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## THE BASSETT BULLETIN <sup>TM</sup>

### INCURABLE JURY ARGUMENT

Imagine this situation--the Plaintiffs' attorney compares your jury argument urging a smaller amount of damages than the Plaintiff sought to the German T-Four Program (where some individuals, who were aged and impaired, were subjected to experiments and ultimately killed during World War II). You failed to object to the outrageous argument of Plaintiffs' counsel, and worse, the jury returned a verdict in excess of a million dollars. Quickly, you call appellate counsel to determine whether the judgment can be reversed even though no objection was made to the jury argument of Plaintiff's counsel.

This issue was raised in a case captioned *Living Centers of Texas, Inc., et al. vs. Augustine Penalver, Individually, etc., et al.*, 51 Tex. Sup. Ct. J. 370 (Tex. 2008).

### THE FACTS OF THE CASE

Living Center of Texas, Inc., (Living Center) a nursing home operator, was sued by the Plaintiffs who sought wrongful death and survival damages because Belia Penalver, their 90 year old mother, died one day after a nursing home employee dropped her during a wheelchair-to-bed transfer. A first jury trial resulted in judgment in favor of the Plaintiffs. The Court of Appeals reversed and remanded the first judgment for a new trial because of improperly admitted evidence of previous falls at the nursing home.

Before the second trial, Living Center stipulated that its negligence proximately caused Belia's injuries and death, so the only issue at trial was the amount of damages. During closing arguments, the Plaintiffs' counsel referred to Defense counsel's trial conduct urging a smaller amount of damages than the Plaintiff sought to the German T-Four Project. Defense counsel made no objection to the Plaintiffs' jury argument. Ultimately, the second jury awarded damages in excess of a million dollars, almost three times the actual damages awarded in the first trial.

Living Center filed a Motion for New Trial based, in part, on the position that the Plaintiffs' jury argument regarding the T-Four Project was improper, incurable, and harmful. The Trial Court denied the Motion for New Trial. Living Center appealed and the Court of Appeals affirmed, with one justice dissenting. In its petition for review to the Texas Supreme Court, Living Center argued that the judgment should be reversed based upon the Plaintiffs' counsel's criticism of Defense counsel during final jury argument comparing the diminution of damage arguments made by Living Centers' counsel to the Germany World War II, T-4 Project.

## **TEST TO DETERMINE WHETHER A JURY ARGUMENT IS INCURABLE**

Ordinarily, error involving improper jury argument must be preserved by a timely objection which is overruled. *Texas Employers' Ins. Ass'n v. Haywood*, 266 S.W. 2d 856 (Tex. 1954). To prevail on a claim that improper jury argument was incurable, it must be shown by the complaining party that the argument by its nature, degree, and extent resulted in such error that an instruction from the Court or retraction of the argument could not remove its harmful effects. *Id.* The test to determine whether a jury argument is incurable is as follows:

Whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction by the Court, or both, could not eliminate the probability that it resulted in an improper verdict. *Id.*

## **TEXAS RULES OF CIVIL PROCEDURE 269**

The effects of jury arguments not based on evidence or the invitation of opposing counsel are recognized in Rule 269 et. seq. of the Texas Rules of Civil Procedure which provides, in pertinent part, the following guidance:

Counsel shall be required to confine argument strictly to the evidence and argument of opposing counsel. Mere personal criticism upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

## **THE SUPREME COURT'S RULING**

The Supreme Court of Texas agreed with the Living Center's argument that the jury argument of the Plaintiffs' counsel comparing Defendant's trial counsel to the perpetrators of the T-4 Project atrocities was improper. Accordingly, the judgment of the Court of Appeals was reversed, and the case was remanded to the trial court for a new trial. The Supreme Court noted that incurable jury arguments are rare and not all personally critical comments concerning opposing counsel are incurable.

The Supreme Court held that extreme, unsupported personal attacks on opposing parties and witnesses compromise the basic principles that a trial should be fair and impartial. Arguments such as those made by the Plaintiffs' counsel were observed to have the potential to strike at the Courts' impartiality, equality, and fairness, even damaging the judicial system itself by impairing the confidence citizens have in the judicial system.

## WHAT DOES THIS MEAN?

According to the Supreme Court's ruling, the Court has little tolerance for unsubstantiated personal attacks during jury argument against opposing counsel.

This means that jury arguments should not include unsupported personal attacks on opposing parties and witnesses. If such attacks are made, and the jury argument is shown to be incurable, the judgment can be reversed even if no objection was made.

What can trial counsel do to ensure their jury argument is proper and not subject to reversal?

- (1). Avoid unsupported arguments which are designed to turn the jury against the opposing counsel and his/her clients;
- (2). Ensure that criticism of opposing parties and witnesses is based on the facts and the evidence properly admitted during the trial;
- (3). Do not attempt to incite the passions of the jury against opposing counsel for merely doing what a lawyer is ethically bound to do: zealously advocate their client's interests within the bounds of the law; and
- (4). If such attacks are made at trial, object to such statements for preservation of appeal.

If an opposing attorney's closing arguments make personal attacks and compromises the basic principles of a fair and impartial trial, note that you may have the possibility of appealing a unfavorable verdict.

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