IN THE
SUPREME COURT OF FLORIDA

Case No. 93,353

SHIRLEY SAWCZAK,

Petitioner,

vs.

ALAN L. GOLDENBERG, M.D., ALAN L. GOLDENBERG, M.D. P.A., J. STERNBERG and S. SCHULMAN, M.D. CORP., ALAN ALARCON, M.D., and HUMANA INC. d/b/a WESTSIDE REGIONAL MEDICAL CENTER, f/k/a HUMANA HOSPITAL BENNETT,

Respondents.

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION
TO REVIEW THE DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Shirley Sawczak brought the medical malpractice action below as a result of serious injuries she sustained after her common bile duct was completely severed during what was supposed to be a routine laparoscopic gall bladder removal procedure on April 7, 1992. She brought the action against Dr. Alan Goldenberg, the surgeon performing the operation, and his professional association; Dr. Alan Alarcon, the radiologist who reviewed x-ray films that were taken during the operation, and his employer, Sternberg & Schulman, M.D. Corp. ("the radiology group"); and Humana Hospital Bennett, the hospital at which the procedure was performed ("the hospital"). (R. 70)

After a trial lasting 13 days, the trial court directed a verdict of liability against the surgeon, Goldenberg.[1] (Tr. 3162) The jury returned a verdict assessing the plaintiff's damages as $4,000,629 but finding that none of the other defendants were liable for negligence in causing Sawczak's injuries. (R. 1059) The trial court entered judgment for all defendants except Goldenberg (R. 1518); and upon the trial court's denial of the post-trial motion (R. 1516), Sawczak appealed.

Based on the evidence presented at trial, Goldenberg's negligence in misidentifying Sawczak's ductal system anatomy and severing her common bile duct, the main duct which carries bile from the liver to the intestines, rather than her cystic duct, was an all but foregone conclusion. Moreover, it was largely undisputed that, as a result of the botched surgery, Sawczak has suffered permanent and severe liver damage, which, according to expert testimony, will require a liver transplant in the future. (Tr. 935)

The central factual dispute presented to the jury was whether the radiologist, Alarcon, who interpreted the intraoperative x-rays of Sawczak's ductal system before Goldenberg severed the wrong duct, shared responsibility for Sawczak's injuries. This issue was vigorously disputed by expert testimony.

It is on this issue that Sawczak did not receive a fair trial. She was deprived of a fair trial because of numerous improper statements during closing argument by counsel for the radiologist, radiology group and the hospital. In addition, the plaintiff was unfairly disadvantaged by the trial court's denial of the plaintiff's motion to limit cumulative experts. The

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[1] Although testifying that he was "devastated" by the injury he caused to Mrs. Sawczak (Tr. 1158), Dr. Goldenberg filed a petition for bankruptcy on the last day of trial immediately before the jury was to commence deliberations. (Tr. 3551; R. 1098) The Plaintiff obtained emergency relief from the bankruptcy stay. (R. 1406-17) Since then, the bankruptcy court has upheld Dr. Goldenberg's exemption of $3,751,678 of his $3,791,119 in assets (the remaining assets are non-saleable). Order Overruling Creditor's Objections to Claimed Exemptions, In re Alan L. Goldenberg, M.D, P.A., Case No. 96-22043-BKC-RBR (S.D. Fla. Dec. 19, 1996). Mrs. Sawczak has appealed this ruling.

result was that three defendants, whose interests were aligned, were able to present the opinions of three defense radiologist experts, against the plaintiff's one, that the radiologist was not liable.

At the hearing on the plaintiff's motion for new trial, the trial court commented that although the standard for a new trial based on improper comments is a "relatively high burden," "[t]here are occasions to do so. **This may very well be one of them.**" (6/11/96 Tr. 31) In a reversal of the trial and appellate courts' traditional functions, however, the trial court declined to determine if a new trial was warranted "without the benefit of the appellate court's scrutiny."[2] (6/11/96 Tr. 34-35, 36, 37-38) In denying the motion for new trial, the trial judge apparently took into consideration that he had privately "lecture[d]" one of the offending defense lawyers, Crane Johnstone, counsel for the radiologist. (6/11/96 Tr. 40-41). According to the court, "it is my hope and it is my understanding that Mr. Johnstone has learned from this particular case, as well as the court has, and he will view some of the concerns that he has in perhaps a different light before he presents them to the jury . . . ." (Id.) Believing this attorney to be rehabilitated based on "discussion with other members of the judiciary" (id.), the trial court denied Sawczak's motion for new trial. (R. 1516)

On appeal, the Fourth District Court of Appeal agreed "that many of defense counsel's arguments were improper and often egregious." Sawczak v. Goldenberg, 710 So.2d 996, 997 (Fla. 4th DCA 1998). The Fourth District held, however, that Sawczak "waived any error that occurred" by her attorney's failure to object specifically and contemporaneously to the improper comments. Id. In so ruling, the Fourth District refused to apply this Court's decisions providing an exception to the requirement of a contemporaneous objection if improper comments are pervasive and prejudicial.

STATEMENT OF THE FACTS

As presented by expert testimony (Tr. 895-907), a normal laparoscopic gall bladder procedure is generally as follows:[3] The surgeon places several surgical tubes called trocars into the patient's midsection which enable the surgeon to gain access to the patient's ductal system. Carbon dioxide is pumped into the patient's abdominal cavity to insufflate the area, which permits the surgeon to perform the procedure. Using a laparoscope with a video camera at its head, the surgeon attempts to visualize portions of the patient's ductal system, including the cystic

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[2] On several occasions, the trial judge remarked that this matter was his first medical malpractice trial and had been "a learning tool for me." (6/11/96 Tr. 31-32; Tr. 2219)

[3] For the Court's reference, we have appended hereto Plaintiff's Exhibit 1, a diagram illustrating the anatomy of the ductal system.

duct, common bile duct, and common hepatic duct. The images of the laparoscope are seen on a television monitor. To perform an intraoperative cholangiogram (x-ray), as was done here, the surgeon must identify the cystic duct. Before the cholangiogram films are taken, the surgeon places a surgical clip across the cystic duct close to the gall bladder. The surgeon then punctures the cystic duct in order to insert a catheter in the cystic duct. (Tr. 902) The surgeon inserts the catheter and injects contrast material (dye) into the cystic duct so that images of the ductal system will appear on x-rays and fluoroscopically on another monitor in the operating room. (Tr. 803) After injecting the dye, the surgeon directs the x-ray technician to shoot x-rays of various images within the ductal system. (Tr. 904)

The technician takes the x-rays, develops them, and presents them to a radiologist (in this case, Alarcon) for an immediate interpretation while the surgeon waits for the results. After receiving the results of the radiologist's interpretation, assuming a normal exam result, the surgeon completes the gall bladder removal procedure. To do so, the surgeon removes the catheter, and places two additional clips across the cystic duct below the point of entry of the catheter (i.e., closer to the junction of the cystic and common bile ducts). (Tr. 904-05) The surgeon then severs the cystic duct between the clips and removes the gall bladder. (Tr. 906)

Dr. Alan Livingstone, a Professor and the Vice-Chairman of the Department of Surgery for the University of Miami and Chief of the Department's Division of Surgical Oncology (Tr. 863), testified for the plaintiff that the surgeon, Goldenberg, failed to properly identify the anatomy. (Tr. 885) Specifically, rather than identifying the cystic duct and inserting the catheter within the cystic duct, Goldenberg misidentified the anatomy and inserted the catheter into the junction of the cystic and common hepatic ducts. (Tr. 885-86; 818) Mistakenly believing he was in the cystic duct at a point where he should have been, rather than at its juncture with the common bile or hepatic duct as he actually was, Goldenberg then placed clips below the catheter's point of entry <u>over the common bile duct</u>. (Tr. 886, 929) If Goldenberg had inserted the catheter in the correct place on the cystic duct where he believed he was, the clips would have been placed over the cystic duct, just below the catheter entry site. (Tr. 887, 929) Consequently, he then mistakenly severed the common bile duct when he should have been severing the cystic duct for purposes of removing the gall bladder. (Tr. 887-88, 929)

The parties disputed whether Alarcon, the radiologist who reviewed the intraoperative cholangiograms, should have discovered that the surgeon was in the wrong place or misidentified the anatomy as plaintiff presented and if so, whether he should have alerted the surgeon waiting for the interpretation that the ductal anatomy was not properly visualized or clarified or recommended more films to clarify the anatomy. On this point, the parties disputed the

purpose for which the radiologist reviews and interprets such films. Certain of the defense experts argued that the radiologist's primary, if not sole, purpose was simply to report whether any gallstones had been retained in the ductal system. (Tr. 2175, 3040) By contrast, the plaintiff's expert, Dr. Livingstone, testified that another important purpose of the cholangiogram is to define the anatomy and "verify that we are indeed where we think we are." (Tr. 902, 909, 914) As Dr. Livingstone explained, a radiologist who is an expert in interpreting films serves the "absolutely essential function" of providing supportive and corroborative information to the surgeon so the surgeon may safely proceed with the rest of the operation. (Tr. 914)[4]

