

CLOSING ARGUMENTS IN CIVIL TRIALS¹

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Contents

I.	Introduction.....	1
II.	Order of Arguments.....	1
	A. General Order (Where Defendant Introduces Evidence).....	1
	B. Where Defendant Introduces No Evidence	1
	C. Multiple Defendants	2
	D. Additional Arguments.....	2
III.	Length of Arguments	2
	A. General Rule.....	2
	B. Extensions of Time	3
IV.	Content of Arguments.....	3
	A. Permissible Scope	3
	B. Improper Arguments	3
	C. Court's Obligation when Argument Improper.....	8
V.	Bench Trials	9
VI.	Preservation of Argument in the Record	9
	A. Transcription	9
	B. Alternative Narrative	9

I. Introduction. A closing argument, generally speaking, is a critically important part of a litigant's case or defense. Unlike the opening statement, the closing is the party's chance to *argue* to the jury how and why both the facts and law support a verdict in its favor. North Carolina law gives the parties "wide latitude" to make their arguments. But there are limits, as discussed below.

II. Order of Arguments

A. General Order (Where Defendant Introduces Evidence). In most civil trials, the plaintiff is permitted to both open and close the arguments. As the party with the burden of proof, the plaintiff is given the advantage of both "primacy" and "recency" in making its case to the jury. Thus, plaintiff typically is permitted to provide the first closing argument, defendant then provides its full closing argument, and plaintiff then offers a rebuttal of defendant's argument.

B. Where Defendant Introduces No Evidence

1. Order of Arguments Reversed. "[I]f no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." N.C. R. SUPER. AND DIST. CTS. RULE 10 ("Rules of

¹ For information regarding closing arguments in criminal cases, see the survival guide chapter entitled "[Jury Argument: Content of Opening and Closing Statements](#)" (Jessica Smith, April 2012).

Practice”). Thus, defendant presents the first argument, plaintiff then presents its argument, and defendant offers a final rebuttal.²

2. **“Introduce Evidence.”** A party introduces an item by offering it as substantive evidence or by presenting it so it may be examined by the jury to “determine whether it illustrates, corroborates, or impeaches the testimony of a witness.” *State v. Hall*, 57 N.C. App. 561, 564 (1982).
 - a. Showing an item to a witness to refresh the witness’s recollection does not amount to offering the item into evidence. *Id.*
 - b. Defendant does not “introduce evidence” by testifying during plaintiff’s case after having been called to the stand by plaintiff. *Hord v. Atkinson*, 68 N.C. App. 346, 352 (1984).

3. **Disputes Over Order of Argument.** Rule of Practice 10 states that, “[i]f a question arises as to whether the plaintiff or defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.” Notwithstanding this language, the appellate courts, in the criminal context, have repeatedly held that it is reversible error to deny a defendant the right to first and last argument under Rule 10. See *State v. Hogan*, ___ N.C. App. ___, 720 S.E.2d 854, 856 (2012); *State v. Bell*, 179 N.C. App. 430, 432 (2006); *State v. Shuler*, 135 N.C. App. 449, 455 (1999); *State v. Hall*, 57 N.C. App. 561, 565 (1982) (noting that the error is reversible despite the language of Rule 10).

- C. **Multiple Defendants.** “[W]here there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise.” Rule of Practice 10.

- D. **Additional Arguments.** If a party wishes to make additional arguments, the party may make a motion, which the court may allow in its discretion “as the interests of justice may require.” G.S. 7A-97.

III. Length of Arguments.

- A. **General Rule.** “The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions...as follows: to...not less than two hours on each side in...civil actions.” *Id.*

² Note that, in civil trials, G.S. 7A-97 allows “two addresses to the jury for the...plaintiff and two for the defendant.” The meaning of this statute is unclear in light of the nearly universal and long-recognized practice of allowing plaintiff to open and close the arguments. In addition, Rule of Practice 10 clearly requires that the defendant be given first and last argument in cases where the defendant introduces no evidence. The language of G.S. 7A-97 appears inconsistent with this rule.

- B. Extensions of Time.** “Where...any extension of time [is] desired,” a party may make a motion, which the court may allow in its discretion “as the interests of justice may require.” *Id.*

IV. Content of Arguments

- A. Permissible Scope.** Closings may contain arguments of both the facts and the law. G.S. 7A-97 (“In jury trials the whole case as well of law as of fact may be argued to the jury.”); *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 414–15 (1988). The trial court is to give parties “wide latitude” in arguing their case to the jury. *Corwin v. Dickey*, 91 N.C. App. 725, 728 (1988); *Seafare*, 88 N.C. App. at 415. “Jury argument, however, is not without limitations.” *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 98 (1999) (quoting *State v. Sanderson*, 336 N.C. 1, 15 (1994)).

