Improper Jury Argument: To Object or Not to Object?

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I. Introduction.

It is well-settled that in a civil case, a party need not object to an improper jury argument if the argument is so egregious as to be "incurable." Or is it? Recent cases suggest that proposition is not "well-settled." Today, an attorney seeking to preserve the right to raise an improper jury argument point on appeal should object at trial regardless of whether the argument appears to fall into one of the categories of arguments that have traditionally been deemed incurable.

II. What is an "incurable" jury argument?

In *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979), the supreme court explained that incurable jury arguments can be described as those that: 1) appeal to racial prejudice; 2) involve unsupportable epithets such as "liar," "fraud," "faker," "cheat," and "imposter"; or 3) contain an unsupported charge of perjury. *Id.* at 840; *see also* 4 McDONALD TEXAS CIVIL PRACTICE § 23.23 at 355 (1992 ed.) (stating that Texas Supreme Court has only recognized three types of incurable arguments). Other cases indicate that appeals to religious prejudice and ethnic solidarity, personal attacks on opposing counsel,[1] and charges that opposing counsel manufactured evidence have been considered incurable.[2]

III. In the past, an objection was not required for improper jury arguments that were considered "incurable."

In the past, it was clear that an objection to incurable jury argument was not required to preserve error. For example, in *Texas Employer's Ins. Ass'n v. Haywood*, the Texas Supreme Court stated that a new trial will be awarded for improper jury argument in the absence of an objection "when the probable harm or resulting prejudice cannot be eliminated or 'cured' by retraction or instruction." 266 S.W.2d 855, 858 (Tex. 1954). And in *Otis Elevator Co. v. Wood*, the court held that a failure to object does not waive a complaint of improper jury argument if the argument is "incurable." 436 S.W.2d 324, 333 (Tex. 1968).

The rule that an objection is not necessary when the argument rises to the level of "incurability" apparently originated in *Gulf, C. & S. F. Ry. Co. v. Greenlee*, 8 S.W. 129 (Tex. 1888). *Greenlee* involved an allegedly improper argument that the defendant's counsel did not object to. The supreme court held that the defendant waived the improper argument point of error by failing to object but left room for situations where an objection would not be necessary: "[W]e will say that the remarks were not so plainly prejudicial to defendant as to demand that the verdict be set aside, in the absence of an objection by its

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[1] Texas Rule of Civil Procedure 269 governs the argument phase of a trial. Subsection (e) of the rule provides: "[m]ere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court."

[2] *See, e.g., Tex. Employer's Ins. Ass'n Haywood*, 266 S.W.2d 855, 858 (Tex. 1954) (counsel referral to witnesses as "yellow nigs" was racially prejudicial and incurable by instruction or retraction); *Circle Y v. Blevins*, 826 S.W.2d 753, 757-59 (Tex. App.–Texarkana 1992, writ denied) (accusation by plaintiff's counsel during jury argument that defense counsel manufactured evidence held incurable); *Texas Employers Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 866 (Tex. App.–San Antonio 1990, writ denied) (jury argument urging racial solidarity incurable); *American Petrofina, Inc. v. PPG Indus. Inc.*, 679 S.W.2d 740, 755 (Tex. App.–Fort Worth 1984, writ dism'd) (jury argument analogizing civil action to criminal prosecution and attacking the professional ethics and integrity of opposing counsel incurable and reversible); *Texas Employers Ins. Ass'n v. Jones*, 361 S.W.2d 725, 727 (Tex. App.–Waco 1962, writ ref'd n.r.e.) (reversal required due to statement that witness was "an old hand at the job, that Jew is").

counsel at the time the words were spoken." *Id.* at 131.

IV. *Standard Fire Ins. Co. v. Reese* may have abandoned the rule that an objection is not required for incurable jury argument.