Dr. Livingstone testified that the radiologist, Alarcon, fell below the standard of care in interpreting the four cholangiogram films and that such failure was a legal cause of Sawczak's significant injuries. (Tr. 879) In particular, the films revealed that the tip of the catheter was in the common bile duct (Tr. 927), which the Hospital's radiologist even admitted was not normal (Tr. 2027). Moreover, the cystic duct could not be seen on any of the four films. (Tr. 926-27, 2021) Nor was there any evidence on the films that the catheter had been inserted in the cystic duct as it should have been. (Tr. 916-17) Thus, the films, which are to be roadmap for the surgery, revealed the potential of a major surgical mishap, which Alarcon could have avoided had he reported this information to the surgeon or recommended more films be taken to define the anatomy further. Goldenberg testified that his belief that he was in the right place was confirmed by the radiologist's report, which raised no question about the issue. (Tr. 752)

The plaintiff's radiologist expert, Dr. Edward Russell, testified by deposition that the images in the files were substandard and that the radiologist should have recommended that additional films be taken. (Tr. 1569, 1582) Had additional films been taken, they would have revealed, according to Dr. Russell, an injury in progress. (Tr. 1582)

In addition to disputing whether the radiologist fell below the standard of care in failing to report that Goldenberg was in the wrong place, that the films were inadequate and that further films should be taken, the defense argued that such failure was not a contributing cause of Sawczak's injuries. The defense seized on statements by Goldenberg on cross-examination that he did not expect the radiologist to tell him that he was in the wrong duct at the time of the surgery. (Tr. 1184). However, the defense argument suffered the obvious fallacy that, as

[4] Indeed, Alarcon conceded that he was aware of the importance of verifying the anatomy of the patient's ductal system in preventing injuries of the type sustained by Mrs. Sawczak. (Tr. 1849-50)

established by plaintiff's expert testimony, Goldenberg was in the wrong place before the films were taken and that if the radiologist had recommended a clarification of Sawczak's anatomy through more films, Sawczak's significant injuries would have been avoided. In short, as the Fourth District noted below, the issue of liability and causation as to the radiologist were hotly contested at trial.

ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR NEW TRIAL ON LIABILITY BASED ON THE NUMEROUS IMPROPER AND PREJUDICIAL COMMENTS BY DEFENSE COUNSEL IN CLOSING ARGUMENT.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE DEFENSE TO INTRODUCE CUMULATIVE EXPERT TESTIMONY.

III. WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S REQUEST TO INSTRUCT THE JURY AS TO (1) THE EXCEPTION TO THE HOSPITAL'S INDEPENDENT CONTRACTOR DEFENSE TO VICARIOUS LIABILITY, (2) THE DETRIMENTAL RELIANCE ELEMENTS OF THE PLAINTIFF'S APPARENT AGENCY THEORY OF VICARIOUS LIABILITY AGAINST THE HOSPITAL.

SUMMARY OF ARGUMENT

The trial court erred in denying the plaintiff's motion for new trial on liability issues based on the numerous improper and prejudicial comments by defense counsel in closing argument. Those comments, including charges of collusion with one defendant, conscience of the community arguments, misstatements of the applicable law, and injection of personal opinions, were so pervasive and prejudicial as to deprive the plaintiff of a fair trial. Accordingly, a new trial should have been awarded even in the absence of contemporaneous objection to all such comments. In addition, many of the comments were objected to and the error was preserved.

The trial court abused its discretion in denying the plaintiff's pretrial and trial requests to prevent the defense from introducing cumulative expert testimony. As a result of the trial court's rulings, the radiologist, radiology group and the hospital were permitted to have multiple radiologist and surgical experts over the plaintiff's one. Given that the interests of these defendants were inextricably intertwined, that the radiology group's liability was solely vicarious, and that the testimony itself was cumulative, it was improper and unfair to allow each defendant to present an expert offering the same opinions. A new trial should be awarded.

Finally, the trial court erred in denying two special jury instructions proposed by the plaintiff relating to her vicarious liability claims against the hospital. One instruction set forth the exceptions to the hospital's independent contractor defense to agency liability. The other instruction set forth the elements to the plaintiff's apparent agency theory against the hospital. The instructions correctly set forth the law and were supported by evidence. A new trial on liability should be

granted.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL ON LIABILITY BASED ON THE NUMEROUS IMPROPER AND PREJUDICIAL COMMENTS BY DEFENSE COUNSEL IN CLOSING ARGUMENT

A. Florida Supreme Court Precedent on Exception to Requirement of Contemporaneous Objection to Improper Comments in Closing Argument

This Court's leading decisions on when a new trial may be awarded in civil cases because of un-objected to improper closing arguments are Seaboard Air Line Railroad Co. v. Strickland, 88 So.2d 519 (Fla. 1956), and Tyus v. Apalachicola Northern Railroad Co., 130 So.2d 580 (Fla. 1961). Those cases set forth the following standard:

While we are committed to the rule that in the ordinary case, unless timely objections to counsel's prejudicial remarks are made, this court will not reverse the judgment on appeal, however, this ruling does not mean that if prejudicial conduct of that character in its collective impact of numerous incidents, as in this case, is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, this court will not afford redress.

Strickland, 88 So.2d at 523; see Tyus, 130 So.2d at 587. In Tyus, the Court clarified the Strickland standard by ruling that the prejudicial remarks or conduct, "need not begin at the outset of a trial and continue intermittently to its conclusion." 130 So.2d at 587. Thus, improper comments within a closing argument itself may, in appropriate cases, satisfy the standard.

The Strickland Court held that although "partisan zeal" by an attorney for his client's cause is necessary, the attorney's "conduct during the cause must always be so guarded that it will not impair or thwart the orderly processes of a fair consideration and determination of the cause by the jury." 88 So.2d at 523. Echoing this view, the dissent in Tyus (a 4-3 decision) pointed out that an attorney, although an advocate, is also an Officer of the Court:

[C]ounsel in a litigated cause has not only the duty to advocate the cause of his client to the best advantage of his client, but he, as an officer of the court, also has an equally compelling duty to see to it that the opposing party's right to a fair trial on the evidence and the merits is not disadvantaged by his conduct.

Tyus, 130 So.2d at 595.

The need for attorneys to act professionally and uphold their positions as Officers of the Court is no less a valid concern today than it was at the time of Strickland and Tyus. If anything, the modern trend towards "win at all costs"

[5] makes it even more important for the courts to enforce standards of professionalism.[6] See Borden, Inc. v. Young, 479 So.2d 850, 851 (Fla. 3d DCA 1985), rev. denied, 488 So.2d 832 (Fla. 1986) (not acceptable for the judiciary "to act simply as a fight promoter, who supplies an arena in which parties may fight it out on unseemly terms of their own choosing"); Murphy v. Murphy, 622 So.2d 99, 102 (Fla. 2d DCA 1993) ("We believe . . . that a jury trial should not resemble a 'Shoot-out at the OK Corral'."); Muhammad v. Toys "R" Us, Inc., 668 So.2d 254, 259 n.1 (Fla. 1st DCA 1996) ("any unseemly conduct that lowers the professional reputation of the Bar and brings disrepute to our legal profession must be curtailed").

As demonstrated below, the litany of improper and prejudicial comments by defense counsel, which even the Court of Appeal below viewed as "improper and often egregious," pervaded the closing argument and gravely impaired a calm and dispassionate consideration of the evidence and the merits by the jury of the radiologist's liability for Sawczak's injuries. A new trial should therefore be awarded on liability issues.

B. Improper Comments in Closing Argument by Defense Counsel

1. Counsel for Defendant Alan Alarcon, M.D. (Crane Johnstone)

a. Accusing Plaintiff's Counsel of a Fraud on the Court

Before the trial began, defense counsel challenged plaintiff's counsel and Goldenberg's counsel to reveal whether there were any secret deals; everything was answered in open court: There were none. (Tr. 246) All the attorneys, as officers of the court, should have accepted these statements of counsel. The matter should have ended there. Unfortunately, it did not. The radiologist's attorney, Mr. Johnstone, on cross-examination of Goldenberg, raised the unfounded accusation that plaintiff's counsel was in collusion with Dr. Goldenberg and had "choreographed" his direct examination. (Tr. 1364) Plaintiff's counsel contemporaneously objected, outside the presence of the jury, voicing strong opposition to this attack. (Tr. 1364) Mr. Johnstone informed the trial court that he fully intended to make that theory a recurrent theme throughout the trial and through closing argument. (Tr. 1364-65) The trial court expressly admonished Mr. Johnstone from doing so. (Tr. 1366-67) Mr. Johnstone, however, completely disregarded the court's mandate and

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[5] See Honorable Peter T. Fay, Officers of the Court, Fla. Bar J. 9, 12 (December 1986) (decrying modern trend and pointing out that "[a]ttorneys' first, primary and overriding loyalty must be to the system").

