

TOP 10 INCURABLE JURY ARGUMENTS

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TOP 10 INCURABLE JURY ARGUMENTS

10. Plaintiff placed himself in the hands of attorneys who had every reason in the world to hoodwink this jury from the time they went shopping for doctors. When they can sue you for hundreds of thousands of dollars on manufactured evidence, when all they have to do is pay a filing fee....
9. Dr. Watt was looking for whittling flesh. He was a cutting doctor. That reminds me of the story of the boy catching a fish, the fish is flopping around in the boat, and the boy says, 'What's the matter, honey, I ain't going to do nothing to you except cut your guts out.' That is exactly what I say Dr. Watt has done in this case.
8. If you write any verdict other than for the plaintiff, you tell him where he can get and keep a job that requires the use of that leg.
7. I'm sorry for getting steamed up. I get a little steamed when I see an all powerful insurance company kick a workman down.
6. The defendant's lawyer has just pulled the most despicable act that I've ever seen in a courtroom.
5. Don't prostitute your oath because you have kinfolk working for the Defendant.
4. If you believe plaintiff is lying, you go tell her she is lying and tell me I am lying to you. If that is how you feel, I have failed as a lawyer today.
3. What doth the Lord require of thee, but to do justice, love mercy and walk humbly with thy God. You aren't doing justice if you take a little man up against the insurance company and don't give him the benefit of the doubt.
2. Vultures swooped down on her. You've got to stop it. Whose grandmother is next? Whose aunt is next?
1. God, if I am wrong, burn me.

Introduction

Jury arguments which result in the reversal of a case are rare. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979). To reverse a case due to an improper jury argument, a complainant has the burden of proving:

(1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge. . . . (5) that the argument by its nature, degree and extent constituted reversibly harmful error. How long the argument continued, whether it was repeated or abandoned and whether there was cumulative error are proper inquiries. All of the evidence must be closely examined to determine (6) the argument's probable effect on a material finding. (7) Importantly, a reversal must come from an evaluation of the whole case, which begins with the voir dire and ends with the closing argument. The record may show that the cause is weak, strong, or very close. From all of these factors, the complainant must show that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence.

Id. The jury arguments in each of the following ten cases led to a reversal and remand for a new trial. As suggested by the "Top 10" moniker, an in-depth analysis of incurable jury arguments is beyond the scope of this paper and is best left to learned treatises. Here, then, are the "Top 10 Incurable Jury Arguments" in Texas jurisprudence.¹

¹ Arguments containing either racial or religious bias or prejudice have been intentionally excluded from this list.

NO. 10

Plaintiff placed himself in the hands of attorneys who had every reason in the world to hoodwink this jury from the time they went shopping for doctors. When they can sue you for hundreds of thousands of dollars on manufactured evidence, when all they have to do is pay a filing fee

Cross v. Houston B. & T.R. Co., 351 S.W.2d
84 (Tex. Civ. App.—Houston [1st Dist.] 1961,
writ ref'd n.r.e.)

Wayne Cross had a prior back condition which at times troubled him but did not incapacitate him. He went to work for the railroad as a switchman after being given a thorough examination by the railroad's doctor. Over a period of thirty-nine months, he performed his duties satisfactorily although he lost six to eight days from work as the result of his back bothering him. An accident occurred on the job, which was corroborated by other testimony. Cross brought an FELA lawsuit for personal injuries. In closing argument, the railroad's counsel argued:

This is a case where a man who had a pre-existing condition, and for whatever reason he laid down or was out in that yard, he was afforded the best medical treatment Harris County could offer, and he refused it, and he placed himself in the hands of these attorneys who had every reason in the world from their financial interest in this case to do everything that they can to hoodwink this Jury from the time that they went shopping for doctors and they have been trying to put in twisted evidence they do everything they can to try and—

351 S.W.2d at 86.

At this point Plaintiff's counsel objected, which drew this comment from the

trial judge: "Counsel I think you can draw emphasis from the testimony." *Id.*

Plaintiff's counsel continued to object; but with no ruling on the objection, the railroad's counsel continued to railroad his adversaries:

Well, I think their conduct describes it better than anything and has shown it, that when this man went to hire them, when he could have gotten the treatment that he needed, and when he hired these attorneys it was just a question of manufacturing testimony, and they went out and hire any witnesses they can get to say things that you have heard from this witness stand here. I don't know of any other way that we could have met it, because it is not pleasant to stand up here and have to criticize people like this, but when they can sue you for hundreds of thousands of dollars on manufactured evidence like this, when all they have to do is pay a \$25 filing fee to bring a case like this into Court—

Id.

