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Closing Arguments: Enforcing Fairness in the Presentation of Damages

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Closing Arguments: Enforcing Fairness in the Presentation of Damages

Tune v. Synergy Gas Co.[1]

I. INTRODUCTION

The permissible scope of closing arguments before a jury is broad.[2] One limit, however, arises in plaintiff's final closing argument.[3] Of those jurisdictions that allow plaintiffs to split their argument, most either require that plaintiff's final closing argument cover only those matters raised by defendant in closing argument[4] or require that anything sufficiently raised by plaintiff's initial closing argument or defendant's closing argument is appropriate.[5]

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1. 883 S.W.2d 10 (Mo. 1994).

2. Zoerner v. Iwan, 619 N.E.2d 892, 901 (Ill. App. Ct. 1993); Lewis v. Bucyrus-Erie, Inc., 622 S.W.2d 920, 925 (Mo. 1981); Kubiszak v. Rinis Supermarket, 603 N.E.2d 308, 314 (Ohio Ct. App. 1991). *See also* WILFRED R. LORRY, A CIVIL ACTION: THE TRIAL 126 (1959); JACOB A. STEIN, CLOSING ARGUMENTS: THE ART AND THE LAW § 12, at 125 (1994).

While the discretion is broad, there are limits upon the scope of argument. JAMES R. DEVINE, MISSOURI CIVIL PRACTICE AND PROCEDURE § 32-21 (1986) (including as improperly arousing racial prejudice and resentment, derogatory comments about attorneys, appeals to passion, and wealth of party); STEIN, *supra* § 12; Russell, Inc. v. Trento, 445 So. 2d 390, 392 (Fla. Dist. Ct. App. 1984) (holding that arguments about quantifying a monetary value for a human life are inappropriate).

3. Closing arguments are typically structured so that the party with the burden of proof argues first. DEVINE, *supra* note 2, § 32-21; STEIN, *supra* note 2, § 5. The party with the burden of proof may be allowed to split the allotted time in order to argue first and last. *Id.* Typically, the party with the burden of proof is the plaintiff. Thus, throughout the text of this note, the party with the burden of proof will be referred to generically as the plaintiff.

Additionally, there is no uniform nomenclature to distinguish between plaintiff's two closing arguments. For consistency, this note has incorporated the terminology employed by the majority in *Tune* which refers to the plaintiff's first argument as the plaintiff's initial closing argument and the plaintiff's reply after the defendant's closing argument as the plaintiff's final closing argument. *Tune*, 883 S.W.2d at 17 n.1.

4. STEIN, *supra* note 2, § 5; LESLIE H. VOGEL, FINAL ARGUMENT 4-5 (1954).

5. J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 142 (1983). This rule, the expanded rebuttal rule, is utilized in Missouri. *Tune*, 883 S.W.2d at 17. *But cf.* Friedman v. United Rys. Co., 238 S.W. 1074 (Mo. 1922) (holding that the purpose of the final closing argument is rebuttal and if the defendant waives argument the plaintiff is not entitled to a final closing argument).

Offering the party with the burden of proof an opportunity to respond to any new arguments raised by the opposing party arose from notions of fairness.[6] In *Tune v. Synergy Gas Co.*,[7] the Missouri Supreme Court reaffirmed the purpose of the plaintiff's final closing argument.[8] The court held that it was an abuse of discretion to allow a plaintiff to withhold a request for a specific amount for total damages until the plaintiff's final closing argument, when the issue had not been addressed by the initial closing argument or the defendant's argument.[9] This Note reviews the *Tune* decision, and discusses the logic and fairness inherent in the court's decision.