[6] Indeed, the goal of restoring professionalism to the practice of law has resulted in this Court's establishing of Commission on Professionalism and the Bar's establishing of a Center for Professionalism. See In re Amendments to the Rules Regulating the Fla. Bar, 23 F.L.W. S495, S496 (Fla. Sept. 24, 1998).

used his closing argument as a springboard to recreate textbook examples of inflammatory comments.

Mr. Johnstone's baseless allegations simply cannot be condoned, especially since the trial court had warned Mr. Johnstone against this improper line of attack. Mr. Johnstone, during closing argument, again accused plaintiff's counsel of committing a fraud upon the court by coordinating the answers of Goldenberg which were presented to the jury. Mr. Johnstone made *himself* a credibility witness; he was "testifying" to the jury that plaintiff's counsel knew the answers to Goldenberg's questions before they were asked:

MR. JOHNSTONE: **That's what's been going for the last two and a half weeks. And it's been clear to you, and it's been clear to everybody that <u>there has been a unified, joint effort from this side of the room (Indicating), and this side of the room</u> <u>to choreograph, and to have witnesses testify ahead of time knowing what the questions are going to be --</u>**

MR. FIORE: Excuse me. I object to this.

THE COURT: Sustained as to the comments related to the attorneys. Please proceed.

MR. JOHNSTONE: **<u>I think everybody in this courtroom has seen what's been going on in the last couple of weeks.</u>**

MR. FIORE: Judge, he did it again.

THE COURT: Sustained, Counsel.

MR. RUSSOMANNO: He should be admonished.

THE COURT: I ask the jury to disregard the last comment by counsel. Let's please proceed to comment on the evidence or the lack of evidence in the case.

(Tr. 3451-52)

Mr. Johnstone alleged improper behavior by plaintiff's counsel regarding "witnesses" in the plural. While Goldenberg was technically a "witness," he was participating in this trial as a party defendant. The only other witness called to testify at trial by Goldenberg was his expert, Dr. Pevsner, by deposition. (Tr. 2579-2700) Thus, aside from allegations by defense counsel of "collusion" with "witness Goldenberg," there is no other possible "witness" with whom plaintiff could have "colluded."

What is most telling of the **intentional and calculated nature** of the improper commentary in Mr. Johnstone's closing argument is the fact that **he was warned** by the trial court, early in the trial, not to make that specific, personal attack about collusion. (Tr. 1366-67) Mr. Johnstone snubbed his nose at the

trial court's ruling, and its authority, and then feigned ignorance at the side bar conference:
MR. JOHNSTONE: That's what I'm asking, what personal attacks are we talking about?

THE COURT: Counsel, he just referred to one of the areas where he—that it was referred to is the fact that it should be abundantly clear to the jury that there has been an essence of cooperation between the attorneys for Dr. Goldenberg—

MR. JOHNSTONE: **But there has.**

THE COURT: —and for the plaintiff. And they would talk about the questions.

MR. JOHNSTONE: **But there has been.**

THE COURT: Counsel, is there anything wrong with that? Every single attorney is allowed to talk to their witnesses. So the fact they are able to talk to their witnesses is not a problem. In fact, there is a very instruction on that particular concern.

MR. JOHNSTONE: **Do you find in this courtroom there has been no collaboration and cooperation between Dr. Goldenberg and Mrs. Sawczak**?

THE COURT: Counsel, I find there has been significant collaboration between you and Mr. O'Hara.

MR. JOHNSTONE: **No.**

THE COURT: And between you and Mr. Miller. But those are not to be commented upon to the jury. **It is not evidence in the case.** And the attorneys working that way is improper. If there is improper conduct on the part of the attorneys, the improper conduct should be brought to the attention of this court, and this court should seek—you should seek to have this court stop that kind of improper conduct off the record.

MR. JOHNSTONE: All I've pointed out is that there has been cooperation between Dr. Goldenberg and the plaintiffs to shift blame from him to the radiologist.

THE COURT: Counsel, you weren't talking—

MR. JOHNSTONE: You have seen that as well for the last two and a half weeks.

THE COURT: You weren't talking about Dr. Goldenberg when **you talk about counsel and counsel getting the questions together with the opposing counsel. And you're implying an improper conduct that the jury should consider in their deliberations.**

MR. JOHNSTONE: **Judge, you know what's been going on.**

THE COURT: I don't –Counsel, obviously I'm not getting very far with you.

MR. JOHNSTONE: I just don't understand. I just don't understand.

(Tr. 3481-83)

Aside from the choreography and collusion comments, Mr. Johnstone improperly implied to the jury on other occasions that plaintiff's counsel were trying to mislead the court and the jury:

These films are of diagnostic quality. They were read correctly, and Dr. Fortgang testified to that. **They can twist his notes or his testimony all they want.** (Tr. 3438)

* * * *

Mr. Fiore made the remarkable statement in opening—sorry—in closing argument that it does not matter what Dr. Goldenberg says regarding the criticism he has in this case, and that his thoughts as to why he was misled are irrelevant. He said that to you in closing. **I wrote that down because I can't believe that he said that.** That's why we're here. **If Dr. Goldenberg had ever said to these folks, I accept responsibility.** This problem is my problem. I misidentified the anatomy. I was not misled by anyone. **This lawsuit would never have been brought against Dr. Alarcon.** . . . (Tr. 3441)

This comment, aside from constituting an attack on plaintiff's counsel, was an improper comment regarding the merits of the case against the radiologist and the "duty" of Goldenberg to accept the entire blame for plaintiff's injuries. Certainly, if plaintiff's counsel had injected such an inflammatory, personal opinion into the trial about a defendant, that argument would constitute reversible error. See, e.g., Fayden v. Guerrero, 474 So.2d 320 (Fla. 3d DCA 1985) (improper to argue that a defendant should not have defended but should have put money on the table).

An attorney simply cannot attack the credibility of the opposing attorney. That is not what a trial is about. See, e.g., Owens Corning Fiberglas Corp. v. Morse, 653 So.2d 409, 412 (Fla. 3d DCA 1995) (improperly stating that plaintiff's counsel was "excellent at confusing issues" and "hiding the ball" and was a "master of trickery"). In Owens Corning, one attorney stated that a witness "was being prodded by [the other attorney] into giving a response. A response ladies and gentlemen that he had to have been told by his attorneys." Id. at 410. The appellate court explained that such comments "are similar to calling plaintiffs' counsel liars, and accusing the plaintiffs' counsels [sic] of perpetrating a fraud upon the court and jury." Id. at 411. The court below erred in not finding that the repeated, derogatory comments of Mr. Johnstone attacking the integrity of

plaintiff's counsel which deprived plaintiff of a fair trial.

b. Challenging Plaintiff to Present Additional Radiologists

Despite the pretrial order limiting each attorney to one expert per specialty (R. 263), Alarcon's counsel made the highly improper and false arguments that plaintiff's counsel could have brought in all the radiology experts they wanted. Alarcon's counsel thereby expressed that his client's case was stronger than plaintiff's case because plaintiff was outnumbered. This "go-with-the-numbers" theme was prevalent throughout the radiologist group attorney's argument as well. See Section II, infra.

MR. JOHNSTONE: Dr. Russell was **the only radiologist** that the plaintiffs attempted to call in this case. Think about it. Dr. Russell was **the only radiologist**, the same specialty as Dr. Alarcon, they attempted to call, to say he fell below the standard of care. And what did he say? He said something that was completely different than what their surgical expert said, Dr. Livingstone. And you didn't even get a chance to look him in the eye, and size him up, and gauge his credibility. **They read his depo to you at 5:00 o'clock or 5:30 at night.** And that's **the only radiologist** that they ever called in their case in chief. **They had two solid weeks to call whomever they chose.** They called **one witness** by deposition to say that Dr. Alarcon fell below the standard of care. He was not in the courtroom for you to size up and to evaluate and to judge. **You've got to go on a transcript that was read to you at 5:30 at night. . . .** You didn't have a chance to do that at all with Dr. Russell, **their only radiology expert. Is that proving to you by the clear and convincing force and effect of the entire evidence** that Alan Alarcon fell below the standard care, that he caused injury to Shirley Sawczak? I suggest to you it is not. (Tr. 3439-40)

In City Provisioners, Inc. v. Anderson, 578 So.2d 855, 856, 857 (Fla. 5th DCA 1991), the court held that an incorrect statement of the law made by an attorney who appeared pro hac vice, unlike Mr. Johnstone, had "no place in final argument" and warranted reversal "standing alone" from the other cumulatively improper comments.

