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TAMPA BAY TRIAL LAWYERS ASSOCIATION

6 WAYS TO LOSE YOUR VERDICT DURING CLOSING

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I. GENERAL LAW ON CLOSING ARGUMENT

a. **Purpose**

i. "The purpose of closing argument is to help the jury understand the issues in a case by applying the evidence to the law applicable to the case. Attorneys should be afforded great latitude in presenting closing argument, but they must confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence." Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1028 (Fla. 2000) (internal citations omitted).

b. **Prohibited statements:**

i. Rule 4-3.4(e) of the Rules Regulating the Florida Bar provides that in trial, a lawyer must not:

1. "state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law,
2. allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,
3. assert personal knowledge of facts in issue except when testifying as a witness, or
4. state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused."

ii. Counsel is entitled to point out the lack of factual or legal support for the opposing party's contention, or the lack of reasonableness or rationality in approach, but the court should keep tight reins on a lawyer who seeks to win his or her case by castigating an entire segment of the legal profession. Hartford Acc. & Indem. Co. v. Ocha, 472 So. 2d 1338, 1343 (Fla. 4th DCA 1985).

iii. A party may not give a closing argument that is "designed to inflame the emotions of the jury rather than prompt a 'logical analysis of the evidence in light of the applicable law.'" R.J. Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753, 760–61 (Fla. 4th DCA 2016) (citation omitted).

iv. "A plaintiff may not suggest to the jury that a defendant is somehow acting improperly by defending itself at trial or that a defendant should be punished for contesting damages." R.J. Reynolds Tobacco Co. v. Robinson, 216 So. 3d 674, 681 (Fla. 1st DCA 2017).

v. A party may not refer to matters excluded from evidence or accuse the opposing counsel from improperly trying to prevent the jury from hearing about such excluded matters. Johnnides v. Amoco Oil Co., Inc., 778 So. 2d 443, 444 n.2 (Fla. 3d DCA 2001).

vi. Counsel is prohibited from arguing a negative inference from the failure of a witness or party to testify where there has been a sufficient explanation for such absence or failure to testify. Additionally, it must be shown that a *witness* was available to testify before a negative inference can be argued because of their failure to do so. However, "availability" is not a prerequisite to arguing a negative inference can be drawn from a *party's* failure to testify. Fino v. Nodine, 646 So. 2d 746, 750-51 (Fla. 4th DCA 1994).

c. **How to properly preserve error**

i. "[I]n order to preserve a sustained objection for appellate review, unless the improper argument constitutes a fundamental error, a motion for a mistrial or request for a curative instruction must be made 'at the time the improper comment was made'." Companioni v. City of Tampa, 51 So. 3d 452, 454 (Fla. 2010) (internal citation omitted); see also Barkett v. Gomez, 908 So. 2d 1084, 1087 (Fla. 3d DCA 2005) (for discussion of curative instructions).

ii. "However to avoid interruption in the continuity of the closing argument and more plainly to afford defendant [or plaintiff] an opportunity to evaluate the prejudicial nature of the objectionable comments in the context of the total closing argument, we do not impose a strict rule requiring that a motion for mistrial be made in the next breath following the objection to the remark." Ed Ricke & Sons, Inc. v. Green By & Through Swan, 468 So. 2d 908, 910 (Fla. 1985) (internal citations omitted).

iii. A party who fails to move for mistrial after an objection has been sustained will generally waive their right of appellate review. Newton v. S. Florida Baptist Hosp., 614 So. 2d 1195, 1196 (Fla. 2d DCA 1993).

d. **If error preserved**

i. The trial court should grant a new trial if the argument was "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).

e. **If error not preserved**

i. To receive new trial in civil case based on unobjected-to closing argument, a complaining party must establish that:
   1. the argument is improper;
   2. the argument is harmful;
   3. the argument is incurable; and
   4. the argument so damaged fairness of trial that public's interest in system of justice requires new trial

Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1027-31 (Fla. 2000).

ii. "[W]hen granting a new trial based on unobjected-to closing argument, the trial court must specifically identify the improper arguments of counsel and the actions of the jury resulting from those arguments." Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1030 (Fla. 2000).

iii. Appellate courts must apply the abuse of discretion standard of review when reviewing the trial court's grant or denial of a new trial based on unobjected-to closing argument because "applying such standard sufficiently recognizes that the trial judge is in the best position to determine the propriety and potential impact of allegedly improper closing argument." Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1031 (Fla. 2000).

iv. However, in evaluating improper comments made during closing argument, the reviewing court considers the cumulative effect of challenges to comments that were both preserved and unpreserved. Domino's Pizza, LLC v. Wiederhold, 248 So. 3d 212, 228 (Fla. 5th DCA 2018).