II. FACTS AND HOLDING

Ronald Tune brought an action against Synergy Gas Company (hereinafter Synergy) for failure to warn.[10] Mr. Tune had a propane tank filled at the 71 Truck Stop, which was owned by Synergy.[11] Although a portable propane cylinder tank like the one used by the plaintiff should only be filled to eighty percent capacity, the attendant at the truckstop filled the tank to approximately one hundred percent.[12] Mr. Tune used the tank later in the day.[13] The propane, which had leaked out due to the overfilling and the heat of the day, ignited around Mr. Tune.[14] Mr. Tune suffered permanent injuries from the severe burns which covered over forty percent of his body.[15]

In the plaintiff's initial closing argument, counsel stated that the out-of-pocket expenses totalled $54,419.28.[16] Additionally, counsel emphasized that the jury would have to award a sum for pain and suffering, future medical expenses, and future lost earnings.[17] The defense counsel's only mention of damages in closing argument was "'Mr. Tune received bad injuries' and that

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6. FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS §§ 514-15 (1949); STEIN, *supra* note 2, §§ 5, 23.

7. 883 S.W.2d 10 (Mo. 1994).

8. *Id.* at 22.

9. *Id.*

10. *Id.* at 10. Although the initial pleadings enumerated four separate claims, only the failure to warn claim was pursued to fruition. *Id.* at 13.

11. *Id.* at 12.

12. *Id.* at 12-13.

13. *Id.* at 12.

14. *Id.*

15. *Id.* at 13.

16. *Id.* at 16.

17. *Id.* at 23.

he [defendant's counsel] did 'not want to downplay the injuries.'"[18] The plaintiff, in final closing argument, specifically requested the jury to award $3,368,825.29 in damages.[19] The defense objected claiming that total damages were not sufficiently raised in the plaintiff's initial closing argument or in the defendant's closing argument.[20] The plaintiff maintained that damages were specifically raised by giving a specific sum for out of pocket expenses.[21] The trial court overruled the objection.[22] The jury returned a verdict of $2,850,000 for the plaintiff.[23] The Missouri Court of Appeals, Southern District, affirmed.[24]

Upon transfer, a five-two majority[25] of the Missouri Supreme Court reversed and remanded on the damages issue.[26] It ruled that allowing a plaintiff to request a specific total damage amount for the first time in the plaintiff's final closing argument is an abuse of discretion and subject to a rebuttable presumption of prejudice.[27] If the plaintiff cannot overcome the presumption of prejudice, then it is reversible error.[28]

Judge Holstein, in dissent, argued that no error was shown because there was no evidence that the trial court abused its discretion or that the error was prejudicial.[29] The dissent suggested three factors that could aid a determination of whether an abuse of discretion occurred. He advocated an inquiry into whether there was (1) surprise by the defendant, (2) waiver by the defendant, and (3) an excessively large verdict.[30]

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18. *Id.* at 16.
19. *Id.*
20. *Id.* at 16-17.
21. *Id.* at 17.
22. *Id.*
23. *Id.* at 22.
24. Tune v. Synergy, No. 18273, 1993 WL 309055 (Mo. Ct. App. Aug. 17, 1993).
25. The majority opinion, written by Judge Thomas, was joined by Chief Justice Covington and Judges Price, Limbaugh and Robertson. The dissent, written by Judge Holstein, was joined by Judge Benton. *Tune*, 883 S.W.2d at 22-23.
26. *Id.* at 22.
27. *Id.* at 20.
28. *Id.* at 22.
29. *Id.* at 23 (Holstein, J., dissenting).
30. *Id.* at 26-27 (Holstein, J., dissenting).

III. LEGAL BACKGROUND

The rule precluding a plaintiff from raising new matters in final closing argument first arose in the Florida case of *Seaboard Air Line Railway v. Rentz*.[31] In *Seaboard*, the plaintiff failed to present any argument in his initial closing argument except a general assertion that the defendant was liable.[32] After the trial court overruled the defendant's objection that the plaintiff's argument was insufficient, the defendant presented his closing argument.[33] The plaintiff then presented a detailed final closing argument.[34] The defendant renewed his objection, requesting a chance to respond to the plaintiff's contentions, but was again overruled.[35]

Although holding that the record did not show prejudice to the defendant, the Florida Supreme Court expressed its disapproval of a plaintiff's "sandbagging."[36] The court noted that a rule essentially allowing a plaintiff to make a defendant argue first, without a chance to reply, was unfair.[37]