B. Improper Arguments

- 1. Matters Not in Evidence.** What is included in a closing argument must be supported by the evidence on the record. An attorney may not “travel outside the record and inject into his argument facts of his own knowledge or other facts not included in the evidence.” *Karriker v. Sigmon*, 43 N.C. App. 224, 225–26 (1979) (quoting *Crutcher v. Noel*, 284 N.C. 568, 572 (1974)).
- a.** In *Crutcher*, plaintiff’s counsel stated that defendant had planned to call several doctors to testify on defendant’s behalf, but the witnesses were not called. Plaintiff’s counsel argued that if these doctors were able to give favorable testimony, defendant would have called them. In response, defendant’s counsel then indicated that those doctors would have testified favorably to his client, and that their testimony would merely have been duplicative. The Supreme Court granted a new trial to plaintiff, holding that “the weight of the medical testimony was the paramount issue. ...[Counsel’s] statement...that twelve doctors...would have testified to the same thing his client testified to, offered facts outside the record which effectively buttressed his client’s testimony on this crucial issue...[and] weighted the verdict in defendant’s favor.” 284 N.C. at 573.
- b.** In *Calicutt v. Smith*, 267 N.C. 252, 252–53 (1966), a motor vehicle negligence case, defendant’s attorney was properly prohibited from using a large chart in his closing setting forth defendant’s life expectancy and various other computations. Counsel was “in effect...attempting to use this chart as an exhibit which had never been introduced into evidence.”

c. In *Karriker v. Sigmon*, 43 N.C. App. 224, 225–26 (1979), a bodily injury case, defendant's counsel argued, "[t]he plaintiff was not hurt. The auto was in her name and she did not sue for damage to her car. This shows you there was little or no damage to the car. She would have sued for the damage if there had been any." Because the pleadings did not "raise an issue with reference to the damage to plaintiff's car...[t]his argument was outside the record...and did not relate to any reasonable inference arising from the evidence."

2. Misstatements of the Evidence and Impermissible Inferences.

Closing arguments must include "[o]nly the legitimate inferences that may be drawn from the evidence." *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 535 (1995) (citing *Wilson v. Commercial Finance Co.*, 239 N.C. 349, 359–60 (1954)). Misstatements of the evidence are not permitted. *Amethyst Corp.*, 120 N.C. App. at 535; see also Rule of Practice 12 ("Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, [or] the language or argument of opposite counsel.").

3. Facts of Other Cases. Closing arguments must not include statements of the facts and outcomes of other cases as a basis for arguing that the jury must come to the same conclusion in the case before the court. *Joines v. Moffitt*, ___ N.C. App. ___, 739 S.E.2d 177, 182 (2013) (citing *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 479 (1967)). In *Wilcox*, defendant's counsel read fact and conclusion portions of three opinions and stated, "I say to you that the facts in this case are the same as the facts in the case I have just read...and that the defendant...is no more liable here than the defendants in the other cases." *Id.* at 478. The Supreme Court held that such argument was "highly prejudicial to plaintiffs" and that "[i]t is not sufficient merely to stop such an argument without an appropriate direction to the jury." *Id.* The court explained that,

In order to make meaningful a statement of a rule of law found in a reported decision, it is sometimes necessary to recount some of the facts which the court had before it when it pronounced the rule in question. For this purpose, counsel, in his argument in a subsequent case, may not only read the rule of law stated in the published opinion in the former case but may also state the facts before the court therein. ...

It is not permissible argument for counsel to read, or otherwise state, the facts of another case, together with the decision therein, as premises leading to the conclusion that the jury should return a verdict favorable to his client in the case on trial. That is, counsel may not properly argue: The facts in the reported case were thus and so; in that

case the decision was that there was no negligence (or was negligence); the facts in the present case are the same or stronger; therefore, the verdict in this case should be the same as the decision there.