II. ASSERTIONS OF PERSONAL BELIEFS

a. Not improper

i. "[U]se of the personal pronoun 'I' during closing argument is not, in and of itself, improper…. When determining whether counsels' use of the personal pronoun 'I' is improper, judges must not place form over substance; it must be understood that trial counsel is required to analyze the evidence and present reasonable interpretations and inferences based on the evidence to the jury." Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1029 (Fla. 2000).

b. Improper

i. Plaintiff's counsel improperly expressed a personal opinion and bolstered the reliability of the plaintiff's testimony where counsel stated that the plaintiff "looked you in the eye, she didn't make anything up," and "she was very honest with you." City of Miami v. Kinser, 187 So. 3d 921, 923 (Fla. 3d DCA 2016).

ii. Following plaintiff's counsel's successful exclusion of expert testimony, plaintiff's counsel argued that the "lack of a scintilla of evidence" offered by the defendants and saying that the defense's theory "was merely speculation," plaintiff's counsel stated that this speculation was "simply an attempt ... to avoid responsibility," concluding with multiple statements of "shame on these defendants." The court held the comments about the lack of evidence were disingenuous and misleading. Further, the comments about the "shameful" defense to "avoid responsibility" improperly shifted the focus of the case from compensating the plaintiff to punishing the defendant and suggested the

defendant should be punished from defending itself. State Farm Mut. Auto. Ins. Co. v. Thorne, 110 So. 3d 66, 73–74 (Fla. 2d DCA 2013).

iii. In wrongful death action arising out of a motor vehicle accident which resulted in death of a boy, defense counsel stated:
   1. "And I say to [the plaintiff], I'm sorry, and you're sorry, but you have got to put away sorrow. You don't buy a boy, as you would on the market."
   2. "Should you also ought to be sorry for [the defendant]? Because [the defendant] is in a place where he's having to defend himself in a courtroom through no fault of his own because some boys got out there on a highway where they didn't belong and they got in his way, and he has to wear and bear that thought the rest of his life. I say the doctor is a victim as well."
   3. "The thing that [the plaintiff] needs is to let that boy be a happy loving memory. She should not have to think about this any more. But if you give her an award, then every time she spends those dollars, she's going to think about this case, and I submit that that's just too much for her to bear."
   4. "[I]f the truth means nothing ... we can give plaintiff lots of money just like we are selling beef."

   Martin v. State Farm Mutual Automobile Ins. Co., 392 So. 2d 11, 12-13 (Fla. 5th DCA 1980).

iv. Defense counsel stated that plaintiff's claimed damages were "absolutely ridiculous" and "[t]his is why our courtrooms are crowded ... and ... why we read articles in the newspaper." Stokes v. Wet N' Wild, 523 So. 2d 181, 182 (Fla. 5th DCA 1988).

v. Plaintiff's counsel repeatedly stated that various aspects of the corporate defendant's conduct was a "greedy charade." Such statements improperly denigrated the defense and argued facts not in evidence. Domino's Pizza, LLC v. Wiederhold, 248 So. 3d 212, 223 (Fla. 5th DCA 2018).

vi. Statements by plaintiff's counsel that defense's theory of fault was "ridiculous," that defense presented "ridiculous testimony," and that his client did an "exceptional job" driving were improper assertions of personal knowledge or opinions. Sacred Heart Hosp. of Pensacola v. Stone, 650 So. 2d 676, 679 (Fla. 1st DCA 1995).

vii. Plaintiff counsel characterized the defenses theory as being "unbelievable" or "ridiculous" or "insulting to you that [opposing counsel] would think that you might believe this." Counsel also improperly talked about his own nightmare

after seeing his client's day-in-the-life video. Baptist Hosp., Inc. v. Rawson, 674 So. 2d 777, 778 (Fla. 1st DCA 1996).

viii. Counsel stated that an expert witness's opinions were "so ludicrous" that the witness "did not bother to appear to testify in person." Held impermissible because it was counsel's personal opinion as to the justness of the cause and credibility of the witness. Muhammad v. Toys R Us, Inc., 668 So. 2d 254, 258 (Fla. 1st DCA 1996).

ix. Plaintiff's counsel stated: "Everything we've been telling you about [plaintiff] is true," "[Defense counsel] and his witnesses will say anything. [He] had to create a defense...How can he continue to misrepresent things to the jury?" Cohen v. Pollack, 674 So. 2d 805, 806 (Fla. 3d DCA 1996).

x. Plaintiff's counsel stated:
   1. "[IME doctor] will continue to see [injured plaintiffs] and treat these individuals and offer these ludicrous opinions until ... [IME doctor] leaves town or is run out of town ... [or] he determines no amount of money would entire [him] down to that courtroom again."
   2. "I'm absolutely outraged at the defense … in this case." "They don't admit liability. They come in here and say, 'you prove it'"
   3. "There is not enough dignity to address [plaintiff - a priest] with the proper title of 'Father.'"

