APPLICATION FOR NOMINATION TO THE FIFTH DISTRICT COURT

(Please attach additional pages as needed to respond fully to questions.)

DATE: February 26, 2013 Florida Bar No.: 328685

GENERAL: Social Security No.: [redacted]

1. Name Brian D. Lambert E-mail: kgarrido@circuit5.org

   Date Admitted to Practice in Florida: October 29, 1981

   Date Admitted to Practice in other States: n/a

2. State current employer and title, including professional position and any public or judicial office.

   Circuit Judge, Fifth Judicial Circuit, Marion County, Florida

3. Business address: 110 NW 1st Avenue, Room 4058

   City Ocala County Marion State FL ZIP 34475

   Telephone (352) 401-6785 FAX (352) 401-7881

4. Residential address: [redacted]

   City [redacted]

   Since September, 2006 Telephone [redacted]

5. Place of birth: Detroit, Michigan

   Date of birth: [redacted] Age: 56

6a. Length of residence in State of Florida: Since 1978

6b. Are you a registered voter? ☒ Yes ☐ No

   If so, in what county are you registered? Marion

7. Marital status: Married

   If married: [redacted]

   If ever divorced give for each marriage name(s) of spouse(s), current address for each former spouse, date and place of divorce, court and case number for each divorce.

   n/a

8. Children

Name(s)	*Age(s)*	*Occupation(s)*	*Residential address(es)*
[redacted]			

9. Military Service (including Reserves)

Service	*Branch*	*Highest Rank*	*Dates*
n/a			

Rank at time of discharge _____ Type of discharge _____

Awards or citations _____

HEALTH:

10. [redacted]

11a. [redacted]

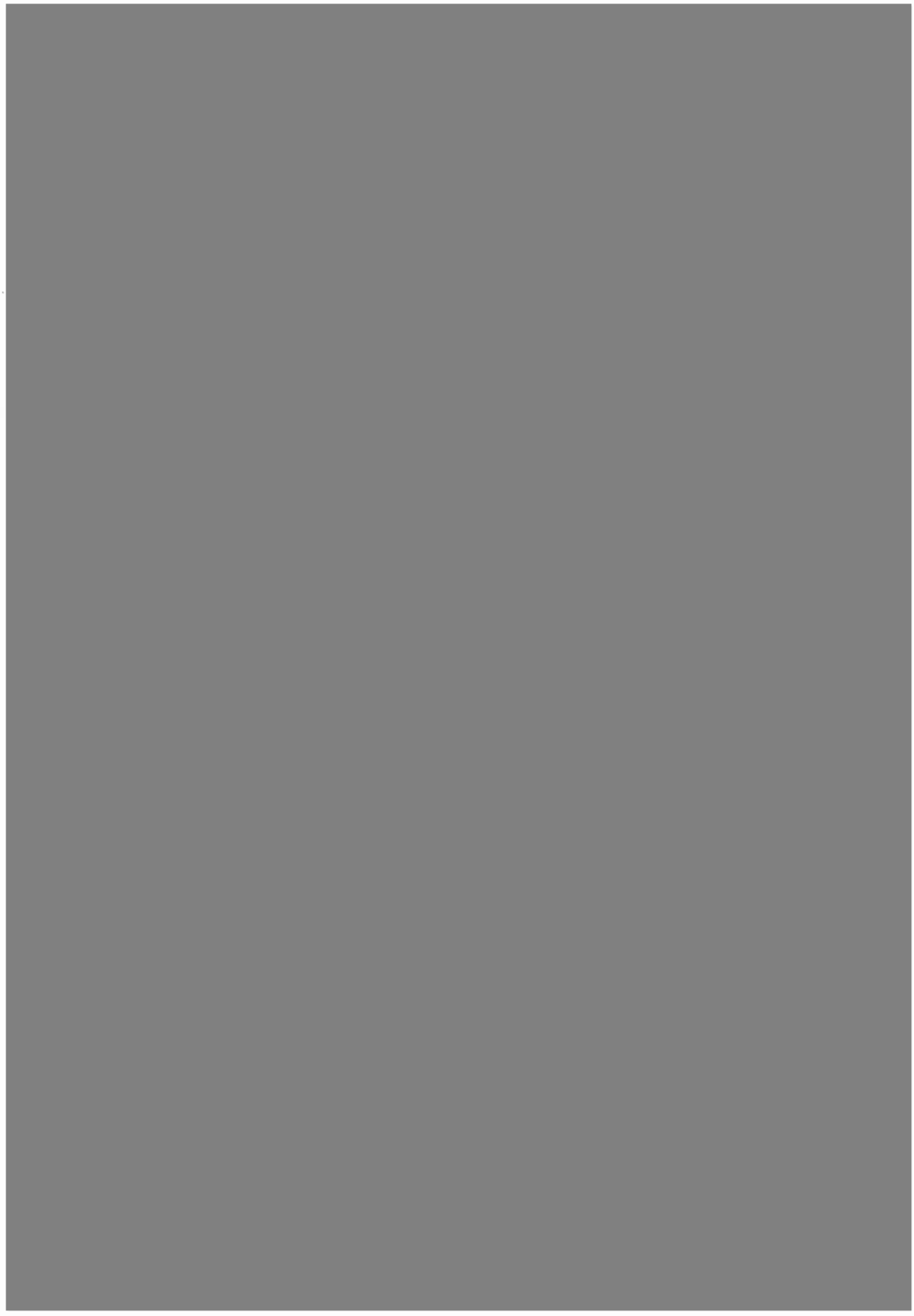
11b. [redacted]

12a.

12b.

13.

14.



15. [redacted]

16.

17.

EDUCATION:

18a. Secondary schools, colleges and law schools attended.

Schools	*Class Standing*	*Dates of Attendance*	*Degree*
Eastern Michigan University	Upper 15%	9/74-6/78	B.S.
University of Florida	Roughly 50%	9/78-6/81	J.D.

18b. List and describe academic scholarships earned, honor societies or other awards.

I received an athletic scholarship to play tennis at Eastern Michigan University and therefore made no application for academic scholarships. I graduated Cum Laude. I received no academic scholarships, awards, etc. while a student at the University of Florida Law School.

NON-LEGAL EMPLOYMENT:

19. List all previous full-time non-legal jobs or positions held since 21 in chronological order and briefly describe them.

Date	*Position*	*Employer*	*Address*
6/80-9/80	Construction Crew Laborer	John Carlo, Inc.	Detroit, Michigan

PROFESSIONAL ADMISSIONS:

20. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have been suspended or resigned.

Court or Administrative Body	*Date of Admission*
The Florida Bar	10/29/81
I am presently a Circuit Judge so I am no longer able to practice in front of any courts and/or administrative bodies.	

LAW PRACTICE: (If you are a sitting judge, answer questions 21 through 26 with reference to the years before you became a judge.)

21. State the names, dates and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as a sole practitioner, law clerkships and other prior employment:

Position	*Name of Firm*	*Address*	*Dates*
Law Clerk	Savage, Krim, Simons & Fuller, P.A.	121 NW 3rd St. Ocala, FL 34470	10/80-6/81
Associate	Savage, Krim, Simons, Fuller & Ackerman, P.A.	Same	6/81-5/86
Partner	Savage, Krim, Simons, Fuller & Ackerman, P.A.	Same	5/86-9/90

Partner	Savage, Krim, Simons, Behnke & Lambert, P.A.	Same	9/90-12/91
Owner	Law Office of Brian D. Lambert	500 NE 8th Ave. Ocala, FL 34470	1/92-3/94
Partner	Lambert & Himes, P.A.	Same	3/94-12/96
Owner	Brian D. Lambert, P.A.	Same	1/97-2/29/00

22. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

Prior to my appointment as a Cirucit Judge effective March 1, 2000, I was a Board Certified Civil Trial Lawyer with an "AV" rating from Martindale-Hubbel and was practicing primarily insurance defense and some construction litigation. My first 8-10 years of practice were a general trial practice which included civil, probate, some criminal practice and some domestic relations litigation.

23. What percentage of your appearance in courts in the last five years or last five years of practice (include the dates) was in:

Court		Area of Practice	
Federal Appellate	0 %	Civil	97 %
Federal Trial	2 %	Criminal	0 %
Federal Other	0 %	Family	0 %
State Appellate	5 %	Probate	3 %
State Trial	93 %	Other	0 %
State Administrative	0 %		
State Other	0 %		

		%			
TOTAL	100	%	TOTAL	100	%

24. In your lifetime, how many (number) of the cases you have tried to verdict or judgment were:

Jury? 25-30 App. Non-jury? 40-50 App.

Arbitration? 0 Administrative Bodies? 1

25. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

I have been a Circuit Judge for 13 years. Prior to my appointment as a Circuit Judge, my answer to this question would be no.

26. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain in full.

n/a. I have been a Circuit Judge for 13 years.

(Questions 27 through 30 are optional for sitting judges who have served 5 years or more.)

27a. For your last 6 cases, which were tried to verdict before a jury or arbitration panel or tried to judgment before a judge, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

n/a

27b. For your last 6 cases, which were settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

n/a

27c. During the last five years, how frequently have you appeared at administrative hearings?
n/a average times per month

27d. During the last five years, how frequently have you appeared in Court?
n/a average times per month

27e. During the last five years, if your practice was substantially personal injury, what percentage of your work was in representation of plaintiffs? n/a% Defendants? n/a%

28. If during any prior period you have appeared in court with greater frequency than during the last five years, indicate the period during which this was so and give for such prior periods a succinct statement of the part you played in the litigation, numbers of cases

and whether jury or non-jury.

n/a

29. For the cases you have tried to award in arbitration, during each of the past five years, indicate whether you were sole, associate or chief counsel. Give citations of any reported cases.

n/a

30. List and describe the six most significant cases which you personally litigated giving case style, number and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried and names of other attorneys involved.

n/a

31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

See attached.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:

32a. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved and the dates of service or dates of candidacy.

Yes. As of March 1, 2000, I have held the office of Circuit Judge, Fifth Judicial Circuit, Marion County, Florida.

32b. List any prior quasi-judicial service:

Dates	*Name of Agency*	*Position Held*
None.		

Types of issues heard:

32c. Have you ever held or been a candidate for any other public office? If so, state the office, location and dates of service or candidacy.

No.

32d. If you have had prior judicial or quasi-judicial experience,

(i) List the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance.

I am presently presiding over a felony docket and have had a number of criminal trials

Answer to Question 31 – Example of legal writing.

In my most recent application for nomination to the Fifth District Court of Appeal regarding the last vacancy on the Court, I had attached a copy of the dissenting opinion that I wrote as a member of the Fifth Circuit Court Appellate Panel in the case of *Wiggs v. State* regarding a criminal contempt proceeding involving attorney Jeffrey Wiggs. On appeal, the 5th DCA, in a 2-1 opinion, adopted my dissenting opinion as its own and reversed the case. *Wiggs v. State, 981 So. 2d 576 (Fla. 5th DCA 2008).*

I now attach a copy of the opinion dated August 5, 2011 that I wrote as an associate Judge of the Fifth District Court of Appeal in the case of City of Orlando v. Pineiro, Case No. 5D10-1388. The case citation is *City of Orlando v. Pineiro, 66 So. 3d 1064 (Fla. 5th DCA 2011)*

66 So.3d 1064, 36 Fla. L. Weekly D1720
(Cite as: 66 So.3d 1064)

C

District Court of Appeal of Florida,
Fifth District.
CITY OF **ORLANDO**, Appellant,
v.
Carmen PINEIRO, as Personal Representative, etc., Appellee.

No. 5D10–1388.
Aug. 5, 2011.

Background: Estate of motorist, who was fatally injured when driver's pickup truck struck his vehicle, brought action against driver, owner of driver's pickup truck, and city, alleging that police, immediately prior to the accident, negligently engaged in a high speed pursuit of driver and that the pursuit proximately caused or contributed to the accident and motorist's death. The Circuit Court, Orange County, Julie H. O'Kane, J., entered judgment on jury verdict finding city 55% responsible for motorist's death and driver 45% at fault, and city appealed.

Holdings: The District Court of Appeal, B.D. Lambert, Associate Judge, held that:
(1) new trial was warranted because the cumulative effect of the improper closing arguments by estate's counsel deprived city of fair trial;
(2) evidence of driver's guilty plea and a certified copy of the judgment of conviction reflecting driver's plea was admissible as an admission against interest; and
(3) jury verdict finding city 55% responsible for death of motorist was not against the manifest weight of the evidence.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⇨977(3)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k976 New Trial or Rehearing
30k977 In General
30k977(3) k. Grant of new trial in general. Most Cited Cases

Appeal and Error 30 ⇨977(5)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k976 New Trial or Rehearing
30k977 In General
30k977(5) k. Refusal of new trial. Most Cited Cases

Appellate courts review a trial court's order granting or denying a motion for a new trial based on objected-to or unobjected-to improper argument for abuse of discretion.