The Houston court reviewed "the entire statement of facts, consisting of more than 1,200 pages," and could find nothing to justify the argument of the railroad's counsel:

There is no evidence showing that the [plaintiff's] counsel had any financial interest in this suit, or that they went shopping for doctors, or that they were putting in twisted evidence, or that there was any manufacturing of testimony, or that said attorneys went out and hired any witnesses they could get to testify as they did on the witness stand.

Id.

Regarding the trial judge's "I think you can draw emphasis from the testimony" remark, the Houston court held, "Thus did the Court lend its approval to the poignant poison of prejudice injected into the case, and improperly comment upon the evidence and the credibility of [plaintiff's] witnesses and counsel." *Id.*

The jury found that Cross sustained no injury. Given the evidence of his prior back condition that did not incapacitate him, and the corroboration of the accident in question, the Houston court concluded that the jury's finding of no injury "probably resulted from the improper argument of [defendant's] counsel and the court's comment." *Id.* at 87.

* * * * *

NO. 9

Dr. Watt was looking for whittling flesh. He was a cutting doctor. That reminds me of the story of the boy catching a fish, the fish is flopping around in the boat, and the boy says, 'What's the matter, honey, I ain't going to do nothing to you except cut your guts out.' That is exactly what I say Dr. Watt has done in this case.

Southwestern Greyhound Lines v. Dickson,
149 Tex. 599, 236 S.W.2d 115 (1951)

Gladys Dickson entered the Greyhound bus station in Austin and attempted to step over a long water hose lying on the bus driveway. While she was astride the hose, a Greyhound employee raised the hose and caught her leg. Dickson fell forward, bringing her knees, hands and apparently some of the forward and side portions of her body into violent contact with the edge and flat surface of a walkway, breaking her right kneecap and also injuring her right hip, sacroiliac joint and

vertebrae, resulting in shortening of her right leg, spinal curvature, excessive nervousness, anemia, loss of appetite, rapid exhaustion, and a continuing sense of general bodily pain.

At least, that was Dickson's story.

As the Supreme Court put it, "Except as to the mere fall and kneecap fracture, requiring the surgical repair that shortly followed and resulting in slightly limited knee action, virtually all essential facts of [plaintiff's] claim are flatly disputed." 236 S.W.2d at 116.

At Dickson's behest but at the expense of Greyhound, Dr. Will Watt, an Austin surgeon, treated Dickson immediately after the accident and within a week performed surgery on her injured knee. Dr. Watt re-examined Dickson sixteen months after the accident and again twenty-eight months after the accident "during a previous trial of this case." *Id.* at 117. After performing a fifteen to twenty minute examination, Dr. Watt concluded Dickson should see an "x-ray specialist." Dickson's counsel refused since court was about to reconvene. *Id.* Until that examination, Dr. Watt testified that he never had any occasion to suspect Dickson had suffered any other injury apart from the injured knee. When cross-examined by plaintiff's counsel, Dr. Watt admitted to being a "surgeon", that he lacked independent recollection of certain factual details, and that he performed about a thousand operations a year. *Id.*

Plaintiff's counsel vivisected Dr. Watt in closing argument:

Now, Dr. Watt I am sure is a skilled surgeon. He says he devotes practically all of his time to it. I agree with them that he is a good cutting doctor; * * * That June 5, 1947 examination was another one of those 15 or 20 minute examinations. The woman was suffering untold pain and he took that much time. He didn't want to waste time doing those things, because he was looking for whittling flesh; that is what he wants. He is not interested in giving a diagnosis; he was a cutting doctor. * * * He devotes practically all of his time to surgery. You recall Dr. Watt was very nice here,—he said Miss Dickson was very co-operative, and they got along fine. Oh yes, she had a little fracture of her knee. It was not bad,—a little fracture; but he socked her \$350 for it. Yet he says it was nothing. He took 17 stitches on her knee and charged her \$350.00; but now that is nothing,—just a little thing. And finally on direct examination the last thing he said was, "I don't think anything is wrong with her." Well, I am reminded of a story in that connection that I think is very appropriate,—the store about the boy out fishing and he hooked a five or six-pound catfish, and the fish flopping around in the boat and he was trying to catch him to get to work on him, and finally the boy said, 'what's the matter, honey, I ain't going to do nothing to you except cut your guts out.' . . . That is exactly what I say Dr. Watt has done in this case.