   Pippin v. Latosynski, 622 So. 2d 566, 567-68 (Fla. 1st DCA 1993)

xi. Plaintiff's counsel said, of the defense:

> I have a 14–year–old son, he plays sports, he is an athlete, and if he were here, he'd say, "Come on, dog, just give it up. Just give it up." And they're not giving it up.

The court held that was improper because even if the 14-year-old son was a witness, his opinion about the UM insurer's litigation tactics would not have been admissible and, more importantly, "irrelevant stories and information about counsel's family have no place in closing argument." Mercury Ins. Co. of Florida v. Moreta, 957 So. 2d 1242, 1252 (Fla. 2d DCA 2007).

III. PERSONAL ATTACKS ON PARTY, ATTORNEY OR WITNESSES

a. Generally

i. "A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship. Arguments that go beyond bias, and instead attack opposing counsel or suggest fraud or

collusion are not acceptable and will not be condoned." Rosario-Paredes v. J.C. Wrecker Serv., 975 So. 2d 1205, 1208 (Fla. 5th DCA 2008) (citations omitted).

b. Not improper

i. "It is not improper for counsel to state during closing argument that a witness 'lied' or is a 'liar,' provided such characterizations are supported by the record…. If the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence." Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1028 (Fla. 2000).

c. Improper

i. "By reproaching [the defendant] for its supposed failure to 'come clean' and admit past wrongdoing, [the plaintiff] violated the principle that plaintiffs may not disparage defendants for contesting liability at trial." R.J. Reynolds Tobacco Co. v. Robinson, 216 So. 3d 674, 682 (Fla. 1st DCA 2017).

ii. Comments by defense counsel accusing plaintiffs' attorneys of "trickery," "hiding the ball" and suggesting that plaintiff was "prodded" into giving a response "he had to have been told by his attorneys," were similar to calling plaintiffs' counsels liars and accusing plaintiffs' counsel of perpetuating fraud upon the court. Owens Corning Fiberglas Corp. v. Morse, 653 So. 2d 409 (Fla. 3d DCA 1995).

iii. Improper to refer to defense experts as "courtroom doctors" who "have their little tricks" and were paid to say that the plaintiff was not hurt, and that the defendant paid these doctors and "[f]or the money they sent, they got what they needed." City of Miami v. Kinser, 187 So. 3d 921, 925 (Fla. 3d DCA 2016).

iv.

v. Plaintiff's counsel referencing the absence of defendant's corporate representatives at trial against unfairly implied that the companies were not showing proper respect for the trial, the decedent, and personal representative of his estate. R.J. Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753, 761 (Fla. 4th DCA 2016).

vi. It was an improper attack on the defendant's counsel when the plaintiff's attorney suggested that the defendant's lawyers were involved in a conspiracy,"…through the Tobacco Institute, were speaking privately, secretly among themselves, high-ranking officials of the Tobacco Institute…want to know why the defense in these cases consistently tries to recast the jury instructions and the questions on the verdict form, you have information that

helps you from one of their co-conspirators, and that's the Tobacco Institute…" R.J. Reynolds Tobacco Co. v. Gafney, 188 So. 3d 53, 56 (Fla. 4th DCA 2016).

vii. Plaintiff's counsel repeatedly chastised the defendant for failing to take responsibility and then said:

> 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 court held such arguments "improperly suggested that the defendant should be punished for contesting damages at trial and that its defense of the claim in court was improper." Intramed, Inc. v. Guider, 93 So. 3d 503, 507 (Fla. 4th DCA 2012).

viii. "[G]iven the absence of any evidence showing that either [the defendant] or its counsel hid evidence or acted improperly, any argument by Plaintiff's counsel implying that defense counsel was hiding evidence was both egregious and prejudicial to [the defendant]." SDG Dadeland Associates, Inc. v. Anthony, 979 So. 2d 997, 1001 (Fla. 3d DCA 2008)

ix. "So what does [plaintiff's counsel] have to do? He goes out and finds Dr. Padva and says, Dr. Padva, what we are going to do, we are going to try to get a naive jury. And then what we are going to do is, I need you to look at all of these tests and somehow come up with some scientific gobble-dee-cock that confuses the jury…." Johnnides v. Amoco Oil Co., Inc., 778 So. 2d 443, 444 (Fla. 3d DCA 2001).

x. Closing argument encouraging jury to punish insurer for defending against damages claim and suggesting that the defense was manufactured, taken together with improper impeachment of defense expert, constituted reversible error.

1. "Allstate denied the undisputed medical evidence. They denied accepting responsibility. I ask you, is that what it means to be in good hands?"
2. Allstate's expert "was enlisted as part of an effort to manufacture a defense . . ."
3. "Now, what is repentance? We know what repentance is. . . . . It's not enough to say, Golly, gee, okay, now five years almost after this

> accident, yeah, the uninsured motorist in this case was negligent and caused harm . . . . The second step is to accept full responsibility . . . . Not part of the responsibility, to accept full responsibility. And the third step is to do everything necessary to make it right, to do everything necessary to make it right. Not part of it all of it. Now, you got to do all you can to that person that uninsured motorist hurt to make it right."

