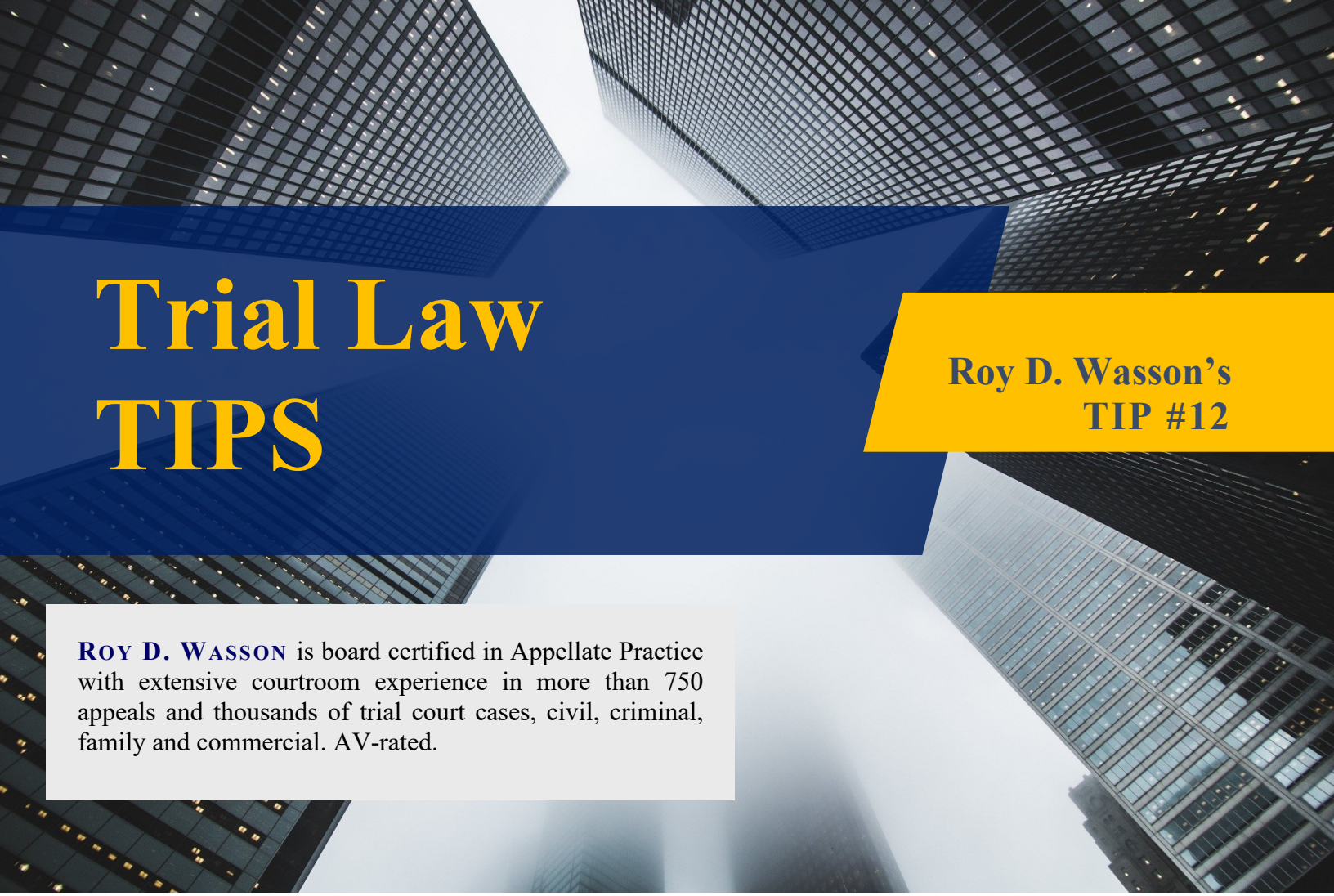

Trial Law TIPS

Roy D. Wasson's TIP #12

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Sayonara to Fundamental Error

"Fundamental Error." Forget you ever heard those two words. The doctrine no longer exists in Florida jurisprudence, at least not in civil cases. From here on out, unless you object, long, loudly and often, and intersperse those objections with frequent requests for curative instructions, motions for mistrial, and other relief, there simply will be no recourse for you on appeal. The appellate courts of Florida have made it clear that "the policies behind the requirement . . . that [errors] be properly preserved override the necessity [that verdicts be correct] on the law."

Gone are the days when an opponent's closing argument was so unfair and pervasive that the appellate courts could (and would readily) take cognizance of the matter without you interrupting the idiot during closing and annoying the jury. Now you have to jump up like a jack-in-the-box or risk waiving an unfair argument (to say nothing of other serious errors) for appellate purposes.

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The last nail in the coffin of the harmless error doctrine was started by the Florida Supreme Court's decision in *Murphy v. International Robotic Systems, Inc.,* 766 So. 2d 1010 (Fla. 2000). The *Murphy* court undid more than sixty-five years of precedent and plainly held that errors during closing argument are absolutely waived for appellate purposes unless raised before the trial court. While the Supreme court in Murphy established a complex system of standards which theoretically allow a trial court to entertain objections to closing argument made for the first time ***after*** the verdict—on a motion for new trial—the upshot of the decision is that any objection not made contemporaneous with the improper argument will not support grant of relief on appeal.

