does not overrule decades of precedent allowing per diem arguments.

Note that courts have held that a per diem argument cannot be saved for rebuttal. *Heddendorf v. Joyce*, 178 So.2d 126 (Fla. 2d DCA 1965).

Although not a per diem argument, the Third DCA recently addressed a somewhat similar argument. In *Philip Morris USA, Inc. v. Ledoux*, 230 So. 3d 530 (Fla. 3d DCA 2017), the court held that the following comment was improper: “But I can tell you this, if in 1996 someone had put an ad in the paper that Roland Ledoux had read—he reads the paper ever day—and the ad was, we will pay you \$10 million, and all you have to do is you have to sit there and you have to watch your wife, the love of your life, choke and struggle and die in front of you—.” While not an improper Golden Rule argument, the Third DCA found that this comment (and two others) were too “overly-dramatic” and were intended merely to “evoke the jury’s sympathy.” *Id.* at 537. Good news, the Third DCA affirmed the trial court’s denial of a new trial motion, in part because of preservation errors.

Don’t accidentally cap the non-economic damages

Be oh-so-careful about your damages request for pain and suffering damages. After you win, the defense may claim that remittitur is required when the jury awards more than the plaintiff’s attorney requests in closing argument. This argument got traction in Florida for a while, *e.g. R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 333 (Fla. 1st DCA 2012); *Ernie Haire Ford, Inc. v. Atkinson*, 64 So. 3d 131, 133 (Fla. 2d DCA 2011), but the Florida Supreme Court just

recently righted the ship. *Schoeff v. R.J. Reynolds Tobacco Co.*, --- So. 3d ---, 2017 WL 6379591 (Fla. Dec. 14, 2017). *See also Allstate Ins. Co. v. Wiley*, 954 So. 2d 1273, 1275-76 (Fla. 2d DCA 2007) (“Contrary to Allstate’s argument, the jury was not limited by Wiley’s attorney’s closing argument in determining the amount of the damage award.”).

Here’s our argument on this, in a nutshell: Plaintiff’s counsel can never hamstring a jury by identifying a damage amount in closing argument, particularly for pain and suffering damages. Instead, as the Florida Supreme Court explained decades ago, counsel’s argument regarding the value of pain and suffering is not evidence; it is merely a suggestion, and the ultimate decision remains with the jury. *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365-66 (Fla. 1974); *see also USAA Cas. Ins. Co. v. Howell*, 901 So. 2d 876, 879 (Fla. 4th DCA 2005) (“A jury may properly award damages equal to or in excess of those requested by counsel in closing argument”); *Rudy’s Glass Constr. Co. v. Robins*, 427 So. 2d 1051, 1053 (Fla. 3d DCA 1983) (same); *Lopez v. Cohen*, 406 So. 2d 1253, 1256 (Fla. 4th DCA 1981) (same).

Concluding otherwise would improperly infringe upon the scope of the jury’s work and discretion. It would also lead to a ridiculous result where a remittitur would be required in every case where the jury exceeded the number requested, even if only by \$100 or \$1,000. Plus, it is unfair since the standard jury instructions do not advise the jury that their discretion is, in fact, capped by whatever number Plaintiff’s counsel identifies.

Instead, this circumstance is, at most, relevant when it is one of multiple factors suggesting that the jurors has been carried away by their emotions. *R.J. Reynolds Tobacco Co. v. Smith*, 131 So. 3d 18, 19 (Fla. 1st DCA 2013). Even the *Webb* case, acknowledges that an award that exceeds the amount requested is “not determinative.” *Webb*, 93 So. 3d at 339; *see also Glabman v. De La Cruz*, 954 So. 2d 60, 62-63 (Fla. 3d DCA 2007) (focusing on “highly emotional” testimony that caused even the trial judge to cry).

So, for that reason, it’s still best to avoid the issue altogether. To do that, you must be very careful not argue a sum certain, when requesting non-economic damages. Here’s one approach:

I would—it would be completely inconsistent with the evidence if I were to suggest anything less than \$5 million for that. In the past, the last 20 years, whatever else he bears in the future. Like everything else I have told you that is a suggestion from the evidence in the case. Accept it, reject it, whatever you think the number is appropriate. That is your decision. These are simply suggestions.

