RENDERED: JULY 19, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000891-MR

STEPHEN C. SHY, D.O. — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 08-CI-00744

DENNIS WALKER; DENNIS WALKER,
AS CO-ADMINISTRATOR, OF THE
ESTATE OF CATHERINE ELAINE
GEORGE WALKER, DECEASED; AND
TED GEORGE, AS CO-ADMINISTRATOR,
OF THE ESTATE OF CATHERINE ELAINE
GEORGE WALKER, DECEASED — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: In this medical malpractice action a jury returned a 9 to 3 verdict against Stephen C. Shy, D.O., in favor of Dennis Walker, individually and

as Co-Administrator of the Estate of Catherine Elaine George Walker, deceased, and Ted George, as Co-Administrator of the Estate of Catherine Elaine George Walker, deceased (collectively referred to as the Estate). Damages were awarded in the amount of $1,300,000 and fault apportioned 70% to Dr. Shy and 30% to Dr. Anna Liu.[1] Dr. Shy contends he was prejudiced when the Estate's counsel urged the jury to send a message to the medical community and make their community safe and entitled to a mistrial or new trial. The Estate counters that the issue was not properly preserved for review and, if it was, there was no reversible error. After review of the record, we agree that even if improper, counsel's comments were not so prejudicial that the trial court erred when it denied Dr. Shy's motions.

On June 3, 2007, at approximately 1:18 a.m., Catherine Elaine George Walker arrived at the Highlands Regional Medical Center emergency room in Floyd County where she was examined by Dr. Shy. Catherine remained in the emergency room for approximately three hours during which Dr. Shy ordered a variety of tests and determined that she was not suffering a heart attack. She was admitted to the hospital for additional testing.

At approximately 4:52 a.m., Dr. Shy transferred Catherine's care to Dr. Liu, an osteopathic medicine resident from the University of Pikeville, College of Osteopathic Medicine, and she remained under Dr. Liu's care for the duration of Dr. Liu's shift. During the time Catherine was under her care, Dr. Liu did not make a diagnosis.

[1] Dr. Liu and the Estate settled the claims against her prior to trial.

At approximately 7:30 a.m., another osteopathic medicine resident assumed care of Catherine. He quickly concluded that Catherine was suffering from a condition that could not be appropriately addressed at Highlands Regional and made the decision to transfer Catherine to King's Daughters Medical Center in Ashland.

At approximately 10:20 a.m., Catherine arrived at King's Daughters and emergency exploratory surgery was planned. However, Catherine went into respiratory arrest and died. An autopsy performed revealed that Catherine sustained an acute aortic dissection from the base of the aortic valve to the left femoral artery.

The present action was filed alleging medical negligence and proceeded to trial. Because the substance or admissibility of the expert testimony presented by the parties is not an issue in this appeal, we briefly summarize its content.

The Estate presented expert testimony that Dr. Shy deviated from the required standard of care by failing to exclude a possible acute dissection diagnosis. Further expert testimony was presented that if Catherine was properly diagnosed and treated in a timely manner, she would have had over a 90% chance of survival and a relatively normal life. Dr. Shy defended on the basis that because Catherine did not complain of any sensation of a ripping or tearing pain, he should not have suspected an aortic dissection. He presented expert testimony that Catherine's symptoms were atypical of an aortic dissection and Dr. Shy acted

reasonably and appropriately in his care and treatment of Catherine. Further, Dr. Shy presented expert testimony that Catherine would have had less than a 50% chance of survival if she had been earlier diagnosed.

The focus of this appeal is on an order in limine prohibiting the Estate's counsel from suggesting in any way "that the jurors should 'send a message' or 'make the community safe' by rendering a verdict against [Dr. Shy]" and the following remarks made by the Estate's counsel during closing argument:

> …you get to decide what the standard of care for an emergency room medicine specialist here in Floyd County is. You've heard two competing, almost diametrically 180 degrees opposed visions of what the standard of care is. One vision of the standard of care would permit an ER doctor, like Dr. Shy, to not consider a deadly disease because of an atypical presentation – which would put virtually everyone in this community in danger because as Dr. Heuer told you and as Dr. Eckerline told you, nobody presents with a typical presentation. Everyone presents atypically. And what they are trying to tell you is this – it's okay because there wasn't that one symptom, that sharp, tearing pain, it's okay for Dr. Shy and it's okay for an emergency room doctor to not even consider it. And that's not just for Dr. Shy and the aortic dissection. That would extend to every ER doc here in Floyd County with any atypical presentation of what turns out to be a deadly disease.

