



**FEDERAL PRACTICE INSTITUTE**

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**TIPS ON PREPARING AND PRESENTING  
A CLOSING ARGUMENT IN A CIVIL CASE**

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### **Introduction**

Some say that in a civil case, a jury has made up its mind about the case before closing arguments are ever given by counsel for the plaintiff and the defendant. Whether or not that is the case, we would submit that for a plaintiff, the closing argument is a critical opportunity to summarize the evidence that has been presented to the jury throughout the trial, to argue why the facts and the law support a plaintiff's verdict in the case, and to walk through each element of awardable damages to demonstrate to the jury why those damages should be awarded to the plaintiff.

### **When To Prepare The Closing Argument**

It is appropriate to begin preparation of your opening argument before the trial ever begins. However, it is important not to be wedded to the document you have prepared before the trial. It is important to listen to the evidence as it comes in at trial (including evidence presented by the defendant) and to react and respond to that information in your closing.

### **Summarize The Evidence**

In a civil case, the jury will be presented with a lot of evidence, often through multiple witnesses and multiple documents. The closing argument is the attorney's opportunity to pull that evidence together from multiple sources, and to argue why that evidence supports a verdict in favor of the plaintiff.

Don't take for granted that the jury will piece all the information together and naturally realize by the end of the case that "plaintiff wins." Walk through the evidence that has been presented. Remind the jurors of which witness presented which testimony. Remind the jurors of critical documents that they have received in evidence that support your client's position. Most importantly, marshal the facts to tell your client's story.

### **Use Demonstrative Evidence**

By the time you reach your closing argument, you know what documents have been admitted as full exhibits in the case. Pick out a few of the most critical of those documents and show them to the jury during your closing argument.

### **Do Not Argue Facts That Were Not In Evidence**

Be very careful not to argue facts that did not come into evidence in the case. You should presume that the jury listened closely to evidence that came in at trial. You will lose credibility fast if you try to talk about facts that did not come into evidence during the trial, and you may risk reversal of the verdict. *See Border Brook Terrace Condominium Ass'n v. Gladstone*, 137 NH 11 (1993); *Leblanc v American Honda Motor Co., Inc.*, 141 NH 579 (1997).

### **Address Weaknesses In The Case**

If there are critical weaknesses in your case that were emphasized during the trial, you need to explain to the jury why your client should still win the trial. Discuss the “weaknesses” and put them in context. Accept the weaknesses instead of making the jury think you are ignoring them (hoping they will too). You will gain credibility by addressing any weaknesses in your closing argument head on.

### **Talk About The Law**

Don't take for granted that the jurors will understand the law presented to them through the judge's reading of the jury instructions. There is so much information that the jurors will need to take in (through listening to/reading a long set of jury instructions) that you should emphasize in your closing the most critical parts of the law, and argue why you think on the law, your client wins.



### **Talk About Each Count In Cases With Multiple Counts**

Walking through every count in the lawsuit is helpful for a jury. It is also advantageous to let the jury know that it can find in plaintiff's favor on all or just some of the claims. If any claims were dismissed or withdrawn during trial, consider explaining that to the jury. For example, if a claim was withdrawn, you may (with the judge's permission) tell the jury that the plaintiff withdrew the claim because he/she wasn't confident that there was sufficient evidence to prove the claim and he/she wanted the jury to be able to focus on the strongest claims.

### **Respond To The Defendant's Case**

Be prepared in your closing to respond to the facts and argument presented by the defendant during the trial and during defense counsel's closing argument.

### **Emphasize The Burden Of Proof**

In civil cases, talking about the burden of proof is important. So many jurors are used to television shows talking about "beyond a reasonable doubt" that the civil burden of proof is likely much less familiar to your jurors. As a plaintiff, you want to show the jury that even if it is a close call, your client has met his/her burden of proof.

We typically have a section in our closing in which we explain the difference between the criminal burden of proof and the civil burden of proof and we emphasize that, in this case, the civil burden of proof applies. We demonstrate the scales of justice, and tell the jurors "if the scales tip ever so slightly in the plaintiff's favor, then the plaintiff has met his/her burden of proof and the verdict should be in his/her favor."

### **Discuss Each Element Of Damages**

As the attorney representing a plaintiff, it is critical to talk to the jury in the closing argument about each element of damages upon which the jury will be instructed. Where

applicable, discuss lost wages and benefits, future lost wages and benefits, emotional distress damages for pain and suffering and loss of enjoyment of life, enhanced compensatory damages, liquidated damages, and punitive damages.

Explain to the jury that it will be within the jury's discretion to determine an appropriate award for damages such as emotional distress damages and enhanced compensatory damages. Explain to the jury that it is the jury's obligation to award full and fair damages to the plaintiff if the jury has found that the plaintiff has met his/her burden of proof. Express confidence that the jury will be able to use its collective judgment and experience in determining an appropriate, full and fair award for those types of damages.

#### **Talk About Any Special Verdict Form**

If a special verdict form is being used in the case, talk about the form with the jury. Special verdict forms can be confusing, and you don't want the jury to be confused when it reviews and completes the form.

#### **Thank The Jury For Its Service**

Choose your words carefully if you choose to "thank" the jurors for their service in the case. A thank you is always appropriate, but we have heard closing arguments in which the "thank you" sounded patronizing to jurors.



# UNITED STATES DISTRICT COURT District of New Hampshire


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## (e) Closing Arguments

Closing arguments shall be limited to one (1) hour and only one (1) attorney shall argue for each party, except by leave of the court. The plaintiff in a civil action, the libelant in an admiralty action, and the claimant in a land condemnation action shall argue last. In a criminal case, the government shall be permitted to offer rebuttal argument that shall not exceed fifteen (15) minutes.

