

SCOPE OF PERMISSIBLE JURY ARGUEMNT IN CIVIL CASES

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The credit for this document goes to

Associate Professor Ann M. Anderson and W. R. Kenan Distinguished Professor Jessica Smith, for the content of their material in Closing arguments in Civil Trials and Jury Argument: Content of Opening and Closing Statement

North Carolina Superior Court Judges' Bench Book, UNC School of Government

Without the research and the materials contained in each of these set of materials, this presentation would not have been possible

I. Order and Length of Arguments:

A. Defendant Acme: We will have opening and closing arguments, since we presented no evidence, even though defendant Hospital offered evidence-that does not affect us.

Plaintiff: Objection! We are entitled to both opening and closing.

A. (overruled)

B. (sustained)

C. (discretionary with the court)

Ruling: overruled- plaintiff has opening and closing as defendant Hospital offered evidence. Rule 10, Rules of Practice.

B. Plaintiff: Your Honor, even though neither defendant offered testimonial evidence or exhibits, they have lost the right to open and close because defendant Acme refreshed the recollection of our witness Dr. Butcher by showing him his operative notes, thereby offering evidence.

Defendant: Objection!

A. (overruled)

- B. (sustained)
- C. (discretionary with the court)

Ruling: overruled- defendants have right to open and close as showing a witness an item to refresh their recollection is not offering evidence. State v Hall, 57 N.C. App. 561, 564 (1982).

- C. Defendants: Your Honor each defendant will waive opening argument and take closing arguments since we did not introduce any evidence.

Plaintiff: Objection! Your Honor we did not introduce the video from the operating room but merely had the doctors testify as to what took place. Defendant Acme marked the video as an exhibit, played it for the jury and cross examined the doctor from it. The video contained “new material” that was not testified to and not relevant to an issue in this case.

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained- State v Lindsey, ___ N. C. App. ___, COA 15-1188, (9/20/2016), quoting State v Shuler, 135 N. C. App. 449 (1999)-“evidence” is introduced during cross examination when: ‘(1) it is offered’ into evidence by the cross-examiner; or (2) the cross-examination introduces new matter that is not relevant to any issue in the case. Citing State v. Bell, 179 N. C. App. 430, 431 (2006).

- D. Court: I will allow each party one and one-half hours of closing argument so that we can conclude the charge conference, arguments and charge and send this case to the jury the same day.

Plaintiff and each Defendant: Objection! Your Honor, we respectfully request two hours per party for closing.

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - Court may not limit each party to less than two hours. G.S. 7A-97.

E. Plaintiff: Your Honor, with two defendants, we respectfully ask for three hours of closing arguments.

Defendants: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: - discretionary with the Court G.S. 7A-97, “as the interest of justice may require.”

II. Matters not in Evidence

A. Plaintiff: And the doctors that the hospital had on their witness list and did not call-they would have called them if they had been able to give favorable testimony.

Defendant: Those doctors would have testified exactly as Dr. Feelgood did and they were not called because their testimony would have been “what he, himself, had already said”

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained- quoting Crutcher v Noel, 284 N. C. 568, 572 (1974); reversed, new trial for plaintiff because defendant argued facts outside the record which... “effectively buttressed his client’s

testimony on this critical issue and weighted the verdict in defendant's favor."

- B. Plaintiff: I'm showing you a chart I prepared last night with figures I came up with as to Mrs. Willoughby's loss of earnings and how long I expect her to live.

Defendant: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - Callicutt v Smith, 267 N. C. 252, 252-53 (1966).
May not argue or show jurors matters not in evidence.

- C. Plaintiff: The Acme surgical table is just like the Takata air bags that you have been reading about and seeing on the news.

Defendant: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained – GS 15A-1230 (a) (which applies to civil cases also) – counsel may not argue matters that are not in evidence. State v Jones, 355 NC 117, 132 (2002).

III. Misstatement of Evidence

Defendant Acme: Even before Mrs. Willoughby's surgery, the hospital knew better than to store anything on the table base because the warning clearly read "WARNING PERSONAL INJURY HAZARD/EQUIPMENT DAMAGE".

Defendant Hospital: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained – Johnson v. Amethyst Corp. 120 N. C. App. 529, 535- misstatements of evidence are improper.

IV. Trial Courts Legal Ruling

Plaintiff: “The Court let you hear it because the Court found the witnesses were trustworthy and reliable...if there had been anything wrong with that evidence, you would not have heard that.”