Dr. Shy did not object to counsel's statements during closing argument and did not move for a mistrial until its conclusion, and after the jury was excused from the courtroom to begin deliberation. At that point, Dr. Shy moved for a mistrial contending that counsel's argument suggested to the jury that if they did not render a verdict against Dr. Shy, they would be endangering the residents of Floyd County and they should send a message to the Floyd County medical community to

consider every possible diagnosis regardless of the patient's symptoms. He argued that counsel's statements were improper under Kentucky law and violated an order in limine issued by the trial court prohibiting any such references. Dr. Shy did not request a curative admonition.

The trial court deferred ruling on the motion for a mistrial pending the jury's verdict. After the verdict was returned against him, Dr. Shy filed a motion for a new trial again arguing that the Estate's closing argument was improper and prejudicial. After considering the parties' memorandums, oral arguments, and a review of the trial record, the trial court ruled that the Estate's counsel did not violate the in limine order and denied the motion. The sole issue presented by Dr. Shy is whether the trial court properly denied his motions for a mistrial and a new trial.

As a threshold issue, the Estate submits that review is precluded because Dr. Shy did not make a contemporaneous objection when the alleged improper comments were made. The Estate further maintains that Dr. Shy's failure to request a proper admonishment waived any error. Finally, even if the comments were improper, it contends they were in response to Dr. Shy's closing argument and that no manifest injustice resulted from the denial of Dr. Shy's motions for a mistrial and a new trial.

Dr. Shy argues the error was preserved by his motion in limine. Further, he contends his motion for a mistrial immediately after the jury was excused from the courtroom to deliberate was sufficiently contemporaneous to preserve the issue for

review and an admonition would not have cured the prejudice caused by counsel's improper remarks. Finally, he contends that even if the error was not preserved by a proper objection, this Court may review the error under the palpable error standard. Kentucky Rules of Civil Procedure (CR) 61.02. He points out that the verdict was less than unanimous and suggests that during *voir dire*, one juror expressed dissatisfaction with the medical care available in Floyd County and was predisposed to prejudice caused by opposing counsel's statements.[2]

Initially, we consider whether Dr. Shy properly preserved the issue presented. We begin our discussion with the often recited rule that to preserve error for appeal with regard to a claimed improper argument, it is necessary to make a contemporaneous objection to the alleged improper remark. *Polk v. Greer*, 222 S.W.3d 263, 265 (Ky.App. 2007). However, in light of the adoption of Kentucky Rules of Evidence (KRE) 103(d), continued adherence to the contemporaneous objection rule has been questioned and, therefore, extensively discussed in *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005).

KRE 103(d) provides:

> Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the

[2] Although Dr. Shy now apparently has concern regarding this ability of this particular juror to render a fair and impartial verdict, he does not cite the record where he used a preemptory challenge to this juror or argue on appeal that she should have been stricken.

> court from reconsidering at trial any ruling made on a motion in limine.

Discussing the evidentiary rule, our Supreme Court emphasized that a motion in limine "is primarily a pretrial tool aimed, in essence, at 'heading off at the pass' the introduction of evidence." It will not preserve a particular objection for appellate review when the motion was directed only at a general area of inquiry and not a particular evidentiary fact. *Lanham,* 171 S.W.3d at 21-22 (quoting *Metcalf v. Commonwealth,* 158 S.W.3d 740, 743 (Ky. 2005)). After extensive review of the effect of KRE 103(d) on Kentucky's long-standing contemporaneous objection rule, the Court clarified that the rule was not repealed by KRE 103(d). A motion in limine will preserve an error absent a contemporaneous objection only when the motion (1) specifically identifies the evidence to which the party objects; (2) provides a specific reason why the party believes the evidence should not be admitted; and (3) is resolved by an order of the trial court. *Id*.

Dr. Shy's motion in limine pertained to arguments by counsel and not specific evidence. The motion did not provide the specificity required by KRE 103(d) but generally sought to prohibit counsel from suggesting that the jurors send a message or make the community safer by rendering a verdict against Dr. Shy. We conclude that Dr. Shy's motion did not preserve for review the issue regarding the Estate's counsel's alleged improper argument.