[2] New Trial 275 ⇨29

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k29 k. Conduct of counsel. Most Cited Cases

New Trial 275 ⇨31

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k31 k. Necessity of objection. Most Cited Cases

If the issue of an opponent's improper argument has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial.

[3] New Trial 275 ⚿29

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k29 k. Conduct of counsel. Most Cited Cases

New Trial 275 ⚿31

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k31 k. Necessity of objection. Most Cited Cases

For an unobjected-to improper argument to support a new trial order, the unobjected-to improper argument must be of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments.

[4] New Trial 275 ⚿29

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k29 k. Conduct of counsel. Most Cited Cases

New trial was warranted in wrongful death action brought by estate of motorist, who was killed by driver during high speed police chase, because the cumulative effect of the improper closing arguments by estate's counsel deprived city of fair trial and new trial was required to cure the prejudice; estate's closing argument was a calculated effort by the estate, in its last comment to the jury in this hotly disputed trial, to elicit an emotional response from the jury, that, in order to avoid being laughed at, post-verdict, it had to find the city liable, and it was error for estate's counsel to ask jury during closing argument to place a monetary value on the life of motorist because the value of a human life was not an element of damages.

[5] Trial 388 ⚿125(1)

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k125 Appeals to Sympathy or Prejudice
388k125(1) k. In general. Most Cited Cases

Remarks made during rebuttal closing argument by estate of motorist, who was killed by driver during high speed police chase, telling jury that, if they failed to hold city accountable for motorist's death, then the police were going to be doing exactly what they were doing at scene of accident, which was laughing, were highly inflammatory, and as such, the argument was improper; there was no legitimate basis for this inflammatory argument, and it was clearly a calculated effort by motorist's estate, in its last comment to the jury in this hotly disputed trial, to elicit an emotional response from the jury, that, in order to avoid being laughed at, post-verdict, it had to find the city liable.

[6] Trial 388 ⚿114

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k114 k. In general. Most Cited Cases

It is error to ask a jury during closing argument to place a monetary value on the life of a decedent because the value of a human life is not an element of damages and is not the proper topic for closing argument.

[7] Trial 388 ⚿114

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments

388k114 k. In general. Most Cited Cases

It was improper for estate of motorist, who was killed by driver during high speed police chase, to ask jury during closing argument how jury could put a value on the life of a loved one, for purposes of awarding damages to motorist's parents, and telling jury that money could not bring motorist back, but it did help to tell motorist's parents that jury recognized that what had been done was wrong and should not have ever happened; estate's comments were an improper send-a-message argument because the jury was being asked to award money not based on proof supporting the proper recoverable damages allowed in a wrongful death action, but to remedy wrongful, intentional, as opposed to negligent, conduct.

[8] Appeal and Error 30 ⇐207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k207 k. Arguments and conduct of counsel. Most Cited Cases

Because neither of the two arguments the city made on appeal were made below, its arguments regarding closing remarks made by counsel for estate of motorist, who was killed by driver during high speed police chase, were not preserved for appellate review; although estate's closing argument was improper because it suggested to jury that a significant verdict would send message to stop these experiences from happening and would make others less likely to act irresponsibly, on appeal, the city did not raise this specific argument, and instead, city argued that this was an improper golden rule argument and was also a factual misrepresentation that estate would be uncompensated absent a favorable verdict because estate had previously settled its claim against driver.

[9] Appeal and Error 30 ⇐242(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k242 Necessity of Ruling on Objection or Motion
30k242(1) k. In general. Most Cited Cases

Although counsel for estate of motorist, who was killed by driver during high speed police chase, repeatedly referred in closing argument to motorist's parents as "mom" and "dad," over the city's objection, this issue was not preserved for appellate review because no ruling was secured on city's objection.

[10] Appeal and Error 30 ⇐1060.1(1)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)12 Arguments and Conduct of Counsel
30k1060.1 In General
30k1060.1(1) k. In general. Most Cited Cases

New Trial 275 ⇐31

275 New Trial
275II Grounds
275II(B) Misconduct of Parties, Counsel, or Witnesses
275k31 k. Necessity of objection. Most Cited Cases

For unobjected-to comments in closing argument to justify reversal, they must be (1) improper; (2) harmful; (3) incurable; and (4) so damaging to the fairness of the trial that the public's interest in the system of justice requires a new trial.

[11] Appeal and Error 30 ⇐207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k207 k. Arguments and conduct of counsel. Most Cited Cases

While it was improper to make derogatory remarks about opposing counsel, and it should be avoided, contextually, the unobjected-to closing argument by counsel for estate of motorist, who was killed by driver during high speed police chase, regarding the age of the city's counsel did not require reversal; city's counsel, in his own closing argument, made reference to his own age, and in rebuttal closing argument, estate's counsel, while acknowledging his respect for opposing counsel, basically agreed that his opponent was, as he himself admitted, getting old, noting that the city's counsel had inadvertently misstated some otherwise undisputed facts.

[12] Appeal and Error 30 ⇐207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon

30k207 k. Arguments and conduct of counsel. Most Cited Cases

Unobjected-to rebuttal closing argument by counsel for estate of motorist, who was killed by driver during high speed police chase, regarding fee paid by the city to its expert witness did not require reversal; in his rebuttal closing, estate's counsel argued that the city's expert did not have a Ph.D. and was not an engineer, and yet the fee was $25,000, and these arguments inferred or suggested that the city would do whatever it took to win by paying this type of fee to a somewhat unaccomplished expert.

[13] Appeal and Error 30 ⇐207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon

30k207 k. Arguments and conduct of counsel. Most Cited Cases

Unobjected-to closing argument by counsel for estate of motorist, who was killed by driver during high speed police chase, telling jury that, if crash injured famous basketball player, no jury in the world would have any problem compensating player $20 million or whatever the value of one year's salary was for him, did not justify reversal, even though it was improper value of life argument.

[14] Appeal and Error 30 ⇐207

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon

30k207 k. Arguments and conduct of counsel. Most Cited Cases

Unobjected-to closing argument by counsel for estate of motorist, who was killed by driver during high speed police chase, telling jury that city would do whatever it took to try to win, was improper, but did not justify reversal; statement that the city would do whatever it took to try to win the case suggested that the city was engaging in improper or less than honest tactics, but zealous advocacy was not improper.

[15] Evidence 157 ⇐207(4)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k206 Judicial Admissions
157k207 In General

157k207(4) k. Confession or plea of guilty in criminal prosecution. Most Cited Cases

Evidence of driver's guilty plea and a certified copy of the judgment of conviction reflecting driver's plea was admissible as an admission against interest because this admitted culpability for the accident, wherein driver's car struck motorist's

vehicle, thereby killing him, during high speed police chase, and motorist's death was a factor for consideration by the jury in negligence action brought against city by motorist's estate. West's F.S.A. § 772.14.

[16] Appeal and Error 30 ⇐1177(6)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(6) k. Issues not passed on below. Most Cited Cases

In negligence action brought against city by estate of motorist, who was killed by driver during high speed police chase, trial court failed to apply the proper standard in summarily precluding evidence that might demonstrate bias against the city, and thus, on retrial, the trial court should determine whether the probative value of any prior arrests of estate's eyewitnesses by the police department was substantially outweighed by the danger of unfair prejudice. West's F.S.A. §§ 90.403, 90.608.

[17] Automobiles 48A ⇐245(19)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(2) Care Required and Negligence
48Ak245(19) k. Vehicles used in saving life or property or enforcing law. Most Cited Cases

Evidence 157 ⇐574

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k574 k. Conflict with other evidence. Most Cited Cases

Jury verdict finding city 55% responsible for death of motorist, who was killed by driver during high speed police chase, was not against the manifest weight of the evidence; motorist's estate called nine eyewitnesses, each of whom testified to their observations of the speed and manner in which the city's police officers were driving just prior to the accident, and jury was free to reject the city's expert witness testimony, even if not contradicted by an opposing expert, in favor of conflicting lay testimony or other evidence.

*1067 Walter A. Ketcham, Jr. and Ramon Vazquez of Grower, Ketcham, Rutherford, Bronson, Eide & Telan, P.A., Maitland, for Appellant.

Christopher V. Carlyle, Shannon McLin Carlyle and Kelly L. Rooth of The Carlyle Appellate Law Firm, The Villages, for Appellee.

LAMBERT, B.D., Associate Judge.

The City of Orlando ("the City") appeals the final judgment rendered in this wrongful death action brought by Carmen Pineiro ("Pineiro") as personal representative of the estate of her son, Edwin Alvarado.[FN1] The jury found the City 55% responsible for the death of Alvarado and the *Fabre* [FN2] defendant, Kenyon Crowe ("Crowe"), 45% at fault, and final judgment was rendered accordingly. The City argues that a new trial should be ordered because of (1) numerous improper closing arguments of Pineiro's counsel, and (2) erroneous evidentiary rulings made by the trial court; it concludes that a new trial is warranted in any event because the verdict is contrary to the evidence and the law. For the reasons explained seriatim, we reverse and remand for a new trial.

FN1. Though Judge Julie O'Kane entered the final judgment, she did not preside over the trial or enter the order denying the City's motion for new trial. Judicial assignments had apparently changed when the motion for entry of the final judgment was considered.

FN2. *Fabre v. Marin*, 623 So.2d 1182 (Fla.1993), *receded from in part on other grounds, Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So.2d 249 (Fla.1995). "A ' *Fabre* defendant' is a non-party defendant whom a party defendant asserts is wholly or partially responsible for the negligence alleged." *Salazar v. Helicopter Structural & Maint., Inc.*, 986 So.2d 620, 622 n. 1 (Fla. 2d DCA 2007).

On the evening of January 20, 2006, Edwin Alvarado, 21 years of age, had just left a barbershop when a pickup truck driven by Crowe struck his vehicle, killing him. Pineiro was appointed personal representative of her son's estate and initially brought suit against both Crowe and the owner of the vehicle. The complaint was later amended to add the City. Pineiro asserted that officers from the Orlando Police Department, immediately prior to the accident, negligently engaged in a high speed pursuit of Crowe in violation of the City's pursuit policy and that the pursuit proximately caused or contributed to the accident and Alvarado's death. Pineiro eventually resolved her claims against the other defendants and the case went to trial against the City. Because the impropriety of comments made during closing argument is dispositive of this appeal, we address those comments first. We then turn to other evidentiary rulings to provide guidance to the parties upon retrial and, finally, we address the City's argument *1068 that the verdict was against the manifest weight of the evidence.

I. CLOSING ARGUMENT

[1][2][3][4] The City argues that the trial court committed reversible error in not sustaining four objections made during Pineiro's closing argument and in not granting its post-trial motion for new trial based on these errors and other improper closing arguments made by Pineiro but not objected to by the City. We review a trial court's order granting or denying a motion for a new trial based on objected—to or unobjected—to improper argument for abuse of discretion. *Murphy v. Int'l Robotic Sys. Inc.*, 766 So.2d 1010, 1030–31 (Fla.2000); *Bocher v. Glass*, 874 So.2d 701, 704 (Fla. 1st DCA 2004). "If the issue of an opponents improper argument has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial.' " *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1271 (Fla.2006) (quoting *Tanner v. Beck*, 907 So.2d 1190, 1196 (Fla. 3d DCA 2005)). However, for an unobjected—to improper argument to support a new trial order, the unobjected—to improper argument must be "of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments." *Id.*; *see also Murphy*, 766 So.2d at 1029–30. We separately address the objected-to and unobjected-to alleged improper closing arguments.

A. OBJECTED–TO CLOSING ARGUMENT.

1. Inflammatory Comment.

[5] At the conclusion of Pineiro's rebuttal closing argument, counsel stated:

> The City of Orlando has to be held accountable for the death of Edwin Alvarado and you must compensate them for an amount equal to their harm. The harm that they suffered. If you fail to do so, they escape responsibility. But more importantly, if you fail to do so in this case, if you see OPD [Orlando Police Department] outside the courtroom or in the elevator or in the parking garage, guess what they are going to be doing, folks?

The City objected and a sidebar was held. The City first argued that what the Orlando Police Department would do outside the courtroom was neither relevant nor rebuttal to any comment by the City. The trial court understandably inquired as to the direction of the argument. Pineiro's counsel advised that he would be arguing to the jury that if it failed to award damages in favor of Pineiro against

the City, the Orlando Police Department would be laughing. [FN3] The City reiterated its objection that this comment was not rebutting the City's closing, was very prejudicial and argumentative, and was not a comment on the evidence because there was no evidence as to what the Orlando Police Department would do after the case was over. The court overruled the City's objection, and Pineiro concluded his rebuttal closing argument as follows:

> FN3. One of Pineiro's eyewitnesses, Janice Kilpatrick, had testified that she observed officers after the accident administering no help to anyone in the vehicles and that they were standing there, laughing. While we are somewhat unclear why this evidence was relevant, there being no testimony from Pineiro's witness regarding the subject of the alleged laughter, no objection was raised at trial. In the City's case, two officers testified that any laughter pertained to the smallish stature of a third officer, who helped lift one of the vehicles.