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**NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT**

**ADVOCATE**

**Rule 3.3. Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

**Ethics Committee Comment**

1. New Hampshire's Rule reverses the order of ABA Model Rules (c) and (d). This clarifies that a lawyer's disclosure obligation during an *ex parte* proceeding applies even if the information provided to the tribunal would otherwise be protected by Rule 1.6.

2. See Rule 3.9 regarding nonadjudicative proceedings.

3. Rule 3.3 as revised supersedes N.H. Ethics Opinion 1995-96/5, "Presentation of False Evidence to a Tribunal by a Third Party Non-client"; see <http://nhbar.org/pdfs/FO95-96-5.pdf>. Revised Rule 3.3 requires disclosure of falsity in circumstances where it was not required under the prior version of the rule. See N.H. Ethics Opinion 2008-09/3, "Remedial Measures Under Rule 3.3"; <http://nhbar.org/uploads/pdf/EthicsOpinion2008-9-3.pdf>.

**2004 ABA Model Rule Comment  
RULE 3.3 CANDOR TOWARD THE TRIBUNAL**

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct



that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

### **Representations by a Lawyer**

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

### **Legal Argument**

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### **Offering Evidence**

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].



## **Remedial Measures**

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

## **Preserving Integrity of Adjudicative Process**

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

## **Duration of Obligation**

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

## **Ex Parte Proceedings**

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

## **Withdrawal**

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a

lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

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**NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT**

**ADVOCATE**

**Rule 3.4. Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

**2004 ABA Model Rule Comment**

**RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a

contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

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**141 N.H. 579 (N.H. 1997)**

**688 A.2d 556**

**Thomas LeBLANC**

**v.**

**AMERICAN HONDA MOTOR CO., INC.**

**No. 94-198.**

**Supreme Court of New Hampshire.**

**January 28, 1997**

**[688 A.2d 557] [Copyrighted Material Omitted]**

**[688 A.2d 558]**

Vincent C. Martina, Amherst, by brief and orally, for plaintiff.

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Shaheen, Capiello, Stein & Gordon, P.A., Concord (Robert A. Stein, on the brief and orally, and Diane Perin Hock on the brief) for defendant.

BROCK, Chief Justice.

The defendant, American Honda Motor Co., Inc. (Honda), appeals the special jury verdict of the Superior Court (Conboy, J.), holding Honda liable for injuries caused by the defective design and failure to warn of the braking and steering properties of its product, the Honda Odyssey. For the reasons that follow, we reverse and remand.

On January 16, 1988, the plaintiff, Thomas LeBlanc, while riding on the back of a snowmobile driven by his friend, was injured when the snowmobile collided with an off-road vehicle driven by Stephen Beaulieu and manufactured by Honda. The impact of the collision severely injured the plaintiff's leg.

The plaintiff sued Beaulieu and Honda alleging negligent operation of the Odyssey by Beaulieu and asserting a products liability claim against Honda. The jury rendered its verdict via a special verdict form that contained eight questions agreed to by the parties. The jury found: that the 1985 Honda Odyssey contained a design defect which rendered it unreasonably dangerous; that the design defect was a cause of the accident; that the Odyssey was unreasonably dangerous and defective due to Honda's failure to adequately warn the driver, Beaulieu; that the failure to warn Beaulieu was a cause of the accident; that the plaintiff proved all the elements of his negligence claim against Beaulieu; that negligence or misconduct by the plaintiff contributed to cause his injury; that Honda was 68% at fault, Beaulieu was 27% at fault, and the plaintiff was 5% at fault; and that the plaintiff's total damages were \$2,206,000. The superior court ordered judgment against Honda for \$1,487,196 plus [688 A.2d 559] statutory interest and costs, and against Beaulieu for \$590,504 plus statutory interest and costs.

On appeal, Honda argues: (1) that the plaintiff's trial counsel, Vincent C. Martina, made improper and inflammatory remarks during the trial and during closing arguments in an attempt to cultivate in the jury a racial and national bias against Honda, a subsidiary of a Japanese



corporation; (2) that the trial court erred by admitting previously undisclosed testimony and by allowing a courtroom demonstration; and (3) that the trial court erred by denying the defendant's motion for judgment notwithstanding the verdict.

Honda first argues that certain remarks made by Martina so tainted the proceedings as to deprive Honda of a fair trial and that

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denial of its motion for a mistrial and motion for a new trial on this ground was reversible error. We agree.

The trial court should grant a party's motion for a mistrial if it determines that some circumstance ... indicates that justice may not be done if the trial continues to verdict. To justify a mistrial, remarks or the conduct must be more than merely inadmissible; they must constitute an irreparable injustice that cannot be cured by jury instructions. Because the trial court is in the best position to gauge prejudicial impact, it has broad discretion to determine whether a mistrial or other remedial action is necessary.

*State v. Martin*, 138 N.H. 508, 516, 643 A.2d 946, 951 (1994) (citations, quotations, and brackets omitted); see *Walton v. City of Manchester*, 140 N.H. 403, 408, 666 A.2d 978, 981-82 (1995).

Remedial action includes, but is not limited to, curative jury instructions, which the jury is presumed to follow. *State v. Lemire*, 130 N.H. 552, 555, 543 A.2d 425, 426 (1988).

The defendant points to several statements made by Martina as grounds for reversal. The first, directed at Honda's vehicle design expert, focused on the color scheme of the Odyssey. Martina asked the expert if he knew the color of the Japanese flag. After Honda objected, Martina explained that he was curious about how the machine's color happened to be designed. The court decided to give Martina "some latitude." Martina then questioned the expert about whether the expert had ever wondered why the Odyssey is "red, white and blue, the color of the American flag."

