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CAUDLE v. DISTRICT OF COLUMBIA: THE GOLDEN RULE HAS NO PLACE IN A COURTROOM

Abstract: On February 15, 2013, the U.S. Court of Appeals for the District of Columbia in *Caudle v. District of Columbia* held that golden rule arguments made in the context of liability are prejudicial and can warrant the granting of a new trial. This Comment argues that the damages-liability distinction for golden rule arguments as applied by the Second, Fifth, Tenth and Eleventh Circuits is the appropriate approach, and that there should not be a per se exclusion of golden rule arguments on the issue of liability.

INTRODUCTION

Federal courts have long drawn distinctions between types of arguments that are allowable and those that are prejudicial in the context of opening and closing arguments, even occasionally finding an argument to be so prejudicial that it warrants a new trial.¹ Among these, one of the most problematic has been the “golden rule” argument, which implores the jury to imagine themselves in the place of one of the parties.² Every federal appeals court that has considered the issue has agreed that a golden rule argument posed in the context of determining damages is prejudicial and may warrant a new trial.³ Nevertheless, the U.S. Courts of Appeals for the Second, Fifth, Tenth, and Eleventh Circuits have held that golden rule argu-

¹ See, e.g., *Caudle v. District of Columbia*, 707 F.3d 354, 363 (D.C. Cir. 2013); *Leathers v. Gen. Motors Corp.*, 546 F.2d 1083, 1086 (4th Cir. 1976); *Callaghan v. A. Lague Express*, 298 F.2d 349, 351 (2d Cir. 1962); *Klotz v. Sears, Roebuck & Co.*, 267 F.2d 53, 54–55 (7th Cir. 1959); *F.W. Woolworth Co. v. Wilson*, 74 F.2d 439, 442 (5th Cir. 1934). To emphasize its overall point of fair play, the U.S. Court of Appeals for the District of Columbia in *Caudle v. District of Columbia* ended its opinion with a footnote illustrating an often-quoted exchange between Judge Learned Hand and Justice Oliver Wendell Holmes, Jr. 707 F.3d. at 363 n.10; see Michael Herz, “Do Justice!”: *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 112 (1996) (describing the example as “widely-used”). After having lunch together, Judge Hand wished an elderly Justice Holmes: “Well, sir, goodbye. Do justice!” Whereupon Justice Holmes turned and remarked: “That is not my job. My job is to play the game according to the rules.” 707 F.3d at 363 n.10 (internal quotation marks omitted) (citing Herz, *supra*, at 111).

² BLACK’S LAW DICTIONARY 761 (9th ed. 2009). In other words, this argument is “essentially a suggestion to a jury by an attorney that the jurors should do unto others, normally the attorney’s client, as they would have others do unto them.” Kevin W. Brown, Annotation, *Propriety and Prejudicial Effect of Attorney’s “Golden Rule” Argument to Jury in Federal Civil Case*, 68 A.L.R. FED. 333, 334 (1984).

³ See, e.g., *Leathers*, 546 F.2d at 1086; *Callaghan*, 298 F.2d at 351; *Klotz*, 267 F.2d at 54–55; *F.W. Woolworth*, 74 F.2d at 442.

ments on the issue of liability are not prejudicial.⁴ According to these courts, there are fewer dangers associated with using the golden rule argument in the context of determining liability, as the rationale of avoiding a decision based on sympathy or emotion does not apply as strongly as when determining damages.⁵

In contrast, the U.S. Courts of Appeals for the District of Columbia and the Third Circuit departed from their sister circuits, holding that any use of a golden rule argument is improper.⁶ These courts reasoned that a golden rule argument in either circumstance carried the same risk of causing the jury to make a decision based on undue sympathy or emotion.⁷ Therefore, in these circuits, the use of golden rule arguments is prejudicial in the context of liability and may constitute grounds for a new trial.⁸

Part I of this Comment describes the facts underlying the U.S. Court of Appeals for the District of Columbia's 2013 case *Caudle v. District of Columbia*.⁹ It also recounts the case's procedural history prior to its arrival before the D.C. Circuit.¹⁰ Part II then examines the reasoning behind the Second, Fifth, Tenth, and Eleventh Circuits' creation of the damages-liability distinction for golden rule arguments.¹¹ It then discusses the Third and D.C. Circuits' subsequent rejection of that distinction.¹² Finally, Part III argues that the *Caudle* court incorrectly adopted the Third Circuit's flawed reasoning in failing to adopt the liability-damages distinction and thereby eliminated a useful tool when articulating the reasonable person standard.¹³ Instead, in the context of determining liability, the trial judge should have discretion regarding whether the use of golden rule arguments is appropriate.¹⁴

⁴ See *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1071 n.3 (11th Cir. 1996); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1289 (2d Cir. 1990); *Shultz v. Rice*, 809 F.2d 643, 651–52 (10th Cir. 1986); *Burrage v. Harrell*, 537 F.2d 837, 839 (5th Cir. 1976).