Id. at 118.

The Supreme Court stated that nothing in the testimony or in the defendant's argument

gave reasonable cause for the exaggerated and inflammatory remarks of [plaintiff's] counsel, which were quite susceptible of the interpretation that [Dr. Watt] was unfaithful to his high profession and even a person of inhuman instincts. That a physician happens to be a busy surgeon and to have performed a necessary operation on the [plaintiff's] knee is certainly no excuse to suggest that his diagnoses were influenced by a desire 'for whittling flesh' and that he had the same jocular regard for a serious operation on a human being as the rough and ready fisherman had for 'cutting the guts out' of a fish.

Id. at 120.

NO. 8

If you write any verdict other than for the plaintiff, you tell him where he can get and keep a job that requires the use of that leg.

*Fidelity and Casualty Company of New York
v. Johnson*, 419 S.W.2d 352 (Tex. 1967)

Linden Johnson brought a worker's compensation suit following an incident which allegedly resulted in the permanent total loss of use of his right leg. According to the Supreme Court, however, the evidence on this issue was conflicting. 419 S.W.2d at 355. In the context of this conflicting evidence, Johnson's counsel argued to the jury:

Now, if I'm wrong about it and I don't think I am for one minute, but if I am wrong about it, I want to ask you just one favor—if you go out there and write any verdict other than I want you to—answer my question when you leave this courtroom to ease my conscience. I hope you go up to Linden Johnson and tell him where he can go and get a job and keep a job that requires the use of that leg—please do it because he can't—

Id. at 354.

Defendant's counsel objected; but before the court ruled, Johnson's counsel responded:

I am not trying to intimidate you but you just go up to him and tell him where that job is because I know and you know and as his attorney for nearly three years that he cannot get and keep a job that requires the use of that right leg and he never will be able to and if you know we are wrong about it, please come and tell after your verdict is received where that job is—where they will accept him in the first place that requires the use of that right leg in the

performance of the task of a working man.

* * *

I don't think you can deny it, but if you do, I think you will be ladies and gentlemen enough to come and tell him—'Linden, I know where that job is—one you can get that requires the use of that right leg—I simply believe you can get it and keep it Linden.' If you can do that in good faith and good conscience that I am wrong—

Id. at 354-355.

Defendant's counsel objected again; but this time the trial judge overruled the objection. Johnson's counsel finished his argument:

I think what I asked was fair—I do not think it was unreasonable—goodness knows—you know I am not trying to intimidate you—I'm just asking you to do what is fair and reasonable.

Id. at 355.

In evaluating the impropriety of this argument, the Supreme Court held,

Those experienced in trial of lawsuits before juries know the reluctance and embarrassment that would be caused a juror if he had to talk to the losing party and justify the jury's verdict. The argument was an appeal to the sympathetic feelings of the jury to return answers to the issue submitted based on sympathy rather than an analysis of the evidence heard in the trial. We have carefully read the statement of facts, as well as the bills of exceptions and find this argument was reasonably calculated to cause and probably did cause the rendition of an improper judgment in this case.

Id.

* * * * *

NO. 7

I'm sorry for getting steamed up. I get a little steamed when I see an all powerful insurance company kick a workman down.

Texas Employers' Ins. Ass'n v. Hacker, 448 S.W.2d 234, 240-41 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.)

In this worker's compensation case, the jury awarded the plaintiff compensation for total and permanent disability. The defendant appealed, complaining of six separate excerpts from plaintiff's closing argument. This was the fourth excerpt:

I apologize to the Jury also for becoming a little steamed up. When I get a little steamed up I see an all powerful insurance company kick a workman down. Never paid him one penny compensation. No, sir; wouldn't even pay the doctor bill.

Id. at 240.

With respect to this excerpt, the Fort Worth court stated, "We believe that no instruction the trial court might have given would have the effect of withdrawing the damage done by such statement in this case. It should not have been made." *Id.* at 241.

* * * * *

NO. 6

The defendant's lawyer has just pulled the most despicable act that I've ever seen in a courtroom.