> *1069 And if you don't hold the City of Orlando accountable or you don't compensate the mother and father of Edwin Alvarado in an amount equal to their harm that the City of Orlando caused, when you see the City of Orlando folks outside the courtroom or in the elevator or out in the parking garage, guess what they are going to be doing? They are going to be doing exactly what they were doing at the scene of the accident and at the Citrus Bowl, laughing.

On appeal, the City argues that these comments were highly inflammatory, without basis in evidence, not in response to the City's closing, and were intended to do nothing but prejudice the jury. We agree. There was no legitimate basis for this inflammatory argument; it was clearly a calculated effort by Pineiro's counsel, in his last comment to the jury in this hotly disputed trial, to elicit an emotional response from the jury, that, in order to avoid being laughed at, post-verdict, it must find the City liable.[FN4]

> FN4. Appellate counsel was not Pineiro's trial counsel.

This court has long cautioned attorneys against resorting to inflammatory, prejudicial argument. *Walt Disney World Co. v. Blalock*, 640 So.2d 1156 (Fla. 5th DCA 1994); *Silva v. Nightingale*, 619 So.2d 4 (Fla. 5th DCA 1993). In *Murphy*, the Florida Supreme Court provided guidance and direction regarding closing argument:

> The purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case." *Hill v. State*, 515 So.2d 176, 178 (Fla.1987). Attorneys should be afforded great latitude in presenting closing argument, but they must "confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts in evidence." *Knoizen v. Bruegger*, 713 So.2d 1071, 1072 (Fla. 5th DCA 1998); *see also Venning v. Roe*, 616 So.2d 604 (Fla. 2d DCA 1993). Moreover, closing argument must not be used to "inflame the minds and passions of the jurors so that their verdict reflects an emotional response ... rather than the logical analysis of the evidence in light of the applicable law." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985).

Attorneys presenting closing argument in Florida courts, whether in criminal or civil trials, are governed by Rule 4–3.4 of the Rules Regulating The Florida Bar. Rule 4–3.4 states:

> A lawyer shall not ... in trial, 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 credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

R. Regulating Fla. Bar 4–3.4(e). The underpinnings of this ethical rule are well-founded; it not

only prevents lawyers from placing their own credibility at issue in a case, it also limits the possibility that the jury may decide a case based on non-record evidence. *See Davis v. South Florida Water Management District*, 715 So.2d 996, 999 (Fla. 4th DCA 1998); *Forman v. Wallshein*, 671 So.2d 872, 875 (Fla. 3d DCA 1996). In sum, Rule 4–3.4 is in place to help insure that juries render verdicts based on record evidence and applicable law, not based on impermissible matters interjected by counsel during closing argument.

Murphy, 766 So.2d at 1028.

This argument was clearly improper.

***1070 2. Value of Life/Send–a–Message Argument.**

[6][7] In an attempt to assist the jury in evaluating damages to award Alvarado's parents for Alvarado's death, Pineiro's counsel stated:

> The question you may be asking is, how do I possibly put a value on the life of a loved one?

The City correctly objected on the ground that this is not the correct standard of damages. *Fasani v. Kowalski*, 43 So.3d 805 (Fla. 3d DCA 2010); *Wilbur v. Hightower*, 778 So.2d 381, 383 (Fla. 4th DCA 2001). It is clearly error to ask a jury to place a monetary value on the life of a decedent because " 'the value of a human life is not an element of damages and is not the proper topic for closing argument.' " *Wilbur*, 778 So.2d at 383 (quoting *Russell v. Trento*, 445 So.2d 390, 392 (Fla. 3d DCA 1984)). The trial court did not specifically rule on the objection, but directed Pineiro's counsel to "stick to pain and suffering."

Seemingly undeterred, Pineiro's counsel continued:

> How do you possibly put a figure on the value of the pain and suffering for Edwin's mother and father? Unfortunately, there is no exact measurement or formula. One thing we know is that virtually every day we place some form of a value on life. Think about the times an individual is lost at sea or by boat or plane. We don't hesitate to send helicopters, the Coast Guard, hundreds of men and women and divers to search for person. When considering spending money to save a stranded person, we don't stop first and ask the person's age, race or social status. We all recognize the value of human life.
>
> You may be asking yourself, what good is the money going to do? We all know that money cannot bring back Edwin, but that's not the issue here.... Also, the money does help to tell Edwin's mother and father that you, the jury, recognize that what has been done is wrong and should not have ever happened.

At this point, the City again objected and moved for a mistrial, arguing that the statement that an award of money will tell the parents that what was done is wrong and should never have happened is an improper send-a-message argument. The motion for mistrial was denied.

We agree with the City that the comment was improper send-a-message argument, *Kloster Cruise Ltd. v. Grubbs*, 762 So.2d 552 (Fla. 3d DCA 2000), because the jury was being asked to award money not based on the proof supporting the proper recoverable damages allowed in a wrongful death action, but to remedy wrongful, intentional, as opposed to negligent, conduct. Had this been the only improper comment, we may not have concluded that reversal was required. However, as we are obliged to reverse based on the inflammatory comment addressed above, this comment adds support for our decision. The cumulative effect of the improper comments leads us to conclude that the City was deprived of a fair trial and that a new trial to cure the prejudice is required. *See Werneck v. Worrall*, 918 So.2d 383, 388 (Fla. 5th DCA 2006); *Bocher*, 874 So.2d at 704.

3. Additional Send–A–Message Argument.

[8] Pineiro's counsel later argued that Pineiro was not seeking a monetary award based upon sym-

pathy, but was seeking damages equal to the harm the City caused. However, counsel then argued:

> Instead, the law says that you must speak to Edwin's mother and father through your verdict. It is through this piece of paper that each and every one *1071 of you tell Mom and Dad that Edwin's life did have value....
>
> Many of us have suffered the loss of a loved one during our lifetime but have never received money for it. Why should Edwin's mother and father recover money? The answer is simple. The law in Florida recognizes that the loss of a loved one is a traumatic and tragic experience. We want to do everything we can to stop these experiences from happening unnaturally. We want others to act responsibly and to do—

At this point, the City objected and, at sidebar, argued that this comment was a send-a-message argument, which only applies in a punitive damages case. [FN5] The trial court advised counsel not to say "sentiments or words" to that effect.

> FN5. The City, as a municipality, is not subject to punitive damages. *See* § 768.28(5), Fla. Stat. (2010).

Although we find this an improper argument as it clearly suggests to the jury that a significant verdict will send a message to stop these experiences from happening [FN6] and will make others less likely to act irresponsibly, [FN7] on appeal, the City did not raise this specific argument. Rather, the City argued that this was an improper golden rule argument [FN8] and was also a factual misrepresentation that Pineiro would be uncompensated absent a favorable verdict because Pineiro had previously settled her claims against the other defendants. Because neither of the two arguments the City makes on appeal were made below, its arguments are not preserved for review. *Aills v. Boemi,* 29 So.3d 1105 (Fla.2010); *Herskovitz v. Hershkovich,* 910 So.2d 366, 367 (Fla. 5th DCA 2005) ("Absent jurisdictional or fundamental error, an appellate court should not consider issues that were not presented to the trial court."). We caution against the use of any send-a-message arguments on retrial.

> FN6. An obvious reference to the police pursuit in this case.
>
> FN7. *C.f. Superior Indus. Int'l, Inc. v. Faulk,* 695 So.2d 376 (Fla. 5th DCA 1997).
>
> FN8. A golden rule argument is improper because it depends upon "inflaming the passions of the jury and inducing fear and self interest." *Bocher v. Glass,* 874 So.2d 701, 703 (Fla. 1st DCA 2004); *see also Tremblay v. Santa Rosa County,* 688 So.2d 985, 987 (Fla. 1st DCA 1997). "The classic Golden Rule argument specifically requests the jurors to imagine themselves as the injured party, and to award damages as if they were the injured party." *SDG Dadeland Assocs., Inc. v. Anthony,* 979 So.2d 997, 1003 (Fla. 3d DCA 2008). Implicit golden rule arguments can also be improper. *Id.*

4. References to Alvarado's Parents.

[9] Lastly, the City argues that Pineiro's counsel's repeated references in closing to Alvarado's parents as "mom" and "dad" violated an earlier admonition or order that the parents should be referred to as "mother" and "father." Our review of the record indicates that Pineiro's counsel regularly used the informal references over the City's objection, but because no ruling was secured on the objection, the issue was not preserved for review. *LeRetilley v. Harris,* 354 So.2d 1213 (Fla. 4th DCA), *cert. denied,* 359 So.2d 1216 (Fla.1978).

B. UNOBJECTED–TO ARGUMENT.

[10] The unobjected-to closing arguments by Pineiro's counsel that the City believes justify a new trial are a comment regarding the age of the City's counsel; a reference to the fee paid by the City to its expert witness; an improper "value of

life" analogy; and the statement that the City would do whatever it takes to try to win. Pursuant to *1072*Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010, 1031 (Fla.2000), for unobjected-to comments in closing argument to justify reversal, they must be (1) improper; (2) harmful; (3) incurable; and (4) so damaging to the fairness of the trial that the public's interest in the system of justice requires a new trial. The Florida Supreme Court defined harmful comments those that are "so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury" and defined an incurable argument as one that, "even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict." *Id.* at 1030, 1031. As to the fourth prong, the court recognized that closing arguments appealing to racial, ethnic, or religious prejudice traditionally fit within the narrow category requiring a new trial even in the absence of an objection. *Id.* at 1030. Our analysis under *Murphy* does not proceed to this fourth prong unless the complaining party first establishes the improper, harmful, and incurable requirements. *Mercury Ins. Co. of Fla. v. Moreta*, 957 So.2d 1242 (Fla. 2d DCA 2007). We also review the unobjected-to closing argument consistent with the admonition by the supreme court that it has come as close as possible to "closing the door" on appellate review of unpreserved challenges to closing argument consistent with notions of due process which deserve public trust in the judicial system. *Murphy*, 766 So.2d at 1031.

1. Counsel's Age.

[11] The City's counsel, in his closing argument, made reference to his own age. In rebuttal closing argument, Pineiro's counsel, while acknowledging his respect for opposing counsel, basically agreed that his opponent was, as he himself admitted, getting old, noting that the City's counsel had inadvertently misstated some otherwise undisputed facts. While it is improper to make derogatory remarks about opposing counsel, *Maercks v. Birchansky*, 549 So.2d 199 (Fla. 3d DCA 1989), and it should be avoided, contextually, this comment does not require reversal.

2. The City's Expert Witness.

[12] Numerous eyewitnesses testified on behalf of Pineiro as to their factual observations of the pursuit of Crowe by the police just prior to the accident. The City defended, asserting that, objectively, the pursuit could not have occurred as testified to because not enough time elapsed between the start of the purported pursuit and its tragic conclusion, which occurred just nine-tenths of a mile from the start, for the police to have engaged in the pursuit and reached the speeds estimated by Pineiro's witnesses. The City retained an expert whose opinion testimony supported the City's position.

Pineiro's counsel, in his initial closing, commented:

> Now, if I understand the City of Orlando's position, on one hand, they don't want you to believe any of the nine witnesses. But just in case you do, let me head up to Connecticut and find me an expert and pay him $25,000.

In his later rebuttal closing, Pineiro's counsel argued that the City's expert did not have a Ph.D. and was not an engineer, yet the fee was $25,000. While these arguments infer or suggest that the City will do whatever it takes to win by paying this type of fee to, in Pineiro's view, a somewhat unaccomplished expert, we find the comments, under *Murphy*, do not justify reversal.

***1073 3. Value of Life—Analogy to Dwight Howard.[FN9]**

> FN9. Dwight Howard is an all-star basketball player with the Orlando Magic in the National Basketball Association.

[13] Pineiro's counsel stated to the jury:

> We live in a very strange society. If someone is at fault in a crash, ran a red light and injured Dwight Howard, and Dwight Howard broke a bone and couldn't play basketball for a year, no jury in the world would have any problem compensating Dwight Howard $20 million or whatever the value of one year's salary is for Dwight.
>
> But we're all here today trying to evaluate Mom and Dad's pain and suffering for the loss of their son. Edwin was not famous. He was not a star. Very few people even knew who he was. Edwin was one of many faces in the crowd, but to Mom and Dad, he was the most important person in the world.

This is an improper value of life argument, *Fasani v. Kowalski,* 43 So.3d 805 (Fla. 3d DCA 2010), *Chin v. Caiaffa,* 42 So.3d 300 (Fla. 3d DCA 2010), but does not meet the *Murphy* test for reversal.

4. Doing Whatever it Takes to Try to Win.

[14] One of the witnesses testifying for Pineiro was Johnny Harris, an employee of the City. In closing, Pineiro's counsel argued:

> About one week before trial, just one week before trial, the City finally takes the deposition of Johnny Harris. They don't like his testimony so much, what do they do? A City of Orlando employee. They went and you saw it, a stack of documents to try to discredit Johnny Harris, a City of Orlando employee. The City will go and do whatever it takes to try to win this case, but it didn't work with Johnny Harris.