Defendant: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - quoting State v Allen, 353 N. C. 504, 508-11 (2001) - Improper to argue when court admitted hearsay statements.

V. Relevant Law

Defendant: I’m going to read to you the law regarding a hospital’s responsibility when using damaged equipment...

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: overruled – G. S. 7A-97, Rules of Practice, all relevant law may be argued by counsel.

VI. Irrelevant Statements of Law

Defendant: I’m going to read to you from Hospital v Patient, 00 NC 00 (2013) to explain to you why Mrs. Willoughby was contributorily negligent and is entitled to no recovery

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained – State v Gardner, 316 N.C. 605 (1986) – Counsel may not argue law that is irrelevant to the case before the jury.

VII. Personal Beliefs

Plaintiff: Based on thirty years of trying these kinds of cases, I know and believe this case is worth \$1,500,000-assign responsibility to each defendant as you believe proper.

Defendant: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained: State v Jones, 355 N. C. 117, 127-counsel may not generally inject personal beliefs into closing argument. "N.C.G.S. § 15A-1230(a) (1999)...While this statutory provision is applicable to jury trials in criminal cases, the standards articulated are likewise applicable in civil cases. In closing arguments to the jury, an attorney may not: (1) become abusive, (2) express his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or... (4) make arguments premised on matters outside the record," quoting State v Jones, Id.

VIII. Personal Experiences

Plaintiff: When I had a laparoscopic appendectomy, one of the three incisions didn't heal and left an ugly one and a half inch scar. The hospital quickly paid me \$50,000.00 without filing a lawsuit and the defendants in this case want to pay us nothing!

- Defendant: Objection!
- A. (overruled)

- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - State v Jones, 355 N. C. 117, 132-33 (2002). State v Millsaps, 169, N. C. App. 340, 348-49 (2005), G.S. 15A-1230(a)
counsel may not argue or inject personal experiences in closing arguments

IX. Positions or Conclusions

Plaintiff: Based on the evidence you've heard these last two weeks you should not believe the testimony of Defendant's expert Dr. Feelgood.

Defendant: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: overruled – State v Phillips, 365 N.C. 103, 139-40 (2011) –
proper to argue on the basis of the evidence, counsels conclusion regarding a matter in issue for the jury

X. Tragic National Events

Defendant: Mrs. Willoughby is asking you for \$1,500,000 for a few scars to her abdomen. Compare this to what the surviving first responders on 9/11 received and what this worth compared to that.

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained: State v Jones 355 N. C. 117, 132-33 (2002). State v Millsaps, 169, N. C. App. 340, 348-49 (2005) - generally improper to refer to national tragedies as they are outside the record.

XI. Experts

A. Defendant: Plaintiff's expert psychologist Dr. Nuts – He is a “paid psychologist” who is being paid by the hour for being here.

Plaintiff: Objection!

A. (overruled)

B. (sustained)

C. (discretionary with the court)

Ruling: overruled – proper argument, may argue evidence and such inferences as may be drawn there from Crutchey v. Noel, 284 N. C. 568, 572 (1974)

B. Defendant: Let's talk about Plaintiff's expert, Dr. Money... “You can get a doctor to say just about anything these days”.

Plaintiff: Objection!

A. (overruled)

B. (sustained)

C. (discretionary with the court)

Ruling: sustained – quoting State v Vines, 105 N.C. App. 147, 156 (1992) Improper to argue that expert's testimony was for pay.

C. Plaintiff: Our expert witnesses were a vascular surgeon and gastroenterologist, both experts in specific parts of the body medical doctors, while plaintiff simply called a general family practitioner.

Defendant: Objection!

A. (overruled)

B. (sustained)

C. (discretionary with the court)

Ruling: overruled – State v. Womble, 343 N.C. 667, 692-93 (1996) – Merely pointing out the differences between vascular surgeon, gastroenterologist and general family practitioner.

XII. Facts and outcomes of other cases

Plaintiff: The facts which I have just read to you in Talley v. Lock, 00 N. C. 00 (2016), from our Supreme Court, are the same as the facts in this case and the jury found the defendants liable in that case.

Defendant: Objection!

A. (overruled)

B. (sustained)

C. (discretionary with the court)

Ruling: sustained - Joines v Moffitt, 226 N. C. App. 61, 66, (2013) (citing Wilcox v Glover Motors Inc., 269 N. C. 473, 479 (1967)). Argument may not include statements of facts and outcome of other cases and argue that this jury must reach the same result.