Allstate Ins. Co. v. Marotta, 125 So. 3d 956 (Fla. 4th DCA 2013).

xi. Plaintiff's counsel's arguments to the jury that defense counsel was "pulling a fast one," "hiding something," and "trying to pull something," was tantamount to calling defense counsel liars and accusing them of perpetrating a fraud upon the court and jury. Sanchez v. Nerys, 954 So. 2d 630, 632 (Fla. 3d DCA 2007).

xii. Defense counsel stated:
   1. That plaintiff's doctor "as he usually does, has found a permanency";
   2. That the treating health care providers had ulterior, self-interested, motives in testifying and admonished the jury not to be deceived by them;
   3. "[Plaintiff] should have said thank goodness I wasn't injured more seriously ... instead of seeking recompense for what injuries she got."
   4. That plaintiffs "were seeking not a small fortune, a large one." and
   5. "[D]on't let [plaintiffs' child] think that this is the way you get from one end of life to the other."

   Schubert v. Allstate Ins. Co., 603 So. 2d 554, 555 (Fla. 5th DCA 1992)

xiii. Plaintiff's counsel referred sarcastically to witnesses as "a good soldier" or "this joker" to denigrate them, and compared the defendant, Walt Disney, to "some nickel and dime carnival" throwing "pixie dust" to mislead the jurors. Defense counsel was also accused of treating the jurors as though they were "fools" and "idiots." Muhammad v. Toys R Us, Inc., 668 So. 2d 254, 258 (Fla. 1st DCA 1996).

xiv. Held that it is improper to refer to an expert as a "hired gun." King v. Byrd, 716 So. 2d 831, 836 (Fla. 4th DCA 1998).

xv. Defense counsel called plaintiff's doctor "nothing more than an unqualified doctor who prostitutes himself ... for the benefit of lawyers" who is paid to perform a service by giving the "magic testimony" for plaintiff's lawyer which allows him to get the case to court. Such comments were improper as they essentially accused the expert of perjury and opposing counsel of unethically committing a fraud upon the court. Venning v. Roe, 616 So. 2d 604, 604 (Fla. 2d DCA 1993).

xvi. Comment about plaintiff and plaintiff's counsel "getting rich" from the requested verdict amount is impermissible. Aetna v. Kaufman, 463 So. 2d 520, n. (Fla. 3d DCA 1985).

xvii. Defense counsel stated that "[i]t's not uncommon for plaintiff's attorneys to put up some ridiculous number 50 times what they really do expect to get...." Donaldson v. Cenac, 675 So. 2d 228, 229 (Fla. 1st DCA 1996)

xviii. Defense counsel's comment that plaintiffs' attorneys routinely ask for eight to ten times "what a case is worth" were improper. Laberge v. Vancleave, 534 So. 2d 1176, 1177 (Fla. 5th DCA 1988).

xix. Improper to criticize insurer's litigation and claim-handling practices in an action to recover UM benefits because the remarks were not based on matters in evidence, and insurer's alleged practices in other cases were irrelevant. Mercury Ins. Co. of Fla. v. Moreta, 957 So. 2d 1242, 1251 (Fla. 2d DCA 2007).

xx. The insured's testimony that her UM insurer dropped her coverage, even though she paid her premiums, and her attorney's closing argument stating that the insurer was shirking its responsibilities or otherwise acting in bad faith warranted a new trial for insurers. Carvajal v. Penland, 120 So. 3d 6, 10 (Fla. 2d DCA 2013).

IV. "GOLDEN RULE" ARGUMENTS

a. Generally

i. "A Golden Rule argument asks the jurors to place themselves in the plaintiffs' position and urge them to award an amount of money they would desire if they had been the victims. A golden rule argument is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence. Such arguments constitute reversible error, if a contemporaneous objection is made, because they strike at the very heart of our justice system. Even when an attorney does not explicitly ask the jurors how much money they would wish to receive in the plaintiff's position, comments may violate the Golden Rule if they implicitly suggest that the jury place itself in the plaintiff's position." Philip Morris USA, Inc. v. Ledoux, 230 So. 3d 530, 536 (Fla. 3d DCA 2017).

b. Not improper

i. Plaintiff's counsel's remarks which dramatized "the devastating impact of the tragedy on the injured plaintiff by the use of rhetoric" – including use of the pronoun "you" but, by context, was referencing the plaintiff rather than the jury

– did not constitute a Golden Rule violation. Bew v. Williams, 373 So. 2d 446, 447 and n.2 (Fla. 2d DCA 1979).