269 N.C. at 479 (internal citations omitted).

4. **Efforts to Settle.** Evidence of efforts to settle may not be introduced during trial to prove liability. N.C. R. EVID. 408. Likewise, closing arguments should not reference such efforts. *Karriker v. Sigmon*, 43 N.C. App. 224, 225–26 (1979) (ordering a new trial where defendant's counsel informed the jury that, "[t]his is a case that should not be here. The defendant made an effort to dispose of the matter, but plaintiff would not be reasonable.")
5. **Insurance Coverage.** In most negligence actions, the presence or absence of liability insurance is not relevant to the jury's determination, and the mention of such insurance in a closing statement creates impermissible prejudice. *Fincher v. Rhyne*, 266 N.C. 64, 68–70 (1965); *Scallon v. Hooper*, 58 N.C. App. 551, 556–57 (1982). Insurance should not be mentioned in either a positive or negative manner. *Id.* at 556.
6. **Collateral Sources of Payment.** It is improper to make reference in closing argument to collateral sources of payment, such as public assistance, to argue that a plaintiff has suffered no damages. *Cates v. Wilson*, 321 N.C. 1, 11 (1987) (ordering a new trial where counsel made repeated reference to Medicaid payments); see also *Fallis v. Watauga Med. Ctr., Inc.*, 132 N.C. App. 43, 49–51 (1999) (comparing collateral source rule with argument regarding medical bills).
7. **Financial Status of Plaintiff or Defendant.** Unless directly relevant to a jury question,³ the financial status of a party should not be discussed in a closing statement: "In a court of justice neither the wealth of one party nor the poverty of the other should be permitted to effect the administration of the law." *Watson v. White*, 309 N.C. 498, 507 (1983).
 - a. In *Watson*, the trial court erred in overruling an objection to the following statement: "Can you imagine what a jury verdict, a low jury verdict, a little one, five thousand dollars, would do to that little family?" The remarks were "clearly improper, calculated to appeal to the sympathy of the jury"...and "injected extraneous considerations concerning defendants' financial situation so far as their capacity to respond to damages was concerned." 309 N.C. at 507.
 - b. In *Scallon v. Hooper*, 58 N.C. App. 551, 556–57 (1982), it was improper to note that defendant would be "legally obligated to pay every single dollar of [the] verdict" and to implore the jury to deal "cautiously and fairly with the estate and the property of

³ For example, in the punitive damages phase of a trial, the jury may consider "[t]he defendant's ability to pay punitive damages, as evidenced by its revenues or net worth." G.S. 1D-35(2)i.

[defendant].” These statements implied the defendant had no insurance coverage and that a damage award would create a “significant burden on the young defendant.”

8. **Appeal to Juror’s Pecuniary Interests.** A closing argument should not reference the effect of a verdict on the financial interests of the jury. *Smith v. Bohlen*, 95 N.C. App. 347, 353 (1989). In *Bohlen*, defendant’s counsel argued, “If you were sitting around reading the newspaper and you saw something that upset them [sic] and you said ‘Why don’t they do something about it?’ then this is your opportunity to be ‘they.’” The Court of Appeals agreed that “counsel’s remark can only be interpreted as a reference to publicity concerning lawsuits and their effect on the insurance industry. Thus, the remark was an improper appeal to the pecuniary interest of the jurors in that it implied that a verdict for defendant would help to hold down insurance costs.” *Id.*
9. **“Golden Rule” or “In Their Shoes” Arguments.** In personal injury cases, a closing argument “in which the jury is asked to put itself in the position of the injured party is improper.” *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 279 (2001) (holding that it was improper in a case involving injury to a minor for plaintiff’s counsel to argue, “[w]hat would you require us to pay you? Would you take \$100 a day for it to live with the rest of your life?”).
10. **Inflammatory Statements, Abusive Remarks, Name-Calling, Religious Arguments, and Other Remarks Designed Merely to Create Prejudice.** Statements are improper if made for the sole purpose of prejudicing the jury’s decision on the issue before it rather than to address the reasonable inferences to be drawn from the evidence. *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 536–37 (1995); *see also* Rule of Practice 12 (“Counsel are at all times to conduct themselves with dignity and propriety. ... Abusive language or offensive personal references are prohibited.”).
 - a. In *Amethyst Corp.*, plaintiff sued a hospital for alleged sexual assault by a hospital employee. In his closing, the hospital’s attorney made the following statements:
 - o “And about the same time in April of 1991 a law professor from Oklahoma State University [Anita Hill] accused a man who was nominated to be a Supreme Court Justice of the United States of sexual harassment and sexual impropriety. What was in it for her?” 120 N.C. App. at 536.
 - o “In a plea arrangement orchestrated by the attorneys for the four women who were making the charges ... for the purpose of bringing legal claims within two days after they came forward with these allegations. How plausible is it that in response to these charges, descriptions of the conduct like [plaintiff] has told you, that Judge Jane Harper—a female judge-

would give [the alleged assailant] no active time if there was believable evidence that any of this were true?" *Id.*

Ordering a new trial, the Court of Appeals found counsel's Anita Hill argument to be "prejudicially infirm to the sense of fairness and justice in our legal system" and stated that,

The clear import of counsel's argument was to appeal to the passion and prejudice of the jurors that stem from that unrelated sexual harassment matter. We expressly reject the use of this type of inflammatory comparison which seeks only to...transfer the jurors' feelings from an unrelated matter to the case at hand.