⁵ *McNely*, 99 F.3d at 1071 n.3; *Johnson*, 899 F.2d at 1289; *Shultz*, 809 F.2d at 651–52; *Burrage*, 537 F.2d at 839.

⁶ *Caudle*, 707 F.3d at 357; *Edwards v. City of Philadelphia*, 860 F.2d 568, 574 n.6 (3d Cir. 1988).

⁷ See *Caudle*, 707 F.3d at 360; *Edwards*, 860 F.2d at 574 n.6.

⁸ See *Caudle*, 707 F.3d at 357; *Edwards*, 860 F.2d at 574 n.6.

⁹ See *infra* notes 15–23 and accompanying text.

¹⁰ See *infra* notes 24–36 and accompanying text.

¹¹ See *infra* notes 37–56 and accompanying text.

¹² See *infra* notes 57–69 and accompanying text.

¹³ See *infra* notes 70–89 and accompanying text.

¹⁴ See *infra* notes 84–89 and accompanying text.

I. THE TRIAL COURT IN *CAUDLE v. DISTRICT OF COLUMBIA* FINDS GOLDEN RULE ARGUMENTS DO NOT WARRANT A NEW TRIAL

Beginning in late 2005, five African-American officers of the District of Columbia Metropolitan Police Department's ("MPD") First District Focus Mission Unit ("FMU") believed that the new supervising lieutenant was discriminating against them on the basis of race.¹⁵ On June 16, 2006, the officers sent an anonymous letter to their commander expressing their concerns about the new lieutenant.¹⁶ Shortly thereafter, the commander initiated a meeting among the FMU officers.¹⁷ She explained that she had received the complaint and shared portions of its contents.¹⁸ At the end of the meeting, the commander queried whether the FMU officers could still work together.¹⁹

Subsequent to this incident, the commander required all FMU officers to reapply to the unit.²⁰ In addition, the African-American officers—who usually patrolled together—were forced to ride with other officers and were barred from a number of FMU operations.²¹ In the end, none of the reapplications by the complaining African-American officers were approved.²² Instead, these officers each ended up back in the patrol unit, which they considered to be a demotion from the FMU.²³

In February 2008, the demoted officers filed suit for retaliation against the District of Columbia (the "District") under Title VII of the Civil Rights

¹⁵ *Caudle v. District of Columbia*, 804 F. Supp. 2d 32, 37–38 (D.D.C. 2010). The "FMU" is a specialized plainclothes unit composed of patrol officers. *Id.* at 38.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* The plaintiffs reported that the other attending officers "[t]ook shots at" them during the meeting and "appeared to know who was behind the unsigned complaint." *Id.* (alteration in original) (internal quotation marks omitted). After the meeting, members of the FMU unit reportedly "had trouble getting along." *Caudle*, 707 F.3d at 357. It was around this time that officer Nikeith Goins—who was not party to the letter—"complained to [the lieutenant]" directly "about unfair treatment." *Id.* (internal quotation marks omitted).

²⁰ *Caudle*, 804 F. Supp. 2d at 38. This was an "unprecedented step that [the commander]" testified was "motivated by performance concerns." *Id.*

²¹ *Id.* Convinced their reassignments were retaliatory, the officers wrote a second complaint to the D.C. Office of Human Rights and to the U.S. Department of Justice. *Id.*

²² *Id.*

²³ *Id.* at 39. Officer Frazier Caudle was the first to be relegated to the patrol unit. *Id.* Officers William James, Donald Smalls, and Goins were placed in a new "Intel unit," which was comprised of only them, and was soon disbanded. *Id.* (internal quotation marks omitted). Afterwards, they too were assigned back to the patrol unit. *Id.* Officer Sholanda Miller was given an evening patrol shift. *Id.*

