DIGEST OF CASES:
OPENING STATEMENT ERROR

Rule 4-3.4(e) Fairness to Opposing Party and Counsel: "A lawyer shall not… in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused"

This Rule makes a general prohibition of use of or reference to inadmissible evidence or impermissible argument in opening statement. Many of the following cases are not opening statement cases, but are general principles of law, which govern whether certain subjects are appropriate for reference in opening statements.

Argument in Opening: *Murphy v International Robotic Systems*, 766 So. 2d 1010 (Fla. 2000). This is a breach of contract case that was **not** reversed as fundamental error, without objection, for the following statements in closing argument: (1) counsel's repeated use of the term "B.S. detector"; (2) counsel's comment that if the jury found for the Plaintiffs, the jury would be "accessories, after the fact, to tax fraud"; and (3) counsel's characterization of the Plaintiffs' case as cashing in on a "lottery ticket." Although this case is a closing argument case, it is a significant case that extensively discusses underlying policy and the standard for fundamental error (improper, harmful, incurable, fundamental damage to public interest). States argument in closing may not be raised for the first time on appeal (there should at least be a motion for new trial).

Reference to Collateral Source: *Gormley v. GTE*, 587 So. 2d 455 (Fla. 1991). Plaintiff claimed damages from a fire caused by a television set. Plaintiff had previously made an insurance claim and the claim form was introduced to show lesser claim for damages to insurance company. The court stated, "introduction of collateral source evidence misleads the jury on the issue of liability and, thus, subverts the jury process. Because a jury's fair assessment of liability is fundamental to justice, its verdict on liability must be free from doubt, based on conviction, and not a function of compromise. Evidence of collateral source benefits may lead the jury to believe that the plaintiff is 'trying to obtain a double or triple payment for one injury'"

This case is applicable to opening statement through Rule 4-3.4(e).

Reference Whether a Party is Insured: *Thompson v. Florida Drum Co*., 668 So. 2d 192 (Fla. 1996). This is a negligence and breach of contract case involving shipyard repairs. The court affirmed lower District Court and stated that "it makes no difference whether the case is grounded on a claim of negligence or breach of contract. We find that the chance that a jury will be improperly prejudiced by knowledge of insurance coverage in either case outweighs the usefulness of the evidence to the finder of fact. *See* §§ 90.402–90.403, Fla.Stat. (1995). We hold that the general policy which has always dictated caution in negligence cases applies just as strongly in actions based on breach of contract."

Hollenbeck v Hooks, 933 So. 2d 50 (Fla. 1st DCA 2008). This case was reversed because Defendants counsel stated, "I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate." In fact, counsel was insurance defense counsel and the statement could not be fairly controverted because it would prejudice Defendant if it was explained that counsel was really employed by the carrier. Counsel timely objected, made motion for mistrial and for new trial.

Comment on Wealth or Poverty of Party: *Chin v. Caiffa,* 42 So. 2d 3d 300 (Fla. 3d DCA 2010). Personal injury verdict was **reversed** due to improper attack by Plaintiff's counsel on Defendant and his counsel in opening statement and throughout trial, including reference to poverty of Plaintiff due to debt incurred from medical bills resulting from the accident. The Court stated, "no reference may be made to the wealth or poverty of a party during the course of the trial." The Court also stated, "It long has been understood that the function of an opening statement is 'briefly to outline what the party expects to prove in support of his cause of action or defense.' " Counsel made contemporaneous objections.

Express Personal Knowledge or Opinion: *Murphy v International Robotic Systems*, 766 So. 2d 1010 (Fla. 2000). See above – in addition, the Court provides discussion of expressing personal knowledge or opinion in violation of Rule 4-3.4(e).