This argument is improper. The statement that the City would "do whatever it takes to try to win this case" suggests that the City is engaging in improper or less than honest tactics. Zealous advocacy is not improper. *Carnival Corp. v. Pajares,* 972 So.2d 973, 977 (Fla. 3d DCA 2007) (finding "grievous" the plaintiff's arguments suggesting defendant acted improperly by defending plaintiff's claim and denigrating its defenses). We find, however, that, while this argument should be avoided on retrial, under *Murphy,* this unobjected-to comment does not require reversal.

Because none of the unobjected-to arguments, while arguably improper, meet the *Murphy* test for reversal, they have not been a factor in our decision to reverse this case and remand for a new trial. [FN10] *Carnival Corp.,* 972 So.2d at 979.

> FN10. Our review of the record also indicates that Pineiro's counsel argued that the jury did not see "one bit of remorse of any of the officers who testified in trial. Not one of them looked over at mom during the trial and said sorry for your loss." No objection was made at trial and the issue was not raised on appeal. This argument is improper because it suggests the City is doing something wrong by either vigorously defending itself or not showing proper sympathy or empathy. It should also be avoided on retrial. *Chin v. Caiaffa,* 42 So.3d 300 (Fla. 3d DCA 2010). A separate reference to the City's alleged failure to conduct an "honest, fair" investigation into Alvarado's death was also improper, *Carnival Corp. v. Pajares,* 972 So.2d 973 (Fla. 3d DCA 2007), but was not raised on appeal.

II. OTHER EVIDENTIARY ISSUES

To facilitate the retrial, we address the other evidentiary issues raised.

A. Evidence of Crowe's Guilty Plea.

[15] The City contends that even though the jury heard that Kenyon Crowe was testifying from prison, his anticipated *1074 release date, his use of marijuana on the day of the accident, and that his blood alcohol level was, in essence, twice the legal limit, the trial court erred in precluding evidence of Crowe's plea of guilty to DUI manslaughter and his conviction thereof for his part in Alvarado's death. Pineiro responds that because Crowe was no longer

a party but merely a *Fabre* defendant,[FN11] evidence of his conviction was improper and, in any event, its admission would have been unfairly prejudicial because an admission against interest can only be used as it affects the interests of the person making the plea and cannot be used against others.

> FN11. Pineiro unsuccessfully sought to preclude Crowe from being a *Fabre* defendant on the verdict form but did not pursue this issue on appeal.

In the context of this case, we do not read *Fabre* to preclude this evidence. In civil actions, where one of the issues is the guilt of a person convicted of a criminal offense or some fact necessarily involved in the determination of such guilt, it is proper to admit evidence of the person's plea of guilty to the criminal offense. § 772.14, Fla. Stat. (2010); *Boshnack v. World Wide Rent–A–Car, Inc.*, 195 So.2d 216, 219 (Fla.1967). On retrial, evidence of Crowe's guilty plea and a certified copy of the judgment of conviction reflecting Crowe's plea is admissible as an admission against interest because this admitted culpability for the accident and Alvarado's death is a factor for consideration by the jury.

B. Prior Arrests.

[16] The City argues that the trial court impermissibly precluded inquiry of Pineiro's eyewitnesses regarding their prior arrests by the Orlando Police Department. The City asserted that, pursuant to section 90.608, Florida Statutes (2009), evidence of these prior arrests, regardless of the lack of conviction, is admissible to demonstrate the witnesses' bias against the City.

Section 90.608 provides in pertinent part:

> Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
>
> (2) Showing that the witness is biased.
>
> (3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.

The City points out that at least one of Pineiro's witnesses, on direct examination, testified he had friends and relatives employed in the Orlando Police Department, but when the City attempted, on cross-examination, to introduce evidence of the witness's prior arrests by the Orlando Police Department, the trial court precluded the testimony. Pineiro argues that no error occurred because section 90.610 permits a party to attack the credibility of any witness only with evidence of a conviction of a prior felony or a crime involving dishonesty or false statement, which was not the situation here. However, section 90.610(3) specifically provides that nothing in section 90.610 affects the admissibility of evidence under section 90.608.

We find that the trial court failed to apply the proper standard in summarily precluding evidence that may demonstrate bias against the City. On retrial, the trial court should, pursuant to section 90.403, determine whether the probative value of any prior arrests of Pineiro's witnesses by the Orlando Police Department is substantially outweighed by the danger of unfair prejudice.

***1075 III. VERDICT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE**

[17] The City argues that the trial court erred in not granting its motion for new trial because the verdict is contrary to the manifest weight of the evidence. The City contends that no objective view of the evidence, which includes video surveillance evidence from the business establishment where the pursuit purportedly began and evidence at the crash site, could support the conclusion that its police officers had sufficient time to engage in this pursuit. The City therefore concludes that the jury either disregarded the jury instructions or based its verdict on improper passion, prejudice, and undue influence. We disagree.

Pineiro called nine eyewitnesses, each of whom testified to their observations of the speed and manner in which the City's police officers were driving just prior to the accident. The jury was free to reject the City's expert witness testimony, even if not contradicted by an opposing expert, in favor of conflicting lay testimony or other evidence. *Durousseau v. State,* 55 So.3d 543, 562 (Fla.2010) ("Where expert testimony is admitted, it is still the sole province of the jury or court as trier of facts to accept or reject such testimony, even if it is uncontroverted."), *pet. for cert. filed,* (U.S. May 10, 2011) (No. 10–10518); *Parrish v. City of Orlando,* 53 So.3d 1199, 1203 (Fla. 5th DCA 2011) ("[A] jury is free to accept or reject an expert's testimony or to give it such weight as it deserves, considering the witness's qualifications, the stated basis for the witness's opinion, and all of the evidence in the case."); *see also Wald v. Grainger,* 64 So.3d 1201 (Fla.2011) ("A jury is free to weigh the opinion testimony of expert witnesses, and either accept, reject or give that testimony such weight as it deserves considering the witnesses' qualifications, the reasons given by the witness for the opinion expressed, and all the other evidence in the case, including lay testimony.").

In summary, we reverse the final judgment based on the inflammatory and prejudicial comment regarding the hypothetical scene the jurors would face post-trial if they did not find in Pineiro's favor. In addition, we conclude that the cumulative effect of the objected-to improper comments, as discussed above, acted in concert to deprive the City of a fair trial. *Werneck; Bocher.* Such comments cannot be condoned, and we urge vigilant adherence, on retrial, to professional standards during closing argument.

REVERSED and REMANDED FOR A NEW TRIAL.

ORFINGER, C.J. and JACOBUS, J., concur.

Fla.App. 5 Dist.,2011.
City of Orlando v. Pineiro

66 So.3d 1064, 36 Fla. L. Weekly D1720

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2011

CITY OF ORLANDO,

Appellant,

v. Case No. 5D10-1388

CARMEN PINEIRO, AS PERSONAL REPRESENTATIVE, ETC.,

Appellee.

_____/

Opinion filed August 5, 2011

Appeal from the Circuit Court
for Orange County,
Julie H. O'Kane, Judge.

Walter A. Ketcham, Jr. and Ramon Vazquez of Grower, Ketcham, Rutherford, Bronson, Eide & Telan, P.A., Maitland, for Appellant.

Christopher V. Carlyle, Shannon McLin Carlyle and Kelly L. Rooth of The Carlyle Appellate Law Firm, The Villages, for Appellee.

LAMBERT, B.D., Associate Judge.

The City of Orlando ("the City") appeals the final judgment rendered in this wrongful death action brought by Carmen Pineiro ("Pineiro") as personal representative

of the estate of her son, Edwin Alvarado.[1] The jury found the City 55% responsible for the death of Alvarado and the *Fabre*[2] defendant, Kenyon Crowe ("Crowe"), 45% at fault, and final judgment was rendered accordingly. The City argues that a new trial should be ordered because of (1) numerous improper closing arguments of Pineiro's counsel, and (2) erroneous evidentiary rulings made by the trial court; it concludes that a new trial is warranted in any event because the verdict is contrary to the evidence and the law. For the reasons explained seriatim, we reverse and remand for a new trial.

On the evening of January 20, 2006, Edwin Alvarado, 21 years of age, had just left a barbershop when a pickup truck driven by Crowe struck his vehicle, killing him. Pineiro was appointed personal representative of her son's estate and initially brought suit against both Crowe and the owner of the vehicle. The complaint was later amended to add the City. Pineiro asserted that officers from the Orlando Police Department, immediately prior to the accident, negligently engaged in a high speed pursuit of Crowe in violation of the City's pursuit policy and that the pursuit proximately caused or contributed to the accident and Alvarado's death. Pineiro eventually resolved her claims against the other defendants and the case went to trial against the City. Because the impropriety of comments made during closing argument is dispositive of

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[1]Though Judge Julie O'Kane entered the final judgment, she did not preside over the trial or enter the order denying the City's motion for new trial. Judicial assignments had apparently changed when the motion for entry of the final judgment was considered.

[2]*Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), *receded from in part on other grounds*, *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995). "A '*Fabre* defendant' is a non-party defendant whom a party defendant asserts is wholly or partially responsible for the negligence alleged." *Salazar v. Helicopter Structural & Maint., Inc.*, 986 So. 2d 620, 622 n.1 (Fla. 2d DCA 2007).

this appeal, we address those comments first. We then turn to other evidentiary rulings to provide guidance to the parties upon retrial and, finally, we address the City's argument that the verdict was against the manifest weight of the evidence.

I. CLOSING ARGUMENT

The City argues that the trial court committed reversible error in not sustaining four objections made during Pineiro's closing argument and in not granting its post-trial motion for new trial based on these errors and other improper closing arguments made by Pineiro but not objected to by the City. We review a trial court's order granting or denying a motion for a new trial based on objected-to or unobjected-to improper argument for abuse of discretion. *Murphy v. Int'l Robotics Sys. Inc.*, 766 So. 2d 1010, 1030-31 (Fla. 2000); *Bocher v. Glass*, 874 So. 2d 701, 704 (Fla. 1st DCA 2004). "If the issue of an opponent's improper argument has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial.'" *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1271 (Fla. 2006) (quoting *Tanner v. Beck*, 907 So. 2d 1190, 1196 (Fla. 3d DCA 2005)). However, for an unobjected-to improper argument to support a new trial order, the unobjected-to improper argument must be "of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments." *Id.*; *see also Murphy*, 766 So. 2d at 1029-30. We separately address the objected-to and unobjected-to alleged improper closing arguments.

A. OBJECTED-TO CLOSING ARGUMENT.

1. Inflammatory Comment.

At the conclusion of Pineiro's rebuttal closing argument, counsel stated:

> The City of Orlando has to be held accountable for the death of Edwin Alvarado and you must compensate them for an amount equal to their harm. The harm that they suffered. If you fail to do so, they escape responsibility. But more importantly, if you fail to do so in this case, if you see OPD [Orlando Police Department] outside the courtroom or in the elevator or in the parking garage, guess what they are going to be doing, folks?

The City objected and a sidebar was held. The City first argued that what the Orlando Police Department would do outside the courtroom was neither relevant nor rebuttal to any comment by the City. The trial court understandably inquired as to the direction of the argument. Pineiro's counsel advised that he would be arguing to the jury that if it failed to award damages in favor of Pineiro against the City, the Orlando Police Department would be laughing.[3] The City reiterated its objection that this comment was not rebutting the City's closing, was very prejudicial and argumentative, and was not a comment on the evidence because there was no evidence as to what the Orlando Police Department would do after the case was over. The court overruled the City's objection, and Pineiro concluded his rebuttal closing argument as follows:

> And if you don't hold the City of Orlando accountable or you don't compensate the mother and father of Edwin Alvarado in an amount equal to their harm that the City of Orlando

[3]One of Pineiro's eyewitnesses, Janice Kilpatrick, had testified that she observed officers after the accident administering no help to anyone in the vehicles and that they were standing there, laughing. While we are somewhat unclear why this evidence was relevant, there being no testimony from Pineiro's witness regarding the subject of the alleged laughter, no objection was raised at trial. In the City's case, two officers testified that any laughter pertained to the smallish stature of a third officer, who helped lift one of the vehicles.

> caused, when you see the City of Orlando folks outside the courtroom or in the elevator or out in the parking garage, guess what they are going to be doing? They are going to be doing exactly what they were doing at the scene of the accident and at the Citrus Bowl, laughing.