Although Missouri followed the logic inherent in *Seaboard Air Line Railway*, it was not until *Votrain v. Illinois Terminal R. Co.*[38] that the Missouri Supreme Court addressed the issue in the context of specifically mentioning a damages sum in final closing argument. In *Votrain*, the plaintiff discussed damages generally in his initial closing argument and concluded by stating "in my [final] closing argument I would like to offer whatever assistance I can in connection to you [regarding computing damages]."[39] In his closing argument, the defendant discussed liability and the extent of Mr. Votrain's injury.[40] The plaintiff in the final closing argument suggested that the jury award his client $85,000.[41] The trial court sustained the defendant's objection to raising the sum but denied a motion for a mistrial.[42] Later in the argument, the plaintiff again mentioned the sum of $85,000.[43] The court

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31. 54 So. 20, 23 (Fla. 1910); *Propriety and Effect of Permitting Counsel Having Burden of Issues in Civil Case to Argue New Matter or Points in His Closing Summation*, 93 A.L.R.2d 273 (1963) [hereinafter *Propriety*].

32. *Seaboard Air Line Ry.*, 54 So. at 23.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. 268 S.W.2d. 838 (Mo. 1954).

39. *Id.* at 843.

40. *Id.*

41. *Id.* at 844.

42. *Id.*

43. *Id.*

again had the reference stricken from the record and gave a curative instruction to the jury, but denied a motion for mistrial.[44] The defendant subsequently appealed the denial of a motion for mistrial.[45]

On appeal, the Missouri Supreme Court affirmed the denial of the motion for mistrial.[46] It explained that the purpose of allowing plaintiffs to split their arguments is to provide them with an opportunity to reply to points raised by the defense.[47] The court further noted that the final closing argument, "by better procedure and practice, should be in the form of rebuttal."[48] Therefore, the court held that raising a specific amount of damages, despite having raised damages generally, was error if not specifically raised in the initial argument.[49] The court affirmed the trial court, however, finding the trial court's remedy of the error did not amount to abuse of discretion.[50]

In *Shaw v. Terminal Railroad Ass'n*,[51] the Missouri Supreme Court again considered the proper procedure for raising damages in final closing arguments. The plaintiff, in his initial closing argument, did not mention damages[52] except to state he "had some other points" to develop in his final argument.[53] The defense interjected that he wanted the plaintiff put on notice that an objection would be raised if the plaintiff did not mention damages until the final closing argument.[54] The Court refused to caution the plaintiff.[55] The defendant did not mention damages in his closing, but the plaintiff in his final closing argument asked the jury for $25,000.[56]

The court ruled that it was "unfair and improper" for the plaintiff in his final closing argument to raise damages for the first time after being put on

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* For a discussion of the extent of the rebuttal rule in Missouri, see *Tune*, 883 S.W.2d at 18 nn.3-4.

49. *Seaboard Air Line Ry.*, 54 So. at 23.

50. *Id.* at 844. The rule giving trial courts broad discretion is common. *See, e.g.*, Williston v. Ard, 611 So. 2d 274, 280 (Ala. 1992); Taluzek v. Illinois Central Gulf R.R., 626 N.E.2d 1367, 1378 (Ill. App. Ct. 1993); Guidry v. Boston Old Colony Ins. Co., 540 So. 2d 543, 546 (La. Ct. App. 1989); Worthington City Schs. v. ABCO Insulation, 616 N.E.2d 550, 557 (Ohio Ct. App. 1992).

51. 344 S.W.2d. 32 (Mo. 1961).

52. The court regarded mentions by plaintiff of being hit or getting hurt as purely incidental and not sufficient to raise damages. *Id.* at 36.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

notice by the defendant.[57] The court noted that a contrary decision would be antithetical to the purpose of allowing the party with the burden of proof to split the argument.[58] However, the court affirmed the decision because the defendant did not renew his motion in the final closing argument.[59]

Following *Shaw*, Missouri courts avoided defining what constituted proper argument in the plaintiff's initial closing argument by focusing upon waiver by the defense.[60] The general rule to emerge from this line of cases was that if a defendant raised an issue generally, the plaintiff was allowed to address the issue in his final closing argument.[61]

Finally, in *Hart v. Forbes*[62] the Western District Court of Appeals addressed what constituted proper damages argument in the initial closing argument. In *Hart*, the trial court had ruled that where a plaintiff had raised a specific sum in initial closing argument, but not the total amount, and the defendant had not waived the damages issue,[63] the trial court's disallowance of the argument as improper was not an abuse of discretion.[64]

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57. *Id.*

58. *Id.*

59. *Id.* at 37.