Some folks have read *Murphy* or heard about that case without taking a long and hard look at the standards imposed for raising an issue for the first time on a motion for new trial, as opposed to objecting at the time error is made. If you wait until after the verdict is returned and move for a new trial on the basis of improper closing (or most other errors), it will be a cold day in the netherworld before such a procedure will afford you a new trial order which will stand up on appeal.

Absent a contemporaneous objection when an improper argument is made, the only way a trial court can grant relief upon your post-trial motion is if you meet a nearly-impossible four-part test under *Murphy*:

The Challenged Argument Must Be Improper (It's Okay for DA to Call Your Client a "Liar")

While it seems to go without saying that one cannot obtain a new trial in the absence of some impropriety, this first arm of the *Murphy* standard reversed a couple of trends which had existed in closing argument law for almost a generation. It used to be understood that attorneys did not express their own opinions about the merits of a case and did not brand other parties "liars."

Now this is the law: "First, it is not improper for counsel to state during closing argument that the witness 'lied' or is a 'liar,' provided such characterizations are supported by the record." *Murphy, supra,* 766 So. 2d at 1028. "Second, use of

the personal pronoun 'I' during closing argument is not, in and of itself, improper." *Id. at 29* (noting with approval a decision from the Third District which held "that defense counsel's use of the phrases 'I think' and 'I believe' did not impermissibly express a personal opinion, but was instead merely a figure of speech"). Good luck in determining what may or may not be "improper" about a closing argument when you do not object at the time.

The Argument Must Be Harmful

This element really is superfluous in light of the more difficult elements which follow.

The Argument Must Be Incurable

The standard requires argument that is so improper and so harmful that a sustained objection would have had no effect. The court quotes from an older case which establishes the standard for incurability as being "the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence." *See Id. at 1030.* The court made it clear that it was sounding the death knell for fundamental error as a doctrine in Florid law when discussing this incurability argument, by predicting that "it willbe extremely difficult for a complaining party to establish that an objected-to argument is incurable." *See Id.* How right they are!

The Error Must Be Such That It So "Damaged the Fairness of the Trial that the Public's Interest in Our System of Justice Requires a New Trial"

The Fourth standard under *Murphy* completely changes the standard of review of a motion for new trial, when the ground for the new trial was an impropriety which was not objected to, such as improper closing argument. No longer will the trial court have the broad discretion to grant a new trial, in light of the Supreme Court's new standard that the impropriety must be so bad as to shake the public's confidence in our entire judicial branch of government.

Note that this is ***not*** the standard for permitting ***appellate*** review of errors not raised below. This is the standard which you must meet to have a motion for new trial granted by the ***trial court***, where those errors were not preserved until being raised in your motion for new trial. Now if you wait until a motion for new trial to raise an objection to something which occurred during the trial, the mere fact that you establish harmful error is not enough to support the grant of a new trial.

There are several cases before and since *Murphy* which elucidate on the demise of fundamental error, but none of them could be more telling than one from the Fourth District which dealt with an erroneous jury instruction. In *Feliciano v. School Board of Palm Beach County,* 776 So. 2d 306, 307 (Fla. 4th DCA 2000), the court made it clear that the new way of doing things is to strictly require adherence to the formalities of preservation of error, which formalities are more highly regarded that accuracy in the result or in the application of controlling law. Somewhat shockingly, the court in rejecting the appellant's argument that her failure to preserve objections to incorrect jury instructions could be cured by application of the fundamental error doctrine, the court held: "In a civil case, the policies behind the requirement . . . that objections to jury instructions be properly preserved, ***override the necessity that a jury be correctly charged on the law.***" That's right! It is more important to state a timely objection than it is to correctly charge the jury on the law applicable to a case. Nor will the courts find fundamental error based upon improper conduct of counsel during trial proceedings other than closing argument, such as improperly associating the adverse party with "Nazis." See Grau v. Branham, 761 So. 2d 375 (Fla. 4th DCA 2000). Referring to a prior settlement involving non-parties there will not be grounds for reversal absent a contemporaneous objection. See Lowe Inv. Corp. v. Clemente, 685 So. 2d 84 (Fla. 2d DCA 1996).

Other areas of trial practice have similarly witnessed the demise of the fundamental error doctrine. An administrative law judge's actions in ignoring the statutory requirements of the NICA proceedings cannot be remedied on appeal under the fundamental error doctrine. See O'Brien v. Florida Birth-Related Neurological Injury Ass'n., 710 So. 2d 51 (Fla. 4th DCA 1998). Even errors of constitutional diminsions, such as in failing to strike unfair jurors

for cause and in imposing limitations on the scope of voir dire cannot be remedied by resort to the harmful error doctrine. See e.g., Wallace v. Harvey Isle Resort & Marina, 706 So. 2d 346 (Fla. 3d DCA 1998). There are other examples too numerous to mention. You get the picture.

Conclusion

Now you know the reason why your personal appellate guru has turned-up the heat, visiting you in trial and whispering in your ear ("object, object, object"), more than in years past. Expect to hear from him or her more during the appellate process, griping that the transcript does not contain sufficient preservation of error. The time is now to recalibrate your internal barometer to start preserving errors which could have been raised for the first time on appeal five or ten years ago. Never again can you be sure that any sort of error would be cognizable for the first time on appeal. When in doubt, stand up respectfully and preserve your objection on anything serious enough to color the jury's verdict.

Keep Tryin!

Roy

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