On appeal, the City argues that these comments were highly inflammatory, without basis in evidence, not in response to the City's closing, and were intended to do nothing but prejudice the jury. We agree. There was no legitimate basis for this inflammatory argument; it was clearly a calculated effort by Pineiro's counsel, in his last comment to the jury in this hotly disputed trial, to elicit an emotional response from the jury, that, in order to avoid being laughed at, post-verdict, it must find the City liable.[4]

This court has long cautioned attorneys against resorting to inflammatory, prejudicial argument. *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156 (Fla. 5th DCA 1994); *Silva v. Nightingale*, 619 So. 2d 4 (Fla. 5th DCA 1993). In *Murphy,* the Florida Supreme Court provided guidance and direction regarding closing argument:

> The purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case." *Hill v. State*, 515 So. 2d 176, 178 (Fla. 1987). Attorneys should be afforded great latitude in presenting closing argument, but they must "confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts in evidence." *Knoizen v. Bruegger*, 713 So. 2d 1071, 1072 (Fla. 5th DCA 1998); *see also Venning v. Rowe*, 616 So. 2d 605 (Fla. 2d DCA 1993). Moreover, closing argument must not be used to "inflame the minds and passions of the jurors so that their verdict reflects an emotional response . . . rather than the logical analysis of the evidence in light of the applicable law." *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985).
>
> Attorneys presenting closing argument in Florida courts, whether in criminal or civil trials, are governed by

[4]Appellate counsel was not Pineiro's trial counsel.

Rule 4-3.4 of the Rules Regulating The Florida Bar. Rule 4-3.4 states:

> A lawyer shall not . . . in trial, 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 credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

R. Regulating Fla. Bar 4-3.4(e). The underpinnings of this ethical rule are well-founded; it not only prevents lawyers from placing their own credibility at issue in a case, it also limits the possibility that the jury may decide a case based on non-record evidence. *See Davis v. South Florida Water Management District*, 715 So. 2d 996, 999 (Fla. 4th DCA 1998); *Forman v. Wallshein*, 671 So. 2d 872, 875 (Fla. 3d DCA 1996). In sum, Rule 4-3.4 is in place to help insure that juries render verdicts based on record evidence and applicable law, not based on impermissible matters interjected by counsel during closing argument.

Murphy, 766 So. 2d at 1028.

This argument was clearly improper.

2. Value of Life/Send-a-Message Argument.

In an attempt to assist the jury in evaluating damages to award Alvarado's parents for Alvarado's death, Pineiro's counsel stated:

> The question you may be asking is, how do I possibly put a value on the life of a loved one?

The City correctly objected on the ground that this is not the correct standard of damages. *Fasani v. Kowalski*, 43 So. 3d 805 (Fla. 3d DCA 2010); *Wilbur v. Hightower*, 778 So. 2d 381, 383 (Fla. 4th DCA 2001). It is clearly error to ask a jury to place a monetary value on the life of a decedent because "'the value of a human life is not an

element of damages and is not the proper topic for closing argument.'" *Wilbur*, 778 So. 2d at 383 (quoting *Russell v. Trento*, 445 So. 2d 390, 392 (Fla. 3d DCA 1984)). The trial court did not specifically rule on the objection, but directed Pineiro's counsel to "stick to pain and suffering."

Seemingly undeterred, Pineiro's counsel continued:

> How do you possibly put a figure on the value of the pain and suffering for Edwin's mother and father? Unfortunately, there is no exact measurement or formula. One thing we know is that virtually every day we place some form of a value on life. Think about the times an individual is lost at sea or by boat or plane. We don't hesitate to send helicopters, the Coast Guard, hundreds of men and women and divers to search for person. When considering spending money to save a stranded person, we don't stop first and ask the person's age, race or social status. We all recognize the value of human life.
>
> You may be asking yourself, what good is the money going to do? We all know that money cannot bring back Edwin, but that's not the issue here . . . . Also, the money does help to tell Edwin's mother and father that you, the jury, recognize that what has been done is wrong and should not have ever happened.

At this point, the City again objected and moved for a mistrial, arguing that the statement that an award of money will tell the parents that what was done is wrong and should never have happened is an improper send-a-message argument. The motion for mistrial was denied.

We agree with the City that the comment was improper send-a-message argument, *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552 (Fla. 3d DCA 2000), because the jury was being asked to award money not based on the proof supporting the proper recoverable damages allowed in a wrongful death action, but to remedy wrongful, intentional, as opposed to negligent, conduct. Had this been the only improper

comment, we may not have concluded that reversal was required. However, as we are obliged to reverse based on the inflammatory comment addressed above, this comment adds support for our decision. The cumulative effect of the improper comments leads us to conclude that the City was deprived of a fair trial and that a new trial to cure the prejudice is required. *See Werneck v. Worrall*, 918 So. 2d 383, 388 (Fla. 5th DCA 2006); *Bocher*, 874 So. 2d at 704.

3. Additional Send-A-Message Argument.

Pineiro's counsel later argued that Pineiro was not seeking a monetary award based upon sympathy, but was seeking damages equal to the harm the City caused. However, counsel then argued:

> Instead, the law says that you must speak to Edwin's mother and father through your verdict. It is through this piece of paper that each and every one of you tell Mom and Dad that Edwin's life did have value . . . .
>
> Many of us have suffered the loss of a loved one during our lifetime but have never received money for it. Why should Edwin's mother and father recover money? The answer is simple. The law in Florida recognizes that the loss of a loved one is a traumatic and tragic experience. We want to do everything we can to stop these experiences from happening unnaturally. We want others to act responsibly and to do--

At this point, the City objected and, at sidebar, argued that this comment was a send-a-message argument, which only applies in a punitive damages case.[5] The trial court advised counsel not to say "sentiments or words" to that effect.

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[5]The City, as a municipality, is not subject to punitive damages. *See* § 768.28(5), Fla. Stat. (2010).

Although we find this an improper argument as it clearly suggests to the jury that a significant verdict will send a message to stop these experiences from happening[6] and will make others less likely to act irresponsibly,[7] on appeal, the City did not raise this specific argument. Rather, the City argued that this was an improper golden rule argument[8] and was also a factual misrepresentation that Pineiro would be uncompensated absent a favorable verdict because Pineiro had previously settled her claims against the other defendants. Because neither of the two arguments the City makes on appeal were made below, its arguments are not preserved for review. *Ails v. Boemi,* 29 So. 3d 1105 (Fla. 2010); *Herskovitz v. Herskovitz*, 910 So. 2d 366, 367 (Fla. 5th DCA 2005) ("Absent jurisdictional or fundamental error, an appellate court should not consider issues that were not presented to the trial court."). We caution against the use of any send-a-message arguments on retrial.

4. References to Alvarado's Parents.

Lastly, the City argues that Pineiro's counsel's repeated references in closing to Alvarado's parents as "mom" and "dad" violated an earlier admonition or order that the parents should be referred to as "mother" and "father." Our review of the record indicates that Pineiro's counsel regularly used the informal references over the City's

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[6]An obvious reference to the police pursuit in this case.

[7]*C.f. Superior Indus. Int'l, Inc. v. Faulk*, 695 So. 2d 376 (Fla. 5th DCA 1997).

[8]A golden rule argument is improper because it depends upon "inflaming the passions of the jury and inducing fear and self interest." *Bocher v. Glass*, 874 So. 2d 701, 703 (Fla. 1st DCA 2004); *see also Tremblay v. Santa Rosa County,* 688 So. 2d 985, 987 (Fla. 1st DCA 1997). "The classic Golden Rule argument specifically requests the jurors to imagine themselves as the injured party, and to award damages as if they were the injured party." *SDG Dadeland Assocs., Inc. v. Anthony*, 979 So. 2d 997, 1003 (Fla. 3d DCA 2008). Implicit golden rule arguments can also be improper. *Id.*

objection, but because no ruling was secured on the objection, the issue was not preserved for review. *LeRetilley v. Harris*, 354 So. 2d 1213 (Fla. 4th DCA), *cert. denied*, 359 So. 2d 1216 (Fla. 1978).

B. UNOBJECTED-TO ARGUMENT.

The unobjected-to closing arguments by Pineiro's counsel that the City believes justify a new trial are a comment regarding the age of the City's counsel; a reference to the fee paid by the City to its expert witness; an improper "value of life" analogy; and the statement that the City would "do whatever it takes to try to win." Pursuant to *Murphy v. International Robotics Systems, Inc.*, 766 So. 2d 1010, 1031 (Fla. 2000), for unobjected-to comments in closing argument to justify reversal, they must be (1) improper; (2) harmful; (3) incurable; and (4) so damaging to the fairness of the trial that the public's interest in the system of justice requires a new trial. The Florida Supreme Court defined harmful comments those that are "so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury" and defined an incurable argument as one that, "even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict." *Id.* at 1030, 1031. As to the fourth prong, the court recognized that closing arguments appealing to racial, ethnic, or religious prejudice traditionally fit within the narrow category requiring a new trial even in the absence of an objection. *Id.* at 1030. Our analysis under *Murphy* does not proceed to this fourth prong unless the complaining party first establishes the improper, harmful, and incurable requirements. *Mercury Ins. Co. of Fla. v. Moreta*, 957 So. 2d 1242 (Fla.

2d DCA 2007). We also review the unobjected-to closing argument consistent with the admonition by the supreme court that it has come as close as possible to "closing the door" on appellate review of unpreserved challenges to closing argument consistent with notions of due process which deserve public trust in the judicial system. *Murphy*, 766 So. 2d at 1031.

1. Counsel's Age.

The City's counsel, in his closing argument, made reference to his own age. In rebuttal closing argument, Pineiro's counsel, while acknowledging his respect for opposing counsel, basically agreed that his opponent was, as he himself admitted, getting old, noting that the City's counsel had inadvertently misstated some otherwise undisputed facts. While it is improper to make derogatory remarks about opposing counsel, *Maercks v. Birchansky*, 549 So. 2d 199 (Fla. 3d DCA 1989), and it should be avoided, contextually, this comment does not require reversal.

2. The City's Expert Witness.

Numerous eyewitnesses testified on behalf of Pineiro as to their factual observations of the pursuit of Crowe by the police just prior to the accident. The City defended, asserting that, objectively, the pursuit could not have occurred as testified to because not enough time elapsed between the start of the purported pursuit and its tragic conclusion, which occurred just nine-tenths of a mile from the start, for the police to have engaged in the pursuit and reached the speeds estimated by Pineiro's witnesses. The City retained an expert whose opinion testimony supported the City's position.

Pineiro's counsel, in his initial closing, commented:

> Now, if I understand the City of Orlando's position, on one hand, they don't want you to believe any of the nine witnesses. But just in case you do, let me head up to Connecticut and find me an expert and pay him $25,000.

In his later rebuttal closing, Pineiro's counsel argued that the City's expert did not have a Ph.D. and was not an engineer, yet the fee was $25,000. While these arguments infer or suggest that the City will do whatever it takes to win by paying this type of fee to, in Pineiro's view, a somewhat unaccomplished expert, we find the comments, under *Murphy*, do not justify reversal.

3. Value of Life—Analogy to Dwight Howard.[9]

Pineiro's counsel stated to the jury:

> We live in a very strange society. If someone is at fault in a crash, ran a red light and injured Dwight Howard, and Dwight Howard broke a bone and couldn't play basketball for a year, no jury in the world would have any problem compensating Dwight Howard $20 million or whatever the value of one year's salary is for Dwight.
>
> But we're all here today trying to evaluate Mom and Dad's pain and suffering for the loss of their son. Edwin was not famous. He was not a star. Very few people even knew who he was. Edwin was one of many faces in the crowd, but to Mom and Dad, he was the most important person in the world.

This is an improper value of life argument, *Fasani v. Kowalski*, 43 So. 3d 805 (Fla. 3d DCA 2010), *Chin v. Caiaffa*, 42 So. 3d 300 (Fla. 3d DCA 2010), but does not meet the *Murphy* test for reversal.

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[9]Dwight Howard is an all-star basketball player with the Orlando Magic in the National Basketball Association.

4. Doing Whatever it Takes to Try to Win.

One of the witnesses testifying for Pineiro was Johnny Harris, an employee of the City. In closing, Pineiro's counsel argued:

> About one week before trial, just one week before trial, the City finally takes the deposition of Johnny Harris. They don't like his testimony so much, what do they do? A City of Orlando employee. They went and – you saw it, a stack of documents to try to discredit Johnny Harris, a City of Orlando employee. The City will go and do whatever it takes to try to win this case, but it didn't work with Johnny Harris.

This argument is improper. The statement that the City would "do whatever it takes to try to win this case" suggests that the City is engaging in improper or less than honest tactics. Zealous advocacy is not improper. *Carnival Corp. v. Pajares*, 972 So. 2d 973, 977 (Fla. 3d DCA 2007) (finding "grievous" the plaintiff's arguments suggesting defendant acted improperly by defending plaintiff's claim and denigrating its defenses). We find, however, that, while this argument should be avoided on retrial, under *Murphy*, this unobjected-to comment does not require reversal.

Because none of the unobjected-to arguments, while arguably improper, meet the *Murphy* test for reversal, they have not been a factor in our decision to reverse this case and remand for a new trial.[10] *Carnival Corp.*, 972 So. 2d at 979.