In a related argument, Dr. Shy contends that counsel's closing argument violated the order in limine and, therefore, a contemporaneous objection was not

required. Although an unpublished decision, our Supreme Court's decision in *Long v. Commonwealth*, 2011 WL 6826377 (Ky. 2011), compels this Court to reject his contention.[3] The Court logically explained:

> [A] party obviously may not obtain a successful pretrial ruling, acquiesce to the breach of the ruling at trial by failing to object to the violation, and then blithely claim preservation based upon the pretrial ruling. KRE 103(d) does not excuse a party from its duty to
>
> contemporaneously bring errors to the trial court's attention in the event the pretrial ruling is violated.

Id. at 3, n.3.

Thus, our Supreme Court has unequivocally stated that the contemporaneous objection rule remains viable. However, contemporaneous does not require an instant objection. In *Polk*, this Court focused on the purpose of the rule and concluded an objection after opposing counsel's argument met the contemporaneous objection requirement where the "delay in no way impinged upon the trial court's opportunity to attempt curative measures." *Polk,* 222 S.W.3d at 265. The objection in *Polk* was made within seconds after the conclusion of opposing counsel's argument. Not only did it preserve the issue presented for review, but the timing of the objection avoided the problems posed by strict adherence to the contemporaneous objection rule. Interruptions during opposing counsel's argument to the jury are often disruptive and frequent objections may be used as a trial strategy to interrupt the flow of counsel's argument and its

[3] Kentucky Rules of Civil Procedure 76.28(4)(c) permits this Court to cite an unpublished case where there is no published authority addressing the issue presented.

persuasiveness. Indeed, it is not uncommon for a trial court to caution counsel against objections during argument.

In this case, Dr. Shy waited until closing arguments had concluded and after the jury had been excused to make his objection known. Yet, he points out that the delay did not deprive the trial court the opportunity to declare a mistrial before the jury returned its verdict and argues, therefore, his objection was contemporaneous under *Polk*. Although his contention is intriguing, further elaboration on the preservation point is unnecessary. Our decision does not require that we delve further into discussion of the preservation issue. Whether deemed preserved or unpreserved, our standard of review in this case is similar.

In *Shabazz v. Commonwealth*, 153 S.W.3d 806, 810-811 (Ky. 2005), the Court emphasized that a trial court's decision to deny a motion for a mistrial will be reversed only if a manifest necessity exists for a new trial. It explained:

> The purpose of this standard is to reserve the extraordinary relief of declaring a mistrial for situations in which an error has been committed that is of such magnitude that the litigant would be denied a fair and impartial jury absent a new trial. It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. In accordance with this standard, appellate courts review a trial court's refusal to grant a mistrial for an abuse of discretion.

(Internal footnotes and quotations omitted). Thus, a denial of a timely motion for a mistrial must be affirmed unless it was "arbitrary, unreasonable, unfair, or

unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Likewise, our only function in reviewing the denial of a motion for new trial is to decide whether the trial court abused its discretion. *McVey v. Berman*, 836 S.W.2d 445, 448 (Ky.App. 1992). "Thus, we will not reverse the decision of a trial court unless that decision is clearly erroneous." *Id*.

When an error is unpreserved, the standard of review is similar. A party may invoke CR 61.02, which permits review under the palpable error rule. "[T]he task of the appellate court in review under CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court." *Childers Oil Co., Inc. v. Adkins,* 256 S.W.3d 19, 27 (Ky. 2008). An error is palpable only when it is "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level,* 957 S.W.2d 218, 222 (Ky. 1997). A palpable error analysis requires a determination whether there is a substantial possibility that the result would have been different without the error. *Hibdon v. Hibdon,* 247 S.W.3d 915, 918 (Ky.App. 2007).

Under the possible applicable standards of review, Dr. Shy's burden is stringent: He must demonstrate that opposing counsel's alleged improper argument resulted in a manifest injustice. We conclude that even if improper, counsel's arguments did not require the trial court to declare a mistrial or grant a new trial.

It is well established that attorneys are allowed wide latitude during closing argument to comment upon and make reasonable inferences from the evidence. *Maxie v. Commonwealth,* 82 S.W.3d 860, 865 (Ky. 2002). In considering alleged improper arguments, the reviewing Court must determine "whether the probability of real prejudice is sufficient to warrant a reversal. In making this determination, each case must be judged on its unique facts. An isolated instance of improper argument, for example, is seldom deemed prejudicial." *Rockwell Intern. Corp. v. Wilhite,* 143 S.W.3d 604, 631 (Ky.App. 2003). Applying *Rockwell*, we consider Dr. Shy's specific allegation of error.