The second series of statements highlighted by Honda occurred during the plaintiff's closing argument:

What's this case about? It's not about Honda making great automobiles or Sony making good Walkmans. But also it's not about Pearl Harbor or the Japanese prime minister saying Americans are lazy and stupid.

....

What this case is about is not American xenophobia; it's about corporate greed.

Counsel for Honda again objected and, at a bench conference, moved for a mistrial. At the bench conference, Martina explained that he was certain that the fact that the defendant is a foreign corporation had entered the minds of the jurors, and he was trying to tell them that that was irrelevant to the case. The court denied the motion for

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a mistrial but warned Martina: "I am, however, Mr. Martina, cautioning you that there's a limit to how far argument can go, and I think you're right at the wall on it. So please back away from it and focus on the issues in the case." The court did not strike the remarks or issue a curative instruction to the jury.



At the conclusion of the trial, the court instructed the jury:  
I try to be fair and impartial, just as you are required to be.... You must decide the case only on the basis of the evidence and the law as I give it to you. You should keep in mind that all parties, whether an individual or a corporation, are equal before the law....

And again:

[Y]ou should decide this case without passion, without prejudice, and without sympathy. It is your highest duty as officers of this court to conscientiously determine a fair and just result in this case.

See Walton, 140 N.H. at 408, 666 A.2d at 982. The court never instructed the jury specifically **[688 A.2d 560]** with regard to Attorney Martina's above-quoted remarks.

Although the decision whether to grant the mistrial motion or the motion for a new trial falls within the trial court's discretion, see Martin 138 N.H. at 516, 643 A.2d at 951, "[i]n some circumstances ..., counsel's remarks may be so prejudicial as to mandate reversal," Walton, 140 N.H. at 408, 666 A.2d at 982; see *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 863 (Tex.Ct.App.1990) (appeals to racial prejudice incurable by instruction).

We do not expect advocacy to be devoid of passion. But jurors must ultimately base their judgment on the evidence presented and the natural inferences therefrom. Thus, there must be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice.

Walton, 140 N.H. at 406, 666 A.2d at 981 (quotation, brackets, and ellipsis omitted). A mistrial or a new trial may be warranted "where counsel attempts to appeal to the sympathies, passions, and prejudices of jurors grounded in race or nationality, by reference to the opposing party's religious beliefs or lack thereof, or by reference to a party's social or economic condition or status." *Id.* at 407, 666 A.2d at 981 (quotation omitted). Such an appeal was attempted in this case.

The remarks, when viewed in isolation and outside of the context of the trial, may not seem to be so "explicit and brazen," Guerrero,

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800 S.W.2d at 864, as to warrant the severe remedy of reversal. This sort of argument, which "may be indirect or implied, as well as direct or express," Annotation, Statement by Counsel Relating to Race, Nationality, or Religion in Civil Action as Prejudicial, 99 A.L.R.2d 1249, 1255 (1965), is nonetheless an affront to the court. See Guerrero, 800 S.W.2d at 865 (characterizing racial or ethnic appeals to be "an attack on the social glue that helps bind society together"). "It is true that counsel's closing reference was brief. At the same time, when an elephant has passed through the courtroom one does not need a forceful reminder." *Willey v. Ketterer*, 869 F.2d 648, 652 (1st Cir.1989).

Honda invites us to declare appeals to racial bias per se incurable. Although we have considered seriously the adoption of a per se rule of reversal in such cases, we believe it better at this time to leave these matters to the sound discretion of the trial court. Compare Walton, 140 N.H. at 408, 666 A.2d at 982 with Guerrero, 800 S.W.2d at 866. Such appeals, although extremely unprofessional and deplorable, must be considered in light of the circumstances of the particular case. See *Lincoln v. Gupta*, 142 Mich.App. 615, 370 N.W.2d 312, 317 (1985). When a racial or ethnic appeal has been made, as in this case, the trial judge



must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself.

*Forrestal v. Magendantz*, 848 F.2d 303, 309 (1st Cir.1988) (quotation omitted); see *Walton*, 140 N.H. at 408, 666 A.2d at 982. In reaching this conclusion, we keep in mind that it will be an unusual case in which the invocation of racial or ethnic bias should not result in a mistrial or sanctions, see *Walton*, 140 N.H. at 408, 666 A.2d at 982; N.H. R. Prof. Conduct 3.5 ("A lawyer shall not ... seek to influence a ... juror ... by means prohibited by law...."), and that attorneys and judges have authority to refer these matters to the committee on professional conduct or the committee on judicial conduct when appropriate. See N.H. R. Prof. Conduct 8.3; N.H. Prof. Conduct Comm. R. 2.1; Sup.Ct.R. 38, Canon 3(A)(2).

In denying Honda's motion for a new trial, the trial court recognized that Martina's remarks "raised irrelevant and potentially prejudicial issues," but nonetheless concluded that "the jury followed the Court's instructions, and based its verdict only on the

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evidence and the law." No immediate curative jury instruction was given. See *Walton*, 140 N.H. at 408, 666 A.2d at 982; cf. *South [688 A.2d 561] Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1123-24 (5th Cir.1984) (trial court's immediate curative instruction after ethnic appeal "sufficient to smother the inflammatory effect" of comments). Plaintiff's counsel's remarks, however, were "not only improper but reflect disregard ... of his duty to the court and to the adversary system which supposes a fair contest, not under-handed blows." *South Hampton Co.*, 733 F.2d at 1124. Under the circumstances of this case, we conclude that Martina's remarks, "calculated as they were to encourage the jury to make a decision based on ... bias rather than reason and the presented evidence, were so prejudicial as to require a new trial." *Walton*, 140 N.H. at 408, 666 A.2d at 982 (quotation omitted); see *Border Brook Terrace Condo. Assoc. v. Gladstone*, 137 N.H. 11, 18, 622 A.2d 1248, 1253 (1993).

