Improper Closing Argument in Civil Trials: A Trial Notebook Summary of Mississippi Case Law

By Robert M. Frey

Bob Frey is a member of the Appellate and Commercial Litigation groups at Butler, Snow, O'Mara, Stevens and Cannada, PLLC, in Jackson, MS. Bob has nearly twenty-five years' experience helping businesses faced with litigation – avoiding it when possible, prosecuting and defending it when necessary. He is especially interested in liability insurance coverage, defense, settlement, and indemnity issues. He can be reached at ***bob.frey@butlersnow.com****; a full bio, and sample briefs, can be found at* ***http://www.butlersnow.com/atty_search/bio/46/robert_m_frey.html****.*

The parties have rested and opposing counsel is on his feet, making his closing argument. Preoccupied with planning what you're going to say when your turn comes, you hear opposing counsel declare that your client "thinks he's above the law." Do you object?

To make that decision you must, of course, first know whether the argument is objectionable. Even if it is you may decide, as a tactical matter, to stay seated, but you can't make an informed decision on that unless you know the answer to the first question.

The answer is "yes," and your authority is *Eckman v. Moore*, 876 So.2d 975, 987 (Miss. 2004) ("And quite frankly I don't think they believe that a Lee County jury will hold them responsible. They think that they're above the law. If they spent half as much time taking care of Taylor Moore as they have on defending this lawsuit. . . ."; *held*: improper). Here, for your trial notebook, is a summary of Mississippi cases on improper argument in civil trials.

*** Appeals to passion and prejudice.** *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 62 ¶144 (Miss. 2004) ("Appeals to passion and prejudice are always improper and should never be allowed") (internal quotation marks omitted).

*** Appeals to sectional prejudices.** *James W. Sessums Timber Co., Inc. v. McDaniel*, 635 So.2d 875, 882 (Miss. 1994) ("[W]e do not condone appeals to sectional prejudices of the jury").

*** Abuse, unjustified denunciation or a statement of fact not shown in evidence.** *Brush v. Laurendine*, 150 So. 818, 819 (Miss. 1933) (counsel's statement that after a prior case, defendant fired employees who testified against defendant, and counsel's statement that defense witness was "sleek, fat, [and] pompous," who "strutted"; *held:* improper) (internal quotation marks omitted).

*** "[I]nflammatory language calculated to mislead the jury and which has no relation to the issues of fact which are being presented to the jury for determination."** *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 62 ¶144 (Miss. 2004).

*** Excessively emotional arguments.** *Standard Oil Co. v. Decell*, 166 So. 379, 384 (Miss. 1936) (Anderson, J., dissenting) ("Sympathy for suffering and indignation at wrong are worthy sentiments, but they are not safe visitors in the courtroom, for they may blind the eyes of Justice. They may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel. In judiciary inquiry the cold clear truth is to be sought and dispassionately analyzed under the colorless lenses of the law") (internal quotation marks omitted).

*** Punitive arguments where punitive damages are not at issue.** *Shell Oil Co. v. Pou*, 204 So.2d 155, 157 (Miss. 1967) (argument "that the defendant was a corporation, had no soul, could neither go to heaven nor hell and that 'the way that the law punishes a corporation for not paying their debts in a case like this, if you find that they owe actual damage, is to require them to pay a punitive damage'" improper, where punitive damages should not have been submitted) (*Q.* whether this argument proper where punitive damages *are* at issue?); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 62 ¶143 (Miss. 2004) (demand for $20 million per

Continued on next page

Improper Closing Argument in Civil Trials: A Trial Notebook Summary of Mississippi Case Law

plaintiff, unsupported by evidence, was "[e]ssentially" a "punitive damages argument") (also condemning irrelevant charges of intentional misconduct, and "send a message" arguments).

*** Irrelevant matters, and matters not supported by the record.** *Pickwick Greyhound Lines v. Silver*, 125 So. 340, 344 (Miss. 1929) (the pertinent portions of *Pickwick* are too lengthy to summarize here, but the case may also support the proposition that argument concerning an irrelevant matter is improper, even if evidence of that matter was admitted).

*** Invitations to consider excluded evidence.** *White's Market & Grocery Co. v. John*, 121 So. 825, 825 (Miss. 1929) ("This man, Freeman, made a statement to the policeman, McWilliams, regarding this collision. That statement would shed some light upon this controversy, and the attorneys for the defendants did not want you gentlemen to hear it. They would not permit you gentlemen to hear it. . . . The court says I cannot argue to you about the testimony which McWilliams gave out of your hearing, but you know you did not hear it because the defendants did not want you to hear it"; *held*: improper).