ii. Defendant's closing argument that jurors all drove, knew importance of brake lights, and realized possibility of hitting car, which unexpectedly stopped and that everyone has had close call due to unexpected stop by another car attempted to ask jury to use common, everyday experience in deciding case, was not directed to damages, and was not impermissible "golden rule argument." Shaffer v. Ward, 510 So. 2d 602, 602 (Fla. 5th DCA 1987)

c. Improper

i. In a wrongful death action, plaintiffs' counsel told the jury that if a "magic button" were placed in front of a juror and $6 million were placed in front of another juror, the plaintiffs would walk past the money and press the button to bring their son back. Bocher v. Glass, 874 So. 2d 701, 703 (Fla. 1st DCA 2004).

ii. Golden rule violation found where plaintiff's counsel argued "we can't feel [the plaintiff's] pain," to "guess, only imagine" the plaintiff's pain, and that "scars are only tiny on somebody else's face." Chin v. Caiaffa, 42 So. 3d 300, 309 (Fla. 3d DCA 2010).

iii. Golden rule violation found where counsel said, "I'm not even going to talk about damages … Walk in their shoes." Metro. Dade County v. Zapata, 601 So. 2d 239, 242 (Fla. 3d DCA 1992).

iv. Golden rule violation found where, in wrongful death case of a minor child, the jury was repeatedly addressed directly as "you" in comments referring to parents and children. Harbor Ins. Co. v. Miller, 487 So. 2d 46, 47 (Fla. 3d DCA 1986).

v. Golden rule and conscience of the community violations where defense counsel argued that a verdict for the plaintiff in this case would bring an immediate halt to hog hunting in the county, that it would have a punitive effect on landowners in general, and that any verdict for plaintiffs would endanger recreational use of all land in the area for hunting. Norman v. Gloria Farms, Inc., 668 So. 2d 1016 (Fla. 4th DCA 1996)

vi. Golden rule violation when plaintiff's counsel stated: "If the shoe is on the other foot, would you wear it?" Nat'l Car Rental Sys., Inc. v. Bostic, 423 So. 2d 915, 917 (Fla. 3d DCA 1982).

vii. During rebuttal, plaintiff's counsel concluded by telling a story about a disabled boy who chooses to take care of an injured puppy:

> How are you going to do that when you go back into the jury room? And I'm trying to think how do I convey this to you so you'll understand what it is to go through what this lady has gone through and what she will have to go through when we all leave, when we go back to our families and ways of life and all of the Christmases and holidays she's had to celebrate in casts and in therapy? How do I do that? How do you go back and make this right?
>
> ***
>
> A little boy got $8, and he wants a puppy, and he goes into a puppy store because it has a big sign that says puppies for sale. And the owner comes out, and the boys [sic] says, "I only have $8." And the owner says, "Let me show you the puppies." And he opens up the door, and five or six little white puffy puppies come running out except the one in the back. The one in the back comes limping out, and the owner goes, "Which one of these do you want?" The little boy says, "I want the one in the back that's limping." And the owner says, "Why would you want the one in the back that's limping? Take one of these healthy puppies. That one has a bad leg. He's been injected. He's had surgery. It is no good." The little boy says, "I want that one." And the owner says, "Why?" And the boy lifted up his pant leg with a brace on it. "Because," he says, "that puppy is going to need somebody that knows what it is like to feel that bad."

The court held that even though the comments did not directly ask the jury to place itself in the plaintiffs' position, "[t]he only conceivable purpose behind counsel's argument was to suggest that jurors imagine themselves in the place of" the plaintiff. Further, "there can be no doubt that the Puppy Story struck at the sensitive area of financial responsibility and hypothetically requested the jury to consider how much they would wish to receive in a similar situation." SDG Dadeland Associates, Inc. v. Anthony, 979 So. 2d 997, 1000–01 (Fla. 3d DCA 2008).

V. OTHER APPEALS TO SYMPATHY OR PREJUDICE (I.E., "SEND-A-MESSAGE" AND "CONSCIENCE OF THE COMMUNITY")

a. Generally

i. "Closing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response rather than the logical analysis of the evidence in light of the applicable law." Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1028 (Fla. 2000) (internal citation omitted).

ii. When an attorney makes "impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation," the attorney generates unfair prejudice by creating an improper "us-against-them"

mentality, which at best is a "distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial." City of Miami v. Kinser, 187 So. 3d 921, 924 (Fla. 3d DCA 2016)

b. Not improper

i. The following statement was *not* a conscience-of-the-community argument:

> Nothing would be better than if juries had the ability to take a magic wand and, after hearing a case, go, we make it go away. It's gone. It didn't happen. That would be great, but we don't have that. That technology, unfortunately, hasn't been invented. All you have is this, you have your pen, and that's a very powerful instrument, because that's your instrument to deliver justice.