Honda argues that several other remarks made by Martina during the trial would also, independently, mandate a new trial. Specifically, it asserts that Martina falsely implied that the *Odyssey* had caused deaths; that he wrongly implied that the defendant deprived the jury of valid evidence; that he falsely implied that the plaintiff had sustained psychological injury and would only be able to walk with great difficulty; and that he improperly expressed his personal opinion. The trial court sustained objections, immediately instructed the jury, or cautioned Martina in front of the jury at the time each of these statements was made. See *Lemire*, 130 N.H. at 555, 543 A.2d at 426-27 (jury presumed to follow trial judge's instructions). Because we assume that counsel for the plaintiff, knowing that this conduct is inappropriate, is unlikely to make the same mistakes on remand, we decline to address Honda's arguments.

Honda next argues that the trial court erred in permitting the plaintiff's expert to testify regarding testing with a model vehicle. The defendant asserts that the admission of previously undisclosed testimony and the courtroom demonstration unfairly surprised the defendant and substantially prejudiced its defense. See Super.Ct.R. 62; *Welch v. Gonic Realty Trust Co.*, 128



N.H. 532, 535, 517 A.2d 808, 809 (1986). Because the model and accompanying testimony will no longer be a surprise in the event of another trial, we decline to address this issue.

Next, the defendant argues that the trial judge erred in denying its motion for judgment notwithstanding the verdict because the plaintiff failed to present sufficient evidence on the issues of design defect and causation, and inadequate warning and causation. We disagree.

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The standard of review of a motion for judgment notwithstanding the verdict is well established:

A party is entitled to judgment notwithstanding the verdict only when the sole reasonable inference that may be drawn from the evidence, which must be viewed in the light most favorable to the nonmoving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand. The court cannot weigh the evidence or inquire into the credibility of the witnesses, and if the evidence adduced at trial is conflicting, or if several reasonable inferences may be drawn, the motion should be denied.

*Broderick v. Watts*, 136 N.H. 153, 159, 614 A.2d 600, 604 (1992) (citations, quotation, and brackets omitted).

In this case, the plaintiff sought to prove that the absence of a rear-wheel differential on the Odyssey amounted to a design defect and that the defect was a cause of the accident. The plaintiff also sought to prove that Honda failed adequately to warn the Odyssey's driver of the general operating characteristics of the vehicle on packed snow and that the failure to warn made the Odyssey unreasonably dangerous.

To maintain a products liability claim based on defective design, a plaintiff must prove: (1) that the design of the product created a defective condition unreasonably dangerous to the user; (2) that the condition existed when the product was sold by a seller in the business of selling such products; (3) that the use of the product was reasonably foreseeable by the manufacturer; and (4) that the condition caused injury to the user or the user's property.

**[688 A.2d 562]** *Chellman v. Saab-Scania AB*, 138 N.H. 73, 77, 637 A.2d 148, 150 (1993).

An analysis of whether a product is unreasonably dangerous requires evaluating many possible factors including a product's social utility balanced against the risk of danger, the cost and practicality of reducing the risk of danger, and the presence or absence and efficacy of a warning of hidden danger.... If the design of a product makes a warning necessary to avoid an unreasonable risk of harm from a foreseeable use, the lack of warning or an ineffective warning causes the product to be defective and unreasonably dangerous.

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*Id.* at 77-78, 637 A.2d at 150; see *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978).

The plaintiff's design defect and failure to warn claims are separate. Under the design defect claim, the issue is whether the Odyssey was defective in that it had a fixed rear axle and whether that defect made the product unreasonably dangerous. The issue in the failure to warn claim, in contrast, is whether the danger inherent in the Odyssey was or could have been made reasonable by the issuance of adequate warnings.

"[L]iability may attach if the manufacturer did not take available and reasonable steps to



lessen or eliminate the danger of even a significantly useful and desirable product." Thibault, 118 N.H. at 807, 395 A.2d at 846. Moreover, "when an unreasonable danger could have been eliminated without excessive cost or loss of product efficiency, liability may attach even though the danger was obvious or there was adequate warning." Id. at 808, 395 A.2d at 847. In the end, [a] court will rarely be able to say as a matter of law that a product has no social utility, or that the purpose or manner of its use that caused the injury was not foreseeable. The jury must decide whether the potentiality for harm is open and obvious. Reasonableness, foreseeability, utility, and similar factors are questions of fact for jury determination.

Id. at 809, 395 A.2d at 847-48 (citations omitted).

"The existence of concurrent causes will not in and of itself vitiate a finding that one cause was a proximate cause of the injury." *Reid v. Spadone Mach. Co.*, 119 N.H. 457, 463-64, 404 A.2d 1094, 1098 (1979), overruled in part by *Daigle v. City of Portsmouth*, 129 N.H. 561, 534 A.2d 689 (1987); see *Chellman*, 138 N.H. at 79-80, 637 A.2d at 152. The plaintiff need not show that either design defect or failure to warn was the sole proximate cause of the accident. See *Reid*, 119 N.H. at 463-64, 404 A.2d at 1098.