There are numerous cases "which have granted new trials caused by improper closing arguments violating the Code of Professional Responsibility, even in the absence of objection." Sacred Heart Hosp. of Pensacola v. Stone, 650 So.2d 676, 680 (Fla. 1st DCA 1995) (citing Pippin v. Latosynski, 622 So.2d 566, 569 (Fla. 1st DCA 1993)).[7]

[7] See also Silva v. Nightingale, 619 So.2d 4 (Fla. 5th DCA 1993) (where counsel only objected to two of five improper comments, reversal was warranted because the combined effect of misconduct was so extensive that its influence pervaded the trial, gravely impairing calm and dispassionate consideration of the evidence

c. A Verdict Against the Radiologist Would Be A First

Mr. Johnstone improperly told the jury that there had never been a case in which the radiologist was found negligent in assisting a surgeon. This commentary was highly prejudicial, inflammatory, and a violation of Florida Bar Rule 4-3.4(e) because Mr. Johnstone was "testifying" about matters outside of the evidence presented in the case. In the words of Mr. Johnstone, "there are no cases":

MR. JOHNSTONE: Mr. Fiore asked a couple of witnesses whether they had ever served as experts before in cases where the radiologist was being accused of doing something wrong in a lap chole case. They all said no. **Nobody has seen such a case.** That was a great question. Not one of those experts has ever testified in a case where the general surgeon claims the radiologist misled him. **Why? Because that's preposterous. There are no cases.** No one can tell you about any other similar case. There are no instances that any of these people can tell you about where a general surgeon was misled by a radiologist when he's identifying the anatomy and removing a gallbladder. (Tr. 3459-60)

The Fourth District has expressed its intolerance for attorneys who refer to matters in other lawsuits. In Bellsouth Human Resources Admin., Inc. v. Colatarci, the court explained, "**What other lawyers have done, what has occurred in other lawsuits**, and what other corporations have done, **are things which are clearly outside the bounds, and reference to them directly violates the ethical rule.**" 641 So.2d 427, 430 (Fla. 4th DCA 1994); accord Parker v. Hoppock, 695 So.2d 424 (Fla. 4th DCA 1997), rev. denied, 707 So.2d 1126 (Fla. 1998).

d. Appeals to the Community Conscience

1) This Broward County Jury

The effort by Alarcon's counsel to appeal to the conscience of the community was a flagrantly improper argument. In Norman v. Gloria Farms, Inc., the Fourth District held that community

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and merits by the jury); Riley v. Willis, 585 So.2d 1024 (Fla. 5th DCA 1991) (expressions of personal belief by attorney created reversible error despite the absence of a contemporaneous objection as they were a breach of rule 4-3.4 and the combined effect of the comments required reversal); Stokes v. Wet 'N Wild, Inc., 523 So.2d 181 (Fla. 5th DCA 1988) (comments that courts were overcrowded; that $48,300 for damages was ridiculous; that counsel did not think the plaintiff's witnesses were reasonable, and that he did not believe the plaintiff's testimony was true, all of which violated rule 4-3.4, required reversal based on their combined effect); Schreier v. Parker, 415 So.2d 794 (Fla. 3d DCA 1982) (arguments in derogation of Code of Professional Responsibility will not be condoned even without objection).

conscience arguments, in conjunction with other comments which violate the Bar Rule, may constitute reversible error despite the lack of objection, due to their "pervasiveness." 668 So.2d 1016 (Fla. 4th DCA), rev. denied, 680 So.2d 422 (Fla. 1996). Moreover, as Norman held, impassioned appeals to matters outside the record cannot be condoned. 668 So.2d at 1021-22. Mr. Johnstone's comments were equally improper:

MR. JOHNSTONE: Half justice is injustice if you let Dr. Goldenberg come into this courtroom at this stage and say really for the first time, long after the suit was filed, that this radiologist in some way misled him, or sandbagged him, you will have said to Dr. Alarcon and to the other defendants that it's okay to change your story. **It's okay to shift and maneuver and manipulate the facts to protect yourself financially. And that in the Broward County area, here in Florida, it's okay if you come in and make things up to protect yourself. That's what you're telling everybody who looks at this case**. (Tr. 3453)

"While counsel is accorded great latitude in making argument to the jury, this leeway is not unbridled. The comments made by defense counsel were an improper attempt to appeal to the conscience of the community." Davidoff v. Segert, 551 So.2d 1274, 1275 (Fla. 4th DCA 1989); accord Superior Indus. Int'l, Inc. v. Faulk, 695 So.2d 376 (Fla. 5th DCA 1997).

Mr. Johnstone's comments about this Broward County jury were also designed to curry favor with them by stroking their collective ego. See, e.g., Kelley v. Mutnich, 481 So.2d 999 (Fla. 4th DCA 1986) (improper to remark that counsel "liked" and "picked" the jury):

MR. JOHNSTONE: And keep in mind when we met with you to begin with during that voir dire process, **we were looking for jurors from this community who had the stamina and the intelligence** to separate the claims in this case, people who were willing to give Dr. Alarcon a fair shot. Dr. Alarcon has followed all the rules. He has been here. He has testified. (Tr. 3440-41)

Mr. Johnstone also improperly tried to appeal to the sympathy of this "Broward County" jury and remind them of how his client supposedly helps the downtrodden of Broward County:

He gets sued, shows up for deposition. He sits down, and Mr. Fiore presented him with a single document. This is what he's presented with in his deposition (Indicating). You've been sued. The surgeon in the case, Goldenberg, is claiming you did something wrong. You're said to have misled him. Have a seat. **You're in a lawsuit, and you're going to be in a lawsuit for the next two and a half years**. Okay. That's what he is presented with. Here's what he's given at his deposition. Remember that the group that he worked for he long since left. **He's over at Glades General. He's making an hour and a half drive, working migrants [sic] and underprivileged in Belle Glade, Florida, where he's the radiologist at the hospital, running the show over there for those folks as we speak.**

And at the time he was sued—and keep in mind radiology group Sternberg and Schulman had dissolved. And the radiologists migrated on to other practices and other communities, other cities. **So, okay, you're sued. Have a seat. You're going to be around awhile.**

(Tr. 3465-66)

This comment is also improper because Mr. Johnstone was attempting to evoke sympathy for his client because he had been in the lawsuit for "two and a half years" and implied that somehow it was due the inappropriate behavior on the part of plaintiff's counsel who brought him into the suit.

2) God Help Physicians in the State of Florida

Alarcon's counsel clearly implied that a verdict against this radiologist would be a first and would affect the practice of medicine in Florida. This commentary is the flip-side of the send-a-message argument that has been used improperly by some plaintiff's counsel. The appellate courts have held that the message need not be overt in order to cause harm. See S.H. Investment and Development Corp. v. Kincaid, 495 So.2d 768 (Fla. 5th DCA 1986), rev. denied, 504 So.2d 767 (1987) (citing Westbrook v. General Tire & Rubber Co., 754 F.2d 1233, 1238-39 (5th Cir. 1985)). The comments by Alarcon's counsel amounted to such an impassioned plea to protect physicians in Florida:

MR. JOHNSTONE: They have just said you should have told the surgeon something he already knew about. **Well, that's preposterous.**[8] **If that's what makes a med mal case in this state, then God help any physician who is sued**. (Tr. 3465)

Trials are to decide disputes between parties, not to send messages or to protect non-parties. It was improper for Mr. Johnstone to again assert his personal opinion regarding the merits of the case and to appeal to the conscience of the community and have the jury consider matters clearly outside the record. Such arguments fall squarely within the prohibitions of Florida Bar Rule 4-3.4(e)- expressed frustration that trial counsel seek "to attack trial lawyers in general, and suggest that their bringing of frivolous lawsuits was one of the major ills of our society," and that these types of comments persist despite the plethora of opinions which should guide the conduct of counsel. 641 So.2d at 430. The court noted that "[w]e hope we do not have to go so far as recommending, in our opinions, that the Florida Bar prosecute counsel for engaging in this kind of unethical conduct." Id.