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[10]Our review of the record also indicates that Pineiro's counsel argued that the jury did not see "one bit of remorse of any of the officers who testified in trial. Not one of them looked over at mom during the trial and said sorry for your loss." No objection was made at trial and the issue was not raised on appeal. This argument is improper because it suggests the City is doing something wrong by either vigorously defending itself or not showing proper sympathy or empathy. It should also be avoided on retrial. *Chin v. Caiaffa*, 42 So. 2d 300 (Fla. 3d DCA 2010). A separate reference to the City's alleged failure to conduct an "honest, fair" investigation into Alvarado's death was also improper, *Carnival Corp. v. Pajares*, 972 So. 2d 973 (Fla. 3d DCA 2007), but was not raised on appeal.

II. OTHER EVIDENTIARY ISSUES

To facilitate the retrial, we address the other evidentiary issues raised.

A. Evidence of Crowe's Guilty Plea.

The City contends that even though the jury heard that Kenyon Crowe was testifying from prison, his anticipated release date, his use of marijuana on the day of the accident, and that his blood alcohol level was, in essence, twice the legal limit, the trial court erred in precluding evidence of Crowe's plea of guilty to DUI manslaughter and his conviction thereof for his part in Alvarado's death. Pineiro responds that because Crowe was no longer a party but merely a *Fabre* defendant,[11] evidence of his conviction was improper and, in any event, its admission would have been unfairly prejudicial because an admission against interest can only be used as it affects the interests of the person making the plea and cannot be used against others.

In the context of this case, we do not read *Fabre* to preclude this evidence. In civil actions, where one of the issues is the guilt of a person convicted of a criminal offense or some fact necessarily involved in the determination of such guilt, it is proper to admit evidence of the person's plea of guilty to the criminal offense. § 772.14, Fla. Stat. (2010); *Boshnack v. World Wide Rent-A-Car, Inc.*, 195 So. 2d 216, 219 (Fla. 1967). On retrial, evidence of Crowe's guilty plea and a certified copy of the judgment of conviction reflecting Crowe's plea is admissible as an admission against interest because this admitted culpability for the accident and Alvarado's death is a factor for consideration by the jury.

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[11]Pineiro unsuccessfully sought to preclude Crowe from being a *Fabre* defendant on the verdict form but did not pursue this issue on appeal.

B. Prior Arrests.

The City argues that the trial court impermissibly precluded inquiry of Pineiro's eyewitnesses regarding their prior arrests by the Orlando Police Department. The City asserted that, pursuant to section 90.608, Florida Statutes (2009), evidence of these prior arrests, regardless of the lack of conviction, is admissible to demonstrate the witnesses' bias against the City.

Section 90.608 provides in pertinent part:

> Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
>
> (2) Showing that the witness is biased.
>
> (3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.

The City points out that at least one of Pineiro's witnesses, on direct examination, testified he had friends and relatives employed in the Orlando Police Department, but when the City attempted, on cross-examination, to introduce evidence of the witness's prior arrests by the Orlando Police Department, the trial court precluded the testimony. Pineiro argues that no error occurred because section 90.610 permits a party to attack the credibility of any witness only with evidence of a conviction of a prior felony or a crime involving dishonesty or false statement, which was not the situation here. However, section 90.610(3) specifically provides that nothing in section 90.610 affects the admissibility of evidence under section 90.608.

We find that the trial court failed to apply the proper standard in summarily precluding evidence that may demonstrate bias against the City. On retrial, the trial court should, pursuant to section 90.403, determine whether the probative value of any prior arrests of Pineiro's witnesses by the Orlando Police Department is substantially outweighed by the danger of unfair prejudice.

III. VERDICT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

The City argues that the trial court erred in not granting its motion for new trial because the verdict is contrary to the manifest weight of the evidence. The City contends that no objective view of the evidence, which includes video surveillance evidence from the business establishment where the pursuit purportedly began and evidence at the crash site, could support the conclusion that its police officers had sufficient time to engage in this pursuit. The City therefore concludes that the jury either disregarded the jury instructions or based its verdict on improper passion, prejudice, and undue influence. We disagree.

Pineiro called nine eyewitnesses, each of whom testified to their observations of the speed and manner in which the City's police officers were driving just prior to the accident. The jury was free to reject the City's expert witness testimony, even if not contradicted by an opposing expert, in favor of conflicting lay testimony or other evidence. *Durousseau v. State*, 55 So. 3d 543, 562 (Fla. 2010) ("Where expert testimony is admitted, it is still the sole province of the jury or court as trier of facts to accept or reject such testimony, even if it is uncontroverted."), *pet. for cert. filed*, (U.S. May 10, 2011) (No. 10-10518); *Parrish v. City of Orlando*, 53 So. 3d 1199, 1203 (Fla. 5th DCA 2011) ("[A] jury is free to accept or reject an expert's testimony or to give it

such weight as it deserves, considering the witness's qualifications, the stated basis for the witness's opinion, and all of the evidence in the case."); *see also Wald v. Grainger*, No. SC08-1143, 2011 WL 1885710 at *3 (Fla. May 19, 2011) ("A jury is free to weigh the opinion testimony of expert witnesses, and either accept, reject or give that testimony such weight as it deserves considering the witnesses' qualifications, the reasons given by the witness for the opinion expressed, and all the other evidence in the case, including lay testimony.").

In summary, we reverse the final judgment based on the inflammatory and prejudicial comment regarding the hypothetical scene the jurors would face post-trial if they did not find in Pineiro's favor. In addition, we conclude that the cumulative effect of the objected-to improper comments, as discussed above, acted in concert to deprive the City of a fair trial. *Werneck*; *Bocher*. Such comments cannot be condoned, and we urge vigilant adherence, on retrial, to professional standards during closing argument.

REVERSED and REMANDED FOR A NEW TRIAL.

ORFINGER, C.J. and JACOBUS, J., concur.

this year. Some of the attorneys that have appeared before me this year are:

1. Brad King, State Attorney 110 NW 1st Avenue, Ste. 5000, Ocala, FL 34475
   (352) 401-5914

2. Bryon Aven, Assistant State Attorney 110 NW 1st Avenue, Ste. 5000, Ocala, FL 34475
   (352) 671-5824

3. John Tedder, Assistant Public Defender 204 NW 3rd Avenue, Ocala, FL 34475
   (352) 671-5476

I would also add the following attorneys who previously appeared before me in civil matters

4. John B. Fuller, Esq. 1396 NE 20th Ave., Ste. 500, Ocala, FL 34470
   (352) 547-4292

5. Edwin C. Cluster P.O. Box 1148, Ocala, FL 34478
   (352) 351-2222

6. Robert W. Batsel Esq. P.O. Box 2530, Ocala, FL 34478
   (352) 622-3252

(ii) Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.

From 3/1/00-12/31/01 I was on the family law/domestic violence docket and probably handled 5000 cases per year including DOR child support cases. From 1/2/02-12/31/04, I was on the civil/probate docket and probably handled close to 200 cases per month. From 1/2/05-12/31/08, I was on the felony criminal docket (as well as the probate docket) and handled approximately 300 cases per month. From 1/2/09-12/31/10, I was back on a civil docket (including probate) during the foreclosure crisis and handled approximately 4000 primarily foreclosure cases per year.

In 2011, I was on the family law/domestic violence docket. Because we now have General Magistrates and Child Support Hearing Officers, the caseload was probably 2,500-3,000 cases that year. I am now back on the felony docket effective January 2, 2012 and we are probably addressing 200-250 cases per month. I have also been on the Circuit Court Appellate Panel for the Fifth Circuit for approximately 11 years in which we hear appeals from our five county courts. In addition to the felony docket, I am assigned (as are many of our Judges) a portion of the civil docket to address new foreclosure cases. The case load is now roughly 400 cases of which I approximately address 50-75 per month.

(iii) List citations of any opinions which have been published.

I have been an associate Judge on the Fifth District Court of Appeal on at least five separate ocasions. I wrote the following opinions for the 5th DCA which have been published:

1. Green Solutions International, Inc. v. Gilligan, 807 So. 2d 693 (Fla. 5th DCA 2002)

2. Cape Royal Realty, Inc. v. Kroll, 804 So. 2d 605 (Fla. 5th DCA 2002)

3. Bracero v. Bracero, 849 So. 2d 388 (Fla. 5th DCA 2003)

4. Singer v. Unibilt Development Co., 43 So. 3d 784 (Fla. 5th DCA 2010), Review Denied, 60 So. 3d 389 (Fla. 2011)

5. City of Orlando v. Pineiro, 66 So. 3d 1064 (Fla. 5th DCA 2011).

I also wrote a dissenting opinion as a Circuit Judge on the Fifth Judicial Circuit Appellate Panel which was adopted by the 5th DCA as its own opinion and set out in full in Wiggs v. State, 981 So. 2d 576 (Fla. 5th DCA 2008).

(iv) List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases and tell why you believe them to be significant. Give dates tried and names of attorneys involved.

See attached.

(v) Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give date, describe complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

I have never been formally notified by the JQC of any complaint made against me. I have been aware, in two estate proceedings, that a reference has been made by the parties that they filed a JQC complaint against me. I do not recall either the name of the attorney or the complainant and did not see the complaint filed with the JQC. I assume the JQC determined no violation was committed since I was never notified by the JQC.

(vi) Have you ever held an attorney in contempt? If so, for each instance state name of attorney, approximate date and circumstances.

Yes. O.B. Samuel, Jr., Esq., 151 SE 8th St. Ocala, FL 34471. A copy of the Order of Contempt is attached.

(vii) If you are a quasi-judicial officer (ALJ, Magistrate, General Master), have you ever been disciplined or reprimanded by a sitting judge? If so, describe.

n/a

BUSINESS INVOLVEMENT:

33a. If you are now an officer, director or otherwise engaged in the management of any

Answer to Question 32d (iv) – Five most significant cases tried or heard.

1. *Stephens v. Gilliam*, Case No. 89-2737-CA-C. Attorneys Fred J. Krim, 121 NW 3rd Street, Ocala, FL, 34475 and S. Sue Robbins (now Circuit Judge Robbins). Trial/evidentiary final hearing was March 30, 2000.

In this case, the former wife sought to hold the former husband in contempt of court for non-payment court-ordered alimony. The former husband contended that he was not in contempt because of the doctrine of laches and also requested that the court deny the claim for alimony arrearages.

This case was significant to me because, in essence, it was one of my first contested evidentiary hearings/trials. It also impressed upon me the effect of divorces on family relationships even after the children of the parents are long since grown. In this case, for a number of years during the long term marriage, the wife dutifully went to Shands Hospital in Gainesville, FL for treatment for an alleged serious illness. The family was supportive for 17 years of the marriage but the family unit eventually came apart. Sometime long after the final judgment, the former husband and the parties' two adult children became aware that the former wife was, in essence, misleading them about her alleged illness and never, in fact, was ill. Confronted, the former wife apparently acknowledged the same, post-judgment, but then some seven years later, resurrected the case by asking that the Court hold the former husband in contempt for arrearages of approximately $32,000. I found in favor of the former husband.

2. *State of Florida v. Anthony Russell*, Case Nos. 01-3151-CF-A-W and 03-172-CF-A-W. Assistant State Attorney Michelle Janson represented the State of Florida, 110 NW 1st Avenue, Suite 5000, Ocala, FL, 34475 and then Assistant Public Defender Melanie Kohler, now at 44 South 1st Avenue, Suite 201, Ocala, FL, 34471 represented the defendant. Trial held on July 15, 2005.

The defendant was charged with violating his probation because he allegedly battered his pregnant girlfriend. The girlfriend did not testify at trial. The arresting deputy provided the only testimony in support of the charges. He testified that he responded to a gas station at the request of the victim who explained to him that Russell had grabbed her by the hair and struck her on the neck during an argument. After she escaped, she called law enforcement and Russell left the area in her car. The deputy observed the victim as being nervous and scared with a red mark on the back of her neck, which appeared to have been caused by a fist. When the deputy later contacted the defendant, Russell, he told him that he "doesn't hit the victim, just roughs her up."

I found the Defendant violated his probation and imposed a lengthy prison sentence. He filed a direct appeal and my judgment and sentence was affirmed by the 5th DCA, *Russell v.*

State, 920 So.2d 683 (Fla. 5th DCA 2006). The court disagreed with the defendant's assertion that his probation was revoked based solely on otherwise inadmissible hearsay evidence. (As an aside, hearsay evidence is admissible in probation revocation proceedings as long as it is not the sole basis for a conviction.)

The 5th DCA also held, in what it referred to as a case of first impression in Florida, that the United States Supreme Court decision of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in which the high court held that the admission of hearsay statements of a victim violates a defendant's Sixth Amendment right of confrontation, does not apply to probation revocation proceedings.

The Florida Supreme Court accepted jurisdiction and on May 1, 2008, in a 6-1 decision, approved the decision of the 5th DCA, holding that I properly concluded that the greater weight of the evidence demonstrated that Russell committed a battery and thus a willful and substantial violation of the terms of his probation and that because *Crawford* does not apply to revocation proceedings, admission of the hearsay testimony from the victim was proper. *Russell v. State*, 982 so.2d 642, 648 (Fla. 2008).