Standard Fire is the most recent supreme court case substantively addressing improper jury argument. There, the court seemingly abandoned its earlier holdings that an objection is not required to preserve error caused by incurable jury argument. The *Standard Fire* court held that an objection is required for improper jury argument, recognizing that "even under the discarded rule of presumed harm, one who sat by while hearing an improper argument without objection or motion was not later heard to complain about it." *Id.* at 840. Accordingly, the complaining party in *Standard Fire*, "by failing to object and press for an instruction at the time of the argument, waived his complaint." *Id.* at 840-41. It must be noted, however, that *Standard Fire* did not involve arguments that fit squarely within the categories that have been deemed "incurable."

Despite the fact that the *Standard Fire* court did not expressly overrule *Haywood* and *Otis Elevator*, the decision seems to leave no room for an "incurable jury argument" loophole in the general rule requiring an objection at trial to preserve error. *See Cook v. Sabio Oil & Gas, Inc.*, 972 S.W.2d 106, 112 (Tex. App.–Waco 1998, pet. denied) (citing *Standard Fire* for the unqualified proposition that an objection is required to preserve a complaint of improper jury argument); *see also Busse v. Pacific Cattle Feeding Fund #I, Ltd.*, 896 S.W.2d 807, 815 (Tex. App.–Texarkana 1995, writ denied). Indeed, the Dallas Court of Appeals has interpreted *Standard Fire* as closing the loophole created in *Haywood* and *Otis*. *See Hatley v. McCarter*, No. 05-97-01903-CV, 1998 WL 870881, at *15 (Tex. App.–Dallas Dec. 16, 1998, pet denied) (unpublished).

Not all courts, however, have viewed *Standard Fire* as eliminating the loophole for incurable jury argument. Some courts continue to hold that an objection is not required for improper jury arguments that are incurable. *See, e.g., Macias v. Ramos*, 917 S.W.2d 371 (Tex. App.–San Antonio 1996, no writ); *Nat'l Union Fire Ins. Co. v. Kwiatkowski*, 915 S.W.2d 662, 664 (Tex. App.–Houston [14th Dist.] 1996, no writ). Typically, those courts base their conclusions on the holding in *Otis Elevator*.

This lack of consistency among the courts is not surprising. The incurable jury argument rule has always generated confusion. For example, in *Texas & N. O. R. Co. v. Sturgeon*, 177 S.W.2d 264 (Tex. 1944), the supreme court prefaced a discussion of the incurable jury argument rule with this comment: "We think it is advisable, in view of some apparent confusion on the subject, to point out that counsel for petitioner followed the better practice in objecting to the argument at the time it was made, since it was of such a nature that its harmful effect could have been removed by instruction." *Id.* at 266. Today, that confusion is likely to be magnified in light of recent decisions by the court of criminal appeals and the supreme court that indicate an objection may be required for incurable jury argument in civil cases.

V. *Cockrell v. State* supports the conclusion that an objection is required in civil cases for *any* type of improper jury argument.

Support for the conclusion that an objection is required in civil cases for *any* type of improper jury argument – curable or incurable – can be found in a criminal case. *See Cockrell v. State*, 933 S.W.2d 73 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1173 (1997). In *Cockrell*, the court of criminal appeals acknowledged it had previously held that an objection was not required for incurable jury argument. *Id.* at 89. However, the court explained, those holdings "have been undermined by the enactment of Texas Rule of Appellate Procedure 52(a). . . ." *Id.* Until 1997, Rule 52(a) was the preservation of error rule, applicable to both civil and criminal cases, requiring parties to make timely objections to preserve error. Rule 52(a) is now embodied in Rule of Appellate Procedure 33.1, which is substantially the same as prior Rule 52(a).

Explaining that a defendant's right to prevent incurable jury arguments is "one of those rights that is forfeited by a failure to insist upon it," the court overruled its earlier decisions. *Id.* The court held that failure to object to *any* type of jury argument – incurable or otherwise – or to pursue an adverse ruling on an objection to improper jury argument, forfeits the

right to complain on appeal. *Id. Cockrell* applies even where the improper argument allegedly violates a constitutional right. *See Cacy v. State*, 942 S.W.2d 783, 784 (Tex. App.–Waco 1997, pet. ref'd).