And regarding the "shockingly inappropriate" plea arrangement argument, the court noted that,

[M]ost egregious are counsel's disparaging statements that because District Court Judge Jane Harper is a female judge, she would not have accepted a plea bargain giving [the alleged assailant] 'no active time if there was believable evidence that any of the [allegations] were true.' This argument is not only insulting to the judicial system as a whole, it further calls into question the fairness of female judges who preside over trials involving sexual misconduct. It is no more than a blatant attack on the integrity of judges who may share diverse qualities with a particular litigant.

120 N.C. App. at 537.

- b.** In *Corwin v. Dickey*, 91 N.C. App. 725, 728–29 (1988), a wrongful death action, defense counsel made the following statements:
- "Any money that you will award will go to the lawyers; this is a lawyers case, money, money, money! The lawyers brought this case, it is for their benefit. All I see is their financial benefit. What is the world coming to? It is all for money."
 - "Is it Christian to sue for money? Is it Christian for a stepdaughter to sue her stepfather who was going to take care of her? It's as unchristian as Jim and Tammy Bakker."
 - [Pointing to the 10 commandments]: "Suits like this should not be brought."
 - "There will be a reckoning on Judgment Day for persons who are greedy and how will these people defend this."

Ordering a new trial, the Court of Appeals stated that "this personal assault on plaintiffs, calculated to interject religious values and criticism of the legal profession into an automobile

negligence action...constituted an abuse of counsel's privilege to argue his case."

- c. In *Clemons v. Lewis*, 23 N.C. App. 488, 489–490 (1974), an action to recover the amount of a loan, it was improper for defendant's counsel to comment to the jury that plaintiff had been in jail the night before the alleged loan was made.

C. Court's Obligation when Argument Improper

1. When a Party Objects.

- a. **Court's Task.** Where a statement is improper, and the opposing party makes a timely objection, the court is obligated to sustain the objection and take appropriate action. *Crutcher v. Noel*, 284 N.C. 568, 572 (1974); *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 97–98 (1999).
- b. **Remedies.** At a minimum, the court should "correct the transgression by clear instructions" to the jury. *Crutcher*, 284 N.C. at 572; see also *Wilcox*, 269 N.C. at 478 (trial court should have "instructed the jury to disregard this portion of counsel's argument"). A clear and complete instruction often will suffice. See, e.g., *Clemons v. Lewis*, 23 N.C. App. 488, 489–490 (trial court's instruction to disregard the statements was appropriate). However, where the statement at issue is grossly improper or egregious, a new trial may be necessary. See, e.g., *Amethyst Corp.*, 120 N.C. App. at 536–37 (new trial required for counsel's "shockingly inappropriate" comments); see also *Fincher*, 266 N.C. at 70-71 (new trial was warranted where counsel discussed liability insurance).

2. **When There is No Objection.** If a party fails to object to an improper closing argument, the court nevertheless has an obligation to intervene *ex mero motu* if the statement is "grossly improper." *Watson v. White*, 309 N.C. 498, 507 (1983); *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 414 (1988). A grossly improper statement often will merit the granting of a new trial, but, depending on the surrounding circumstances, a clear limiting instruction may be sufficient. See, e.g., *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 99–100 (1999) (holding no new trial required where grossness of the statement was balanced by overwhelming evidence of negligence); *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 310–312 (1999) (holding that numerous statements about plaintiff's counsel's "agenda" to make money and get the "big guy" were improper, but not so egregious as to warrant a new trial).

- V. **Bench Trials.** In non-jury trials, closing arguments are a “privilege, not a right”, and the trial judge has discretion to dispense with them. *Roberson v. Roberson*, 40 N.C. App. 193, 194–95 (1979).
- VI. **Preservation of Argument in the Record.**
- A. **Transcription.** In general, closing arguments must be transcribed and included in the record before the appellate courts will address their propriety. *Joines v. Moffitt*, ___ N.C. App. ___, 739 S.E.2d 177, 183 (2013) (*citing* *Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 624 (1998)).
- B. **Alternative Narrative.** In the absence of a transcript, the courts may still allow review if the relevant statements have been reconstructed in a sufficiently reliable form.
1. In *Corwin v. Dickey*, 91 N.C. App. 725, 728, the Court of Appeals accepted a reconstruction of the narrative created during settlement of the record pursuant to N.C. R. APP. P. 9(c).
 2. In *Joines*, on the other hand, the Court of Appeals found that, “although plaintiff attempted to narrate the relevant portion of defendant’s closing argument pursuant to Appellate Rule 9(c),...there is no evidence that plaintiff’s version of the argument ‘accurately reflect[s] the true sense of...[the] statements made[.]’” ___ N.C. App. at ___, 739 S.E.2d at 183; *cf. Watson v. White*, 309 N.C. 498, 508 (1983) (refusing to grant new trial where record failed to provide context of alleged improper statement).