Here, the plaintiff's automobile expert testified as to the handling behavior of vehicles lacking rear-wheel differentials. The rear wheels of such vehicles essentially are locked together--forced at all times to rotate at the same rate. With the aid of a model, the expert demonstrated that vehicles which combine conventional steering with fixed rear axles behave differently than vehicles which combine conventional steering with rear axles having differentials. The expert testified that the class of vehicles lacking rear-wheel differentials, of which the Odyssey is one, have uncertain steering responses depending on whether the front wheels grip or the rear wheels grip in a turn. The expert testified that in evasive maneuvers

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, when turning to avoid something, "there's a tremendous risk that the back end will simply break away and you'll spin sideways into something." Furthermore, it was the expert's opinion that the lack of a differential in the Odyssey was a design defect and that the defect made the Odyssey dangerous. Finally, the expert testified that he could not see how Honda could be unaware of the effect of the fixed axle and that it was foreseeable that this type of collision would occur.

In a deposition read into the record at trial, the plaintiff's warnings expert stated that the Odyssey was defective because it did not come with instructions and warnings regarding the special hazards involved with driving the Odyssey on a frozen lake, especially in light of the fact that the Odyssey employs hand-operated brakes. He stated that the warnings that did come with the Odyssey regarding safe operation of the vehicle were inadequate. In his report, he indicated that difficulties associated with hand-

**[688 A.2d 563]** actuated controls "have caused brake lockup and subsequent skids such as took place in this accident." Finally, he stated that even assuming the driver did lock the brakes, the skid could have been caused by over-steering or loss of traction on the surface.

Beaulieu testified that he applied the Odyssey's brakes and turned hard right immediately prior to the moment of impact. He also testified that he was probably traveling thirty to thirty-five miles per hour--a speed at or above which, according to the defendant's own expert, the Odyssey



reaches the limit of "its frictional capabilities."

The jury explicitly found (1) that the Odyssey contained a design defect which rendered it unreasonably dangerous and which was a cause of the accident, and (2) that the Odyssey was unreasonably dangerous and defective because of Honda's failure adequately to warn the driver and that this failure to warn was a cause of the accident. Viewing the evidence in the light most favorable to the plaintiff, we cannot say that the sole reasonable inference that could have been drawn therefrom is so overwhelmingly in favor of Honda that no contrary verdict could stand. Broderick, 136 N.H. at 159, 614 A.2d at 604. Accordingly, we find that the trial judge properly denied the defendant's motion for judgment notwithstanding the verdict.

We decline to address the defendant's remaining arguments either because the defendant failed to raise timely objections at trial, or because it failed to include the issues in its notice of appeal. See

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Sup.Ct.R. 16(3)(b); *LeFavor v. Ford*, 135 N.H. 311, 313, 604 A.2d 570, 572 (1992).

Reversed and remanded.

BRODERICK, J., did not sit.

BATCHELDER, J., retired, sat by special assignment under RSA 490:3.

HORTON, J., with whom THAYER, J., joined, dissented.

BATCHELDER, J., concurred specially.

JOHNSON, J., concurred.

BATCHELDER, Justice, concurring specially:

Because I would adopt a per se rule of reversal, I concur only in the result reached in Chief Justice Brock's opinion.

HORTON, Justice, dissenting:

The plurality correctly asserts that the plaintiff's arguments regarding the color of the Honda Odyssey and the need to ignore Japanese transgressions in favor of attention to corporate greed were "extremely unprofessional and deplorable," but the plurality also correctly states that these arguments "must be considered in light of the circumstances of the particular case." The plurality further notes correctly that "the decision whether to grant the mistrial motion or the motion for a new trial falls within the trial court's discretion." The actual rule is "[b]ecause the trial court is in the best position to gauge prejudicial impact, it has broad discretion to determine whether a mistrial or other remedial action is necessary." *State v. Martin*, 138 N.H. 508, 516, 643 A.2d 946, 951 (1994). I would hold that the trial court's actions relative to these arguments were within its broad discretion.

Neither comment was directly related to an issue in the case. Although completely uncalled for, the arguments were, at best, a weak attempt to engender nationalistic (rather than racial) prejudice, the former suggesting that it might be unfair for a Japanese manufacturer to use the colors of the American flag, and the latter pointing out (albeit in the context of suggesting that the jury should not consider this fact) that the Japanese had bombed Pearl Harbor and criticized American workers. These comments are so unrelated to the basis of the case and so lame in their obvious intent to move the jury to act on prejudice that the trial court could make a fair assessment



that any prejudice would be cured by its general instructions. In the words of the trial court, the plaintiff "raised irrelevant and potentially prejudicial issues.... The Court must evaluate the statements in the context of the entire trial and determine whether they ... rendered the trial unfair." The trial court specifically found that the jury followed the court's instructions **[688 A.2d 564]** and based its verdict on the evidence and the law. A review of the record demonstrates that the verdict is, in all other respects,

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consistent with the evidence and the law. There is no indication that the verdict was based on national prejudice.

I would affirm the verdict. To reach this result, I have reviewed the remaining issues preserved on appeal and not addressed in the plurality opinion. This review leads me to the conclusion that the defendant's claims of error are without merit.

I respectfully dissent.

THAYER, J., joins in the dissent.

**Border Brook Terrace Condominium Ass'n v. Gladstone**

Supreme Court of New Hampshire

March 30, 1993, Decided

No. 92-071

**Reporter**

137 N.H. 11; 622 A.2d 1248; 1993 N.H. LEXIS 30

Border Brook Terrace Condominium Association and  
Edward Starr v. Sumner Gladstone & a.

**Subsequent History:** [\*\*\*1] Released for Publication  
April 12, 1993.

**Prior History:** Appeal from Hillsborough County.

**Disposition:** *Reversed and remanded.*

**Counsel:** *Hamblett & Kerrigan P.A.*, of Nashua  
(*Timothy G. Kerrigan* on the brief and orally), for  
Border Brook Terrace Condominium Association.

*Edward Starr, pro se*, filed no brief.