Circle Y of Yoakum v. Blevins, 826 S.W.2d 753, 756-760
(Tex. App.—Texarkana 1992, writ denied)

After a strap on her saddle broke, Sharlene Blevins fell from a horse, injuring her head, hand, ribs, and left shoulder. She sued Circle Y, the designer of the saddle. In a jury trial, she obtained favorable findings on multiple liability theories. The jury awarded \$1,320,000 in actual damages and \$20,000 in exemplary damages. The trial court disregarded the exemplary damages finding but left the gross negligence finding undisturbed. The final verdict was for \$1,571,592.00, including prejudgment interest. 826 S.W.2d at 755.

During closing argument, Circle Y's counsel referred to statements in a medical record admitted in evidence. This drew an erroneous objection from plaintiff's counsel that the record was not in evidence. Apparently, the trial judge asked defense counsel at an unrecorded bench conference to show him the medical record, but counsel could not find it. The judge then sustained the objection of plaintiff's counsel, *id.* at 757, which set the state for a rabid rebuttal:

[PLAINTIFF'S COUNSEL :] I'll tell you something else. Larry Merriman does not want you to decide this on the actions of the lawyers, because he has just pulled the most despicable act that I've ever seen in a courtroom.

[DEFENSE COUNSEL]: Your Honor, I object to that. If that's not a side bar remark, I don't know what it is.

THE COURT: Sustained.

[DEFENSE COUNSEL]: I ask the Jury be instructed to disregard that side bar remark.

THE COURT: The Jury is so instructed.

[PLAINTIFF'S COUNSEL]: I don't know where he got this, and anybody with a typewriter can do it, but you look at where he said it come from, out of Dr. McGinty's record –

[DEFENSE COUNSEL]: May we show them where we got it?

[PLAINTIFF'S COUNSEL]: -- that's in evidence –

[DEFENSE COUNSEL]: Would he like to see it?

[PLAINTIFF'S COUNSEL]: Your Honor, this is my argument, and I have sat through theirs. I'm talking about what's in evidence and I've got the exhibits that they put in evidence here.

THE COURT: All right. I'll overrule the objection. Go ahead.

.....

[PLAINTIFF'S COUNSEL]: Thank you, Your Honor. You look in those records. That ain't now here in there. You heard the Judge sustain the objection. What's this all about? I guess when I couldn't sleep last night, that's what I should have thought about. Well, if you're not going to call any witnesses and you ain't going to put nobody on the stand, just make something up. Although I never dreamed it'd really happen. I've never seen it before. If you can't get a doctor to come in and say she's not hurt, come up with a half page of something that don't [sic] even have his letterhead on it and put it in front of the Jury, when it's not even in evidence and nobody knows whether it's his.

I didn't talk to y'all a while ago about punishing Circle Y of Yoakum, but I'm fixing to now. Remember that? A while ago I didn't say anything about punishment, but I think now they ought to be punished, because Larry Merriman didn't do that without the approval of his client. I can tell you that.

. . . A badge of how desperate Circle Y of Yoakum is is [sic] the actions of their lawyer in the closing argument, and that's why he didn't want your decision based on the actions of the lawyers. But remember, the lawyer is the agent for the client and does what he does as the agent for the client and with the approval of the client, and so I think you can take it into account. And they didn't do it to you once, they did it to you twice.

This other little note he waved up here, he said it's from Schumpert Hospital, and does anybody see Schumpert Hospital's letterhead on that anywhere?

[DEFENSE COUNSEL]: Your Honor, we object. We have the two exhibits which are in evidence from which they've both come, Defendant's Exhibit Number 4, which was on his desk, Defendant's Exhibit Number 3. If you'd like to see them, sir.

[PLAINTIFF'S COUNSEL]: Your Honor –

THE COURT: Overrule the objection at this time, and you may go ahead with your –

[DEFENSE COUNSEL]: They're both in evidence, Your Honor. We want the Jury to be instructed of that.

THE COURT: You didn't show them to the Court when I asked to see them, so I don't know. The Jury will have the exhibits in the jury room with them.

[PLAINTIFF'S COUNSEL]: They've got something they've got marked now and they're sticking them over there on the table. I don't know what they are.

[DEFENSE COUNSEL]: Your Honor, we object to that.

THE COURT: Sustained.