City of Miami v. Kinser, 187 So. 3d 921, 924–25 (Fla. 3d DCA 2016)

ii. Closing argument of attorney for motorcyclist who was severely injured in head-on collision with car did not improperly attempt to inflame passions of jury or improperly attempt to invoke jury sympathy:

> And now she's sitting here damaged for life with the most devastating injury a woman can suffer. Devastating to her, devastating to her family, to her kids, devastating to everybody that knows her and cares for her. Devastating.
>
> * * *
>
> Please don't leave her alone to deal with that. Don't leave her bare and naked, like this accident has already left her, and her children and her family. Don't leave her like that.

Knoizen v. Bruegger, 713 So. 2d 1071, 1072 (Fla. 5th DCA 1998).

iii. In a wrongful death medical malpractice action, plaintiff's counsel stated:

> You need to come back with a verdict you can be proud of [a] verdict that my client, Mr. Hightower, can come up here and shake your hands and say you have made some sense out of this. Don't let these people go back to their offices and [laugh] in the hall room and say, we put one over on them. Baloney. They missed the diagnosis, they missed the x-rays, not once but twice, and this lady's life depended on it. They made a mistake. They didn't mean to do it, but they made a mistake, and they're responsible.

The court held the above-referenced statement was *not* an exhortation to "send a message" or an impermissible "conscience of the community" argument. Although the comment could have been understood as accusing defense counsel of attempting to mislead jury regarding subject of damages, any error was harmless. Wilbur v. Hightower, 778 So. 2d 381, 383-84 (Fla. 4th DCA 2001)

c. Improper

i. The following was held to be an improper conscience-of the community argument:

> She doesn't get to come back. This is her one chance to be before you. This is her one shot. It's all of your one shot to get it right, so go back there and take your instrument and get it right.

The court held an objection was properly sustained because "the jury's role is to fairly evaluate the evidence before it in order to reach a verdict based on the law and the facts." City of Miami v. Kinser, 187 So. 3d 921, 925 (Fla. 3d DCA 2016).

ii. During an Engle wrongful death action, plaintiff's counsel stated:

> Then you have to bury her and you have to live alone for the next 19 years and the rest of your life, I submit to you that Roland Ledoux would have said, thank you, but keep the money.

The court observed that "[a]lthough it is evident that Plaintiff's counsel was attempting to illustrate the practical limitations of our civil justice system by arguing to the jury that no monetary award—regardless of the amount—would suffice to give Roland what he truly wanted, the argument was presented in an overly-dramatic manner such that it could evoke the jury's sympathy." Philip Morris USA, Inc. v. Ledoux, 230 So. 3d 530, 535 (Fla. 3d DCA 2017).

iii. Plaintiff's counsel argued that the jury should "tell them by your verdict in this case to do something about this … Tell them by the verdict that it is significant. They need to anticipate … they need to anticipate accidents before they happen." That was held to be an impermissible "send a message" argument. Kloster Cruise Ltd. v. Grubbs, 762 So. 2d 552, 554-55 (Fla. 3d DCA 2000).

iv. Plaintiff's counsel's gratuitous remarks about his daughter's age was improper and inappropriately evoked sympathy from the jury. R.J. Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753, 761 (Fla. 4th DCA 2016).

v. During the portion of trial which determined compensatory damages and entitlement (but not amount) of punitive damages, plaintiff's counsel was still prohibited from attacking defense counsel and the tobacco companies' alleged failure to accept responsibility. R.J. Reynolds Tobacco Co. v. Calloway, 201 So. 3d 753, 759 (Fla. 4th DCA 2016)

vi. "In addition to accusing opposing counsel of participation in a scheme of deception, counsel for [plaintiff] denigrated [defendant] as an unrepentant, anti-military, criminal predator, whom the jury must fight and destroy. The jury, perhaps heeding [the plaintiff's] ominous warning that 'God's not pleased,' answered with an unprecedented punitive verdict of $23.6 billion. On such a

record, so replete with improper arguments and comments clearly intended to stir the passions of the jury, we must conclude that Robinson's misconduct had its intended effect." R.J. Reynolds Tobacco Co. v. Robinson, 216 So. 3d 674, 682–83 (Fla. 1st DCA 2017).

vii. The court reversed for a new trial and held that a plaintiff may not "send a message" or "appeal to the conscience of the community" while discussing compensatory damages because of the potential for the jury to punish through a compensatory award. "… [I]n your verdict…speak the truth. Your verdict must speak loud and it must speak clear. And the truth your compensation verdict must speak is the amount of money it will take to compensate and equalize, balance the harm that has been done in this case." R.J. Reynolds Tobacco Co. v. Gafney, 188 So. 3d 53, 55 and 58 (Fla. 4th DCA 2016).

viii. It was improper for plaintiffs' counsel to advise the jury that the decedent would recover nothing if they found that the decedent was greater than 50 percent at fault as a result of being under the influence of cocaine and/or marijuana. The court stated that it could "conceive of no other reason" for making such a statement "other than to deliberately and improperly evoke sympathy and compassion for Decedent's parents." Harrison v. Gregory, 221 So. 3d 1273, 1277-78 (Fla. 5th DCA 2017).

ix. In wrongful death action, plaintiff's counsel stated:

> You may be asking yourself, what good is the money going to do? We all know that money cannot bring back Edwin, but that's not the issue here.... Also, the money does help to tell Edwin's mother and father that you, the jury, recognize that what has been done is wrong and should not have ever happened.