60. Sullivan v. Hanley, 347 S.W.2d 710, 716 (Mo. Ct. App. 1961); Barrett v. Morris, 495 S.W.2d 100, 105 (Mo. Ct. App. 1973); Weinbauer v. Berberich, 610 S.W.2d 674, 678 (Mo. Ct. App. 1980).

61. *Sullivan*, 347 S.W.2d at 714-16 (noting that comment in the defendant's summation that the plaintiff had only been seen 13 times by doctor allowed the plaintiff to address damages in the final closing argument); *Barrett*, 495 S.W.2d at 105; *Weinbauer*, 610 S.W.2d at 678.

62. 633 S.W.2d 90 (Mo. Ct. App. 1982)

63. *Id.* at 96. The court noted that the defendant had not mentioned damages by stating:

> Well, I want to talk to you just a minute about damages in this case. I don't think they will be necessary for you to get to the issue of damages . . . [if] nine or more of you agree that it was not Cathy Forbes' fault . . . then there's no reason to go any further.

Id. at 94.

64. *Id.* at 96. For a similar result see Heddendorf v. Joyce, 178 So. 2d 126, 128 (Fla. Dist. Ct. App. 1965) which characterized plaintiff's mention of a specific amount for out-of-pocket expenses, while withholding the total specific sum for the final closing argument, as a "'bikini'—of the damages he was asking the jury to return."

IV. INSTANT DECISION

A. Majority Opinion

In *Tune*,[65] the Missouri Supreme Court held that allowing a plaintiff to raise a specific amount for total damages in the final closing argument, when not raised in the initial closing argument or in the defendant's closing argument, is error.[66] The trial court's allowance of the argument after the defendant's proper objection was held to constitute an abuse of discretion by the trial court.[67] After a general review of the expanded rebuttal rule in Missouri,[68] the court noted that proper argument is determined by:

> whether the argument plaintiff's counsel made in the final portion of his closing argument was closely enough related to the damage argument made in the initial portion of his closing argument that it constituted proper argument.[69]

The court further discussed the scope of discretion permitted by the trial judge in determining what comprises proper argument.[70] While acknowledging that the trial court ordinarily has broad discretion in regulating the scope of closing argument, the court found this discretion limited when dealing with damages.[71] Particularly, the court traced the rule to language in *Goldstein v. Fendelman*.[72] *Goldstein* stated "we consider it unfair and improper to permit plaintiff's counsel to do it [ask for a specific amount of damages] for the first time in his closing argument."[73] The court concluded that fundamental fairness and ease of application supported the rule.[74]

Turning to the issue of prejudice, the court analyzed two lines of cases addressing when error is prejudicial.[75] One line of cases uses excessiveness of the verdict as the test of prejudice.[76] The second line, embodied in *Lester*

65. 883 S.W.2d 10 (Mo. 1994).
66. *Id.* at 20.
67. *Id.*
68. *See supra* note 5.
69. *Tune*, 883 S.W.2d at 18.
70. *Id.* at 18-19.
71. *Id.* at 19.
72. 336 S.W.2d 661, 667 (Mo. 1960).
73. *Tune*, 883 S.W.2d at 19 (citing *Goldstein*) (brackets added by court).
74. *Id.*
75. *Id.* at 20.
76. *Id.*

v. Sayles,[77] presumed prejudice by the party who committed error concerning damages.[78]

The court next examined the effect of the respective standards under each case.[79] The effect of an excessive verdict standard was found to presume that no prejudice results from error, while the rule of *Lester* presumes all error had a dilatory effect.[80] The court stated that improperly arguing damages in closing argument was most likely to have a prejudicial effect.[81] Consequently, the court reasoned that the error should be presumed prejudicial[82] and the case remanded to the trial court for a new trial on damages.[83]