Cockrell was a criminal case, but courts are even more inclined to find waiver in civil cases than in criminal cases, where the stakes – liberty and sometimes life – are higher. *See Brown v. Brown*, 520 S.W.2d 571, 577 (Tex. Civ. App.–Houston 1975, writ dism'd) (conduct may constitute a waiver in a civil proceeding that would not constitute waiver in a criminal proceeding). Arguably, this makes the reasoning in *Cockrell* applicable to civil cases as well.

VI. The reasoning in *The Matter of C.O.S.* supports the conclusion that the holding in *Cockrell v. State* is applicable to civil cases.

Although it did not involve improper jury argument, the Texas Supreme Court's analysis in the case of *In The Matter of C.O.S.* lends support to the conclusion that the reasoning of *Cockrell* applies in civil cases. 988 S.W.2d 760 (Tex. 1998). In *Matter of C.O.S.*, a juvenile commitment case, the juvenile appealed from an adverse ruling, and the State argued the juvenile had waived the asserted error (the trial court's failure to advise the juvenile of certain rights) by failing to object.

The supreme court initially observed the case was governed by "our civil rules of appellate procedure." *Id.* at 765. The court also noted that Rule 33.1, which superseded former Rule 52(a), "is substantially unchanged." *Id.* at 764. Next, the court observed that Rule 33.1 applies to criminal as well as civil cases, "as did Rule 33.1's predecessor, Rule 52(a)." *Id.* at 765. Accordingly, the court was "aided in [its] analysis by the application of former Rule 52(a) to criminal cases." *Id.* As a part of its analysis, the court observed that the court of criminal appeals has held that "failure to object waives error when a jury argument is improper, even if the argument could not have been cured by an instruction. . . ." *Id* at 765-66.

Thus, the supreme court's analysis in *Matter of C.O.S.* suggests that the basis for the holding in *Cockrell* – the requirement in the rules of appellate procedure that a party timely object – might apply in both criminal and civil cases. There certainly does not appear to be any compelling policy reason for applying a more liberal approach to preservation of error in civil cases than in criminal cases.

VII. But what about Rule of Civil Procedure 324?

One legal difference between civil and criminal cases, however, is that Texas Rule of Civil Procedure 324(b)(5) provides that a point in a motion for new trial is a prerequisite to "[i]ncurable jury argument if not otherwise ruled on by the trial court." TEX. R. CIV. P. 324(b)(5). Although that language does not expressly relieve a party of the duty to object to incurable jury argument during trial, it certainly implies that no objection is necessary.[3] The question, then, is whether Subsection (5) should be interpreted as overriding the requirement in Rule of Appellate Procedure 33.1 that a party make a timely objection in the trial court.

The language currently found in Subsection (5) was added to the rule in 1984. *See Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 322-23 (Tex. 1984) (setting forth text of Rule 324 as amended in 1984 and previous version of the rule). Before 1984, Rule 324 contained no provisions addressing or referencing "incurable jury argument not otherwise ruled on by the trial court."[4]

The addition of subsection (5) to Rule 324 *after* the decision in *Standard Fire* suggests that the supreme court did not view its decision in *Standard Fire* as abandoning its earlier holdings that an

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[3] Additionally, Texas Rule of Civil Procedure 269(g) provides: "The court will not be required to wait for objections to be made when the rules as to arguments are violated; but should they not be noticed and corrected by the court, opposing counsel may ask leave of court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruptions made on frivolous and unimportant grounds." Thus, Rule 269 also seems to imply that an objection might not be necessary. The Texas Supreme Court, however, has held that Rule 269 does not relieve a party of the duty to object unless the argument is incurable. *See Wade v. Texas Employers' Ins. Ass'n*, 244 S.W.2d 197, 200 (Tex. 1954).