Held improper because "the jury was being asked to award money not based on the proof supporting the proper recoverable damages allowed in a wrongful death action, but to remedy wrongful, intentional, as opposed to negligent, conduct." However, that comment alone would not have required reversal. City of Orlando v. Pineiro, 66 So. 3d 1064, 1070 (Fla. 5th DCA 2011).

x. Improper to suggest a relationship between verdicts and rising insurance premiums. Russell v. Guider, 362 So. 2d 55, 55 (Fla. 4th DCA 1978).

xi. Improper for defense counsel to suggest that an insured defendant would have to pay the verdict himself and that the defendant's memories of the events giving rise to the suit were punishment enough, or that "[defendant] has to live" with the consequences of his actions "every day of his life." Ballard v. American Land Cruisers, 537 So.2d 1018, 1019-20 n.3 (Fla. 3d DCA 1988).

xii. Defense counsel's comment that "[t]his is a courtroom, not a lottery" was improper. Hang Thu Hguyen v. Wigley, 161 So. 3d 486, 488 (Fla. 5th DCA 2014).

xiii. A new trial was warranted where defense counsel repeatedly said in closing argument that a small business owner – who was not a named defendant but was vicariously liable under the doctrine of respondeat superior – would be solely responsible for any award of damages. Such statements mislead the jury into believing there is no liability insurance to cover the loss and improperly attempt to appeal to the jury's sympathy. Linzy v. Rayburn, 58 So. 3d 424, 426-27 (Fla. 1st DCA 2011).

xiv. It was improper to suggest that God favored a verdict for the plaintiff, particularly coupled with a request that the jury punish the defendants who had not "repented" for their sins. Health First, Inc. v. Cataldo, 92 So. 3d 859, 868 (Fla. 5th DCA 2012).

xv. Defense counsel's closing argument, asking the jury to consider whether it was fair to burden the 18-year-old defendant driver, who was seated alone at the defense table, with a substantial damage award and stating that it was a bad day for her as well, was improper because it was nothing more than an attempt to conjure sympathy for the young defendant to reduce the damage award by improperly asking the jury to weigh the effect a substantial award would have on her while ignoring her absent father, who was also a defendant, and ignoring the fact that there was insurance coverage. Cascanet v. Allen, 83 So. 3d 759, 764-65 (Fla. 5th DCA 2011).

xvi. The following argument was held to be improper because it suggests that a significant verdict will send a message to stop these experiences from happening and will make others less likely to act irresponsibly:

> Many of us have suffered the loss of a loved one during our lifetime but have never received money for it. Why should Edwin's mother and father recover money? The answer is simple. The law in Florida recognizes that the loss of a loved one is a traumatic and tragic experience. We want to do everything we can to stop these experiences from happening unnaturally. We want others to act responsibly and to do—

City of Orlando v. Pineiro, 66 So. 3d 1064, 1071 (Fla. 5th DCA 2011).

xvii. In an action for UM benefits, arguing to the jury that the UM carrier failed to pay despite the insured's payment of 20 years of premiums was, in essence, a "send a message" argument because the issue alleged was the tortfeasor's

negligence, not bad faith failure to settle. State Farm Mut. Auto. Ins. Co. v. Revuelta, 901 So. 2d 377, 379 (Fla. 3d DCA 2005).

xviii. An insured's counsel's reference to the length of time the insured was covered under an auto policy by saying "all the years of" and "thousands of dollars of" payments, and also counsel's argument that insurer left her "out in the cold" upon her first claim was an impermissible plea for sympathy. Govt. Employees Ins. Co. v. Kisha, 160 So. 3d 549, 553-554 (Fla. 5th DCA 2015).

xix. In UM case, plaintiff's counsel argued that the plaintiff had purchased UM "so this wouldn't happen" and argued that he was carrying debt because the UM carrier refused to take responsibility. Similar sentiments were also included on a PowerPoint slide. At the conclusion, counsel projected another slide said which said the plaintiff "has done the right thing all along. Has the Defendant?" without ever uttering anything to that effect. The court held the cumulative effect of the spoken and written statements was "far from inconsequential" and reversed for a new trial. State Farm Mut. Auto. Ins. Co. v. Gold, 186 So. 3d 1061, 1063 (Fla. 4th DCA 2016).