XIII. Collateral Sources of Payment

Defendant: Mrs. Willoughby is asking you for \$249,000.00 for medical expenses when all of her bills were paid by Medicaid.

Plaintiff: Objection!

A. (overruled)

B. (sustained)

C. (discretionary with the court)

Ruling: sustained - Cates v Wilson, 321 N. C. 1, 11 (1987) – Fallis v Watuga Med. Ctr., Inc., 132 N.C. App. 43, 49-51 (1999) – improper to make reference to any collateral sources of payment which also includes medical bills

XIV. Insurance Coverage

Plaintiff: Just give Mrs. Willoughby what she deserves - it will be covered by the hospital's insurance anyway.

Defendant: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - Fincher v Rhyne, 266 N. C. 64, 68-70 (1965); Scallon v Hooper, 58 N.C. App. 551, 556-57 (1982) – insurance coverage is not permissible to be argued either for or against a party.

XV. Efforts to Settle Case

Defendant Hospital: This is a case that should not be before you. The defendant hospital made an effort to settle this matter, but the plaintiffs would not be reasonable with us.

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained-Kerriker v Sigmon 43 N. C. App. 224, 225-26 (1970) – reversed – may not argue efforts to settle.

XVI. Jurors in a Party's Shoes Arguments

Plaintiff: What would this be worth to YOU? 'Would you take \$100.00 a day for the rest of your life never to have sexual relations again?

Defendant: Objection!

- A. (overruled)
- B. (sustained)

C. (discretionary with the court)

Ruling: sustained - Fox-Kirk v Hannon. 142 N.C. App. 267 279 (2001) - improper to ask the jury to place itself in the position of a party.

XVII. Financial Status of a Party:

A. Defendant: Think about what a jury verdict in the amount the plaintiff is asking, one million five hundred thousand dollars, against the hospital would do to a county of forty two thousand people.

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - Watson v White, 309 N.C. 498, 507(1983) – “neither the wealth of one party nor the poverty of the other should be permitted to effect the administration of the law.”

B. Defendant: “The hospital will be ‘legally obligated to pay every single dollar of [the] verdict’, so please... ‘deal “cautiously and fairly...””

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained – quoting Scallon v Hooper, 58 N.C. App. 551, 556-57 (1982) – improper argument as it implies there is not insurance coverage and a verdict would be a burden on the defendant.

XVIII. Appeal to Jurors Pecuniary Interests

Defendant: If you were reading a newspaper or you saw a huge monetary verdict on T.V. that upset you and you said ‘why don’t they do something about it?’ ... ‘this is your opportunity to be they.’”

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - quoting Smith v Bohlen, 95 N. C. App. 347, 353 (1989). Improper to appeal to jurors pecuniary interests with inference to hold down insurance costs.

XIX. Racial References

Defendant: Mr. Willoughby asks you for \$500,000.00 in loss of consortium-look at them- she is African American and he is Caucasian-this is a small town in eastern North Carolina.

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained: State v Diehl, 353 N. C. 433, 436 (2001) – improper to interject race unless race is relevant to the case being tried.

XX. Arguments to Create Prejudice- Inflammatory Statements, Abusive Remarks

- A. Defendant: Mr. Willoughby asked you for \$500,000 for loss of consortium. Look at Mrs. Willoughby, grossly obese-probably weighing at least 300 lbs. Who would be attracted to her? - Get real ladies and gentlemen!

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained- Rule 12, Rules of Practice– abusive language or other offensive personal references are prohibited.

- B. Defendant: “Any money that you will award will go to the lawyers, this is a lawyer’s case, money, money, money! The lawyers brought this case, it is for their benefit. All I see is their financial benefit. ... suits like this should not be brought ... there will be a reckoning on Judgment Day for persons who are greedy and how will these people defend this.”

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - Corwin v Dickey, 91 N.C. App. 725, 728-29 (1988). Reversed, “This personal assault on plaintiffs, calculated to inject religious value and criticism of the legal profession ... constituted an abuse of counsel’s privilege to argue this case.”

- C. Defendant: Ms. Willoughby asks you for \$1,500,000.00 in total damages-remember she testified that she had been convicted of Shoplifting in 2010 and served two weekends in jail.