[4] Prior versions of Rule 324, did, however, provide that if the trial court rendered a judgment n.o.v., the appellee could bring forward a cross appeal asserting that the opposing counsel made an improper argument.

objection is not required for incurable jury argument. The discussions of the Supreme Court Advisory Committee concerning the 1984 amendments to Rule 324 provide additional support for that view. During those discussions, Justice Jack Pope, author of the *Standard Fire* opinion, stated: "It's a pretty settled law that there's one or two categories of jury argument that are incurable and you don't have to a make . . . [an] objection." Minutes, Supreme Court Advisory Committee – 1984 Amendments to Rules of Civil Procedure. Other portions of the debate indicate that none of the Advisory Committee viewed *Standard Fire* as abandoning the rule that no objection is necessary for incurable jury argument. *Id.*

In *Litton*, however, the supreme court explained that Rule 324 was amended in 1984 because "[t]he prior version of the rule created problems including the complaint that an appeal on points complaining of errors that the trial court had not previously had an opportunity to rule upon was resurrecting the rejected fundamental error rule." *Litton*, 668 S.W.2d at 323-24. During the discussion among the Advisory Committee members, Justice Clarence Guittard described the proposed amendments as being "in line with . . . the abolition of the fundamental error concept" and as being designed to "require that objection be made in the trial court." Minutes, Supreme Court Advisory Committee – 1984 Amendments to Rules of Civil Procedure. Thus, it seems clear that at least one goal of the 1984 amendments to Rule 324 was to ensure that trial courts are given the opportunity to cure error.

Arguably, it would conflict with the overarching goal of the 1984 amendments to interpret Subsection (5) as affirmatively relieving a party of the necessity of objecting to incurable jury argument during trial. Theoretically, raising improper jury argument in a motion for new trial gives the trial court the opportunity to cure the harm caused by the argument with a new trial. As set forth below, however, interpreting Subsection (5) in that manner would frustrate the policy that a litigant should not be permitted to obtain reversal based on an error the trial court was not given the opportunity to cure in an effective and efficient manner. *See Cross Marine, Inc. v. Lee*, 905 S.W.2d 22, 25 (Tex. App.–Corpus Christi 1995, writ denied) (judicial economy served by requiring complaints to be raised in a timely fashion). Plainly, the granting of a new trial is not the most effective or efficient means of curing trial error. Furthermore, it is no longer necessary to even call the trial court's attention to the motion for new trial.

VIII. Relieving parties of the duty to object encourages lying behind the log and leaves the trial court with only one, unsatisfactory option for curing the harm.

A. The justification for the incurable jury argument rule is not particularly compelling.

The justification most often given for the rule that a party need not object to an incurable jury argument is that "counsel making the argument is the offender so the law will not require opposing counsel to take a chance on prejudicing his cause with the jury by making the objection." *Otis Elevator,* 436 S.W.2d at 324. In other words, "an objection may tend to overly emphasize or call undue attention to an improper remark." 8 William V. Dorsaneo, III, TEXAS LITIGATION GUIDE § 120C.06[3][a][iii] (June 1999). *But see* Larry A. Klein, *Allowing Improper Argument of Counsel To Be Raised For The First Time On Appeal As Fundamental Error: Are Florida Courts Throwing Out The Baby With The Bath Water?*, 26 Fla. St. U. L. Rev. 97, 120 (1998) ("If the trial court immediately reacts to improper argument, as soon as the objection is made, the court can minimize the objection by drawing jurors' attention away from objecting counsel.")

The stated rationale for the rule seems to be a flimsy justification. Under that theory, attorneys should also be relieved of the duty to object when the opposing counsel attempts to offer evidence of, for example, liability insurance, a settlement offer, or subsequent remedial measures. Attempts to offer evidence of that nature are arguably just as prejudicial, if not more so, than an inflammatory argument.