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[8] **See Baptist Hospital, Inc. v. Rawson, 674 So.2d 777 (Fla. 1st DCA) (inappropriate, and reversible with other comments, to insert personal opinion that a party did something "ridiculous"), rev. denied, 682 So.2d 1100 (Fla. 1996).**

e. Personal Comments on the Credibility of Witnesses or the

Merits of the Case

Mr. Johnstone's closing argument was riddled with his personal opinions, over objection, regarding the credibility of witnesses and the merits of the case in complete and utter derogation of Rule 4-3.4(e)-, the court found that the combined effect of the improper argument regarding the attorney's personal opinion concerning the justness of his client's cause, the credibility of the witnesses and the defendant's culpability were enough to find that the plaintiff had been deprived of a fair trial. The same outcome is mandated here:

MR. JOHNSTONE: Dr. Goldenberg had already been in the suit for over a year and he had already been deposed twice. He had been asked his position on this case in written questions and in depositions. And, yes, it's when I got involved in the case, **I said, well, wait a minute. I want to question this man too. Because a lot of what he's saying doesn't make sense to me or to anyone else that's looked at this case.** (Tr. 3442)

* * * *

[Mr. Fiore's] trying to suggest to you, and has for days, that because these four films that Alan Goldenberg wanted and ordered shot do not show the intraductal system up by the liver, it's the biliary tree above this level—because the surgeon did not have those films he was somehow misled or sandbagged. **Well, that's preposterous.**[9] This is why he has blown this particular exhibit up, because he wants to accentuate what he feels are, according to one of the experts, an incomplete series of films. Folks, if there had been an injury that was found on the 10th by Dr. Goldenberg that showed an injury in the right or left hepatic ducts, or up near the liver, or in the high area of the common hepatic duct that is not seen on some of the films, **then they would have a legitimate beef**. **There would be a problem in that regard, and they might have a lawsuit.** But that's not what happened in this case. Those films are irrelevant. And they spent days going over them. For what reason? I don't know. (Tr. 3446)

* * * *

Why did we spend twenty-five or thirty minutes with Dr. Rush the other afternoon at 5:30, 6:00 o'clock at night talking about clips? **Why would Mr. Fiore try and suggest that Dr. Rush did not see any clips on these films when he was talking about ERCP films? Why would he do that? I will tell you why.**

MR. FIORE: Your Honor, I object to this. You have dealt with this before on Friday.

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[9] This is another one of the three occasions where Mr. Johnstone used the term "preposterous." (Tr. 3446, 3460, 3465) We again refer the Court to Baptist Hospital, Inc. v. Rawson, supra at n.8 (inappropriate, and reversible along with other comments, to insert personal opinion that a party did something "ridiculous").

THE COURT: Counsel, let's refrain from personal attacks on the attorneys. Let's comment upon the evidence. Please proceed.

MR. JOHNSTONE Yes, sir. Let me suggest to you that we spent a great deal of time with many of the expert witnesses talking about issues that have never been issues in this case. When the attorneys on the other side of the courtroom got frustrated—please don't take this out on us. **It's frustrating and it's annoying. And it makes one angry[10] to sit and listen for days and days about non-issues, about issues that the expert witnesses themselves have never considered issues in the case.** (Tr. 3447-48)

* * * *

MR. JOHNSTONE: The only reason that we have been in this courtroom for the last two and a half weeks, as Mr. O'Hara pointed out, is because long after he got sued and finally recognized the true gravity of what he had done, and what his financial responsibility was, Dr. Goldenberg decided that he could come into this courtroom. **He could have the gall and the guts to sit in that stand and tell you that the radiologist did something wrong, and that he should not be responsible for paying these damages to this woman himself.** That's what's been going for the last two and a half weeks. (Tr. 3451)

* * * *

Why did we spend hours and hours and hours on that? The reason is because the merits of the case are so weak, opposing counsel feels it's necessary to spend time on non-issues, and suggesting that somebody is trying to walk away from their responsibility. He never has. He's in this courtroom. And he accepts what you're going to do. And he believes, and I think justly, he believes that **you people are not going to be snowed. You're not going to be misled. You're not going to be led by the nose like children down a path that leads from Dr. Goldenberg to Dr. Alarcon.** He knows you're not going to do that. This man believes in the jury system, believes that **you people are bright enough and smart enough** to leave the smoke and mirrors and all of these non-issues aside and concentrate on what the evidence in the case has been. (Tr. 3468-69)

This passage demonstrates that not even the trial court's admonition of Mr. Johnstone deterred him from continuing his improper arguments and personal attacks on Sawczak's counsel.

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[10] **These comments are not dissimilar from those in Pippin v. Latosynski, 622 So.2d 566, 567 (Fla. 1st DCA 1993), in which the court found the cumulative effect of the comments warranted reversal since it "precluded the jury's rational consideration of the evidence and merits, resulting in an unfair trial and thus constituting fundamental error. . . regardless of the lack of an objection made thereto."**

Moreover, the last comment quoted above is especially disturbing because it again implies that plaintiff's counsel are liars who are trying to "mislead" and "snow" the jurors and because Mr. Johnstone expressed his personal opinion that the "merits of the case are so weak." Such blatant violations of the Bar Rule were inextricably woven throughout Mr. Johnstone's hour-long closing argument.

f. The Expert as a "Hired Gun"

In addition, Alarcon's counsel, Mr. Johnston, improperly referred to plaintiff's vocational rehabilitation expert, Larry Forman, as a "hired gun." (Tr. 3471, 3473-74) Plaintiff's counsel objected to such characterizations. (Id.) Mr. Johnstone nevertheless continued to ridicule Mr. Forman and gave his personal opinion that the witness was somehow deceiving the jury because he was more experienced than he was letting on due to the fact that Mr. Forman was also a lawyer. The cross-examination of this witness, however, did not support Mr. Johnstone's argument that the expert knew more about the legal system than Mr. Johnstone himself; Mr. Forman clearly explained that, although he earned a law degree, he chose not to practice law. (Tr. 1381-82) Thus, Mr. Johnstone's "sophistication" argument was not a fair comment on the evidence and was improper. Naturally, there was also no reason whatsoever why Mr. Johnstone had to demean Mr. Forman's physical appearance:

MR. JOHNSTONE: It's important that you understand that Larry Forman has been hired by these folks for years. **His job is to come in and put big numbers up.** That's what he does for a living. **He's a lawyer. He understands the system better than I do.** He is hired over and over and over again, even in cases where he knows nothing about the medicine or about that particular injury, like this case. He's never worked on a liver case in his life. And yet he was hired in this case **to put big numbers up**. . . . **Mr. O'Hara is right. This man is hired to put big numbers up on the board**, give it to an economist. Then they run it through a computer and put the biggest numbers they can legitimately argue on the board. And that's what they have done in this case. . . . What happened to Shirley Sawczak shouldn't have happened to anybody, it's wrong. **Dr. Goldenberg made a mistake. And the court has ruled that he did.** She did suffer damages. And she's entitled to money damages. . . . She's entitled to look to Alan Goldenberg to pay these damages. (Tr. 3471-72)

* * * *

What does **Mr. Forman** do? He doesn't even take the figure that's given to him by Dr. Livingstone that she would need a transplant in the next ten years. He says she is definitely going to need one in six years. **Who's he kidding?** He's not a doctor. **He's clueless. He has no idea.** He comes in—do you remember him? **The feisty little guy with the beard?** Do you remember him? Would you think he was a credible and **likable** witness? Did you think that he made an effective and credible and believable guy?

* * * *

MR. JOHNSTONE: Ask yourselves when you go back: Do you think that this guy is a credible, believable witnesses? **Or is he a hired gun who was asked to put the biggest numbers he can conceivably think of up on the board?**

(Tr. 3473-74)

Such comments—asking the jury whether they "liked" a witness—were certainly not relevant to the just and proper resolution of any matter before the jury. See Budget Rent A Car Systems, Inc. v. Jana, 600 So.2d 466, 468 (Fla. 4th DCA), rev. denied, 606 So.2d 1165 (Fla. 1992) (refusing to condone attorneys who attempt to "conjur[e] up images of the gunfighter shooting it out in the street"). These types of comments are so egregious that the Florida Bar has suspended lawyers for making the types of remarks that were made in this case. See The Florida Bar v. Schaub, 618 So.2d 202, 203-04 (Fla. 1993).

