

Rules, rhetoric and reptiles: the implications of 'Fitzpatrick v. Wendy's' for trial practice

By Christopher A. Duggan

In *Fitzpatrick v. Wendy's Old Fashioned Hamburgers, et al.*, SJC 12937, ___ N.E.3d ___ 2021 WL 2024453, the Supreme Judicial Court affirmed a trial judge's decision ordering a mistrial based on the plaintiff's "reptilian" closing argument.

The court also reaffirmed the longstanding Massachusetts practice that trial counsel need not interrupt an opponent's closing argument to lodge an objection as long as the objection is made immediately after the argument concludes.



Trial lawyers are expected to know and follow the rules of proper advocacy, and trial judges retain the authority to act when counsel violates those rules. The ultimate goal is a fair trial for all parties. Zealous advocacy does not justify a "win at any cost" approach to trial practice.

Case facts

Plaintiff Meaghan Fitzpatrick claimed that she suffered substantial dental and related injuries when she broke a tooth on a bone fragment in a piece of hamburger. She sued Wendy's and a meat supplier, JBS Souderton.

Fitzpatrick's counsel delivered a closing argument that, in many parts, closely mirrored language from the book "Reptile: The 2009 Manual of the Plaintiff's Revolution" by Donald Ball and Donald Keenan. At times, counsel appeared to repeat language from the book almost word for word.

The Reptile book encourages counsel in closing argument to scare jurors, denigrate corporate defendants, and ingratiate themselves with the jury rather than marshaling facts and delivering a closing argument based on the facts proven and fair inference from evidence introduced at trial. The Reptile strategy can be especially effective for the last lawyer to speak.

Massachusetts courts do not allow rebuttal in most cases, so an unfair argument not based in the evidence goes unanswered in the jury's ears. Improper "reptilian" arguments foist on defense counsel an unfair Hobson's choice: either interrupt and object, which serves only to highlight the wrongful remarks, and perhaps appear rude, or say nothing and thus appear to assent to a baseless charge. That is exactly why the rules prohibit them and why the Reptile book encourages its followers to use them.

Curative instructions, or worse, motions to strike, are rarely effective in the face of an

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improper closing. They, too, serve only to highlight improper comments and in fact compound, rather than cure, the damage done by a Reptile closing.

As the Roman poet Horace observed, a word once spoken cannot be recalled. Oral arguments are not word processing; there is no "delete" button.

After Fitzpatrick's summation, before the jury retired, defense counsel asked for a sidebar and moved for a mistrial on the grounds that the argument violated multiple well-established rules governing proper closing arguments pronounced through decades of Massachusetts precedent and collected in the Massachusetts Guide to Evidence, §1113(b)(3).

Examples included violating the "Golden Rule" (asking jurors to put themselves in the place of the plaintiff), inserting personal opinion, equating the defendants with all "big companies," making assertions outside of the trial evidence, and repeatedly relying on improper appeal to juror emotion and prejudice.

The trial judge, Heidi E. Brieger, expressed serious concern about the plaintiff's closing argument but opted to defer ruling on the mistrial motion until after the jury verdict. She reasoned that if the jury returned a defense verdict, the mistrial motion would be moot.

Her practical approach conserved judicial resources by not wasting the time and effort already invested in the trial by the litigants, jurors and the court if the defendants ultimately were not harmed by the improper argument.

That procedure was endorsed by the SJC in *Commonwealth v. Brangan*, 475 Mass. 143, 147-48 (2016), decided just months before the *Fitzpatrick* case was tried. While *Brangan* was a criminal case, the opinion drew no distinction between civil and criminal cases in this regard.

When the jury returned a large verdict for the plaintiff, Brieger revisited the mistrial motion. After briefing, argument and a review of the trial transcript, she allowed the defendants' motion for mistrial.

In the second trial, plaintiff's counsel eschewed the Reptile approach. The jury returned a plaintiff's verdict, which, after costs assessed against her, was less than \$6,000.

Appeals Court's ruling

Fitzpatrick appealed Brieger's allowance of the mistrial motion. In a lengthy opinion, the Appeals Court acknowledged that counsel's closing argument was improper in numerous respects. Nonetheless, the Appeals Court vacated the trial judge's mistrial order, holding that the judge had applied an incorrect legal standard by ruling on the mistrial motion after the verdict, instead of treating the motion as a motion for new trial under Mass. R. Civ. P. 59. *Fitzpatrick v. Wendy's Old Fashioned Hamburgers of New York, Inc., et al.*, 96 Mass. App. Ct. 410, 431-432 (2019).

SJC's decision

The SJC allowed Wendy's petition for further appellate review, vacated the Appeals Court's decision, and affirmed Brieger's mistrial declaration.

Like the Appeals Court, the SJC quoted several especially troublesome passages from counsel's summation, some of which had come almost verbatim from the Reptile book.