The case is significant because it clarified the 6th Amendment right of confrontation issue in VOP cases on a statewide basis and helped alleviate the practical difficulty faced when victims, primarily female, are afraid to testify against an accused. In VOP cases, the victim's reluctance to testify will not automatically preclude the State from prosecution if otherwise warranted.

3. *State of Florida v. Dennis C. Labrie*, Case No. 02-2723-CF-A-W. Assistant State Attorney Robin Arnold for the State of Florida, 110 NW 1st Avenue, Suite 5000, Ocala, FL, 34475 and J. Melanie Slaughter, 2337 E. Silver Springs Blvd, Ocala, FL 34470. Jury trial held on February 4, 2005.

The significance of this case to me was that this was one of the first, if not the first, felony case that I tried when I began the felony docket full time in January, 2005. The Defendant was ultimately convicted, as charged, of very serious felonies and he was the first individual that I ever sentenced to life in prison. He was also the first individual who knowingly (at least to me) lied in court as evidenced by his attorney representing to the Court, during the trial, that she did not want to ask the Defendant any questions but requested that he be permitted to simply give a narrative. I had not practiced much criminal law as an attorney and, when I did, it was of a limited magnitude more than 20 years ago, so this was a novel experience that I had to address. The judgment and sentence were affirmed on appeal. I later denied the defendant's Rule 3.850 motion for post-conviction relief which was affirmed by the 5th DCA. The sentence was proper in light of the actions of this Defendant in putting in harm's

way innocent citizens and police officers. The case was significant as my first felony trial and brought into focus the ability of a Court to impact not only the lives of the Defendant but the victims of crimes.

4. *State of Florida v. Renaldo D. McGirth, State of Florida v. Jarrord M. Roberts*, Case Nos. 06-2999-CF-AB-W. State Attorney Brad King and Assistant State Attorney Anthony Tatti, (now Circuit Judge), represented the State of Florida, 110 NW 1st Avenue, Suite 5000, Ocala, FL, 34475. Candace Hawthorne, 319 East Main Street, Tavares, FL, 32778 represented the defendant, McGirth, and Henry G. Ferro, 108 North Magnolia Avenue, 7th Floor, Ocala, FL, 34475 represented the defendant, Roberts. Trial was held in January-February, 2008.

The question as posed is the five most significant cases tried or litigated. This was my first "death penalty" case. I have handled other murder trials and have sentenced people to life in prison (see above), however, as the judges at the judicial conference who teach us judges about death penalty cases remind us "death is different." Everything is very heightened and focused in the case. Mr. McGirth was convicted of, among other things, first degree murder with the jury recommending death by an 11-1 vote. I imposed the death penalty. Mr. Roberts was not convicted of first degree murder but did receive a life sentence from me on a separate charge. Both cases were affirmed on appeal.

5. *State of Florida v. Joshua Fulgham*, Case No. 09-1253-CF-A-Y. State Attorney Brad King and Assistant State Attorney Rock Hooker represented the State of Florida. 110 NW 1st Avenue, Suite 5000, Ocala, FL 34475. Terrence Lenamon 100 N. Biscayne Blvd., Ste. 3070, Miami, FL 33132 and Tania Z. Alavi 108 N. Magnolia Avenue, Suite 600, Ocala, FL 34475 represented the Defendant.

Because this was a "death penalty" case, I believe that the nature of these type of cases cause them to be a significant case for a judge. This is my second death penalty case. The trial began on April 2, 2012 and ended on April 20, 2012 when the Jury recommended a life sentence for the first degree murder conviction. On April 25, 2012, I imposed consecutive life sentences. (The Defendant was also convicted of kidnapping). As in the McGirth case above, in death penalty cases, trial judges are aware that everything decided will likely be scrutinized for years post-trial by appellate court. There are many significant constitutional issues addressed in present death penalty litigation in Florida and tremendous preparation and effort on the part of a trial judge is always required.

Answer to Question 32d.(vi)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

05 JUN 20 AM 8:19

[redacted]

IN RE: The Guardianship of

[redacted]

a minor child.

_____/

ORDER ADJUDICATING ATTORNEY
O.B. SAMUEL, JR. IN CIVIL CONTEMPT OF COURT

This guardianship case originated because the minor child, [redacted] sustained personal injuries as a result of a motor vehicle accident and desired to make a claim against the tort feasors. The plenary guardian of the property is Tawana Hamilton, who is the mother of [redacted] She apparently retained Attorney O.B. Samuel, Jr., on behalf of her son, to pursue the personal injury claim. Mr. Samuel is counsel of record in this guardianship proceeding.

Mr. Samuel filed a petition to settle the personal injury claim. The proposed gross settlement was $105,000.00. On August 19, 2003, this Court entered an Order authorizing the settlement. The gross settlement was apparently paid and out of which Attorney Samuel received his one-third (1/3) contingency attorney fee. It is from that point that this guardianship file has basically been neglected by counsel.

The guardian did not file her inventory or simplified accounting. On February 5, 2004, this Court issued an Order, a copy being sent to both the guardian and to Mr. Samuel, directing the guardian to file the inventory and pay the appropriate fee for the filing of the inventory within thirty (30) days of the Order. She did not take any action which resulted in this Court's March 29, 2004 Order to Show Cause. The show cause hearing was set for April 26, 2004. Prior to that hearing, the

guardian, with Attorney Samuel's assistance, filed a petition requesting that the apparent net settlement proceeds of $69,035.00 be deposited into a restricted account with Bank of America. On April 8, 2004, the Court wrote a letter to the guardian and to Attorney Samuel indicating that if the fee for the verified inventory was paid before the April 26, 2004 hearing and that the verified inventory was amended to demonstrate where the funds were presently being held, then the Court would cancel the show cause hearing. Counsel did file an amended inventory and submitted a proposed order designating depository. He advised the Court that the sum of $69,035.00 was presently in his trust account. The Court directed that these settlement monies in Mr. Samuel's trust account be deposited with Bank of America, per the contemporaneous Order designating depository.

On July 23, 2004, the guardian, through the same counsel, filed a motion to allow the withdrawal of money from the restricted account to pay certain bills incurred or to be incurred on behalf of the ward. A hearing was held on this motion and both Attorney Samuel and the guardian were present. This Court entered an Order, dated November 4, 2004, specifically directing O.B. Samuel, Jr., who apparently was still holding the net settlement proceeds in his trust account, to pay (1) $1,733.95 to M.A.R.C. of the Professionals, Inc., (2) $4,000.00 to Gentle Dental, Inc. for orthodontic treatment for the ward and (3) pay Medicaid up to the amount of $19,359.08 to pay the current Medicaid lien. This Order specifically directed that Attorney Samuel, from his trust account, issue these checks payable to these three (3) entities, mail the checks directly to those entities and, within thirty (30) days from the November 4, 2004 Order, file proof in this Court file reflecting that these payments had been made. Attorney O.B. Samuel, Jr. was also directed, in that Order, to file a statement/document in the Court file indicating the gross amount of monies that he received for the settlement of the minor's claim (which should be $105,000.00) and to reflect all disbursements that had been made from the gross settlement proceeds. The Court set this requirement, consistent

with its inherent authority to monitor cases involving minor wards, to determine that the money has been properly spent and/or accounted for.

Attorney Samuel did not comply, of record, at all, with this Court's November 4, 2004 Order. This resulted in the Court entering an Order, dated December 27, 2004, directing Mr. Samuel to show cause why he should not be adjudicated in contempt of Court for his apparent failure to comply with this Court's November 4, 2004 Order. The show cause hearing was set for January 24, 2005 and was mailed to Mr. Samuel at his business address as well as to the guardian at her address. The copy of the Order sent to Mr. Samuel has not been returned by the U.S. Postmaster. Additionally, ¶ 2 of this December 27, 2004 Order provided Attorney Samuel an additional opportunity to avoid civil contempt because the Order stated that if he did comply with the Order prior to the January 24, 2005 show cause hearing, the Court would, in essence, discharge the Order to Show Cause and cancel the hearing.

Attorney Samuel continued to ignore the Court Orders. He did nothing, of record, to comply with either Order and, in fact, did not attend the January 24, 2005 show cause hearing. The guardian and the ward attended Mr. Samuel's show cause hearing and advised the Court that Mr. Samuel had not paid either M.A.R.C. of the Professionals, Inc. or the Medicaid lien. The file does not reflect any payments made to these two (2) entities (or for that matter to Gentle Dental, Inc. although the guardian is of the belief that a payment was made to Gentle Dental) nor has Attorney Samuel complied with the Court's Order to, in essence, file the closing statement reflecting the receipt of the gross settlement funds and the disbursements that have been made to date.

There is no other conclusion that the Court can reach other than Attorney O.B. Samuel, Jr. is in civil contempt of this Court. The Orders are clear. The Court specifically finds that O.B. Samuel, Jr. has and did have the present ability to comply with these Orders. He clearly has had the

net settlement proceeds in his trust account, until apparently very recently, to pay the amounts that were specifically ordered by the Court to be paid by him from his trust account and to which he specifically requested authorization from the Court to pay. Attorney Samuel is the one who presented the paperwork to the Court at the relevant hearing indicating the bills that he wanted to have paid from the settlement funds. Therefore, he had the addresses, amounts, etc. needed to simply write the three (3) checks. For whatever reason, he chose not to do so. The Court finds that Attorney Samuel has willfully and intentionally failed to comply with this Court's Orders. In essence, he has had two and one-half (2½) months to write three (3) checks and file a one-page closing statement reflecting the disbursement of the settlement funds. He has not done so. It is, therefore,

ORDERED:

1. Attorney O.B. Samuel, Jr. is adjudicated in civil contempt of this Court for his willful and flagrant violations of this Court's December 27 and November 4, 2004 Orders. As and for his purge, he is fined the sum of $250.00, which shall be made payable to the Clerk of the Court, and he is to write checks to Medicaid and M.A.R.C. of the Professionals, Inc. consistent with the requirements of the November 4, 2004 Order, a copy being attached for convenience, and provide proof that he has paid Gentle Dental, Inc., Medicaid and M.A.R.C. of the Professionals, Inc. The fine and these payments must be made within fourteen (14) days from the date of this Order and copies of these checks and transmittal letters or other documentation evidencing payments must be filed with this Court file. Simply stating to the Court that it has been done is not sufficient.

2. If Attorney O.B. Samuel, Jr. does not comply with this Court Order by 5:00 p.m. on February 10, 2005, then the Court will issue an Order to take him into custody and confine him in the Marion County Jail where he shall remain indefinitely until he has complied with the terms and

conditions of his purge. Upon fulfilling his purge requirements, Attorney Samuel is to be released forthwith from the Marion County Jail.

ORDERED this 27th day of January, 2005, at Ocala, Florida.

BRIAN D. LAMBERT
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to the following on this 27th day of January, 2005:

O.B. Samuel, Jr., Esquire
151 SE 8th Street
Ocala, FL 34471

Tawana Hamilton
1331 SW 125rd Terrace
Ocala, FL 34481

Judicial Assistant

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

IN RE: The Guardianship of

[redacted]

a minor child.

ORDER AUTHORIZING LIMITED WITHDRAWAL
OF FUNDS FROM RESTRICTED ACCOUNT

A hearing was held before this Court on the Guardian's Motion to withdraw funds from a purported restricted account. Apparently, the settlement funds received on behalf of the minor Ward are currently being held in the trust account of Attorney O.B. Samuel, Jr. Based on the discussions/evidence held at this hearing, it is

ORDERED:

1. O.B. Samuel, Jr. is authorized to pay, from the monies that he is holding on behalf of the minor [redacted] in his trust account, the sum of $1,733.95, payable to M.A.R.C. of the Professionals, Inc. regarding account number 0329300127 pertaining to medical services provided to the minor child by Munroe Regional Medical Center; and also to pay to Health Management Systems, located at 2002 Old St. Augustine Road, Suite E-42, Tallahassee, FL, 32301 on behalf of the beneficiary Dayton Robinson, TPL file number 103763, Medicaid number 735354618, up to the sum of $19,359.08 to pay the current lien amount; and, lastly, pay Gentle Dental, Inc. the sum of $4,000.00 as and for orthodontic treatment for the minor patient, Dayton Robinson. These three (3) checks are not to be issued by O.B. Samuel, Jr. directly to the Petitioner, Tawana Hamilton. These three (3) checks must be separately written by Attorney O.B. Samuel, Jr.

and made payable to the three (3) separate entities described above and mailed directly to those entities. Additionally, within thirty (30) days from the date of this Order, Attorney O.B. Samuel, Jr. must file proof in the above captioned Court file reflecting that these payments have been made.

2. No further payments are authorized to be disbursed regarding the care and treatment of the minor Ward until better documentation is filed and a hearing set as to additional requests. Attorney O.B. Samuel, Jr. shall also file a statement/document in the Court file indicating the gross amount of monies that he received in the settlement of the minor's claim and all disbursements, to date, from the gross settlement amount. This must be done within thirty (30) days from the date of this Order.

ORDERED this 4th day of November, 2004, at Ocala, Florida.

