

Wyatt v. Marcus  
Fla.App. 3 Dist.,2007.

District Court of Appeal of Florida,Third District.  
Shafter G. WYATT, III, as Personal Representative  
of the Estate of Janet L. Wyatt, deceased, Appellant,  
v.

Marilyn L. MARCUS, D.O.; Marilyn L. Marcus,  
D.O., P.A., Appellee.

**No. 3D05-1529.**

March 7, 2007.

**Background:** Personal representative of estate brought action against physician. The Circuit Court, Miami-DadeCounty, [Michael A. Genden](#), J., granted physician's motion for new trial based on improper comments made by personal representative's counsel during closing arguments, which had been objected to by physician. Personal representative appealed.

**Holding:** The District Court of Appeal, [Cortiñas](#), J., held that factors to be considered when evaluating whether unobjected-to comments warrant a new trial did not apply.

Affirmed.

West Headnotes

**[1] Appeal and Error 30**  **977(3)**

**30** Appeal and Error

**30XVI** Review

**30XVI(H)** Discretion of Lower Court

**30k976** New Trial or Rehearing

**30k977** In General

**30k977(3)** k. Grant of New Trial in

General. [Most Cited Cases](#)

A trial court's decision to grant a new trial is reviewed for abuse of discretion.

**[2] New Trial 275**  **29**

**275** New Trial

**275II** Grounds

**275II(B)** Misconduct of Parties, Counsel, or Witnesses

**275k29** k. Conduct of Counsel. [Most Cited Cases](#)

**New Trial 275**  **31**

**275** New Trial

**275II** Grounds

**275II(B)** Misconduct of Parties, Counsel, or Witnesses

**275k31** k. Necessity of Objection. [Most Cited Cases](#)

Factors set forth by Supreme Court to be considered when evaluating whether improper, but unobjected-to, comments made during closing argument warrant a new trial did not apply to defendant physician's motion for new trial based on improper comments made by plaintiff's counsel that were objected to by physician and that were addressed in physician's motions for mistrial, and thus trial court was not required to consider such factors before granting new trial.

\***1204** [Lauri Waldman Ross](#); Dickman & Dickman and Robert J. Dickman, Jr. and [Manuel Epelbaum](#), Miami, for appellant.

Stephens, Lynn, Klein, LaCava, Hoffman & Puya and [Robert J. Cousins](#), Ft. Lauderdale; Hicks Kneale and [Mark Hicks](#) and [Richard A. Warren](#), Miami, for appellee.

Before [GERSTEN](#), [CORTIÑAS](#), and [ROTHENBERG](#), JJ.

[CORTIÑAS](#), Judge.

**[1]** We review the trial court's order granting a new trial based on numerous improper comments made by plaintiff's counsel during closing argument and the cumulative effect of those comments. A trial court's decision to grant a new trial is reviewed for abuse of discretion. See [Engle v. Liggett Group, Inc.](#), 945 So.2d 1246, 1263 (Fla.2006); [Murphy v. Int'l Robotic Sys. Inc.](#), 766 So.2d 1010 (Fla.2000).

\***1205** In [Murphy](#), the Florida Supreme Court addressed the factors which a trial court must consider when dealing with unobjected-to comments in closing argument. [Murphy](#), 766 So.2d at 1028-31. Such factors are only to be considered when there is a fail-

ure to object during closing argument *or* a failure to request a mistrial based on such statements during or at the close of such argument. See [id. at 1031; Garbutt v. LaFarnara](#), 807 So.2d 83, 83 (Fla. 2d DCA 2001).

[2] In this case, all of the improper comments cited by the trial court in its order granting a new trial were addressed through the trial court's consideration of defense counsel's motions for mistrials both during and at the end of plaintiff's closing argument. [FNI](#) Thus, the trial court was correct that the [Murphy](#) standard for unobjected-to comments did not apply. We find that the trial court did not abuse its discretion in granting a new trial.

[FNI](#). We note that many of the improper comments made by plaintiff's counsel were also objected to by defense counsel during closing argument.

Affirmed.

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