Defense right to defend a case

1. Improper Plaintiff comments

Increasingly, Florida's appellate courts are finding that counsel for the plaintiff has asked the jury to punish the defendant for daring to defend the case. Those practicing in the Fourth DCA's jurisdiction should pay close attention to number of cases from that court.

The underlying principle is that closing argument should be limited to the elements of the Plaintiff's case and of any affirmative defenses pressed in response, and to questions of proof (like witness credibility). The jury is not tasked with evaluating a Defendant's right to defend against a claim. So, at a minimum, this kind of argument is irrelevant. Reversal can result where the courts conclude that the Defendant's right to a fair trial was likely thwarted because the improper comments appealed to the jury's emotions (like improper appeals to the "conscience of the community") or distracted the jury from the issues to be decided.

A good example case is *Intramed v. Guider*, 93 So. 3d 503, 507 (Fla. 4th DCA 2012), where the Plaintiff's attorney argued:

- "The only way to get this company to care is to force them to pay all of the harms they have caused. That's what the law is for, to get a company to care, to change, to do what is right."
- "They have never taken responsibility. They have been forced to admit they sent the wrong medication . . . and they still take zero responsibility . . . "
- "How did they respond? Have you heard sorry once in this courtroom, we are sorry we sent you the wrong medication? . . . Not one time have you heard that, not from there, not anywhere . . . "
- "There are things your verdict cannot fix . . . But you can fix the harms that were caused her, the way they defend this case . . . "

- “[The defendant] will get off cheap. [The defendant] will sweep it under the rug. [The defendant] will move on. [The defendant] won’t change. [The defendant] won’t care . . . “
- “It doesn’t matter what [the defendant] do[es] as a company. [They] can get off cheap if [they] want. Slap on the wrist . . . “
- “How do you ask her that? How do you defend yourself that way? How does a company defend itself that way? . . . “

The Fourth DCA was not happy. It ruled that this argument “improperly suggested that the defendant should be punished for contesting damages at trial, and that its defense of the claim in court was improper,” that it “was designed to inflame the jury,” and that it “urged the jury to punish the defendant for having the temerity to be in court.” As a result, the Plaintiff’s verdict was taken away and the case was remanded for a new trial.

The Fourth DCA found the same error in an insured’s action against an insurance carrier in *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956 (Fla. 4th DCA 2013). There, the insured’s counsel argued that the insurer failed to “accept full responsibility” and fully “repent,” and that the insurer just wanted to “protect its money.” These comments were found to improperly urge the jury to punish the insurer for defending against the insured’s claims. The Fourth DCA spoke against these sorts of comments again (even though unnecessary because of the court’s primary holding) recently in *Las Olas Holding Co. v. Demella*, 228 So. 3d 97, 107 (Fla. 4th DCA 2017). Clearly, the Fourth DCA is watching for this.

The Third DCA has been vocal too. In *Carnival Corp. v. Pajares*, 972 So. 2d 973 (Fla. 3d DCA 2007), the Plaintiff’s attorney argued: “They won’t accept responsibility. They won’t accept the harm that they have caused him. They are fighting on both. It is time to hold them responsible.” The Third District concluded that this argument amounted to suggesting that the Defendant “should be punished for defending [Plaintiff’s] claim at all.” Along with other improper arguments, the court held that reversal was mandatory.

The Third DCA also concluded that the analysis doesn’t change when the Defendant has admitted liability (but contests damages). In *Chin v. Caiaffa*, 42 So. 3d 300 (Fla. 3d DCA 2010), the Plaintiff’s counsel argued that the tortfeasor driver was not contrite and never apologized for

the accident despite admitting liability. The Third District repeated that these comments had nothing to do with the issues pending for the jury to decide. Similarly, in *TT of Indian River Inc. v. Fortson*, --- So. 3d ---, 2017 WL 6390381 (Fla. 5th DCA Dec. 5, 2017), the Fifth District reversed a plaintiff's verdict in a case where the defendant admitted liability, and plaintiff's counsel nonetheless questioned the defendant's representative with "denigrating" questions like, "[s]o Mercedes-Benz of Melbourne is totally responsible for this motor vehicle crash;" and the plaintiff "is totally innocent as far as her negligence."