B. Dissenting Opinion

Judge Holstein began the dissent by discussing the trial court's broad discretion in adjudicating the proper scope of closing arguments.[84] The dissent opined that *Shaw*,[85] relied upon by the majority for the proposition that the trial court is limited in deciding the proper scope in arguing damages, could be read to hold that only general and special damages must be raised in the initial argument, not that all special damages must be addressed in order to later raise a total damages calculation.[86] Applying that reading to the instant case led to the conclusion that the argument was proper.[87]

The dissent suggested that the determination of whether the court abused its discretion in allowing an argument should be a case by case determination.[88] The dissent stated that a nonexhaustive list of factors to

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77. 850 S.W.2d 858 (Mo. 1993).

78. *Tune*, 883 S.W.2d at 21.

79. *Id.*

80. *Id. Accord* Bell v. Blackwell, 283 S.W.2d 765, 766 (Tex. Ct. App. 1926).

81. *Tune*, 883 S.W.2d at 21. This assumption was also noted to be consistent with the rules of evidence, which typically require the party who committed the error to show that the error did not have a prejudicial effect. *Id.* at 22.

82. Not all presentation of new matters will constitute prejudice. For example, it is in the trial court's discretion to allow argument to new matters where the issue was inadvertently omitted by the plaintiff. Shaw v. Terminal R.R. Ass'n, 344 S.W.2d 32, 36-37 (Mo. 1961); Brown v. Rogers, 313 A.2d 547, 553 (Md. Ct. App. 1974); Jordan v. Taylor, 161 S.E.2d 790, 795-96 (Va. 1968). *See also Propriety, supra* note 31, at 274.

83. *Tune*, 883 S.W.2d at 22.

84. *Id.* at 23 (Holstein, J., dissenting).

85. *See supra* notes 51-59 and accompanying text.

86. *Tune*, 883 S.W.2d at 24 (Holstein, J., dissenting).

87. *Id.*

88. *Id.* at 26 (Holstein, J., dissenting).

consider in determining whether an abuse occurred would include whether "based upon the entire record . . . the plaintiff may be said to have sandbagged," waiver by defendant[89] and whether improper argument "had the effect of producing an excessively large verdict."[90]

The dissent further criticized the majority's decision to presume prejudice when dealing with an improper damages argument in summation.[91] The dissent claimed that the decision overruled a long line of cases establishing excessiveness of verdict as the standard.[92] The dissent further stated that damages should not be presumed because MAI 2.01 adequately informs the jury that closing "argument is baloney."[93]

Finally, the dissent criticized the rule relied upon by the majority as being technical and rigid.[94] The dissent noted that although useful in the abstract, rigid rules often prove inequitable in administration. Therefore, the reviewing court should make a case by case determination.[95]

V. COMMENT

Given the origins of the procedure for splitting closing arguments in notions of fairness,[96] a rule contrary to the court's decision in *Tune* would have led to a perversion of the expanded rebuttal rules that have developed in Missouri.[97] By allowing the plaintiff both the psychological advantage of going first and last,[98] and the opportunity to interject new matters in the final closing argument, Missouri courts would deprive the defendant of the

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89. The dissent would include as a waiver the failure of a defendant to give full demand and notice or the failure to seek a less drastic relief. *Id.* at 27 (Holstein, J., dissenting).

90. *Id.* at 26 (Holstein, J., dissenting).

91. *Id.*

92. *Id.* at 27 (Holstein, J., dissenting). In particular, the dissent felt that *Lester* only stood for the management of jury deliberations and not for arguments. *Id.* at 29 (Holstein, J., dissenting).

93. *Id.* at 28 (Holstein, J., dissenting).

94. *Id.* at 29 (Holstein, J., dissenting).

95. *Id.*

96. *See supra* note 6 and accompanying text.

97. For example, those jurisdictions which have maintained a strict rebuttal rule would not allow a plaintiff to have a final closing argument in those cases where the defendant waives his closing argument. VOGEL, *supra* note 4, at 13. While Missouri has expanded the scope of the argument by adopting the expanded rule, allowing any new argument would strip any remaining vestiges of the traditional rule. *See supra* notes 4-5 and accompanying text.