Act of 1964.²⁴ At trial, a jury awarded the officers nearly one million dollars in damages.²⁵

Nevertheless, the District moved for a new trial on grounds that the plaintiffs' attorney used three golden rule arguments.²⁶ Again, "golden rule" arguments ask jurors to imagine either themselves or someone they care about in the place of one of the parties.²⁷ The officers' attorney made the following three golden rule statements during closing arguments—each of which were cut short by objection:

- (1) "[A]sk yourself, would *you* hesitate to speak up if *you* knew that speaking up would mean that *your* boss would call a meeting with *your* entire office";
- (2) "Ask yourself this: Wouldn't *you* think twice about complaining about workplace discrimination"; and
- (3) "[I]t is your job to determine how to make [the] plaintiffs whole As you make those decisions, we ask yourselves [sic] to *put yourselves in the plaintiffs' shoes*. What would it do to *you* to have *your* complaint broadcast to *your* entire office, to be the only one excluded" ²⁸

Additionally, the District argued that the district court did not appropriately address these arguments, and therefore, the arguments constituted grounds for a new trial.²⁹ The trial court denied the defendant's motion for a new trial on the grounds that the court adequately responded to each infraction during the trial and as a result, no prejudice occurred.³⁰

On appeal, the D.C. Circuit reversed the district court's decision, holding that the golden rule arguments were improper.³¹ In reaching this conclu-

²⁴ *Id.* See generally 42 U.S.C. § 2000e-2(a) (2006) (proscribing certain unlawful employment practices for employers). The standard for retaliation set by the 2006 U.S. Supreme Court case *Burlington Northern & Santa Fe Railway Co. v. White* forbids "employer actions that would have been materially adverse to a reasonable employee." 548 U.S. 53, 57 (2006).

²⁵ *Caudle*, 804 F. Supp. 2d at 39. The jury returned verdicts for the plaintiffs and awarded a total of \$900,000 in compensatory damages. *Id.*

²⁶ *Id.* at 52.

²⁷ See BLACK'S LAW DICTIONARY, *supra* note 2, at 761; Brown, *supra* note 2, at 334.

²⁸ *Caudle*, 707 F.3d at 358 (alteration in original) (internal quotation marks omitted); see also *Caudle*, 804 F. Supp. 2d at 52 nn.18–19 (observing that the arguments were interrupted). The trial court declined to decide if the plaintiffs' counsel's arguments were improper golden rule arguments because it found that no prejudice occurred from them. *Id.*

²⁹ *Caudle*, 804 F. Supp. 2d at 52–53.

³⁰ *Id.* The court sustained the District's objections to each golden rule argument before the plaintiffs' attorney finished speaking. *Id.* at 52. In addition, after the final offense, the court told the jury to disregard the statements. *Id.* at 53. Finally, during jury instruction, the judge told the jury "to decide the facts of the case only from a fair evaluation of all the evidence without prejudice, sympathy, fear, favor, or public opinion." *Id.*

³¹ *Caudle*, 707 F.3d at 357.

sion, the court considered each golden rule argument individually.³² The third argument—directed towards damages—was found readily prejudicial, as it was the type of golden rule argument that has been universally condemned.³³ The first two arguments, however, were less clear because they were directed towards liability; nevertheless, the court still concluded that they were impermissible.³⁴ Although the plaintiffs argued that these statements merely explained the applicable reasonableness legal standard, the court concluded that the statements could have influenced the jury to determine liability based on “undue sympathy or emotion.”³⁵ The court then remanded the case to be determined in light of its opinion.³⁶

II. DIVERGENT OPINIONS ON THE USE OF GOLDEN RULE ARGUMENTS TOWARDS LIABILITY

Although there is universal agreement among federal courts that golden rule arguments are improper in the context of damages, there are divergent opinions regarding the use of golden rule arguments towards ultimate liability.³⁷ Specifically, when determining the amount of damages to award, all federal appeals courts have held that it is improper to ask the jury to put themselves in the place of the plaintiff.³⁸ Courts agree that a golden rule argument creates a substantial risk that the jury will award disproportionate damages based on unfairly aroused sympathy or other improper emotion.³⁹ At least four federal appeals courts, however, have held that golden rule arguments are permissible with respect to the issue of ultimate liability.⁴⁰ Conversely, the U.S. Court of Appeals for the Third Circuit rejects this lia-

³² *Id.* at 358.