Disparagement of Counsel: *Sun Supermarkets v. Fields*, 568 So. 2d 480 (Fla. 3d DCA 1990). In a personal injury case, Plaintiff's counsel continuously stated throughout the trial that Defense counsel had lied and had committed a fraud upon the court and jury, over objection. The Court remanded for a new trial and stated, "The conduct of the plaintiff's counsel in this case devastated any chance the defendant might have had to secure a fair trial in front of a jury who had been told not to trust the defendant's counsel. These derogatory remarks about opposing counsel will not be condoned. " Contemporaneous objections were made.

Rule 4-8.4(d) Misconduct: A lawyer shall not… (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

Vouching for Party or Witness: *Sacred Heart Hospital v. Stone*, 650 So. 2d 676 (Fla. 1st DCA 1995). In a personal injury case, counsel made "frequent expressions of personal opinions on the justness of his client's cause, the credibility of a witness and the degree of culpability of a civil litigant." These comments were made during opening statement and closing argument. Counsel also referred to case of opposing party as "**ridiculous**." In reversing, the court found that "the cumulative effect of the comments was prejudicial, and that they pervaded the entire trial and constituted fundamental error." This finding was made despite the fact only three of numerous potential objections were contemporaneously made. The Court considered the cumulative nature of all improper statements.

Reference to Inadmissible Evidence: See Rule 4-3.4(e) above and F.S. Ch. 90.

Send a Message: *Pier 66 Co. v. Poulos*, 542 So. 2d 377 (Fla. 4th DCA 1989). In a wrongful discharge and defamation case in which there was an award of $2.8 million, the case was reversed and remanded because of fundamental error due to statements in opening and other error. The statements included "comments that the defendants had destroyed the plaintiff's brain, which, like Humpty Dumpty, could not be put back together, and statements that the plaintiff thought she was going insane, and that her broken heart could only bleed with her tears. Further, in opening statement plaintiff's counsel told the jury that an assistant state attorney would testify that when he spoke to Ms. Poulos following her discharge she looked "just like she had been raped. Plaintiff's counsel also engaged in attacks on the defendants' veracity, including the assertion that they had deliberately engaged in a cover up and a conspiracy to lie and falsify. These charges were coupled with attacks on corporations, urging that the jury use this occasion to **send a message** to others." The Court found that Plaintiff and counsel engaged in "extensive emotionalism" that pervaded the entire trial.

Subsequent Remedial Measures: F.S. 90.407. "Evidence of measures taken after an injury or harm caused by an event, which measures if taken before the event would have made injury or harm less likely to occur, is not admissible to prove negligence, the existence of a product defect, or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or the feasibility of precautionary measures, if controverted, or impeachment."

Undue Prejudicial or Emotional Appeal: *Pier 66 Co. v. Poulos*, 542 So. 2d 377 (Fla. 4th DCA 1989). See above.

Demonstrative Evidence Must not be Misleading: *Taylor v. State*, 640 So. 2d 1127 (Fla. 4th DCA 1994). In a murder case, the prosecution used a demonstrative aid of a feminine looking clay head to demonstrate how deathblows were administered. The issue was insanity and the court reversed and remanded. The court stated that the use of the demonstrative aid "was certain to evoke an emotional response in the minds of the jurors, on a matter that had little or no bearing on the question for the jury, *i.e.,* the issue of appellant's sanity at the time of the offense." A demonstrative aid must be accurate and may not mislead the jury or otherwise inflame or elicit prejudice in the jury.

Note – it is a best practice to obtain approval of the trial judge before attempting to use any demonstrative aid in opening statement.

Fundamental Error: *Sacred Heart Hospital v. Stone*, 650 So. 2d 676 (Fla. 1st DCA 1995); *Murphy v International Robotic Systems*, 766 So. 2d 1010 (Fla. 2000). See above.

Budget Rent a car v. Jana, 600 So. 2d 466 (Fla. 4th DCA 1992). In a personal injury case reversed on other grounds, the Court, in refusing to reverse based on lack of objection to golden rule violation, stated "It is only in those rare circumstances where the comments are "of such sinister influence as to constitute irreparable and fundamental error"