98. BUSCH, *supra* note 6, § 495; THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 296 (3d ed. 1992); VOGEL, *supra* note 4, at 1.

fundamental fairness which the expanded rebuttal rule envisioned.[99] The defendant would be deprived of a fair opportunity to respond.[100]

Clearly, reliance upon a blanket rule requiring surprise would shift the balance originally established by the rules, giving an advantage to the plaintiff which the courts believed imprudent when reversed.[101] The rationale for prohibiting new matters derives naturally from the justification for splitting the argument.[102] Neither party should be put in the position of having to attack points and arguments which are not yet made.[103]

While the foregoing analysis may explain the rationale behind prohibiting new matters to be raised in final closing argument, initially it appears insufficient to explain why total damages must be raised with specificity in initial closing arguments.[104] The criticism would be appropriate if the issue is critiqued in relative terms of generality and specificity. While generality and specificity analysis would be appropriate for most issues discussed under the new matter rules, when analyzing damages arguments, blind adherence to this rule would cause one to miss the trees for the cliché. When analyzed in terms of generality, the inquiry would be: "Was the argument raised generally in the initial argument?" If the answer is affirmative, then the plaintiff would be justified in discussing the issue with greater specificity in the final closing

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99. STEIN, *supra* note 2, §§ 5, 23.

100. Admittedly, the definition of fair is a nebulous concept. Some would respond, as did the dissent, that a fair rebuttal is possible in closing arguments if there is no showing of surprise based upon the entire record. *Tune*, 883 S.W.2d at 26 (Holstein, J., dissenting). That argument mistakes the point of reference. Notice is not determined based upon evidence admitted in trial but in the initial argument. The dissent's reasoning would otherwise lead to the conclusion that there is no need to split the argument portion at all since the scope of closing arguments is limited to the facts and inferences fairly derived from the evidence presented. DEVINE, *supra* note 2, § 32-21; LORRY, *supra* note 2, at 126. Thus a plaintiff would have no legitimate right to split the argument.

101. *See supra* note 61 and accompanying text.

102. *See* Shaw v. Terminal R.R. Ass'n, 334 S.W.2d 32, 36 (Mo. 1961).

103. *Id.*

104. For example, the dissent in *Tune* opined:

> Shaw stands for the proposition that in the second portion of closing argument, a plaintiff can argue anything that plaintiff argued in the initial part of closing argument and may rebut anything that the defendant argued in defendant's portion of the closing argument. Applying the principle here, plaintiff argued both special and general damages during the initial argument, specifically mentioning plaintiff's claim for pain and suffering . . . . Thus the *Shaw* rule was not violated.

Tune, 883 S.W.2d at 24 (Holstein, J. dissenting).

argument.[105] Such an understanding of the rule could easily result from broad language which has been loosely employed by the court.[106] However, when the test is couched in fairness the inquiry becomes: "Has the subject been raised specifically enough to allow a response?" This fairness test would lead to a more consistent result.[107]

In many instances, the inquiry into the appropriateness of the argument using either test would yield the correct result. If a plaintiff raises the extent of damages generally,[108] for instance, the proof that the defendant would wish to emphasize will change little from if a detailed discussion of damages was initially made by the plaintiff.[109] The adverse party will tend to remind the jury of the same evidence which impeaches the nature or extent of the plaintiff's damages.

However, the flaw of generality and specificity analysis is apparent when considering damages. If the inquiry is, "Was the issue raised generally in the initial argument?," the answer is still affirmative.[110] However, if the inquiry is, "Has the subject been raised specifically enough in the initial closing

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105. *See supra* note 61 and accompanying text.

106. *See, e.g.*, Midwest Library Serv., Inc. v. Structural Sys., Inc., 566 S.W.2d 249, 251 (Mo. Ct. App. 1978) ("A plaintiff normally may not, in the second part of his closing argument, introduce an issue which he has not addressed in the opening part.").

107. Heddendorf v. Joyce, 178 So. 2d 126, 129 (Fla. Ct. App. 1965) ("Our concern here is founded upon the nature, function and purpose of closing argument. A trial is not a game to see by what legal stratagem one may procure an advantage over the other.").