These comments were prejudicial because they tended to attack the credibility of Sawczak's counsel, which put Sawczak at a disadvantage to the defendants on all issues, particularly the key issue in dispute: the radiologist's liability.

g. Implying That the Trial Court Did Not Believe Dr. Alarcon Was Negligent

Alarcon's counsel did not simply note the trial court's directing of a verdict against Goldenberg. He improperly commented on how he believed the trial court viewed the merits of the case. He tried to give weight to the fact that the trial court found Goldenberg negligent but not Alarcon—"and for good reason." It was improper for Mr. Johnstone to allude as he did to the trial court's position on the culpability of his client in such a manner:

MR. JOHNSTONE: The Court has ruled as a matter of law that Dr. Goldenberg fell below the standard of care. The court has ruled that he was medically negligent during his surgery. The court has entered that order. And you will not be considering that issue because he's ruled already. **The court has not ruled in that way regarding any other defendant, and for good reason. The good reason is he has left, and properly so, left that decision to you, the judges of the facts.** And you're going to get a chance to go back, if not tonight, then tomorrow morning, and then deliberate on all those issues as to the hospital and as to Dr. Alarcon and as to the group. (Tr. 3433)

The jury must believe that the trial judge is impartial. The court in Matthews v. St. Petersburg Auto Auction, Inc. held that "**any indication, even in the slightest degree**, [that] the judge has departed from this position and has become a champion of any litigant, **is fatal**." 190 So.2d 215, 217 (Fla. 2d DCA 1966) (improper to tell jury the judge does not believe the position of a party).

2. Counsel for Defendant Sternberg & Schulman (Dennis O'Hara)

a. Alleged Joint Efforts by Plaintiff's Counsel and Dr. Goldenberg's Counsel

The attorney for the radiology group, Dennis O'Hara, also made inappropriate references to collusion. He stated that on a certain issue, plaintiff and Goldenberg's counsel, Mr. Fitzgerald, are "like that" and made a gesture crossing two fingers tightly and turning toward plaintiff's counsel in disgust. Such comments are improper. See cases cited in Section II.B.1.a, supra.

MR. O'HARA: Now, Mr. Fiore has indicated to you, Mr. Fitzgerald has indicated to you—and **you notice there's a lot going on here between the two of them.** Because what's going on in this courtroom, folks, is there is an attempt to shift the blame from that table (Indicating) there that way. So that man can avoid financial responsibility in this case. That's what's going on in this courtroom. (Tr. 3397)

* * * *

You have heard here for two weeks a suggestion by plaintiff's counsel and now by Mr. Fitzgerald—see **they're like this on this issue (Indicating**). (Tr. 3406)

b. Plaintiff's Attorneys Always Ask for More than They Expect; 20% Would Make Them Happy

Mr. O'Hara's comments about what plaintiffs' attorneys do in other cases was an improper argument in derogation of the Bar Rule.[11] The trial court erred in overruling plaintiff's objection to this line of argument. While, ultimately, these improper comments as to damages may not have swayed the jury on the damages issue, the comments still portrayed plaintiff's counsel as liars who were not being forthright with the jury, which in turn damaged plaintiff's liability case against three of the four defendants:

MR. O'HARA: **You know, plaintiff's attorneys will come into a courtroom and they will put a high figure on the board and hope that you come in somewhere, you know, high.**

MR. FIORE: Your Honor, I object to this. This is improper.

MR. O'HARA: What's improper?

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[11] Mr. Johnstone followed up by making the same inappropriate comments and by bolstering Mr. O'Hara's credibility by saying that he was "right."

So, I think Mr. O'Hara is right. These attorneys have tried to put up the largest numbers they can in the hopes that you will come back with something like that. (Tr. 3475)

MR. FIORE: I object, Your Honor.

THE COURT: Overruled. Please proceed.

MR. O'HARA: And the manner in which they did it in this case—3.7 million dollars they put on the board in this case—and when I address these issues of damages, I want you to understand I am in no way belittling Mrs. Sawzcak's situation or her damages. But the purpose of this lawsuit, and the purpose of assessing damages, is to give the plaintiff something what the law calls fair and reasonable, just compensation, not something unreasonable. **It's not meant to make somebody a millionaire**. . . . (Tr. 3427-28)
* * * *
MR. O'HARA: **If you were to give them twenty percent**[12] **of what they're asking for, they will be delighted.** (Tr. 3429)

As the Fourth District stated in Hartford Accident & Indemnity Co. v. Ocha, 472 So.2d 1338 (Fla. 4th DCA), rev. dismissed, 478 So.2d 54 (Fla. 1985), a party may not present such arguments to the jury:
Suggesting that all claimants' lawyers always ask for more than they expect to receive or that defense lawyers always say their clients are innocent or that the damages are minor, adds nothing to the orderly resolution of the factual disputes before the jury, and does considerable harm to the already impaired reputation of the legal profession. Counsel are, of course, entitled to point out the lack of factual or legal support for an opposing party's contention, or the lack of reasonableness or rationality in an approach. The trial court should not hesitate, however, to keep tight reins on a lawyer who seeks to win his case by castigating an entire segment of the legal profession. . . .

Id. at 1343. As noted above, that the damages portion of plaintiff's verdict may not have been affected by the improper comment is irrelevant. The fact is that these types of improper comments are designed to continue the personal assault on plaintiff's trial counsel and otherwise obscure the jury's ability to decide the truly disputed issues on the merits.[13] The comments going to plaintiff's damages case, in conjunction with

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[12] **Such comments in Owens—"Any plaintiff's attorney always asks for at least ten or fifteen times what they want"—were deemed prejudicial, improper rhetoric that attacks an entire sect of lawyers and a basis for reversal.**

[13] The hospital's counsel, Mr. Miller, followed up with this improper argument.
In addition to which, I would suggest, and I don't think I'm going to go into specific numbers, but **there was a suggestion made that the damages were probably about twenty percent of what, in fact, they put up on the board.** (Tr. 3499)

the many other inflammatory comments, were cumulatively prejudicial to plaintiff's liability case against three of the four defendants.

c. Personal Comments as to the Credibility of Plaintiff's Theories

Mr. O'Hara's multiple references to the plaintiff's theories of the case as "bogus" and "B.S." were improper comments in violation of Florida Bar Rule 4-3.4(e)--, in which the court found that "[s]ome of the more extreme comments include[d] Mr. Levin's [counsel's] assertion that the decision to take [plaintiff] to [the hospital's] emergency room 'was the most **ridiculous** decision that anybody has ever made in history.'" Such comments were part of a cumulatively prejudicial closing argument that violated the Bar Rule by including the attorney's personal opinion over and over again, despite the want of objection. See also Kaas v. Atlas Chemical Co.:

[E]xpressions by a lawyer of his personal opinion are in derogation of the Code of Professional Responsibility and will not be condoned." Importantly, **such impropriety does not require a contemporaneous objection.**

623 So.2d 525, 526 (Fla. 3d DCA 1993) (quoting Moore v. Taylor Concrete & Supply Co., Inc., 553 So.2d 787, 793 (Fla. 1st DCA 1989) (citing Stokes v. Wet 'N Wild, Inc., 523 So.2d 181 (Fla. 5th DCA 1988); Kendall Skating Centers, Inc. v. Martin, 448 So.2d 1137 (Fla. 3d DCA 1984)).

3. Counsel for Defendant Humana (Mark Miller): Injecting Personal Opinion

Counsel for the hospital, Mr. Miller, also made several remarks that were textbook examples of improper closing arguments. He stated over and over again—at least 10 times—that he did not think in his personal opinion this person or that entity was negligent or otherwise to blame. While an occasional "I think" or "I believe" may constitute a manner of speech that does not reflect the speaker's actual views, this was simply not the case here:

MR MILLER: . . . . And notwithstanding that there was comment that the entire operative report is a piece of fiction—you may remember that comment. The entire operative report was a piece of fiction. **I don't think that statement had any place in this courtroom.** (Tr. 3488)

* * * *

But the fact of the matter is there is no evidence of that on the objective films, no evidence, none. **It's strictly a litigation device to try and spread liability from where it belongs** with Dr. Goldenberg down that table (Indicating), I suppose starting with me and working on down. **And I don't believe that that's appropriate evidence.** (Tr. 3490)

* * * *

Now, I'm going to switch gears for just a second here, because I feel that I do have an obligation to talk about damages **even though I feel very strongly there should be no liability against the hospital** . . . . (Tr. 3496)
* * * *
Now that I've said that, I want you to forget I even said that with regard to the hospital. Because, actually, that should only apply, **the way I see this case**, to Dr. Goldenberg. **I don't believe there is any liability against the hospital.** (Tr. 3499)
* * * *
You heard from the community-based radiologists, Dr. Alarcon, Dr. Raskin, who I asked to come into court and try to explain some of the issues in this case to you because **I didn't feel like the radiologist did anything wrong either**, and there was their radiology department in the hospital. I didn't bring in a surgeon because **I did feel that Dr. Goldenberg**, the private practitioner in this case, **did do something wrong**. (Tr. 3501-02)
* * * *
Let's just talk about **why I think**, basically, that Dr. Goldenberg and Dr. Alarcon are independent contractors. (Tr. 3506)
* * * *
And I want to thank you very much on behalf of Humana Hospital Bennett. **I think it's a good hospital. I think it did nothing wrong in this case**, nor is there any agency relationship involved. (Tr. 3520)

The prejudicial error was that defense counsel converted closing argument into a credibility contest of the attorneys. Thus, while counsel for Alarcon and the radiology group attacked the credibility and integrity of Plaintiff's counsel, the hospital's counsel sought to act as though he was imparting his neutral wisdom to the jury.