2. Responding to such a challenge

To the extent that any language in these decisions can be construed as barring a Plaintiff from criticizing *how* the Defendant tried the case, that's not correct, as a matter of law. When a Defendant undertakes to put on a defense at trial, the Plaintiff (just like the Defendant) has the right to criticize the strength of that case. There is no question that defendants have a constitutional right to present a defense to the jury. But, when a defendant chooses to exercise that right, the plaintiff also has a right to rebut that defense by pointing out any inconsistencies, contradictions, or flaws to the jury. See *Hartford Acc. & Indemn. Co. v. Ocha*, 472 So. 2d 1338, 1343 (Fla. 4th DCA 1985). Similarly, there is nothing improper about criticizing a party, a witness, or the arguments of opposing counsel when the criticism is supported by the evidence. See *Brown v. State*, 59 So. 3d 1217, 1220 (Fla. 4th DCA 2011); *SDG Dadeland Assocs. v. Anthony*, 979 So. 2d 997, 1001 (Fla. 3d DCA 2008); *Dixie-Bell Oil Co. v. Gold*, 275 So. 2d 19, 20-21 (Fla. 3d DCA 1973). Even language that is "somewhat intemperate," such as calling the defendant a "liar," is proper as long as there is evidence to support it. See *Murphy*, 766 So. 2d at 1028-29; *Brown v. State*, 678 So. 2d 910, 912 (Fla. 4th DCA 1996) (quoting *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987)).

And, sometimes, a defendant's high-risk defense strategy can invite such comment, so that the defendant can't later complain. As the concurring opinion in *Hawk v. Seaboard Sys. R.R., Inc.*, 547 So. 2d 669, 674 (Fla. 2d DCA 1989), explains: "When a party's own trial tactics create the risk of adverse jury passion, the court should be hesitant to relieve the party of the fruits of such emotions except in cases of clear error."

Also, there's an important exception where punitive damages have been pled. A defendant's failure to take responsibility for their conduct is evidence of reprehensible conduct warranting punitive damages. A defendant that admits what it did was wrong and expresses remorse is obviously less deserving of punishment than a recalcitrant defendant who denies responsibility to the bitter end and ridicules the plaintiff's claims. One factor in that analysis is whether Defendants recognize that their conduct was wrongful. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-80 (1996). This is not a new or novel concept. For example, in Florida's asbestos litigation, the Florida Supreme Court held that the "attitude and conduct of [the defendant] upon discovery of the misconduct" and the defendant's "apparent indifference to the health and safety" of its customers are proper considerations when punitive damages are at issue. *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485, 487 (Fla. 1999); *see also Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 248 (Fla. 1st DCA 1984).

Jurisdictions around the country have likewise repeatedly affirmed punitive damages awards based on a defendant's lack of repentance, remorse or an apology for their conduct. *See, e.g., Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 56 (D.D.C. 2012); *Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp. 2d 1168, 1182-84, 1190-91 (D. Nev. 2008); *In re Henderson*, 2011 WL 1838777, at *8 (Bankr. E.D. Ky. May 13, 2011); *Heckadon v. CFS Enters., Inc.*, 400 S.W. 3d 372, 385 (Mo. Ct. App. 2013); *Rachal v. Brouillette*, 111 So. 3d 1137, 1145 (La. Ct. App. 2013); *Cliff v. Thibodeau*, 2002 WL 31546082, at *4 (Me. Super. Ct. Aug. 12, 2002). For example, in *Burton v. R.J. Reynolds Tobacco Co.*, 205 F. Supp. 2d 1253, 1257-58 (D. Kan. 2002), *rev'd in part on other grounds*, 397 F.3d 906 (10th Cir. 2005), the court ruled:

The evidence does not reflect that Reynolds has repented of its ways. Its only grudging—and questionably sincere—concessions to the scientific evidence have been wrung from it through settlements of hotly contested lawsuits. It persists in its free choice mantra. Reynolds has not even said in any sincere and convincing fashion that it is sorry for what it did or for what happened to Mr. Burton. In many respects, this is the most disturbing aspect of this case and one which merits stiff punishment.

To be clear, the Fourth DCA does not agree with these arguments here. *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753 (Fla. 4th DCA 2016). On the other hand, other DCAs

have accepted these arguments, but haven't yet written an opinion to say so. So, at a minimum, preserve your right to make these arguments, by getting a ruling preventing you from doing so. If necessary, you can raise this on appeal, and maybe they'll be good law by then.