*Upton, Sanders & Smith*, of Concord (*Russell F.  
Hilliard* and *Gilbert Upton* on the brief, and *Mr.  
Hilliard* orally), for the defendants.

**Judges:** Johnson, J. All concurred.

**Opinion by:** JOHNSON

**Opinion**

[\*12] [\*\*1249] The defendants, Sumner Gladstone, Babson-Reed Corporation (Babson-Reed), and Mt. Vernon Realty Trust (Mt. Vernon), appeal from a Superior Court (*Hampsey*, J.) jury verdict awarding damages to the plaintiffs, Border Brook Terrace Condominium Association (the Association) and Edward Starr, a representative of a class of individual condominium unit owners. The plaintiffs had sued the defendants for negligence, misrepresentation, and breach of implied and express warranties because of

defects in the Border Brook condominium development allegedly caused by the defendants. The defendants raise many issues on appeal, including whether the Association had standing to sue and whether the trial court should [\*\*\*2] have declared a mistrial because of remarks made by the plaintiffs' counsel during his closing argument. We hold that the [\*13] Association had standing to sue, but find that the plaintiffs' counsel's closing argument contained allegations of facts not in evidence, assertions of the [\*\*1250] counsel's personal belief, and accusations and insinuations of criminal conduct similar to conduct at issue in the trial. We hold these comments to be improper and incurably prejudicial to the defendants and, therefore, reverse and remand.

We address the standing issue first. Relying on RSA 356-B:15 and RSA 356-B:41, we find that the Association does have standing. RSA 356-B:15 states:

"The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association, or by its board of directors or any managing agent on behalf of such association, or, in any proper case, [\*\*\*3] by one or more aggrieved unit owners on their own behalf or as a class action."

RSA 356-B:41 states in pertinent part:

"I. Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities with regard to maintenance, repair,



renovation, restoration, and replacement of the condominium shall belong (a) to the unit owners' association in the case of the common areas, and (b) to the individual unit owner in the case of any unit or any part thereof. . . .

II. Notwithstanding anything in this section to the contrary, the declarant shall warrant or guarantee, against structural defects, each of the units for one year from the date each is conveyed, and all of the common areas for one year."

Paragraph II of RSA 356-B:41, together with RSA 356-B:15, plainly grants the Association the authority to maintain a suit for breach of express warranty against Mt. Vernon (the declarant) and, provided the Association can "pierce the corporate veil," against Sumner Gladstone. We read paragraph I of RSA 356-B:41 as granting the Association the authority to maintain the other portions of its suit against the defendants as well. As one component of the power [\*\*\*4] to repair is the authority to seek payment from parties whose actions [\*14] compel the repair work, we think it logical to interpret the broad language of this statute as allowing an association to sue for defects in the common areas. *See* R. Natelson, *Law of Property Owners Associations* § 8.2.4, at 314-15 (1989) (criticizing decisions barring condominium associations for lack of standing from suing developers for defects in the common areas). Our position is buttressed by several other provisions of the condominium act relating to the powers and responsibilities of condominium associations, including RSA 356-B:35 (association for self-governance mandatory), RSA 356-B:40, III (officer of association is suitable person to receive service of process on association), RSA 356-B:42 (default grant of power in association to deal with common areas), RSA 356-B:43 (requiring association or its delegate to obtain master casualty and master liability insurance for condominium), and RSA 356-B:46 (creates lien for the benefit of the association for unpaid assessments, provides for suit to enforce lien, and implies that association may bring suit to recover assessments without lien procedure).

[\*\*\*5] The defendants argue that RSA 356-B:41, I, applies only to defects in the condominiums arising after the Association came into existence and that, because the Association came into existence after the buildings were constructed, RSA 356-B:41, I, does not apply here. We disagree. RSA 356-B:41, I, says nothing about the timing of the defects or of the unit owners' association's creation, and instead describes the association's "powers

and responsibilities with regard to maintenance, repair, renovation, restoration, and replacement" of the common areas without limitation. We will not create a qualification to the Association's authority that is not plainly mandated by the legislature.

We now turn to the question of the plaintiffs' counsel's closing argument. The facts necessary to resolve this issue are as follows. At all relevant times, Sumner [\*\*1251] Gladstone was a sixty percent stockholder of Babson-Reed, the corporation that built the Border Brook condominium development, as well as the trustee of Mt. Vernon, the condominium's declarant and seller. At trial, the plaintiffs introduced testimony of commingled funds and sham enterprises in an attempt to "pierce the corporate [\*\*\*6] veil" and hold Gladstone personally liable. In particular, the plaintiffs argued that Gladstone funneled the profits of Babson-Reed and Mt. Vernon into his private accounts after he learned of the plaintiffs' potential claims against these organizations, thus protecting his own financial security at the expense of the plaintiffs' just claims.

[\*15] The superior court addressed the plaintiffs' claim by instructing the jury on the doctrine of "piercing the corporate veil." The relevant portion of the instruction reads:

"This is a doctrine in New Hampshire which allows a plaintiff to pierce the corporate veil and thereby place liability on an individual. This may be done if a finding is made that the corporate entity or trust entity has been used in such a way as to promote an injustice or fraud upon a plaintiff making the claim.

In this regard, with respect to the issue of liability concerning Sumner Gladstone, you may consider the following factors:

Number one, whether an unfair and unjust result would occur, unless you disregard the formal existence of the trust or corporate entity.

Whether the trust or corporation was established or carried on without [sufficient] assets to [\*\*\*7] meet its anticipated debts and obligations.

The intermingling of properties, accounts, records, employees, and business transactions by the trust or corporation.

Whether the trust or corporation substantially depleted its assets after being advised that defects existed in the condominium projects and claims



were threatened or actually filed seeking damages."