Id. at 757-758. Following this melee, the trial judge held a hearing on the matter and determined that the medical record had been placed in evidence and allowed it to go to the jury during deliberations along with all other exhibits. *Id.* at 756.

The jury awarded \$720,000 for past actual damages and \$600,000 for future

actual damages -- more than double the \$650,000 Blevins pleaded. Circle Y contended that the jury returned an excessive award, unsupported by the evidence, because of Blevins' prejudicial argument. The Texarkana court agreed:

Jury argument must be confined strictly to the evidence and the argument of opposing counsel. Criticism, censure, or abuse of counsel are not permitted. Appeals to passion and prejudice are improper, as are calls to punish a litigant for the acts of counsel. Charges that opposing counsel manufactured evidence, suborned perjury, or was untruthful are highly improper and are generally considered to be incurable. (citations omitted) Moreover, such comments violate the Rules of Civil Procedure and the Canons of Ethics. (citations omitted) As stated by Justice Steakly in *Standard Fire Ins. Co. v. Reese*,

There can hardly be an accusation of more severity and seriousness than the charge that opposing counsel participated in a plot ... to manufacture ... testimony....
(citation omitted)

The comments here clearly charged defense counsel with manufacturing evidence. (citations omitted) The comments were aggravated by the fact that the matters referred to by defense counsel were in evidence. Even if they had not been in evidence, the statements charging defense counsel with manufacturing evidence were intemperate, improper, and inflammatory, and were wholly without support in the evidence. While the trial judge sustained one objection to a "side bar remark," he overruled other objections to the argument, and his statement to defense counsel that "you didn't show them to the Court when I asked to see them," although well-meaning and innocently made, only served to reinforce the impression given to the jury that defense counsel had manufactured evidence. Additionally, plaintiff's counsel continued the argument, insisting that defense counsel's fraudulent acts were done with full knowledge and approval of Circle Y, and urging that the jury "punish" Circle Y for those actions.

Although the trial judge later determined that the questioned exhibits

were in evidence and allowed them to go to the jury in its deliberations, we do not believe that removed the harm caused by the improper jury argument. There were multitudes of exhibits in the case, and it is not likely that simply allowing two more in the jury room adequately apprized the jurors that defense counsel had not tried to deceive them. Certainly it did not remove the prejudice caused by the manufacturing evidence charge... (citation omitted) We therefore conclude that the argument was improper, inflammatory, and incurable.

Id. at 758-759.

After detailing the evidence, the Texarkana court held that the evidence was insufficient to support the jury award and therefore concluded

that the jury's award of damages was the result of passion and prejudice rather than an objective assessment of the evidence. Thus, the probability that the improper argument caused harm is greater than the probability that the verdict was based on the evidence. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d at 840.

Id. at 760.

Attempting to salvage the verdict, Blevins directed the court's attention to the jury's punitive damage award of "only" \$20,000 as proof that the jury did not heed her counsel's argument to punish Circle Y for the alleged improper acts of its counsel.

The court, however, thought otherwise:

[A] review of the evidence convinces us that the jury used the compensatory award to effect its "punishment," since the award is clearly not supported by factual evidence.

Id. The court also resisted ordering a remittitur of damages, reasoning "that the essential fairness of the trial was so impaired by the improper jury argument and the

circumstances surrounding it that only a new trial will afford the parties substantial justice.” *Id.*

* * * * *

NO. 5

Don't prostitute your oath because you have kinfolk working for the Defendant.

Plains Creamery v. Denny, 277 S.W.2d 755, 766 (Tex. Civ. App.–Amarillo 1954, writ ref'd n.r.e.)

Apparently, many employees of Plains Creamery lived in Potter County. What may have been a well known fact, however, never made it into the voir dire record of this wrongful death case. Prior to securing a jury verdict and judgment on behalf of his clients, plaintiff's attorney argued to the jury:

I don't care how many kinfolks or relatives you have with the Plains Creamery, you don't owe them the duty to prostitute your oath of office to find a thing like that against this widow woman and these kids.

