

Tobacco Case Lesson: Use Closing Arguments Cautiously

by Noreen Marcus
Special to the Review

A trial lawyer and his boss did something surprising: They saved a \$5 million jury award by admitting error to judges.

A loss would have been a significant upset for the plaintiffs' side of tobacco litigation and a signal victory for defense forces.

Lawyers with the Ferraro Law Firm in Miami claimed a breakthrough last year when they won \$5 million for an auto mechanic with smoking-related heart disease. Before the case of Antonio Cuculino, tobacco companies had been held liable only for cancer and lung diseases.

The error occurred when Ferraro attorney Alan Kaiser said in his closing argument that Philip Morris gave Cuculino the job of suffering from heart disease and should pay him commensurately. Kaiser blundered by noting that actors and athletes get "astronomical" and "tremendous" salaries.

He accepted a curative jury instruction from Miami-Dade Circuit Judge Jorge Cueto. Later, James Ferraro went to the Third District Court of Appeal and didn't try to explain away the mistake.

"During oral argument, Mr. Cuculino's appellate counsel properly and commendably acknowledged that the complained-of comments were improper," Judge Leslie Rothenberg wrote for the court, affirming the judgment.

The Ferraro firm's strategy probably averted the disaster that can follow an improper closing argument, said Tucker Ronzetti, who has written on the topic for the Florida Bar Journal.

"Courts appreciate candor, jurors appreciate candor, everyone appreciates candor," said Ronzetti of Kozyak, Tropin & Throckmorton in Coral Gables. "One of the signs of a sophisticated attorney is someone who will admit he made a mistake when that position isn't going to hurt the client and in fact will help in the long run."

CLOSING CALLS

The closing argument is an art form. It's the lawyer's final word to the jury, a chance to summarize the evidence in the most persuasive way possible.



J. ALBERT DIAZ

James Ferraro went to the Third District Court of Appeal and admitted his firm's attorney made a mistake in closing arguments. That admission likely salvaged a \$5 million tobacco verdict.

"You're in a difficult situation because on the one hand, you're impassioned and want to appeal to the jury, and on the other, if you go too far you risk losing all the work that you've done," Ronzetti said.

Ferraro said, "You've got to be careful that you don't take the jury out of the facts and into the land of your passion."

In their Florida Bar Journal article, Ronzetti and co-author Janet Humphreys listed the traps trial lawyers should avoid: misstating the law, attacking the law or the court's rulings, misrepresenting the evidence, vouching for witnesses, stating personal beliefs, advocating the Golden Rule and exciting prejudice, passion or sympathy.

Kaiser crossed the line when he presented a variation on the

Golden Rule approach. It can be paraphrased this way: Put yourself in the shoes of the plaintiff—and make them the \$600 Balenciaga sneakers the stars and athletes wear.

"In this case it didn't affect the verdict," Ferraro noted.

What obviously did influence jurors was evidence that Cuculino suffered a

heart attack at 49, had about 20 catheterization procedures and still needs "aggressive intervention and medical therapy," the Third District opinion states. The Ramrod Key resident sold his boat "because he fears suffering a heart attack at sea," the ruling said.

Trial lawyers are keenly aware of context, and tobacco litigation carries a ton of baggage that must be stowed or unpacked, depending on the desired result. All this is reflected in closings.

"There are definitely biases that have to be dealt with that are unique to this area, but there are biases on both sides," Ronzetti said.

"The populace of the U.S. understands that tobacco companies are big and wealthy and that they've made a lot of money based on a product that has caused health concerns, at the least," he said. "At the same time, people understand that the risks attendant to smoking have been known for some time now."

\$145 BILLION LESSON

To determine if a closing argument so powerfully influenced a jury as to taint the trial, courts generally look at the result.

In the Cuculino case it helped the plaintiff that the jury didn't award shockingly high damages, found comparative fault—Cuculino was held 60 percent liable—and exonerated defendant R.J. Reynolds because he mainly smoked Philip Morris' Marlboros.

"This was not a runaway, inflamed, impassioned jury," Ferraro said. "It was

a pretty clinical jury."

For an object lesson on the risks of uninhibited closings, see appellate decisions in the class action named for the late Miami Beach pediatrician Dr. Howard Engle.

In 2000, after two years of interlocking trials, a Miami-Dade jury produced the then-biggest punitive damage verdict in American legal history: \$145 billion.

The Third District wanted to erase the award in part because of inflammatory remarks by lead plaintiffs counsel Stanley Rosenblatt. Speaking to a mostly African-American jury, he likened the wrong they could right through their verdict to slavery.

His "improper race-based appeals ... caused irreparable prejudice and require reversal," Third District Judge David Gersten wrote.

The Florida Supreme Court disagreed. Considering the three-phase trial's duration, Rosenblatt's comments "did not rise to the level of reversible error," its 2006 unsigned ruling states. The court overturned the punitive award and decertified the class on other grounds and launched thousands of individual Engle progeny cases like Cuculino's.

Ronzetti worked with Rosenblatt and his law partner-wife Susan Rosenblatt on a foundation funded by another early tobacco lawsuit. He's a fan.

"When I stand back and look at what they achieved, it's astounding, it's iconic," Ronzetti said. "They really did move the center of gravity for tobacco litigation."



Tucker Ronzetti, who has written about mistakes in closing arguments for the Florida Bar Journal, said the Ferraro firm averted disaster by admitting an error.

PHILIP MORRIS USA, APPELLANT, V. ANTONIO CUCULINO, APPELLEE
Case nos.: 3D14-1339 and 3D14-823
Date: May 6, 2015
Case type: Tobacco tort
Court: Third District Court of Appeal
Author of opinion: Judge Leslie B. Rothenberg
Lawyers for petitioner: Stephen N. Zack and Andrew S. Brenner, Boies, Schiller & Flexner, Miami; J. Daniel Gardner, Shook, Hardy & Bacon, Miami; and Geoffrey J. Michael, Arnold & Porter, Washington
Lawyers for respondent: James L. Ferraro and David A. Jagolinzer, Ferraro Law Firm, Miami
Panel: Rothenberg and Judges Linda Ann Wells and Kevin Emas
Originating court: Miami-Dade Circuit Court

dbr DAILY BUSINESS REVIEW proudly presents:

Litigation CLE Breakfast

ALM EVENTS

Approved by The Florida Bar for 4.0 General CLE Credits including 3.0 Certification Credits towards Business Litigation



To register visit DailyBusinessReview.com, click on 'Sections' then 'Calendar' from the drop down menu. For more information contact Joanne Beaudry at jbeaudry@alm.com or 305-347-6643. For sponsorship information contact Carlos Curbelo at ccurbelo@alm.com or 305-347-6647.

MAY 12, 2015 | 8:00 AM - 12:30 PM

HILTON MIAMI DOWNTOWN | 1601 BISCAYNE BLVD, MIAMI, FLORIDA 33132
INCLUDES CONTINENTAL BREAKFAST, NETWORKING TIME AND AUDIENCE Q&A

PLATINUM SPONSORS:		
GOLD SPONSORS:		