Furthermore, the usual justification for the rule may reflect an inflated assessment of the effect of inflammatory arguments and a fundamental lack of faith in the ability of jurors to disregard improper arguments. The Texas Supreme Court recognized long ago that inflammatory arguments, "though highly improper, being, like all other epithets, weak as

arguments, should not be presumed to have influenced the minds of the jury." *Mayer v. Duke*, 10 S.W. 565, 570 (Tex. 1889). The supreme court has also observed that "strong appeals to prejudice . . . become harmless when the jury is instructed to disregard them. . . ." *Wade v. Texas Employers' Ins. Ass'n*, 244 S.W.2d 197, 201 (Tex. 1954). Moreover, when a party objects to improper argument and the trial court either reprimands the offending attorney or, at the very least sustains the objection, and instructs the jury to disregard the improper argument, chances are the offending attorney's credibility with the jury will be impaired, with a resulting diminution in the effectiveness of the prejudicial argument.

B. The incurable jury argument rule is inconsistent with the goal of judicial economy.

Although the *Haywood* court embraced the loophole for incurable jury argument, that very same court also observed that a rule exempting a party from objecting to improper jury arguments invites litigants to lie behind the log, wait for a favorable verdict and, if disappointed, complain for the first time in a motion for new trial. *See Haywood*, 266 S.W.2d at 858. *See also Hartford Acc. & Indem. Co. v. Thurmond*, 527 S.W.2d 180, 193 (Tex. Civ. App.–Corpus Christi 1975, writ ref'd n.r.e.). Additionally, the *Haywood* court explained that a rule requiring an objection gives offending counsel and the trial court the opportunity to eliminate, if possible, "the prejudice that may result from the argument – counsel by retraction and the court by instruction." *Id.* at 858; s*ee also Isern v. Watson*, 942 S.W.2d 186, 198 (Tex. App.–Beaumont 1997, no writ).

If counsel are permitted to wait until after the trial to assert that the opposing party made an improper argument, the trial court is deprived of the opportunity to ameliorate or eliminate the harm caused by the argument. Instead, the only option left for the court is to grant a new trial. Clearly, a rule that deprives a trial court of the opportunity to immediately cure an error and instead leaves the court with no option but to re-try the case is inconsistent with the principles of judicial economy. *See Lee*, 905 S.W.2d at 25.

IX. The incurable jury argument rule encourages appellate courts to abandon the traditional analysis for determining reversible error.

A. The incurable jury argument rule is a vestige of the abandoned rule of presumed harm.

Although the incurable argument rule ostensibly serves the purpose of sparing counsel from being forced to highlight the improper argument with an objection, the rule most likely came about as adjunct of the abandoned rule of presumed harm. In Texas, appellants have not always been required to show that an error during trial likely affected the outcome of the trial. *See Standard Fire*, 584 S.W.2d at 839, n. 2; *see also* Louis S. Muldrow, William D. Underwood, *Application of the Harmless Error Standard to Errors in the Charge*, 48 Baylor L. Rev. 815, 820 (1996)[hereinafter Muldrow and Underwood]. The common law doctrine of presumed harm permitted reversal in some circumstances without a showing that the error affected the result. Muldrow & Underwood, 48 Baylor L. Rev. at 821. The doctrine of presumed harm was adopted in Texas as early as 1854. *Id.*

Under the presumed harm rule, once an appellant demonstrated an error that realistically could have affected the outcome, the burden shifted to the appellee to demonstrate that the error was harmless. *Id.* As reflected in *Aultman v. Dallas Rwy. and Term. Co.*, 260 S.W.2d 596 (Tex. 1953), Texas appellate courts applied the presumed harm rule when considering improper jury argument points of error. In *Aultman*, the court of appeals, applying the presumed harm rule, reversed and remanded for improper jury argument. However, because the supreme court had previously adopted the harmless error standard in former rules of civil procedure 434 and 503, the court held it was error for the court of appeals to apply the presumed harm rule. The supreme court explained that cases decided before adoption of Rules 434 and 503 "have little value as precedents because they were decided under a rule which required a reversal if the

court entertained any doubt of the harmful effect of the argument." *Id.* at 600.[5]