³³ *Id.* at 360; *see also, e.g., Leathers*, 546 F.2d at 1086 (indicating that golden rule arguments in the context of damages have been universally condemned); *Callaghan*, 98 F.2d at 351 (same); *Klotz*, 267 F.2d at 54–55 (same); *F.W. Woolworth*, 74 F.2d at 4 (same).

³⁴ *Caudle*, 707 F.3d at 360.

³⁵ *See id.* at 360–61 (quoting *Edwards*, 860 F.2d at 574 n.6).

³⁶ *Id.* at 363.

³⁷ *See, e.g., Leathers v. Gen. Motors Corp.*, 546 F.2d 1083, 1086 (4th Cir. 1976) (observing the universal rejection of golden rule arguments in the context of damages); *Callaghan v. A. Lague Express*, 298 F.2d 349, 351 (2d Cir. 1962) (same); *Klotz v. Sears, Roebuck & Co.*, 267 F.2d 53, 54–55 (7th Cir. 1959) (same). *Compare Edwards v. City of Philadelphia*, 860 F.2d 568, 574 n.6 (3d Cir. 1988) (rejecting golden rule arguments in the context of liability), *with Burrage v. Harrell*, 537 F.2d 837, 839 (5th Cir. 1976) (allowing golden rule arguments in the context of liability).

³⁸ *See, e.g., Leathers*, 546 F.2d at 1086; *Callaghan*, 298 F.2d at 351; *Klotz*, 267 F.2d at 54–55; *F.W. Woolworth Co. v. Wilson*, 74 F.2d 439, 442 (5th Cir. 1934).

³⁹ *See Caudle v. District of Columbia*, 707 F.3d 354, 357 (D.C. Cir. 2013); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1071 n.3 (11th Cir. 1996); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1289 (2d Cir. 1990); *Edwards*, 860 F.2d at 574 n.6; *Shultz v. Rice*, 809 F.2d 643, 651–52 (10th Cir. 1986); *Burrage*, 537 F.2d at 839.

⁴⁰ *See McNely*, 99 F.3d at 1071 n.3; *Johnson*, 899 F.2d at 1289; *Shultz*, 809 F.2d at 651–52; *Burrage*, 537 F.2d at 839.

bility-damages distinction, a position that the D.C. Circuit Court of Appeals joined in its 2013 decision in *Caudle*.⁴¹ Both courts reason that the same risk of undue sympathy exists on the issue of liability as well as damages, and therefore reject a per se distinction between arguments directed towards liability versus damages.⁴²

Section A of this Part examines the opinions of the U.S. Courts of Appeals for the Second, Fifth, Tenth, and Eleventh Circuits—all of which draw a distinction between golden rule arguments directed towards damages and liability.⁴³ Section B of this Part discusses the decisions of the Third and D.C. Circuits, which reject the damages-liability distinction.⁴⁴

A. *The Second, Fifth, Tenth, and Eleventh Circuits Find a Distinction Between Golden Rule Arguments on the Issue of Liability and Damages*

The federal appeals courts that allow golden rule arguments in the context of liability find that these arguments do not have the same propensity to arouse unfair sympathy as when they are used in the context of damages; instead, these courts focus on the liability-context arguments' purpose of helping the jury assess the reasonableness of a party's actions.⁴⁵ The Fifth Circuit was the first federal appeals court to delineate between golden rule arguments directed towards liability and damages.⁴⁶ In 1976, in *Burrage v. Harrell*, the defendant's counsel asked the jury to determine the reasonableness of the defendant's actions by putting themselves in the place of the defendant, who was caught in an emergency situation that resulted in an automobile accident.⁴⁷ The court held that this argument related only to the reasonableness of the defendant's actions and that "the argument was not immoderate or unduly emotional."⁴⁸ Specifically, because the golden rule argument related to reasonableness, the court reasoned that it would not un-

⁴¹ See *Caudle*, 707 F.3d at 357; *Edwards*, 860 F.2d at 574 n.6.

⁴² *Caudle*, 707 F.3d at 360; *Edwards*, 860 F.2d at 574 n.6.

⁴³ See *infra* notes 45–56 and accompanying text.

⁴⁴ See *infra* notes 57–69 and accompanying text.