277 S.W.2d at 766.

The Amarillo court did not buy into this solicitous argument, noting with some disdain that plaintiff used the same theory on appeal in slightly different language. According to the court,

The harmful error in the argument is that the same placed in the mind of

each juror the thought that, if he did not render a verdict for the widow and children, he would be in the classification of a juror who prostituted his oath because he had kinfolks or relatives with the Plains Creamery, Inc. It was wholly improper and error to impress upon each member of the jury that, if he found a verdict in favor of the corporation, he would be condemned under the belief that, in so doing, he had prostituted his oath as a juror because of his kinfolks and relatives with the corporation. Any issue as to whether members of the jury were related to members of the corporation should have been clarified by counsel in his examination of the jury panel and it was certainly not a proper subject to be discussed in his closing argument. However, as to whether there was any evidence upon which to base counsel's argument on such matter, it may be noted that the argument was without any factual basis in the record.

Id. The court held that the "duress placed on the jury requires a reversal of the cause . . . as a jury should never be subjected to such elements during its deliberations." *Id.*

* * * * *

NO. 4

If you believe plaintiff is lying, you go tell her she is lying and tell me I am lying to you. If that is how you feel, I have failed as a lawyer today.

Travelers Ins. Co. v. Luna, 428 S.W.2d 885, 887 (Tex. Civ. App.— Houston [14th Dist.] 1968, no writ)

Soila Luna, while carrying a tray at her job at the Texas Grill, "slipped on the floor on a piece of lettuce and fell on her buttocks." 428 S.W.2d at 886. She complained of back trouble following the fall. In her worker's compensation suit, a

jury found total permanent incapacity.

The Houston court reviewed the evidence and found that it was sufficient to support the verdict, even though the testimony did conflict and the jury could have easily found just the opposite. *Id.* at 887, 888. But then the court turned a jaundiced eye towards the jury argument of plaintiff's counsel:

If you want to believe this is plaintiff's imagination, and you want to believe she is lying, *you go tell her she is lying and tell me I am lying to you.* I don't believe you will do that. If that is how you feel, I have failed as a lawyer for today.

Id. at 887 (emphasis in original).

Following the then-recent Linden Johnson case (see No. 9), the Houston court held that it was "constrained to hold that the argument is reversible error." *Id.* at 888.

* * * * *

NO. 3

What doth the Lord require of thee, but to do justice, love mercy and walk humbly with thy God. You aren't doing justice if you take a little man up against the insurance company and don't give him the benefit of the doubt.

Texas General Indemnity Co. v. Savell, 348
S.W.2d 202, 204-05 (Tex. Civ. App.–San
Antonio 1961, no writ)

The San Antonio court had already signaled a reversal and remand of this

worker's compensation case on a charge error; but if that was not enough, "We would reverse the cause for another reason." 348 S.W.2d at 204. Waxing theologically, Plaintiff's counsel argued,

In closing all I can say is this: somebody that is greater than all of us has said, 'What doth the Lord require of thee, but to do justice, love mercy and walk humbly with thy God.' And, as you out there answer these questions, I say, you aren't doing justice if you take a little man up against Pan American and Texas General Indemnity Company, and Mr. Dyer, with his thirty-five years under fire, and don't give him the benefit of the doubt, if there be any, and when the weight of the evidence in his favor give it to him, and you aren't loving mercy * * *. You have got a flesh and blood client here against the General Insurance Company of some kind or another * * *. And you aren't walking humbly with thy God if you go on out and try to hurt a man who has enough guts to work even though his whole back is hurting. I will leave it with you.

Id. at 204-205, n. 2.

Verily, verily, said the San Antonio court,

This is a pure appeal to passion. It arrays the little against the big, the weak against the strong, the poor against the wealthy. Those are not the issues. (citations omitted) The judgment is reversed and the cause remanded.

Id. at 204-205.²

* * * * *

² Perhaps, in closing arguments, the Lord doth require a little more adherence to the wisdom of Proverbs 17:28. Just a thought.

NO. 2

Vultures swooped down on her. You've got to stop it. Whose grandmother is next? Whose aunt is next?

Fortenberry v. Fortenberry, 582 S.W.2d 188, 190
(Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.)

Plaintiffs sued to cancel the will and mineral deed of Ms. Mamie Chambless. The jury found that Ms. Chambless lacked both the testamentary capacity to execute the will and the mental capacity to execute the deed. During the trial, plaintiffs attempted to elicit testimony from a handwriting expert that Ms. Chambless' signature to the instruments was forged. However, since they had not pled forgery, the trial court excluded the testimony. This did not stop the plaintiff's counsel in final argument when he invited the jury to ". . . compare that check with that Deed. You folks are not lying and that's insulting to your intelligence." 582 S.W.2d at 190. Although the trial judge sustained an objection to this argument, the jury later asked for the checks in deliberation. The jury's request persuaded the Beaumont court "that the argument suspecting forgery had influence on the jury." *Id.* at 190.