While courts have made such altruistic declarations, absent judicial enforcement, attorneys do make strategic decisions based upon how far they perceive the rules may be bent. *See* BUSCH, *supra* note 6, § 514.

108. *See* MAUET, *supra* note 98, at 293 (noting that a common strategy is to raise a specific sum for damages in the initial closing argument and then to discuss the details of arriving at that sum in the final closing argument).

109. For example, in the instance of Mr. Tune, if the plaintiff only made tangential comment upon the burns or mental suffering, the defense is not likely to raise the subject of the amount of pain that was suffered. Likewise, if this was a case which involved a broken leg and subsequent partial loss of function in the leg, the defense is likely to discuss the relative merits of the degree of damage regardless of the specificity with which the disability is addressed by plaintiffs in their initial closing argument. The damages context differs in this regard because the amount of damages requested and the computation are often not revealed until the closing argument. Comments such as, "I would not take three million dollars to go through this again" would not be sufficient to allow defendant a fair chance to anticipate and reply.

110. *Tune*, 883 S.W.2d at 23 (Holstein, J., dissenting).

argument to allow a response?," the answer is negative.[111] The second result is the correct result because the defendant is put in the virtually impossible position of arguing against a specific amount of damages that has never been raised.[112]

Since allowing a specific total sum of damages to be raised for the first time in the final closing argument should always constitute error, a bright line rule making this an abuse of discretion makes imminent sense.[113] When viewed with the fundamental fairness function of closing arguments in mind, there can be only one result absent an opportunity for the defendant to reply.[114] Therefore, an abuse of discretion analysis is futile because determining whether the issue is raised does not require the broad discretion granted the court in other areas.[115] Furthermore, the closing argument performs a special function in the trial. Its function and importance stem from the fact that this is the one time that all the evidence is integrated and presented to the jury for consideration in toto.[116] Thus, the need for persuasiveness exhibited by the argument demands strict enforcement.

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111. *See supra* note 73 and accompnaying text; *Heddendorf*, 178 So. 2d at 130 ("To permit the plaintiff for the first time to trap the defendant by briefly mentioning what he plans to argue and then bear down and explore a new method for the edification of the jury in computing damages at a point when the defendant has no opportunity to rebut is not only unfair to the defendant but is prejudicial."); LAWRENCE J. SMITH, ART OF ADVOCACY: SUMMATION 2-7 (1978). *See* Cortez v. Macias, 110 Cal. App. 3d 640, 658 (Cal. Ct. App. 1980); Indianapolis R.R. v. Boyd, 53 N.E.2d 762 (Ind. 1944).

112. *See Tune*, 883 S.W.2d at 20. *See also* JOHN S. ALLEE, PRODUCT LIABILITY § 15.04[4][a] (1991) (stating that even if a plaintiff raises a specific sum for damages in the closing argument, the defense should not mention a specific sum because of the danger the jury will split the difference or interpret raising the sum as a tacit admission of liability); BUSCH, *supra* note 6, § 511 (warning that a defendant's mention of damages runs the risk of being interpreted as a tacit admission).

113. *Heddendorf*, 178 So.2d at 130. Failure to utilize a bright line rule leads to strategic sandbagging in the initial closing argument based upon the attorney's perception of the likelihood that the trial judge will enforce the rules. One commentator suggested such a strategic assessment cautioning that "[k]nowing how strictly the court will sustain scope objections to far-ranging rebuttal arguments is of course critical here." MAUET, *supra* note 98, at 278.

114. *See supra* notes 74, 110 and accompanying text.

115. The trial court would, however, have discretion in the appropriate remedy. *See* Votrain v. Illinois Terminal R. Co., 268 S.W.2d 838, 844 (Mo. 1954). *See also supra* note 71 and accompanying text.

116. BUSCH, *supra* note 6, § 493 (1949) (noting that the "value of [closing] argument as an instrument of persuasion can not be overestimated").

In conclusion, the rule established in *Tune* is administrable and enforceable. Furthermore, with this decision, the Missouri Supreme Court reaffirmed the notion of fairness upon which closing arguments rest.

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