The plaintiffs' counsel's closing argument, which immediately preceded the court's jury instructions, contained the following remarks.

"Mr. Gladstone is not here on criminal charges. We are not accusing him of any crimes, although some of the evidence may suggest to you that his conduct was less than law abiding. . . . And I'll also submit to you that I believe there was probably another association down in Florida that is having the profits from their project skimmed off at this time so that there will be no money available to them either when they find out the kind of problems they have on their project."

The defendants objected to these statements and asked for a mistrial. The court denied their request and instead gave a curative instruction, first reading a verbatim transcript of the offending excerpts to the jurors [\*\*\*8] and then instructing them "to give those comments now stricken absolutely no consideration whatsoever in the course of your deliberations."

[\*16] On appeal, the plaintiffs do not deny the impropriety of their counsel's remarks, but assert that the superior court's instruction cured any undue prejudice the statements may have caused the defendants. The defendants, on the other hand, maintain that, under the circumstances, a mistrial was the only suitable remedy. We agree.

Mistrial is an exceptional remedy. It is rarely used and ordinarily reserved for extraordinary situations.

"The standard of review of the denial of a motion for a mistrial is whether the trial court abused its discretion. The basis for granting a mistrial is the existence of some circumstances which indicates that justice may not be done if the trial continues to verdict. The remarks or the conduct must be more than merely inadmissible; they must constitute an irreparable injustice that cannot be cured by jury instructions. Thus, even if prejudicial testimony was introduced against the defendant, the motion for mistrial may be denied because curative instructions are presumed to be followed."

State v. Lemire, 130 N.H. 552, 554-55, 543 A.2d 425, 426-27 (1988) [\*\*\*9] (citations and quotation omitted).

[\*\*1252] Although deference is usually accorded to a trial court's determination in this area, see *id.*, the

deference varies with the grounds for mistrial alleged, cf. State v. Hartford, 132 N.H. 580, 584, 567 A.2d 577, 580 (1989) (when trial court grants motion for mistrial, this court's scrutiny of the decision varies according to the reasons given; where jury appeared deadlocked, trial court's declaration of mistrial was readily affirmed). For example, we have upheld a trial judge's choice of curative instructions over a declaration of mistrial where the offending remarks were ambiguous, see State v. Ellison, 135 N.H. 1, 4, 599 A.2d 477, 480 (1991), where the complaining party appeared to have brought the problem on himself, see Panas v. Harakis & K-Mart Corp., 129 N.H. 591, 614-15, 529 A.2d 976, 990 (1987), and where the incremental prejudicial effect of the remarks seemed to have been minimal, see Blais v. Town of Goffstown, 119 N.H. 613, 619-20, 406 A.2d 295, 299-300 (1979). [\*\*\*10] On the other hand, we have reversed the denial of a motion for mistrial where counsel offered his or her personal opinion on a material issue, see State v. Bujnowski, 130 N.H. 1, 4, 532 A.2d 1385, 1387-88 (1987) (curative instructions held insufficient); see also N.H. R. Prof. Conduct 3.4(e), and where a witness alluded to criminal conduct of the defendant similar to the conduct charged, see State v. Woodbury, 124 N.H. 218, 221, 469 A.2d 1302, 1305 (1983) (curative instructions held insufficient); [\*17] State v. LaBranche, 118 N.H. 176, 179, 385 A.2d 108, 110 (1978) (curative instructions, had they been given, would have been insufficient). Outside the mistrial context, we have also reversed a verdict where an attorney's closing statement included assertions of crucial facts not in evidence, see State v. Lake, 125 N.H. 820, 822-23, 485 A.2d 1048, 1051 (1984), although our decision depended in large part on the trial judge's failure to give curative instructions, *id.*

Here we have a closing [\*\*\*11] statement that combines most of the elements found so abhorrent in *Bujnowski*, *Woodbury*, *LaBranche* and *Lake*. First, the plaintiffs' counsel asserted facts not in evidence by insinuating that Gladstone's conduct was criminal and that profits were being "skimmed" from a condominium project in Florida. See Lake, 125 N.H. at 822, 485 A.2d at 1050. Second, the attorney offered his opinion on a material issue by stating, "I believe there was probably another association down in Florida that is having the profits from their project skimmed off at this time so that there will be no money available to them either when they find out the kind of problems they have on their project." (Emphasis added.) As the allegation of similar



behavior at the Border Brook condominium project was one of the main components of the plaintiffs' attempt to hold Gladstone personally liable, the assertion went directly to a material issue. See *Bujnowski supra*. Finally, the remarks of plaintiffs' counsel were likely interpreted by the jury as assertions of criminal conduct similar to the conduct alleged as grounds [\*\*\*12] for "piercing the corporate veil." See *Woodbury*, 124 N.H. at 221, 469 A.2d at 1305; *LaBranche*, 118 N.H. at 179, 385 A.2d at 110. The phrase "having the profits from their project skimmed off" has a decidedly criminal ring to it; combined with the attorney's earlier allegation that "some of the evidence may suggest to you that his conduct was less than law abiding," the unfairly prejudicial effect is obvious.