There is no bright line rule established by Kentucky courts prohibiting send a message arguments or appeals to the jury's loyalty to their community. However, such remarks have been viewed with disfavor when they tend "to cajole or coerce a jury to reach a verdict that would meet the public favor" or suggest that a jury return a verdict on grounds not reasonably inferred from the evidence. *Commonwealth v. Mitchell,* 165 S.W.3d 129, 132 (Ky. 2005). However, even where counsel used the "magic words," a reviewing court is hesitant to reverse a trial court's decision to deny a mistrial or a new trial.

In *Mitchell*, the Commonwealth clearly made a send the message argument when it stated during closing argument in a narcotics trafficking trial that:

> [I]f we are ever to make a dent in a terrible drug problem we've got, prescription drugs with Oxycontin, it's time to send a message to this defendant and to this community that we're going to punish drug dealers for doing what they're doing. It's time we send a message.

Id. at 131. Nevertheless, the Court held that in the context of counsel's entire argument the error was harmless. *Id*. at 132. We reach the same conclusion.

Under Kentucky bare bones approach to jury instructions, in a medical malpractice case, it is counsel's job "to flesh out and explain any violation of the appropriate standard of care, and to show that the violation was the cause of any resulting injury." *Hamby v. University of Kentucky Medical Center*, 844 S.W.2d 431, 434 (Ky.App. 1992). However, that standard is not a community standard of care. *Blair v. Eblen*, 461 S.W.2d 370, 373 (Ky. 1970). The proper standard of care is whether Dr. Shy used "that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances." *Id*. Thus, standing alone, counsel's comments arguably did not accurately reflect the evidence or the jury instructions.

However, the Estate's comments must be viewed in the context of its closing argument and that made by Dr. Shy. In closing, Dr. Shy's counsel told the jury to "be proud to have a facility like Highlands Regional." Counsel directly encouraged that jury to consider the effect of a verdict against Dr. Shy on the Floyd County community when he stated: "I mean think of what it would be like without that facility[.]" In concluding, Dr. Shy's counsel asked the jury to return a verdict in Dr. Shy's favor and "[t]ell him you appreciate his service." The Estate

argues that its comments were well within the wide latitude given during closing argument and in response to Dr. Shy's counsel's comments.

In *Mitchell*, the Court held that no reversible error occurred because defense counsel opened the door for the Commonwealth to make its send a message argument. *Mitchell*, 165 S.W.3d at 132. In this case, Dr. Shy's counsel first appealed to the jury's loyalty to their community by suggesting that a verdict against Dr. Shy could result in a decrease in community medical care. When read in the entire context of closing arguments, we cannot say that the Estate's counsel's comments made in the course of a one-hour closing caused a manifest injustice requiring reversal.

Finally, we cannot overlook that Dr. Shy did not request a curative admonition. Although a party may make a strategic choice not to request an admonition for fear of further emphasizing the alleged improper comment, it is the rule in this Commonwealth that an admonition to the jury to disregard an improper argument "cures the error unless it appears the argument was so prejudicial, under the circumstances of the case, that an admonition could not cure it." *Price v. Commonwealth,* 59 S.W.3d 878, 881 (Ky. 2001). "[A]bsent flagrant misconduct, an error by opposing counsel will warrant relief only if an admonition was requested and either denied or inadequately provided, and then only if the error was not otherwise harmless." *Peacher v. Commonwealth*, 391 S.W.3d 821, 850 (Ky. 2013). We echo the words written in *Oghia v. Hollan*, 363 S.W.3d 30, 38 (Ky.App. 2012): If Dr. Shy believed the Estate's counsel's comments were

"overly prejudicial, he should have asked the court to admonish the jury, a curative step that would have been sufficient to address any harm." There was no flagrant misconduct by opposing counsel to warrant the extreme relief of a mistrial and a new trial.

Based on the foregoing, the judgment of the Floyd Circuit Court is affirmed.