B. The incurable jury argument rule has the propensity to revive the rule of presumed harm.

Because its origins trace back to the presumed harm rule, and because it is a vestige of that rule, the incurable jury argument rule may have the tendency to cause appellate courts to abandon the traditional harmless error analysis in favor of a presumed error analysis. An example of that tendency can be found in *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859 (Tex. App.–San Antonio 1990, writ denied).

In *Guerrero*, the appellant argued that Guerrero's attorney made an appeal for ethnic unity in his closing argument. *Id.* at 862. The majority analyzed the issue of reversible error by considering whether the argument fell into the prohibited category of appeals to racial prejudice. *Id.* at 862-66. According to the majority, when an argument injects racial prejudice into the case, it is *per se* harmful and cannot be cured by an instruction from the trial court. *Id.* Based on that reasoning, the court held that "incurable *reversible* error occurs whenever any attorney suggests, either openly or with subtlety and finesse, that a jury feel solidarity with or animus toward a litigant or a witness because of race or ethnicity. *Id.* at 866 (emphasis added). Thus, under the majority's approach, an argument that fits within one of the categories that have been deemed to constitute incurable jury argument must be considered harmful. In other words, majority employed the presumed harm approach.

The dissent, on the other hand, correctly explained that under *Standard Fire*, it is improper to employ a presumed error analysis when determining whether a particular argument constitutes reversible error. *Id. Standard Fire* requires the reviewing court to evaluate the entire case – from *voir dire* to final argument – and to take into account such factors as the amount of time the improper argument lasted and whether the offensive arguments were repeated, cured, or abandoned. *Id.* Moreover, the reviewing court must closely examine all of the evidence to determine the probable effect of the arguments on a material finding by the jury. *Id.* Finally, after evaluating the whole record, the appellate court must determine whether the probability that the allegedly improper arguments caused harm is greater than the probability that the verdict was grounded on proper proceedings and the evidence. *Id.*

The dissent in *Guerrero* correctly recognized that even if an improper jury argument falls within one of the categories considered incurable, it cannot automatically be deemed reversible error. The fact remains, however, that the majority was led astray by the incurable jury argument rule, and given the confusion that has always plagued the rule, it seems likely that other courts will fall into the same trap.

VIII. Conclusion.

Recent cases suggest that the rule relieving counsel from the duty to object to incurable jury argument may no longer be viable. Accordingly, to ensure that error is preserved, attorneys should object to any and all instances of improper jury argument during trial. Moreover, the policies and goals underlying the rules requiring preservation of error support the elimination of the incurable jury argument rule, and eliminating the rule would also prevent appellate courts from improperly resurrecting the presumed error rule.

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[5] There are early supreme court decisions suggesting that the presumed harm rule was not applied to improper argument points of error except under special circumstances. *See, e.g., Blum v. Simpson*, 17 S.W. 402, 403 (Tex. 1886)("Had the verdict not been against the great weight and preponderance of the evidence, we might not have disturbed it, for the presumption would have been that it was not influenced by these remarks of the appellee's counsel."). On the other hand, the court appears to have applied the presumed harm rule to a point of error asserting improper jury argument in *Chicago, R. I. & T. Ry. Co. v. Langston*, 50 S.W. 574 (Tex. 1899). And in *Ramirez v. Acker*, 138 S.W.2d 1054 (Tex. 1940), the court seems to have applied the presumed harm rule when it stated that an improper jury argument "requires reversal of the case; unless it clearly appears that no injury resulted to the other side." *Id.* at 1055.