⁴⁵ See *McNely*, 99 F.3d at 1071 n.3; *Johnson*, 899 F.2d at 1289; *Shultz*, 809 F.2d at 651–52; *Burrage*, 537 F.2d at 839.

⁴⁶ *Burrage*, 537 F.2d at 839. In *Burrage*, the plaintiff used previous federal golden rule cases to support the contention that the defendant's golden rule argument—posed in the context of liability—was prejudicial. *Id.* The court concluded, however, that the plaintiff could not use the cases for support because each of the cases involved golden rule arguments strictly in the context of determining damages. *Id.*

⁴⁷ See *id.* The issue before the jury was whether the defendant was negligent in the way he operated his vehicle in response to the plaintiff's actions, who either stopped or backed up in front of the defendant on an interstate highway after the plaintiff missed his exit. *Id.* at 838.

⁴⁸ *Id.* at 839. The *Burrage* court also considered the fact that the trial judge explained the reasonable person standard "quite fully," which—in the court's opinion—protected the jury from being confused or prejudiced by the golden rule argument. See *id.*

fairly arouse the jury's sympathies.⁴⁹ Therefore, there was no risk that the argument created a biased verdict and no prejudicial error was established.⁵⁰

The Second, Tenth, and Eleventh Circuits later followed the Fifth Circuit's lead in drawing a distinction between the contexts of determining liability and damages.⁵¹ For example, in the 1986 Tenth Circuit case, *Shultz v. Rice*, the defendant's counsel asked the jury to assess reasonableness by imagining themselves in the defendant-doctor's place, who injected a patient with a treatment that later resulted in injury.⁵² The court reasoned that counsel's request to the jury was meant to ensure that they assessed the reasonableness of the defendant's actions with regard to what he knew at the time of the alleged negligent act.⁵³ As in the Fifth Circuit, the argument was deemed permissible and not prejudicial because it "merely directed the minds of the jury toward the ultimate question of [the defendant's] liability" under the reasonable person standard.⁵⁴

For a period of time, courts generally accepted the difference between golden rule arguments in the contexts of liability and damages and, therefore, the issue did not garner much discussion.⁵⁵ According to the courts that observed the differences between these contexts, this had essentially developed into a per se distinction.⁵⁶

⁴⁹ *Id.*

⁵⁰ *Id.* It should be noted that in *Burrage*, the Fifth Circuit only held that there was no prejudice in the exact circumstances of the case before it. *Id.*

⁵¹ See *McNely*, 99 F.3d at 1071 n.3; *Johnson*, 899 F.2d at 1289; *Shultz*, 809 F.2d at 651–52.

⁵² 809 F.2d at 651. The defendant had administered a hormone to a pregnant woman, claiming that he had no reason to suspect that the woman was pregnant. *Id.* He later ordered a pregnancy test for the woman, but did so solely as a formality in conjunction with other blood tests. *Id.*

⁵³ *Id.* at 652. The crucial time in the case was at the time of the injection, before the doctor had received the results of the patient's pregnancy test. *Id.*

⁵⁴ *Id.*; see *Burrage*, 537 F.2d at 839.

⁵⁵ Cf. *McNely*, 99 F.3d at 1071 n.3; *Johnson*, 899 F.2d at 1289. For example, in 1990, the U.S. Court of Appeals for the Second Circuit in *Johnson v. Celotex Corp.* held that the golden rule arguments at issue mainly went to the matter of ultimate liability and were thus not improper. 899 F.2d at 1289. The *Johnson* court did not include any discussion of the damages-liability distinction, leaving the support to a simple citation of *Burrage*. See *id.* Similarly, in 1996, the U.S. Court of Appeals for the Eleventh Circuit in *McNely v. Ocala Star-Banner Corp.* held that defense counsel did not use a prohibited golden rule argument by asking jurors to put themselves in the defendant-corporation's position to determine liability. 99 F.3d at 1071 n.3. At issue was whether the plaintiff was terminated because of his disability or for legitimate workplace misconduct. *Id.* Although the *McNely* court included some reasoning in a footnote, it was simply a recitation of the reasoning used in *Burrage*. See *id.*

⁵⁶ See *McNely*, 99 F.3d at 1071 n.3; *Johnson*, 899 F.2d at 1289. Unlike *Burrage*, the *Johnson* court did analyze the emotional quality of the particular argument used in the case, but stated only that the argument went towards liability and was, therefore, not prejudicial. Compare *Johnson*, 899 F.2d at 1289 (holding that the golden rule argument was not prejudicial because it was in the context of liability), with *Burrage*, 537 F.2d at 839 (holding that the golden rule argument was not prejudicial because it was not immoderate or unduly emotional).