The SJC reaffirmed the power of trial judges to order mistrials when something occurs that is likely to deprive the parties of a fair trial. The court also held that a trial judge's

decision on a mistrial motion will be reviewed only for abuse of discretion.

The court held that Brieger did not abuse her discretion in *Fitzpatrick*, either by following the *Brangan* procedure or by granting a mistrial based on counsel's argument.

Analysis

The *Fitzpatrick* decision teaches several important lessons for all civil trial lawyers. Most importantly for our profession, lawyers are on notice that "reptilian" arguments are improper and will not be tolerated in Massachusetts.

The Superior Court, Appeals Court and SJC all pointed to specific phrases and arguments that violated Massachusetts trial rules. The SJC affirmed the Superior Court's ruling that declared a mistrial as a result of such an argument.

Trial lawyers are well advised to read all three opinions, which, together, highlight the types of closing arguments that are improper and justify a trial judge in ordering a mistrial despite the inconvenience and judicial waste that will result.

The opinion restates the court's commitment to the principle that all parties are entitled to a fair trial where, in the trial judge's words, the lawyers "stay within the lines." *Fitzpatrick v. Wendy's Old Fashioned Hamburgers of New York, Inc., et al.*, 2017 WL 6040174

Although the court's procedural rulings in *Fitzpatrick* are important to know and understand, the broader implications of the decision are, arguably, even more important to our profession.

(Mass. Super., July 7, 2017, p.7).

If there was ever a doubt, it is now clear that Golden Rule arguments, insertion of personal opinion, statements not based in the evidence, appeals to pure emotion, and attempts to play on juror bias and prejudice will not be tolerated in summation in Massachusetts.

A lawyer who resorts to such tactics in the future does so at his or her peril. All nine judges who reviewed the record in this case — from the Superior Court, Appeals Court and SJC — agreed that the Reptile arguments made at trial were improper. There is no reason to expect Massachusetts courts to retreat from this position.

The SJC did alter Massachusetts procedure in one notable respect. Going forward, a civil trial judge can no longer reserve ruling on a mistrial motion until after the verdict. The trial judge now must rule on mistrial motions when made or, at least before the jury returns a verdict.

That puts trial judges in the uncomfortable position of having to decide quickly, and perhaps without the benefit of briefing or review of the transcript, whether a closing argument that violated the rules was so improper that a mistrial is required to prevent the offending party from benefiting from an improper summation and protect the opponent from being victimized by an unfair and tainted verdict.

If the trial judge denies the mistrial motion, the remedy now left to the objecting party is a motion for new trial under Mass. R. Civ. P.

59, under which even a grossly improper argument is evaluated only in the context of the trial as a whole.

Some might view this as an opportunity rather than a warning. An unscrupulous lawyer could gamble that a blatantly improper summation might be worth a try because trial judges are, appropriately, reluctant to grant mistrials so close to the end, and new trial motions are rarely successful.

Thus, at first blush it might seem that the *Fitzpatrick* case actually encourages, or at least tempts, the last counsel to speak (almost always plaintiff's counsel, in civil cases) to engage in the very conduct condemned by all nine judges who examined the *Fitzpatrick* trial record.

Yet in light of the *Fitzpatrick* result, such a calculation is risky — and unprofessional. The trial judge, who was present while events unfolded, awarded a mistrial and the SJC upheld that decision. In so ruling, the court reaffirmed its confidence in trial judges to act in the face of improper argument and restated the standard that the trial judge's decision will not be reversed except for abuse of discretion.

Massachusetts trial lawyers now have clear direction that arguments such as those outlined in the Reptile book are not tolerated in the commonwealth and justify a mistrial.

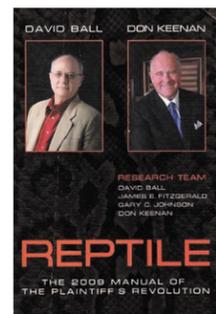
The *Fitzpatrick* opinion also should erase all doubt that an objection to an improper argument lodged promptly after the argument concludes is timely. Interruptions to closing argument, while not prohibited, are not required, either. A good advocate may find many sound reasons for waiting until his adversary has finished even a grossly improper argument before raising an objection without fearing that failure to interrupt might result in a waiver of the objection. In this regard, *Fitzpatrick* comports with longstanding Massachusetts precedent. *Commonwealth v. Johnson*, 374 Mass. 453, 457-58 (1978).

In a world awash with incivility in so many endeavors, civil trial lawyers may still be civil to each other and the court without being penalized for it.

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A mistrial motion based on an improper closing argument puts the trial judge in a difficult position; trial lawyers should not put judges in this spot in the first place.

Underlying the SJC's opinion is faith in the profession. Good advocacy does not require, or even countenance, a "win at any cost" philosophy. Courts are entitled to expect that trial counsel, as members of an honorable profession dedicated to a rule of law, know the rules and abide by them.



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REPTILE
THE 2009 MANUAL OF
THE PLAINTIFF'S REVOLUTION