CAPERTON, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: Respectfully, and reluctantly, I must dissent from the majority opinion which upholds the jury verdict and judgment in this case. I understand the trial court's reluctance to grant a mistrial or to grant a new trial after the jury had returned its verdict. And I appreciate the majority's proper deference to the trial court's judgment on these matters. I share many of the same feelings which would require the result reached by the majority. However, I must conclude that Dr. Shy's objection to the Estate's closing argument was adequately preserved for appeal. By itself, preservation of this issue would not require reversal. Nevertheless, I believe that the improper comments by counsel were so inflammatory and so flagrantly in violation of the pretrial order that no admonition could have cured the error. Therefore, I believe that the verdict must be set aside and a new trial is necessary.

I fully agree with the majority that our analysis turns on whether Dr. Shy properly preserved his objection to the improper remark in the Estate's closing

argument. KRE 103(d) provides that "[a] motion *in limine* resolved by order of record is sufficient to preserve error for appellate review." The court's February 8, 2012 order clearly provided, in pertinent part;

> The Plaintiffs' counsel shall not suggest in any way that the jurors should "send a message" or "make the community safe" by rendering a verdict against the Defendant.

While the issue of preservation should be resolved by the plain language of KRE 103(d) and the trial court's order granting the motion *in limine*, our analysis is complicated by the decision of the Kentucky Supreme Court in *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005). As the majority correctly notes, the Court in *Lanham* held that the adoption of KRE 103(d) modified but did not repeal Kentucky's long-standing contemporaneous objection rule. Based on this finding, the Supreme Court held that a motion *in limine* will preserve an error absent a contemporaneous objection only when the motion (1) specifically identifies the evidence to which the party objects; (2) provides a specific reason why the party thinks the evidence should not be admitted; and (3) is resolved by an order of the trial court. *Id.* at 21-22.

There are sound and important reasons for requiring a contemporaneous objection in most cases. Furthermore, parties would be well-advised to bring any violation of a pretrial order to the court's attention immediately. Raising the matter promptly allows the trial court to determine whether its order has been violated and to fashion the most appropriate relief.

However, I believe that the Court's analysis in *Lanham* complicates the clear language of KRE 103(d). Likewise, the Supreme Court's dicta in *Long v. Commonwealth*, 2011 WL 6826377, at 3, n. 3 (Ky. 2011), as cited in the majority opinion, imposes additional requirements for preservation beyond the express language of KRE 103(d). A court's pretrial order granting a motion *in limine* must mean something, and the parties must be able to expect that it will be enforced. KRE 103(d) plainly provides that the entry of an order granting a motion *in limine* is sufficient to preserve the matter for appellate review. The clear language of the rule would seem to generally preclude an application of the contemporaneous objection rule in such cases.

Nevertheless, I would conclude that Dr. Shy has satisfied the test for preservation set forth in *Lanham*. First, his motion *in limine* specifically identified the arguments which he sought to preclude the Estate from making at trial. Second, his motion provided specific reasons for the preclusion of such arguments. Indeed, Kentucky courts have consistently condemned remarks which appeal the jury's loyalty to their community or suggest that they return a verdict to "send a message" to the community. *See Commonwealth v. Mitchell*, 165 S.W.3d 129 (Ky. 2005). Finally, Dr. Shy's motion *in limine* was resolved by an order which granted the specific relief which he requested.

Furthermore, I would also conclude that Dr. Shy's counsel made a timely contemporaneous objection to the improper argument. As the majority correctly notes, interruptions during opposing counsel's closing argument are often

disruptive and are frequently frowned upon by trial courts. Dr. Shy's counsel raised the objection immediately after the conclusion of the Estate's closing argument. While the jury was in the process of leaving the courtroom at that time, it would have been a simple matter to recall the jury or to address the appropriate remedy at that point. The delay in no way impinged upon the trial court's opportunity to attempt curative measures. Under these circumstances, I would review this issue as a preserved error rather than under the palpable error standard.

In any event, the majority correctly notes that our standard of review is similar regardless of whether the error is considered preserved. The trial court's decision to deny a motion for a mistrial will be reversed only for abuse of discretion upon a showing of a fundamental defect in the proceedings which will result in a manifest injustice. *Shabazz v. Commonwealth*, 153 S.W.3d 806, 810-11 (Ky. 2005). Likewise, we review the trial court's denial of a motion for a new trial abuse of discretion. *McVey v. Berman*, 836 S.W.2d 445, 448 (Ky. App. 1992). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

I have no difficulty finding that the comments by the Estate's counsel during closing arguments amounted to a violation of the trial court's pretrial order. Those comments bear repeating here:

> …you get to decide what the standard of care for an emergency room medicine specialist here in Floyd County is. You've heard two competing, almost

> diametrically 180 degrees opposed visions of what the standard of care is. One vision of the standard of care would permit an ER doctor, like Dr. Shy, to not consider a deadly disease because of an atypical presentation – **which would put virtually everyone in this community in danger** because as Dr. Heuer told you and as Dr. Eckerline told you, nobody presents with a typical presentation. Everyone presents atypically. And what they are trying to tell you is this – it's okay because there wasn't that one symptom, that sharp, tearing pain, it's okay for Dr. Shy and it's okay for an emergency room doctor to not even consider it. **And that's not just for Dr. Shy and the aortic dissection. That would extend to every ER doc here in Floyd County with any atypical presentation of what turns out to be a deadly disease.**

Emphasis added.

Although counsel did not use the exact "magic words" which were barred by the order *in limine*, he went well beyond the facts of the case and appealed the jurors to consider the effect of their verdict on the standard of care applied by emergency room physicians in their community. The argument plainly urged the jury to use its verdict to "send a message" to medical providers in Floyd County and to "make the community safe" from the standard of care advocated by Dr. Shy and his experts. Contrary to the trial court's conclusion, I find that this argument violates the pretrial order.

The majority next points out that an isolated instance of improper argument during closing is seldom deemed to be prejudicial and require a new trial. *Rockwell International Corp. v. Wilhite*, 143 S.W.3d 604, 631 (Ky.App. 2003). However, improper arguments of counsel which refer to matters outside the

record and are calculated to inflame the passions and excite the prejudices of the jurors, induce them to disregard the evidence, or go to an extreme and unjustifiable length in arriving at a verdict, may justify reversal. *Id.* Such isolated improper arguments may not require reversal in cases where the error is unpreserved. *See Mitchell*, *supra* at 132. But I cannot overlook it where the issue is adequately preserved. If we do not reverse in such cases, we will simply encourage this type of conduct.

The majority suggests that Dr. Shy's counsel opened the door for these comments in his closing argument. While I do not necessarily endorse those comments either, that issue is not before us. There was no motion *in limine* to bar such arguments; there was no objection either during or after closing arguments; and the propriety of those comments is not raised on appeal. Although those comments are relevant insofar as they reflect upon the fairness of the entire trial, the comments cannot justify the improper argument made by Estate's counsel.

Moreover, those comments are of a significantly different character than those made during the Estate's closing arguments. The comments by Dr. Shy's counsel were only generally laudatory about the medical treatment provided by Dr. Shy and at Highlands Regional Medical Center. They did not appeal to the jury to consider matters outside of the record. And while counsel argument urged the jury to support the medical care available in Floyd County, he did not directly suggest that the jury's verdict would have an effect on the quality of that care.

Under the circumstances, I cannot agree that the closing argument by the Estate was a fair response to the closing arguments made by Dr. Shy.

Finally, the majority notes that the Estate failed to request a curative admonition or show that an admonition would have been insufficient to address the harm caused by the improper comment. But unlike in *Preacher v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2011), the comments by the Estate's counsel during closing argument were a flagrant violation of the court's pretrial order. Furthermore, an admonition to disregard an improper argument will not be presumed to have cured the error: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the improper reference would be devastating to the defendant; or (2) when the reference was made without a factual basis and was "inflammatory" or "highly prejudicial." *Id.*, citing *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

In this case, the comments by the Estate's counsel were without factual basis and were intended to inflame the passions or prejudices of the jury. Moreover, the jury's verdict in this case was 9-3 in favor of the Estate. Given such a close verdict, there is a strong likelihood that the jury's decision was influenced by the improper argument. At the very least, I conclude that fundamental fairness required the trial court to grant Dr. Shy's motion for a mistrial, or in the alternative, for a new trial. Therefore, I would reverse and remand for a new trial.

BRIEFS FOR APPELLANT:

Daniel G. Brown
Louisville, Kentucky

Stephen Burchett
D.C. Offutt, Jr.
Anne O'Hare
Huntington, West Virginia

ORAL ARGUMENT FOR APPELLANT:

Daniel G. Brown
Louisville, Kentucky

BRIEF FOR APPELLEES:

Stephen M. O'Brien, III
Lexington, Kentucky

Cory M. Erdmann
Richmond, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Stephen M. O'Brien, III
Lexington, Kentucky