*** Arguments likely to cause the Jury to disregard the law as given in the Court's instructions.** *Morrell Packing Co. v. Branning*, 124 So. 356, 358 (Miss. 1929):

> [S]ince [under the law, as given in the Court's instructions,] the jury was not permitted to award the appellee any damages for the death and loss of the child, the fact that
>
> > "nobody knows what the child may have been in after years had it lived to become a man," and that "from the humble walks of life; from the loins of the toiler; from the humble woman, like this modest woman who has brought her cause to this courthouse, have come those who have largely made the history of the world. It is true that there is no way to estimate what this child may have accomplished in years to come, had it lived, but that is immaterial. Those who walk the lowly paths of life in this country have every door open to them, and yet, the instructions of the court must be respected. This child may some day have been a senator"-
>
> was no concern of the jury, and we think it was highly prejudicial for counsel to continually impress upon the jury the great loss which the fond mother sustained by reason of the fact that her child was deprived of the opportunity to attain a high and exalted position among the distinguished men of the nation. We can conceive of no argument more calculated to arouse prejudice and passion in the minds of the jurors, or to induce them, whether consciously or unconsciously, to disregard the instruction upon that point, and we are of the opinion that the argument of counsel, when considered in its entirety, was so prejudicial as to require a reversal of the entire cause.

See also Dement v. Summer, 165 So. 791, 794-795 (Miss. 1936) ("Attorneys for both sides will be confined to the written instructions as completely as they are to the evidence of record, and if either of them go out of or beyond the written instructions, the point may be made and reserved exactly as in cases of improper argument on the facts").

*** "Last word" argument ("Don't worry about making a mistake, it will be fixed on appeal").** *Howell v. State*, 411 So.2d 772, 773 (Miss. 1982) ("Let me say this to you, ladies and gentlemen, your decision, if you find him guilty, will not be the final .... There's a Court above this that will look at this and see if you all made the right decision"; *held*: improper).

*** Reference to "outside opinion."** *Morse v. Phillips,* 128 So. 336, 337-338 (Miss. 1930) (Counsel pointed out that after parties' dispute had become public, defendant ran for, and won, office; therefore "this jury has nothing to try; the people have already tried the case in favor of the defendant"; *held*: improper).

*** Suggesting that verdict would have some effect in addition to compensating plaintiff.** *Kaiser Investments, Inc. v. Linn Agriprises, Inc.*, 538 So.2d 409, 417 (Miss. 1989) ("Counsel implied that unless the jury returned a verdict for [Plaintiff], it would not be able to pay its debt to [a third party]"; *held*: improper).

*** Argument "calculated to dethrone the reason and equilibrium of the jury."** *New Orleans & N.E.R. Co. v. Jackson*, 105 So. 770, 774 (Miss. 1925) (plaintiff's injury was "'nothing but murder'"; statute violated by defendant was enacted "'because so many mothers' sons were being slaughtered by the railroad companies-more than were killed in the war-and they had to put a stop to it'"; Jury should return "'a good verdict because lawsuits are expensive, and they (meaning appellant) made him sue, and you ought to give him a good verdict because they made him file this suit'"; *held:* "The appellee's attorney went too far; he said too much. It was calculated to dethrone the reason and equilibrium of the jury").

Continued on next page

Improper Closing Argument in Civil Trials: A Trial Notebook Summary of Mississippi Case Law

*** "Golden Rule" arguments.** *Woods v. Burns*, 797 So.2d 331, 334 ¶12 (Miss. App. 2001) ("'Golden Rule' argument, which has been condemned by our supreme court, asks the jurors to put themselves in the shoes of the lawyer's client").

*** Suggesting that someone other than defendant (such as his insurance company) will pay the verdict.** *Vicksburg Ice Co. v. Delta Ice Co.*, 119 So. 824, 825 (Miss. 1929) ("'This is not a controversy between the Delta Ice Co. and the Vicksburg Ice Co. It is a controversy between the Delta Ice Company and the Insurance Company. They took the premium and then refused to pay as they always do. . . . Make them pay — it won't cost them anything'"; *held*: improper).

*** Arguing from absence of a witness, where witness was equally available to both parties.** *Illinois Cent. R. Co. v. Weinstein*, 55 So. 48, 49 (Miss. 1911) ("Counsel for the plaintiff, in closing the argument in this cause, said to the jury that the conductor at the time of the accident took the names of the persons present, of Vaiden and others, and that it had failed to bring them to court when it could issue them free passes, and that the reason of this was because they thought they would testify unfavorably for the defendant, and would support the plaintiff"; *held*: improper).

*** Arguments in violation of Miss. R. Prof. Conduct 3.4(e).** Miss. R. Prof. Con. 3.4(e) ("A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant . . ."). *Cf. Lawn v. U.S.*, 355 U.S. 339, 359 (1958) (Prosecutor stated in closing "'We vouch for ([witnesses] Roth and Lubben) because we think they are telling the truth'"; *held:* "Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury, and therefore it was not improper").

Final Word

The bottom line is this: argument has "only [one] legitimate purpose," *vis*, "to assist the jurors in evaluating the evidence and in understanding the law and in applying it to the facts. . . . *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 62 ¶144 (Miss. 2004) (internal quotation marks omitted). Any argument that does not serve this purpose is improper. Attorneys who have this principle in mind, and have this list handy, will be well positioned to decide whether and when to object. ■