3. Defendants have gotten in trouble too

While the cases are older, there are a number of decisions that allow us to keep a close eye on the defense for improper comments. Here's a few examples.

Stokes v. Wet 'N Wild, Inc., 523 So. 2d 181 (Fla. 5th DCA 1988). The defense characterized the plaintiff's damages demand as excessive and "absolutely ridiculous." Defense counsel then argued, "This is why we're here. This is why our courtrooms are crowded and this is why we read articles in the newspaper, because of things like that." The Fifth DCA reversed because "the reference to problems of overcrowded courtrooms is clearly an attempt to appeal to the conscience of the community and matters far afield of the evidence in this case."

Davidoff v. Segert, 551 So. 2d 1274 (Fla. 4th DCA 1989). The defense commented on the "insurance crisis." This was an improper appeal to the conscience of the community as well, and reversed the defense verdict.

Fowler v. Goldring Corp., 582 So. 2d 802 (Fla. 1st DCA 1991): The defense described Plaintiff's case as the "new American dream," calling it a "blatant appeal to the sympathy and prejudice of the jurors [that] was not based on any facts in evidence in this proceeding."

Schubert v. Allstate Ins. Co., 603 So. 2d 554 (Fla. 5th DCA 1992): The defense directly attacked the plaintiff for seeking compensation, saying: (1) "Don't, don't let little Nicholas [plaintiff's child] think that this is the way you get from end of life to the other." (2) "I'm here to tell you the truth." (3) Plaintiff "should have said thank goodness I wasn't injured more seriously," instead of seeking recompense for what injuries she sustained. The Fifth DCA reversed the defense verdict.

Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010 (Fla. 2000): This is the seminal case requiring contemporaneous objections. In particular, this argument was found to be error (although not preserved): "[Plaintiff] has filed a lawsuit. This is a courtroom, not a lottery."

Russell v. Guider, 362 So. 2d 55 (Fla. 4th DCA 1978): Defense argument about relationship between verdicts and rising insurance rates was improperly “emotional,” however it was not preserved as a basis for reversal.

Retaliatory arguments

This is dangerous territory. Arguments in retaliation for opposing counsel’s improper argument sometimes have been accepted by the appellate courts as “fair reply” to improper comments. *See, e.g., Owens-Corning Fiberglass Corp. v. McKenna*, 726 So. 2d 361 (Fla. 3d DCA 1999); *Walker v. City of Miami*, 337 So. 2d 1002 (Fla. 3d DCA 1976); *Metropolitan Dade County v. Dillon*, 305 So. 2d 36 (Fla. 3d DCA 1974);

However, the circumstances seem to be narrow, applying when the retaliatory arguments are limited to truly rebutting an improper argument by opposing counsel. And, over three decades ago, the 3d DCA announced that it would no longer tolerate retaliatory improper arguments. *Borden, Inc. v. Young*, 479 So. 2d 850 (Fla. 3d DCA 1985).

Most times, when reviewing such retaliatory comments, the appellate courts apply the same rules they apply to closing arguments in general. For example, in *Bellsouth Human Resources Admin., Inc. v. Colatarci*, 641 So. 2d 427 (Fla. 4th DCA 1994), the defense argument improperly appealed to the conscience of the community and attacked the legal profession. So much so that the court concluded the comments warranted referring the defense lawyer to the Bar. Regardless, the court held that it was improper for Plaintiff to rebut with comments about “corporate America,” exploding gas tanks, agent orange, and silicone breast implants. *See also, Moore v. Taylor Concrete & Supply Co., Inc.*, 553 So. 2d 787 (Fla. 1st DCA 1989); *Tito v. Potashnick*, 488 So. 2d 100 (Fla. 4th DCA 1986); *Skislak v. Wilson*, 472 So. 2d 776 (Fla. 3d DCA 1985).