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)

C. (discretionary with the court)

Ruling: sustained - Clemons v Lewis 23 N. C. App. 488, 489-490 (1974). Improper argument made to prejudice other party.

D. Plaintiff: The hospital's argument that they did not know that a patient on the table could be hurt if the table base was used for storage is simply 'bull crap' and we all know that.

Hospital Defendant: Objection:

A. (overruled)

B. (sustained)

C. (discretionary with the court)

Ruling: sustained - State v Matthews, 358 N. C. 102, 111-12 (2004). Improper personal belief.

E. Defendant: Mr. Willoughby's testimony to you that he and Ms. Willoughby had sexual relations at least three times a week prior to her surgery is simply a lie.

Plaintiff: Objection!

A. (overruled)

B. (sustained)

C. (discretionary with the court)

Ruling: sustained - State v Gillikin, 217 N. C. App. 256, 267, (2011). May not express personal belief.

XXI. Name Calling

A. Plaintiff: "...[These people and all the doctors that they paraded in here who told you lie after lie, after lie"...]they lied to your face, blatantly, they didn't care. They tried to make fools of everybody in the courtroom", ... "in your face lies", ... "they knew before they put their hands on the bible that they were going to tell those lies and [Defendants' attorney] put them up anyway. That's heavy. ..."

Defendant: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained – quoting Couch v Private Diagnostic Clinic, 133 N. C. App. 93, 97-98 (1999); State v Gell, 351 N. C. 195, 211 (2000), - improper to argue that a party, witness or opposing counsel is a liar.

B. Plaintiff: And the defendants in this case, Memorial Hospital and Acme, each denying liability and blaming the other. Just like a couple of weasels.

Defendant Acme Hospital: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained – Rule 12, Rules of Practice; State v. Jones, 355 NC 117, 127. Counsel may not become abusive or resort to name calling during argument.

XXII. Religious Arguments

Defendant: Mrs. Willoughby is a Muslim, been in this country five years, here from Syria on a green card, God only knows what she has been doing. You know the value of life to these people.

Plaintiff: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained - State v Barden, 356 N. C. 316 (2002). Generally improper to make argument based on religions of the world-may distract jury from applying secular law exclusively.

XXIII. Appellate Review

- A. Plaintiff: The evidence shows that Mrs. Willoughby deserves 1,000,000.00 for her injuries and Mr. Willoughby deserves \$500,000.00 for his loss of consortium. If the Court of Appeals thinks this is too much, they can reverse the case and send it back to Superior Court.

Defendant: Objection!

- A. (overruled)
- B. (sustained)
- C. (discretionary with the court)

Ruling: sustained – State v Hunt, 323 N.C. 407, 428 (1988 may not argue or speculate on possible appeals.

XXIV. Courts Obligation Upon Improper Argument

- A. Counsel objects: sustain and take appropriate action. Crutcher v Noel, 284 N. C. 568, 572 (1974) ; Couch v Private Diagnostic Clinic, 133 N.

C. App.93, 97-98 (1999)-minimum are clear instructions to the jury – “disregard this portion of counsel’s argument”.

But if argument is grossly improper or egregious, a new trial may be necessary. Johnson v Amethyst Corp. 120 N. C. App. 529, at 536-37 (new trial if “shockingly inappropriate” comments.)” Fincher v Rhyne, 266 N. C. 64, 70-71 (1965) (new trial when liability insurance discussed.)

B. No Objection by Either Party-Court has an obligation to intervene *ex mero motu* if “grossly improper” argument. Watson v White, 309 N. C. 498, 507 (1983); Seafare Corp v Trenor Corp., 88 N. C. App. 404, 414 (1988). Appellate courts give some discretion to the trial court, depending upon the surrounding circumstances. Usually where grossness of the statement is balanced out by overwhelming evidence for the other side. Couch v. Private Diagnostic Clinic, 133 N. C. App. 93, 99-100 (1999) ; O’Carrol v Texasgulf, Inc., 132 N. C. App. 307-310-312 (1999).

C. If Arguments are not Recorded - Relevant statements should be reconstructed in a sufficiently reliable form. Corwin v Dickey, 91 N. C. App. 725, 728 reconstruction during settlement of record approved pursuant to N. C. R. App. P. 9(c) however, note Joines v Moffitt ,226 N. C. App at 68 (2013) (citing Heatherly v Indus. Health Council, 130 N. C. App. 616, 624 (1998)). New trial denied based on inadequate record of improper arguments.