The cumulative effect of the above comments constitutes yet further grounds for the ordering of a re-trial. See Riley v. Willis, 585 So.2d 1024 (Fla. 5th DCA 1991) (expressions of personal belief by attorney created reversible error despite the absence of a contemporaneous objection as they were a breach of rule 4-3.4 and the combined effect of the comments required reversal).

C. The Plaintiff Properly Preserved Error on Several Improper Comments to Which Her Counsel Objected

In addition, the Plaintiff preserved error on several of the improper comments by defense counsel. Thus, Sawczak's counsel made timely objections to several of Mr. Johnstone's comments regarding the integrity of plaintiff's counsel and their expert witness, which the trial court sustained, and to Mr. O'Hara's attack on the plaintiff's bar, which the trial court overruled, and, before the jury retired to deliberate, requested a mistrial, coupled with a request for the trial court to reserve its ruling pending the return of the verdict from the jury. (Tr. 3544-46) In response to the oral motion for mistrial, Mr. Johnstone argued

"[t]hat is improper. There is no precedent for that. Either he's moving for a mistrial, which the Court should rule on, or he isn't." (Tr. 3547) At Mr. Johnstone's urging, the trial court ruled, "Well, I agree with you there. So, I think it's either fish or cut bait." (Id.)

Plaintiff's counsel were thus placed in the manifestly unfair position of having to choose between going forward with the deliberations and opting for an immediate mistrial. Plaintiff's counsel at that point had a directed verdict establishing negligence against one of the defendants, were in the third week of a complex medical malpractice trial, and were naturally hesitant to unconditionally request the mistrial which may well have been granted at that point. Contrary to the misstatement of law by Mr. Johnstone to the trial court, as this Court has held, in these circumstances, it is entirely proper to request that the court reserve ruling on the motion for mistrial. Ed Ricke & Sons, Inc. v. Green, 468 So.2d 908 (Fla. 1985)); see also Bellsouth Human Resources Admin., Inc. v. Colatarci, 641 So.2d 427, 430 (Fla. 4th DCA 1994). As this Court noted in Ed Ricke, "[t]he power of a trial court to reserve ruling on a motion for mistrial will not only conserve judicial resources but may also operate to prohibit a wrongdoer from profiting from his intentional misconduct." 468 So.2d at 910.

Nevertheless, the trial court required plaintiff's counsel to decide whether to seek a mistrial without reservation. (Tr. 3548) Plaintiff's refusal to demand a mistrial without such a request for reservation did not waive the effect of the motion which was made below. Ed Ricke, supra. Furthermore, under the circumstances of this case, the trial court's refusal to reserve ruling on the plaintiff's motion for mistrial was itself an abuse of discretion. There was simply no reason why the trial court denied the request by plaintiff's counsel to reserve ruling. Its action was arbitrary and capricious.

Although the trial court requested a curative instruction (Tr. 3549), no attorney could have drafted one that could magically wipe away the entire parade of horribles that occurred. No curative instruction could have served the interests of justice, and such an instruction, even if it does exist in some hornbook or treatise, would have merely highlighted the litany of improper comments the defense made. In short, there was no way to cure the substantial damage that had already occurred. Indeed, appellate courts have held that, even when curative instructions are given, their value is questionable: **"[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good."** Walt Disney World Co. v. Blalock, 640 So.2d 1156, 1159 n.1 (Fla. 5th DCA 1994). See also Muhammad, 668 So.2d at 258 ("although the judge issued a curative instruction, it is debatable whether the comment was erased from the jurors' minds."). This Court explained in Griffith v. Shamrock Village, Inc., 94 So.2d 854, 857 (Fla. 1957), that where an attorney has accused another attorney of perjury and collusion with his witness, a curative "instruction to try the case only on the evidence, in our opinion, did not cure

this error."

"The sentiment of futility over corrective instructions in this narrow situation and a concern over such ethical violations have led some appellate courts to order or sustain new trials even without contemporaneous objections or motions for mistrial." Raymond T. Elligett, Jr., "Closing Argument Conflict," 1 THE RECORD, No. 2 (Florida Bar, Dec. 1995).

This jury was already overwhelmed by the fumes of the defense counsels' numerous improper comments. The stench from the improper comments could not be removed by anything the trial court could possibly say. This is a case in which "[n]either rebuke not a retraction of the comments would have served to destroy their sinister and prejudicial influence." Muhammad, 668 So.2d at 258 (citing Owens). The failure to give a curative instruction, should not, therefore, be dispositive of this mistrial issue.

Accordingly, a new trial should have been awarded as to the specific improper and prejudicial comments to which Mrs. Sawczak's counsel objected.

D. Error for One Is Error for All

Even absent the combined, improper themes of the defendants noted above, if *any* of the defense comments amounted to reversible error, then plaintiff is entitled to a new trial on liability against all three of the defendants at issue since a fair trial was not possible. In Owens Corning, the Third District held that "[e]ven though the inflammatory comments attacking the integrity of opposing counsels were not made by [one of the defendant's] trial counsel, due to the nature of these comments . . . they deprived the plaintiffs of a fair trial as to both defendants. . . . [T]he comments adversely affected the jury's perception of the plaintiff's trial counsels." 653 So.2d at 412. Given the alignment of the radiologist, radiology group, and the hospital on the liability issues, see infra Section II.A, the same finding is applicable here.[14] Moreover, each participated and engaged in the pervasive and improper comments during closing argument.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO LIMIT THE DEFENSE FROM INTRODUCING CUMULATIVE EXPERT TESTIMONY

Plaintiff was unfairly prejudiced as a result of rulings pretrial and during trial which allowed the radiologist and the radiology group to introduce cumulative expert testimony in support of their liability defense. Before trial, plaintiff filed a motion to limit the number of experts at trial. (R. 195, 221) On September 5, 1995, the trial court entered an order limiting "each

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[14] The jury in the retrial should be instructed, as a matter of law, that Dr. Goldenberg was negligent. Shufflebarger v. Galloway, 668 So.2d 996 (Fla. 3d DCA 1996).

attorney" to one expert witness per specialty at trial. (R. 263) The order permitted an attorney to designate a backup expert who could be used in place of the primary expert only upon a showing of "reasonable good cause." (Id.) After taking the deposition of the radiologist experts for the radiologist and the radiology group, the plaintiff moved to strike one of the radiologist experts on the grounds that the interests of the two defendants were completely aligned and that the experts' testimony was cumulative. (R. 805) In short, the two defendants sought to be able to present two radiologist experts expressing the same liability opinions, while the plaintiff was permitted only one. At an extended hearing, on March 27, 1996, the trial court denied the plaintiff's motion. (R. 1307-86)

At trial, the radiologist, the radiology group, and the hospital were permitted to present radiologist experts each expressing the same opinion, namely, that Dr. Alarcon did not fall below the standard of care and did not cause the plaintiff's injuries, thereby gaining an unfavorable advantage in the number of experts.[15] To add insult to injury, the defense was permitted, over objection (Tr. 2950-83), to call Dr. Margarita Alarcon, Alarcon's wife, another radiologist who by coincidence prepared the final report on the four cholangiogram films at issue, as a quasi-expert to bolster the defense case (Tr. 3083-87). Even the trial court in overruling the plaintiff's objection observed that Dr. Margarita Alarcon would "implicitly" be perceived as yet another expert for the defense since she supposedly interpreted the films in the same manner as did her husband, Alarcon. (Tr. 2982)

The gross unfairness of these rulings may be seen in the closing arguments of defense counsel, especially Mr. Johnstone's in which he demonstrates that the sheer number of defense experts, versus the plaintiff's experts, was proof that the greater weight was thus with his client's position. In short, the defense had all the experts, while plaintiff, who according to Mr. Johnstone, could have called anyone she chose, only had one surgeon and one radiologist, by deposition. The following are prime examples of how the defense took advantage of the presence of multiple defense experts:

MR. O'HARA: First of all, **a number of the experts** in this case say you can clearly see it on this film here (Indicating). (Tr. 3403)

* * * *

We're not making this up. That's why Dr. Alarcon said he was in the right place. That's why **Dr. Raskin** said he was in the right place. That's why **Dr. Rush** said he was in the right place. That's why **Dr. Fortgang** said he was in the right place. That's why **Dr. Tershakovec** said he was in the right place. And that's