The Association maintains that the trial judge's curative instructions were sufficient to remove the taint of their attorney's improper comments, and that therefore mistrial was not the proper remedy. Cf. *Lake*, 125 N.H. at 822-23, 485 A.2d at 1051 (where no curative instructions given, prosecutor's assertions of crucial facts not in evidence compelled a reversal). In the Association's favor, we note that this is not a criminal case, as were *Bujnowski*, *Woodbury*, and *LaBranche*, the mistrial cases described above; Gladstone's liberty is not at stake, and the plaintiffs' counsel's statement of personal belief might not have influenced [\*\*\*13] the jury as much as a public prosecutor's opinion, see *Bujnowski*, 130 N.H. at 4, 532 A.2d at 1387. We think, however, that these factors are outweighed by the sheer [\*18] number of ways in which the [\*\*1253] offending statements were improper. Perhaps any one error, in isolation, would be insufficient to mandate a mistrial, but in conjunction we find them sufficient. Moreover, here the jury heard the plaintiffs' counsel's improper remarks not once, but twice. After the plaintiffs' counsel completed his closing argument, the trial court repeated the offensive portions to the jurors word-for-word before telling them to ignore what they had just heard. Even though the plaintiffs' counsel expressed regret at his remarks, we hold that under these circumstances no instruction could have sufficed to cure the irreparable injustice caused by the plaintiffs' counsel's remarks. A mistrial was required.

We do not intend here to hobble a trial court's discretion in the ordinary case to choose between giving the jury a curative instruction and simply continuing the trial, see *LaBranche*, 118 N.H. at 180, 385 A.2d at 110 [\*\*\*14] (curative instruction may "serve[] only to emphasize the prejudice"); nor do we mean to imply that the bell may never be "unrung," see *State v. Hunter*, 132 N.H. 556,

561, 567 A.2d 564, 568 (1989) (court presumes that curative instructions are followed by jury). Instead, we merely hold that in the extraordinary case, such as this one, the bell is simply too loud to be successfully dampened.

For the sake of judicial economy, we now address those additional issues raised by the defendants that are likely to arise again on remand and do not appear to depend heavily on the particular evidence presented at the trial below. First, the defendants argue that the superior court erred in denying their motion to dismiss the negligence portion of the plaintiffs' action. The plaintiffs' negligence claim fails, the defendants argue, because it alleges purely "economic loss," rather than property damage or personal injury. The Association, for its part, denies that the negligence claim alleges only "economic loss."

We agree with the defendants that a plaintiff may not ordinarily recover in a negligence claim for purely "economic loss." See *Ellis v. Robert C. Morris, Inc.*, 128 N.H. 358, 364, 513 A.2d 951, 954 (1986) [\*\*\*15] ("economic loss" not recoverable in negligence action; "economic loss" defined, among other things, as the decrease in value of a product because it is inferior in quality), *overruled on other grounds by Lempke v. Dagenais*, 130 N.H. 782, 547 A.2d 290 (1988); see also *Lempke*, 130 N.H. at 792, 547 A.2d at 296 ("It is clear that the majority of courts do not allow economic loss recovery in tort . . ."); W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 101, at 708 (5th ed. 1984) (similar); Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the [\*\*19] Void*, 67 B.U. L. Rev. 9, 18-19 (1987) (similar). We do not agree, however, that all of the damage alleged by the plaintiffs in their negligence claim falls within the category of "economic loss." The plaintiffs' writ, for example, asserts that, due to the defendants' negligence, "the roofs on buildings 210 and 310 Border Brook Terrace and the pool enclosure are inadequate and defective and as a result therefor[e] water has been allowed to flow into the buildings and [\*\*\*16] units below, causing interior as well as exterior damages." (Emphasis added.) We read this assertion not as a claim that the defendants' product is simply defective, but as a claim that the defendants' defective product accidentally caused harm to the condominium property. As such, it is not a claim for purely "economic loss." See *Ellis supra*. To the extent that the plaintiffs allege damage other than purely "economic loss," we find that the superior court properly refused to dismiss their negligence claim. We leave it to the court on remand to



determine which particular allegations assert purely "economic loss," and which do not. Those that do assert purely "economic loss" cannot be maintained as a negligence claim.

Second, the defendants argue that the superior court erred in refusing to instruct the jury that an implied warranty is limited to latent defects discoverable within a reasonable period of time. See Lempke, 130 N.H. at 794, 547 A.2d at 297. The Association apparently does not disagree with this established principle and instead disputes the defendants' right on appeal to challenge [\*\*1254] the superior court's [\*\*\*17] formulation of its instruction. Because we reverse this case on other grounds, we do not address the Association's procedural contentions and merely direct the superior court on remand to include in its instructions the limitation described above.

Third, the defendants contend that the plaintiffs failed to properly plead their claim against Sumner Gladstone individually, as the alter ego of the trust entity, Mt. Vernon. The defendants base this argument on the wording of the plaintiffs' pleadings: "Due to the conduct of Sumner Gladstone and his agents in the breaches of contract and torts as alleged, the *corporate* veil must be pierced and Sumner Gladstone is liable under the alter ego doctrine." (Emphasis added.) Because the plaintiffs used the term "corporate veil," rather than "corporate and trust veils," the defendants maintain that the

plaintiffs should not have been allowed to sustain their action against Gladstone with regard to the actions of the trust.

This argument has little merit. The pleading containing the above language is the plaintiffs' motion to amend, in which the plaintiffs asked the superior court to "allow the following amendment to [\*20] the complaint [\*\*\*18] against Sumner Gladstone, individually and as *trustee*." (Emphasis added.) The motion charges that Gladstone "commingled funds between himself, the *realty trust* and the corporation," (emphasis added), and "was in fact the entity who was in control of the construction and development" of the condominium project. We find that the plaintiffs' motion to amend, taken as a whole, adequately informed the defendants that the plaintiffs were attempting to hold Gladstone responsible for the actions of Mt. Vernon, the trust, as well as Babson-Reed, the corporation. See R. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 225, at 164 (1984).

In sum, we hold that the Association had standing to sue, but that the plaintiffs' counsel's closing remarks contained improper, incurably prejudicial statements. We reverse the verdict for the plaintiffs and remand for a new trial in accordance with this opinion.

*Reversed and remanded.*

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