BRIAN D. LAMBERT
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to the following on this 4th day of November, 2004:

O.B. Samuel, Jr., Esquire
151 SE 8th Street
Ocala, FL 34471

Carla Rodriguez
Authorized Provider Representative
The M.A.R.C. of the Professionals, Inc.
P.O. Box 61082
Ft. Myers, FL 33906-6182

Tawanna Sikes, Case Worker
Health Management Systems
2002 Old St. Augustine Road, Suite E-42
Tallahassee, FL 32301

Office Manager
Gentle Dental, Inc.
3300 SW 34th Avenue
Ocala, FL 34474

Tawana Hamilton
1331 SW 123rd Terrace
Ocala, FL 34481

Judicial Assistant

business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

n/a

33b. Since being admitted to the Bar, have you ever been engaged in any occupation, business or profession other than the practice of law? If so, give details, including dates.

No.

33c. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind. If so, identify the source of such compensation, the nature of the business enterprise, institution, organization or association involved and the dates such compensation was paid and the amounts.

No.

POSSIBLE BIAS OR PREJUDICE:

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you as a general proposition believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

None other than I have recused myself in cases in which my Wife's employer(s) was a party or a material witness or one of my former Judicial Assistant's Husband or his law firm was counsel of record.

MISCELLANEOUS:

35a. Have you ever been convicted of a felony or a first degree misdemeanor?

Yes _____ No __x__ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

35b. Have you pled nolo contendere or pled guilty to a crime which is a felony or a first degree misdemeanor?

Yes _____ No __x__ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

35c. Have you ever had the adjudication of guilt withheld for a crime which is a felony or a first degree misdemeanor?

Yes _____ No __x__ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

36a. Have you ever been sued by a client? If so, give particulars including name of client, date suit filed, court, case number and disposition.

I have never been personally sued by a client.

36b. Has any lawsuit to your knowledge been filed alleging malpractice as a result of action or inaction on your part?

I have never personally had a malpractice claim asserted against me.

36c. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the amounts involved.

n/a. I have never had a claim brought against me personally for professional malpractice.

37a. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

No.

37b. Have you ever owned more than 25% of the issued and outstanding shares or acted as an officer or director of any corporation by which or against which a petition in bankruptcy has been filed? If so, give name of corporation, your relationship to it and date and caption of petition.

No.

38. Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If so, please supply the jurisdiction/county in which the lawsuit was filed, style, case number, nature of the lawsuit, whether you were Plaintiff or Defendant and its disposition.

I have never personally sued anyone nor have I been personally sued by anyone. While at the law firm of Savage, Krim, Simons, Fuller & Ackerman, P.A. I believe our firm was sued twice for malpractice related to actions of other partners. Additionally, the firm filed some small claims actions to collect fees from clients however the firm, and not me personally, would have been the Plaintiff in those matters. These small claims cases were at least 20 years ago and resulted in some type of settlement or judgment. I also believe one of the malpractice cases against the firm went to trial with a Judgment entered in favor of our law firm.

39. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, give the particulars.

No.

40. To your knowledge within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a formal complaint or formal accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? If so, please state the date(s) of such formal complaint or formal accusation(s), the specific formal complaint or formal accusation(s) made, and the background and resolution of such action(s). (Any complaint filed with JQC, refer to 32d(v).

No other than answer to question 32d(v).

41. Are you currently the subject of an investigation which could result in civil, administrative

or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation and the expected completion date of the investigation.

No.

42. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No.

43a. Have you filed all past tax returns as required by federal, state, local and other government authorities?

Yes ☒ No ☐ If no, please explain. _____

43b. Have you ever paid a tax penalty?

Yes ☒ No ☐ If yes, please explain what and why. See attached.

43c. Has a tax lien ever been filed against you? If so, by whom, when, where and why?

No.

HONORS AND PUBLICATIONS:

44. If you have published any books or articles, list them, giving citations and dates.

None.

45. List any honors, prizes or awards you have received. Give dates.

I am uncertain whether this question relates just to academic matters. I graduated with honors from Eastern Michigan University and was on the Dean's List each semester from the Fall of 1974 through June, 1978. I played on the varsity tennis team at Eastern Michigan University. I probably acquired 75-100 trophies for winning or being a runner up in tennis tournaments which would have occurred primarily between 1973 and 1981. While a Little League Baseball Coach, I received awards and recognition from the League for my involvement.

46. List and describe any speeches or lectures you have given.

I have given lectures or speeches to junior high and high school students regarding law day related activities and have also given speeches to local bar groups pertaining to to criminal and probate law. I do not have a formal text of any of the speeches.

47. Do you have a Martindale-Hubbell rating? Yes ☐ If so, what is it?___No ☐

I previously had an AV rating with Martindale-Hubbell. However, I have been a Circuit Judge for 13 years and have not taken any steps to maintain that rating.

PROFESSIONAL AND OTHER ACTIVITIES:

48a. List all bar associations and professional societies of which you are a member and give the titles and dates of any office which you may have held in such groups and committees to which you belonged.

1990-1993: Member, Florida Bar Grievance Committee, Circuit 5B (Chair - Last 18 months)

Answer to Question 43b – Tax penalty.

Beginning January 1, 1992, I was a sole practitioner until the time that I became a Circuit Judge effective March 1, 2000, with the exception of an approximate two (2) year period in 1994-1996 when I was a partner in the law firm of Lambert & Himes, P.A. During this partnership, tax penalties were paid after dissolution. I tendered money to my partner to make tax deposits but apparently the deposits were either not made or not timely made. After the dissolution, I received notice of tax penalties. I was fortunate to work with an understanding representative with the IRS and was quickly able to pay, in full, the tax penalties charged. Additionally, as a sole practitioner and individually, I have made estimated tax payments. At times, if those estimated payments were not sufficient when my individual tax returns were filed, interest would have accrued on the unpaid tax remaining due and a possible late fee or penalty which were then paid by me.

1996-2002: Member, Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases

2007: Member, Florida Supreme Court Committee on Standard Jury Instructions in Business Cases

Member - The Florida Bar and Marion County Bar Association

Member - Bench and Bar Committee, Marion County Bar Association

Member- D.R. Smith Inn of Court (Marion County)

Certified as mentor judge for new judges

Prior Member - Academy of Florida Trial Lawyers, and then, at a later date, National Defense Research Institute

48b. List, in a fully identifiable fashion, all organizations, other than those identified in response to question No. 48(a), of which you have been a member since graduating from law school, including the titles and dates of any offices which you have held in each such organization.

I have previously served on the Board of the Brick City (Ocala) Field Parents Association which was a private, non-profit corporation that operated Little League baseball for this specific park. The park has since disbanded. I was at times President and Vice-President. I was also on the Board of CFCC Marlins swim program at Central Florida Community College in Ocala, FL. At one point I was President of that Board, however, upon my appointment to the circuit bench, I resigned from that Board because it had, among its duties, fund-raising.

48c. List your hobbies or other vocational interests.

Now that my three children are adults and living away from home, I enjoy reading and spending time with my Wife and our dogs and working around the house. When our children were younger, I was actively involved in their athletic events as a long time Little League baseball coach and as a smimming official with Florida Swimming and spent a great deal of time with these activities.

48d. Do you now or have you ever belonged to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

Answer to Question 48e – Pro bono work.

As a circuit judge I no longer perform any pro bono legal work. Previously as an attorney, I would donate $350 per year to the then Withlacoochee Area Legal Services, Inc. consistent with the Florida Supreme Court's aspirational goal of attorneys performing pro bono legal services or "opting out" by paying $350 yearly to help legal aid societies.

I can recall two separate pro bono cases that I handled in 1997. I assisted a 41-year old woman whose parents had suddenly, but separately, tragically passed away. She was being sued by her ex-husband for non-payment of child support. She had given up custody of her child because of a difficult situation when her present husband who had physically assaulted her and her child. She resided in Pinellas County, Florida and I assisted her in the Marion County litigation to prevent her from having to go to jail and to reach a resolution of her issues.

In a separate case, I represented a couple who had a small piece of land and home in the southern part of Marion County which they acquired from her mother in 1986. Their sister and brother-in-law acquired a contiguous parcel. No title insurance was provided transaction. There was some discrepancies in the legal description. When the contiguous property was sold, the deed into the grantees included this disputed property and was mortgaged. The purchasers defaulted on the mortgage and the mortgage company sued to foreclose the entire property including the disputed strip of property that my clients believed they owned. I represented them pro bono and was able to negotiate a successful resolution to their case so that they were able to retain their ownership in the property.

I have done this type of work in the past in other cases but I do not specifically recall dates, events, etc. I never filed anything with The Florida Bar for this pro bono work as I did not do this for any pro bono credit.

No.

48e. Describe any pro bono legal work you have done. Give dates.

See attached.

SUPPLEMENTAL INFORMATION:

49a. Have you attended any continuing legal education programs during the past five years? If so, in what substantive areas?

I attend the Annual Florida Circuit Judge Conference.

49b. Have you taught any courses on law or lectured at bar association conferences, law school forums, or continuing legal education programs? If so, in what substantive areas?

No.

50. Describe any additional education or other experience you have which could assist you in holding judicial office.

I have been an Associate Judge on the Fifth District Court of Appeal on five separate occasions. I have written opinons for that court and have the ability to understand the workings of the Court for which I seek this position. I have also been on the Fifth Judicial Circuit Court Appellate Panel for approximately 11 years and have written most of the opinions, including dissenting opinions, for that court. I am now the presiding Judge on our Circuit Appellate Panel. I was a Board Certified Civil Trial Lawyer and was probably eligible to apply for the Board Certification Test for Appellate Law but, at the time, had not considered it. I also believe that my experience as a Circuit Judge for 13 years is helpful because I think it is important for an Appellate Judge, in analyzing trial records when reaching a decision, appreciate the processes that Trial Judges go through in presiding over trials, hearings, etc.

Prior to my appointment as a Circuit Judge, I also sat on three separate Juries (one as an alternate) giving me the unique prospective of seeing the judicial process from the eyes of a juror.

51. Explain the particular potential contribution you believe your selection would bring to this position.

See attached.

52. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

In 2002, 2005, 2006, 2007, 2008 and 2012 I previously filed an application to the 5th DCA Judicial Nominating Commission regarding vacancies on the 5th DCA. On each occasion, I made the "short list" of the six nominees submitted by the 5th DCA Judicial Nominating Commission to be considered by the respective Governors. Additionally, in August, 1997 and September, 1999, I filed an application with the Fifth Judicial Circuit Nominating Committee and in February, 2000, I was appointed Circuit Judge by Governor Bush.

53. Give any other information you feel would be helpful to the Commission in evaluating your application.

Answer to Question 51 – Potential Contribution.

In addition to my experience as an "AV" rated Board Certified Civil Trial Lawyer and being a Circuit Judge for more than 12 years including 10 years on the appellate panel and prior experience as an Associate Judge on the 5th DCA. I believe my greatest contribution to the appellate court would be that I write well and have a strong work ethic to fairly but expeditiously resolve cases and move the docket. As a circuit judge, I write the vast majority of my own orders and judgments, not only on contested trials but on everyday motion hearings. Case loads on the various dockets to which I have been assigned have been reduced significantly. I have a firm belief in complying with the guidelines of the *Florida Rules of Judicial Administration* pertaining to the timely finalization of cases.

I frankly enjoy the appellate process more than the trial work because I like to address legal problems and logically reach a conclusion based on the facts, evidence and the law. I am now into my tenth year of being on the appellate court panel of the Fifth Judicial Circuit. I believe the judicial process is best served by the court, whether it be the trial or appellate court, providing a prompt resolution of legal disputes with an effort towards providing a cogent explanation in the judgment or order as to why the court so ruled. I would bring that same effort as an appellate judge and I have received complimentary letters from the 5th DCA Judges when I was on appellate panels regarding the quality and promptness of my written opinions for the court. I have also been fortunate to have a wife and judicial assistants who have the same work ethic and pride in their work, all of which has made me a better judge.

I believe that my experience, maturity and my abilities as both a Trial Attorney and now Trial Judge as well as my appellate experience and work ethic support my application.

I thank you for this opportunity and your consideration.

REFERENCES:

54. List the names, addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for judicial position and of whom inquiry may be made by the Commission.

Honorable Thomas D. Sawaya, Judge, 5th DCA, [redacted]

Honorable Don F. Briggs, Chief Judge, 5th Judicial Circuit, [redacted]

Honorable David B. Eddy, Judge, 5th Judicial Circuit, [redacted]

Honorable Jonathan D. Ohlman, Judge, 5th Judicial Circuit, [redacted]

Honorable Carol A. Falvey, Judge, 5th Judicial Circuit, [redacted]

Brad King, State Attorney, 5th Judicial Circuit [redacted]

H. Randolph Klein, Esquire [redacted]

R. William Futch, Esquire [redacted]

John B. Fuller, Esquire, [redacted]

Charles Ruse, Jr., Esquire/former Ocala City Councilman, [redacted]

CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 26th day of February, 2013.

BRIAN D. LAMBERT
Printed Name

Signature

(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . *The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*