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[15] The radiologist presented Dr. Kenneth Fortgang (Tr. 3027-77), the radiology group presented Dr. Michael Rush (Tr. 2707-2804), and the hospital presented Dr. Michael Raskin (Tr. 1968-2055)

why **Dr. Unger** said he was in the right place. And that's why Dr. Goldenberg said he was in the right place, in the cystic duct. (Tr. 3404-05)
* * * *
And there must have been **five or six experts** who took the stand here who told you that it's quite common, you don't visualize the cystic duct. (Tr. 3415)
* * * *
So the point is: You had **Dr. Fortgang**, **Dr. Rush**, **Dr. Unger**, **Dr. Tershakovec**, and **Dr. Raskin**, all come in here and say that that man met the standard of care. He was not negligent and read those films totally appropriately, totally appropriately. (Tr. 3424)
* * * *
Well, how about **all these highly qualified experts** that took the stand that told you the same thing. Isn't it interesting that their opinion is exactly the same as Dr. Alarcon's. (Tr. 3431)
* * * *
MR. JOHNSTONE: Dr. Russell was **the only radiologist** that the plaintiffs attempted to call in this case. Think about it. Dr. Russell was **the only radiologist**, the same specialty as Dr. Alarcon, they attempted to call, to say he fell below the standard of care. . . . And that's **the only radiologist** that they ever called in their case in chief. **They had two solid weeks to call whomever they chose.** They called **one witness** by deposition to say that Dr. Alarcon fell below the standard of care. . . . Dr. Russell, **their only radiology expert.** Is that proving to you by **the clear and convincing force and effect of the entire evidence** that Alan Alarcon fell below the standard care, that he caused injury to Shirley Sawczak? I suggest to you it is not. (Tr. 3439-40)
* * * *
[MR. MILLER]: Now, we have that expert. **We have all the co-defendants' experts.** We have logic on our side, I think. (Tr. 3505-06)

Mr. O'Hara, Mr. Johnstone, and Mr. Miller all referred to the testimony of the many defense experts as if they were their own. They continually referred to how many of their experts said "X," "Y," or "Z" as compared to plaintiff's two experts. Their experts outnumbered plaintiff's experts and they harped on that fact to sway the jury into believing that the sheer weight of the evidence was therefore with them.

There is no reason why these defendants, whose interests were in the words of Dr. Alarcon's counsel "linked inextricably" (Tr. 1111, 1215), could not have been limited to fewer experts in order to balance the scales of justice. The presentation of evidence through the three radiologists for the hospital, the radiology group, and Dr. Alarcon was unfairly cumulative. The defense case would not have been "gutted" (Tr. 1222) by the mere fact that they would have to share experts.

It is well established that the trial court has discretion to limit

the number of witness for a given side.
[16] As the radiology group's liability was solely vicarious, the trial court should not have allowed both the radiology group and the radiologist (in addition to the hospital) to introduce cumulative opinion testimony. Accordingly, the trial court abused its discretion in allowing the defense to introduce cumulative radiologist opinions and deprived the plaintiff a fair trial.

III. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO THE EXCEPTION TO THE HOSPITAL'S INDEPENDENT CONTRACTOR DEFENSE TO VICARIOUS LIABILITY AND THE ELEMENTS OF PLAINTIFF'S APPARENT AGENCY THEORY OF VICARIOUS LIABILITY AGAINST THE HOSPITAL

A. The Instruction on the Independent Contractor Exception

The hospital contended that the radiologist was an independent contractor and therefore the hospital was not vicariously liable for any negligence of the radiologist. The plaintiff sought to instruct the jury on the non-delegable duty exception to this independent contractor defense. Accordingly, Plaintiff during the charge conference before closing argument presented a jury instruction recognizing this exception as established in Irving v. Doctors Hosp. of Lake Worth Inc., 415 So. 2d 55 (Fla. 4th DCA 1982). (Tr. 3181):

One who undertakes by contract to do for another a given thing cannot excuse himself to the other for a faulty performance, or a failure to perform, by showing that he has engaged another to perform in his place, and that the fault or failure is that of another or independent contractor.[17]

Based on defense counsel's objection that the instruction, which had been taken verbatim from Irving, was "confusing," the trial court refused to accept this instruction. (Tr. 3184) Sawczak revised the jury instruction following closing argument and presented it to the trial court before the jury was to be charged (Tr. 3541):

If you find that Defendant Humana undertook by contract to provide medical services to Shirley Sawczak, then Defendant Humana cannot excuse itself to Shirley Sawczak for a faulty

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[16] E.g., Carpenter v. Alonso, 587 So.2d 572 (Fla. 3d DCA 1991) ("no error in the trial court limiting expert witnesses in a medical malpractice case to one expert per side"); Stager v. Florida East Coast Railway Co., 163 So.2d 15, 16-17 (Fla. 3d DCA 1964), cert. discharged, 174 So.2d 540 (Fla.), cert. denied, 382 U.S. 878 (1965).

[17] Plaintiff's counsel provided a copy of the instructions at issue in this section to the trial court and the court reporter to transcribe into the record but the reporter did not do so. (Tr. 3542) The proposed instructions, however, are quoted verbatim in the Plaintiff's motion for new trial. (R.1167)

performance, or a failure to perform, by showing that Defendant Humana engaged another to perform in its place, and that the fault or failure is that of another or independent contractor.

Although finding this instruction to be "more appropriate than the original one," the trial court ruled that the revised instruction was "untimely." (Tr. 3541-42)

The trial court's ruling was an abuse of discretion and error. The original instruction was timely and accurately stated the applicable law. The hospital's counsel argued that the instruction based on Irving should not be given because the case pre-dated the standard jury instruction on agency and the independent contractor exception. (Tr. 3183-84) However, standard jury instructions are not the final word. Rather, the trial court maintains "responsibility under the law properly and correctly to charge the jury in each case as it comes before him." In re Matter of Standard Jury Instr., 198 So.2d 319, 319, 320 (Fla. 1967).

There are many exceptions to the independent contractor rule which have not yet been reduced to standard jury instructions, including where the "owner/employer has contractually assumed responsibility." Webb v. Priest, 413 So.2d 43, 47 n.2 (Fla. 3d DCA 1982). It is therefore appropriate and mandatory for a trial court to consider whether a proposed instruction would assist the trier of fact in reaching its determination. See Cornette v. Spalding & Evenflo Cos., Inc., 608 So.2d 144, 145 (Fla. 4th DCA 1992).

Plaintiff's instruction correctly stated the exception to the independent contractor rule which is pertinent to the facts of this case, and was identical to the instruction approved by the court in Irving. Where the hospital obtains an instruction on the independent contractor defense, the plaintiff is then entitled to have the jury instructed as to the relevant exceptions to the independent contractor rule. Irving held that it is error to deny such a request. Irving, 415 So.2d at 62; see also Davis v. Charter Mortgage Co. ("the failure of the trial court to grant appellant's requested instruction constituted reversible error" where it correctly stated the legal principle behind an exception to the independent contractor rule).

B. Detrimental Reliance Instruction

Similarly, Sawczak proposed a jury instruction defining the reliance and detriment element of her apparent agency claim against the hospital which accurately reflected Florida law (Tr. 3185, 3542):

In deciding whether Alan Goldenberg, M.D. or Alan Alarcon, M.D. were apparent agents of Defendant, Humana Inc., you may determine whether Shirley Sawczak established the element of "reliance" based on whether you find that she went to Defendant Humana's hospital based on its reputation in the community.

You may also determine whether Shirley Sawczak established the element of "detriment" by based on whether you find that she

suffered injuries which were causally connected to the treatment she received at the Defendant Humana's hospital.

The decision of Orlando Regional Medical Center v. Chmielewski, 573 So.2d 876, 879-80 (Fla. 5th DCA 1990), rev. denied, 583 So.2d 1034 (Fla. 1991), on which the instruction was based, holds that the elements of "reliance" and "detriment" may be implied from certain conduct, including the name and reputation of the facility.[18] Here, the requested instruction was an accurate recitation of the law and should have been provided. Thus, the trial court erred in failing to so instruct the jury.

CONCLUSION

It is respectfully submitted that the judgment in favor of Defendants Alarcon, Sternberg & Schulman M.D. Corp., and Humana Hospital Bennett should be reversed, and the cause remanded for a new trial on liability against these defendants.

[18] See, e.g., Cuker v. Hillsborough County Hosp. Auth., 605 So.2d 998 (Fla. 2d DCA 1992) ("nothing . . . limits its application strictly to emergency room settings").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 19th day of October, 1998, to:

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