Also during closing argument, plaintiff's counsel stated:

Mamie Chambless made it, and I submit to you that this was—the vultures were circling in the air and they swooped down on her. Ladies and Gentlemen, that sort of thing has got to stop with grandmothers and grandfathers, with people that are senile, in accordance with what Dr. John says. The word has got to go out from the courtroom. . . . You've got to stop it. Whose grandmother is next? Whose aunt is next.

Id.

The Beaumont court plucked this clarion carrion call:

Referring to the proponents as 'vultures' is bad enough, but to suggest to the jury it should find for the contestants to protect their own kin is truly inflammatory and improper. Here again the careful trial judge sustained an objection to the argument, but the harm was already done.

In our adversary system, attorneys must be free to vigorously represent their clients, and it is not an easy thing to decide when that vigor and enthusiasm crosses the bounds of toleration and becomes reversible error.

* * *

It is true, of course, that an attorney's argument is a deliberate effort to influence a jury for his client's position. As long as the attorney's argument has some basis, or at least a reasonable inference, in the evidence and is free from inflammatory remarks, it is proper. But, unless a court trial is to take on the atmosphere of a Roman Circus, counsel must be restrained in the use of inflammatory words.

Id.

**THE NO. 1
INCURABLE JURY ARGUMENT
IN THE STATE OF TEXAS**

God, if I am wrong, burn me.

Howard v. Faberge, Inc., 679 S.W.2d 644, 649-50
(Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)

Arthur Howard poured Brut 33 Splash-On Lotion over his hands and chest.

Then he accidentally dropped a match into his waistband. An alleged conflagration ensued, with Faberge subsequently being sued. 679 S.W.2d at 646. The jury found against Howard in his product liability suit.

Even though the Houston court had already held that exclusion of certain evidence probably resulted in the rendition of an improper judgment, the court could not resist commenting on the inflammatory jury argument from Faberge's counsel:

There is ample support in the record that shows that appellee went far beyond a mere reenactment of the demonstrative evidence given by the trial. The court and jury witnessed the following rare demonstration. According to appellant's undisputed account, during appellee's counsel's final argument, he suddenly produced an unmarked and unauthenticated bottle of what was purported to be the defendant's product. In plain view of the jury, counsel then poured the substance onto his arm, lit a match and passed it over the doused arm while stating:

I don't think Mr. Howard could put on a shirt any faster than I can light a match. Let's see how he did it.

God, if I am wrong, burn me.

My friends, ladies and gentlemen of the jury, I urge you to believe the evidence of your eyes. If you have any doubt about it, try it for yourselves. Upon normal application the product is not flammable. That's issue no. 1: is the product flammable upon application to the skin? My goodness, you just saw me do it. *I tried it at home before I tried it here to make sure. I tried it a hundred times.* If it had burned one time, I wouldn't have done it here. You don't try this sort of thing in the courtroom without knowing in advance what is going to happen.

Id. at 649 (emphasis in original). Surprisingly, Howard's counsel did not object to

this would-be attempt at lawyer flambé.

The court held that Faberge's counsel "went far beyond merely rebutting" plaintiff's closing argument:

He performed an unauthorized in-court experiment on himself, by dousing his arm with an unidentified liquid, and attempting to ignite it with a match.

Undoubtedly, the jury was affected by counsel's unsuccessful attempts to ignite the product on his arm, and by counsel's plea for God to burn him, if he were wrong. Because defense counsel was the only person during the trial to perform this type of experiment on a "live" human being, the evidence was not cumulative, as contended by [Faberge], but was highly prejudicial. An instruction from the court, [sic] would not have eliminated from the jurors' minds the combined visual and oral effects of defense counsel's experiment. Indeed, the central issue at trial was whether the product could have ignited after the application, especially on a human body.

Therefore, in light of the entire record, we find that an instruction from the court would not have eliminated the probability that an improper verdict was rendered.

Id. at 649-50.

Author's Note:

Laudatory comments regarding this paper and its presentation are invited and may be submitted via e-mail, snail mail, telephone, facsimile, or carrier pigeon. Non-laudatory comments should be placed in a bottle and thrown into the Gulf of Mexico.