VI. DAMAGES ISSUES

a. Generally

i. Plaintiffs are allowed to ask for specific amounts, but not suggest that such amounts are legally acceptable or will withstand subsequent challenges. Domino's Pizza, LLC v. Wiederhold, 248 So. 3d 212, 226–27 (Fla. 5th DCA 2018).

ii. "In Florida, the propriety of making per diem arguments … rests within the sound discretion of the trial court." McDaniel v. Prysi, 432 So. 2d 174, 175 (Fla. 2d DCA 1983).

iii. The use of a chart during closing is "a widely accepted practice, but when the argument is concluded the chart must be promptly removed from the jury's observation." Louisiana-Pac. Corp. v. Mims, 453 So. 2d 211, 212 (Fla. 1st DCA 1984).

iv. Plaintiff's counsel was properly permitted to place on a blackboard figures representing a mathematical computation reducing pain and suffering to a calculation in money on a per diem basis where such argument is reasonably based on evidence in the record. Perdue v. Watson, 144 So. 2d 840, 841-42 (Fla. 2d DCA 1962).

b. Not improper

i. In closing of wrongful death case, plaintiff's counsel stated:

> [Y]our verdict in this case is supposed to pay for the loss that this man has suffered and will suffer for the rest of his life. That verdict should be in the amount of five million dollars, one million dollars for each of the defendants in this case. In this day and age where inanimate objects like paintings are sold at auctions for ten million dollars, a living, breathing person has died, Barbara Hightower… Before I was interrupted, I was talking about the loss that—what that means to Mr. Hightower that this living person is gone from his life. What is the value of that loss? You could say no amount of money could bring her back and that's true, but you have got to make sense out of this. You have got to make some sense out of this loss.

The court held that reviewing "the argument in its entirety and placing the challenged portion of the plaintiff's argument into context . . . it is clear that the plaintiff's counsel was not arguing that the jury should place a monetary value on the decedent's life but, rather, on her surviving spouse's loss." The court found no error because "while the value of a human life is not an element of damages and is not a proper subject for final argument, the value of a surviving spouse's loss of his wife's companionship and protection, as well as his mental pain and suffering as a result of her wrongful death, is a proper measure of damages within the Wrongful Death Statute." Wilbur v. Hightower, 778 So. 2d 381, 382 (Fla. 4th DCA 2001)

c. Improper

i. In a wrongful death action, plaintiff counsel sated "the question you may be asking is, how do I possibly put a value on the life of a loved one?" The court held "[i]t is clearly error to ask a jury to place a monetary value on the life of a decedent because 'the value of a human life is not an element of damages and is not the proper topic for closing argument.'" City of Orlando v. Pineiro, 66 So. 3d 1064, 1070 (Fla. 5th DCA 2011).

ii. In a wrongful death action, the plaintiff argued that, in awarding damages, the jury should place monetary value on life of the decedent, just as a monetary value is placed on an $18 million Boeing 747 or an $8 million SCUD missile. Pub. Health Tr. of Dade County v. Geter, 613 So. 2d 126, 127 (Fla. 3d DCA 1993).

iii. Plaintiff's counsel stated:

> And I'm going to suggest to you that in order to make this right, to right this wrong, you will need to move a sum of money from their side of the courtroom to Yvonne Wiederhold's side of the courtroom to pay for what they've taken from her. *I'm going to suggest to you that sum is ten*

> *million dollars. Now, no more than that. No more than that because it might not be able to be upheld in post-trial motions. We don't want that. But up to that, all will be okay.*

Held improper because it suggested that the $10 million amount would be upheld. Domino's Pizza, LLC v. Wiederhold, 248 So. 3d 212, 226 (Fla. 5th DCA 2018).

iv. Plaintiff's counsel stated:

> It's what you guys give is what he's going to get. If you give him too much money, the judge can take away some of that money. It's to be—he can order remittitur or cut it down. If you don't give Mr. Anderson enough money, he can't order more money. This is the only shot.

The court held that even if that accurately stated the law (and it did not), it was improper, and that counsel should "not invite the jury to shift responsibility for their verdict to the judge." City Provisioners, Inc. v. Anderson, 578 So. 2d 855, 856 (Fla. 5th DCA 1991).

v. While it is not *per se* impermissible to point to an empty chair, no statement is permitted that settlement was reached with another defendant, or that the empty chair was once a defendant. Black v. Montgomery Elevator, 581 So.2d 624, 625 (Fla. 5th DCA 1991).

vi. Defense counsel stated:

> This is serious stuff. And it is serious to [defendant], because nobody mentioned that this is her golden years. Nobody mentioned that this is her retirement. Nobody mentioned she worked all her life to be able to retire. And nobody mentioned what this kind of money would do to her, nobody mentioned that."

Any comment asking the jury to consider the financial burden that a verdict would place on a party is improper. Padrino v. Resnick, 615 So.2d 698, n. 1 (Fla. 3d DCA 1992).