Unfortunately, the appellate decisions generally do not give enough context to understand the facts which tip the scales for appellate courts to reject retaliatory comments. As recommended by Philip Burlington, Christopher V. Carlyle and Barbara Green in their March/April 2016 article on the subject:

Consequently, the wisest thing to do is to object to any improper argument, request a curative instruction and move for mistrial. Keep any retaliatory argument within the proper bounds of closing argument: reasonable inferences from the evidence presented at trial. In an ideal world, of course, the trial court would sustain an objection to the original, improper argument, and give an appropriate instruction to cure it. In the real world, that does not always happen. When an appropriate objection was made but the trial court did not sustain it, the appellate courts have sometimes permitted a party to resort to self-help by making a responsive argument that otherwise would be deemed improperly. But these cases are unusual. While some leeway may be given, appellate courts will not permit closing arguments to devolve into a game of the dozens or an episode of Beavis and Butthead.

Miscellaneous recent cases:

Boyles v. Dillard's Inc., 199 So. 3d 315 (Fla. 1st DCA 2016): In closing, counsel referred to an alleged inconsistency between a party's trial testimony and previous deposition testimony that was not in evidence. The First DCA held that the comment was improper, may have been intentional (!), and impacted pivotal issue of credibility in the case.

Choy v. Faraldo, 120 So. 3d 92 (Fla. 4th DCA 2013): To support argument that plaintiff was, in fact, capable of earning future income, defense counsel displayed a magazine cover that was not in evidence and that showed a former athlete in a wheelchair. The article described the man's life and post-injury work.

State Farm Mut. Auto. Ins. Co. v. Thorne, 110 So. 3d 66 (Fla. 2^d DCA 2013): Following exclusion of defense expert testimony on causation because it was improperly disclosed, plaintiff argued to the jury that the defense failed to present evidence to refute causation because there was no such evidence. Although the comment made by Plaintiff's counsel, the holding applies equally to both parties.

A few thoughts about preservation and harmless

If you're fighting back a closing argument challenge during post-trial motions or on appeal, always, there are few bread and butter points used by appellate types that you need to remember.

First, always begin with preservation. It's amazing how often the defense does not preserve its challenge arguments it later complains are improper. A couple of fundamental principles to keep in mind:

- The Defendant must object contemporaneously and the objection cannot be too vague to preserve the arguments they make now. *Young v. State*, 2013 WL 5270683, *3 (Fla. Sept. 16, 2013).
- The Defendant must get a ruling from the trial court contemporaneously.
- If not, the only way a Defendant can raise the issue post-trial or on appeal is to assert and establish the onerous standard set forth in *Murphy v. International Robotic Systems, Inc.* 766 So. 2d 1010, 1027-30 (Fla. 2000), in their new trial motion. Failure to do so waives this argument.
- Look to see whether the error was cured by a curative instruction by the trial court, or by conduct of counsel.

Second, on harmless, look for fun atmospherics to make clear that the claim of improper closing argument is one of the two most common arguments by a loser after trial (the other being juror nondisclosure). The danger is that courts are tending to punish particular plaintiffs and their attorneys for improper comments made by others before them and courts increasingly believe that there's a shocking uptake in improper closing arguments. Practical points can help you distinguish yourself from the pack, so that you're an exception to this growing bias. A few examples:

- The number of words challenged (let's say 31 words) compared to a long trial (like 2 weeks, spanning 20 volumes of transcripts, 5 witnesses and dozens of exhibits).
- Whether the jury took a while to deliberate. How can this comment be so powerfully distracting, if the jury was working hard for hours?

- That last point can be made even better if the jury asked questions during deliberations. And, look at those questions. Those words can really drive the point home. For that reason, always be sure that the jury's question is read into the record and filed with the court clerk.
- And, remember the standard: When considering the context of the comments and the totality of the circumstances of the trial as a whole, were the few words complained about "so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial"? *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1271 (Fla. 2006) As the Fifth District explained, "Thus, a comment standing alone may be viewed as inappropriate, but when considered within the context of the entire [] argument and the record, it may be a fair comment." *Rivera v. State*, 840 So. 2d 284, 287 (Fla. 5th DCA 2003).



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Title:	Keeping Your Verdict: Case Law Update on Proper
Level:	Intermediate
Approval Period:	02/01/2018 - 08/01/2019

CLE Credits

General	2.5
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Certification Credits

Appellate Practice	2.5
Civil Trial	2.5
Criminal Appellate Law	2.5
Criminal Trial Law	2.5