B. *The Third Circuit and the D.C. Circuit Reject a Distinction Between Golden Rule Arguments on the Issues of Liability and Damages*

The U.S. Courts of Appeals for the Third Circuit and the District of Columbia reason that golden rule arguments related to liability unduly arouse a jury's sympathies, and thus, these courts are unwilling to distinguish between the contexts of damages and liability.⁵⁷ In 1988, the Third Circuit in *Edwards v. City of Philadelphia* broke with its sister circuits and rejected the distinction between liability and damages.⁵⁸ Instead, the court held that any use of a golden rule argument is improper.⁵⁹ The Third Circuit explained that arguments towards liability and damages have the same issue: "[T]he creation of undue sympathy and emotion."⁶⁰ Thus, the court held that there was no reason to distinguish between the two.⁶¹

The D.C. Circuit in *Caudle* adopted the Third Circuit's line of reasoning, holding that any use of a golden rule argument could arouse undue sympathy or emotion in the jury.⁶² According to the *Caudle* court, these considerations are a risk whenever a golden rule argument is used and thus require the granting of a new trial.⁶³ The court reasoned that forbidding golden rule arguments will avoid the risk of a jury verdict based on "inappropriate considerations such as emotion."⁶⁴ The court stated that it is just as inappropriate for a jury to be persuaded by emotional argument to determine liability as it is for damages.⁶⁵

Moreover, the *Caudle* court explained that asking an individual juror to think of how they would have felt or acted if they were in the place of a party is inconsistent with the jury's duty to apply an objective reasonableness person (or employee) standard.⁶⁶ The reasonableness standard seeks to

⁵⁷ See *Caudle*, 707 F.3d at 360; *Edwards*, 860 F.2d at 574 n.6. Recall that the reasoning behind the universal rejection of golden rule arguments in the context of *damages* is their capacity to unduly incite juror sympathies. See, e.g., *Leathers*, 546 F.2d at 1086; *Callaghan*, 98 F.2d at 351; *Klotz*, 267 F.2d at 54–55; *F.W. Woolworth*, 74 F.2d at 442.

⁵⁸ 860 F.2d at 574 n.6.

⁵⁹ *Id.*

⁶⁰ *Id.* (internal quotation marks omitted). The court only specifically discussed the use of a golden rule argument towards damages by the plaintiff, and towards liability by the defendant, but one can assume the court meant the rationale to apply to both plaintiffs and defendants on the issue of liability, as it was applied to the plaintiffs in *Caudle*. Cf. *Caudle*, 707 F.3d at 360; *Edwards*, 860 F.2d at 574 n.6.

⁶¹ *Edwards*, 860 F.2d at 574 n.6. Interestingly, despite the improper arguments, the court did not grant a new trial, reasoning that the judge's jury instructions prevented any prejudice against the plaintiff. See *id.* at 575.

⁶² See 707 F.3d at 360; *Edwards*, 860 F.2d at 574 n.6.

⁶³ 707 F.3d at 360.

⁶⁴ *Id.*; see also *Stokes v. Delcambre*, 710 F.2d 1120, 1128 (5th Cir. 1983) ("The [golden] rule's purpose is to reduce the risk of a jury decision based on emotion rather than trial evidence.")

⁶⁵ *Caudle*, 707 F.3d at 360.

⁶⁶ See *id.* at 361.

avoid the uncertainties that “plague the judicial effort to determine a plaintiff’s unusual subjective feelings.”⁶⁷ The court reasoned that the plaintiffs’ attorney abandoned an objective standard by asking each juror to decide how they would feel subjectively in the plaintiffs’ position.⁶⁸ Therefore, the *Caudle* court held that golden rule arguments are inappropriate in the liability context.⁶⁹

III. THE CAUDLE DECISION: OVERLOOKING REALITY FOR THE APPEARANCE OF OBJECTIVITY

Golden rule arguments should not be per se impermissible in the context of determining liability, but rather it should be left to the trial judge to exercise discretion.⁷⁰ Specifically, courts should distinguish between golden rule arguments in the contexts of liability and damages because these arguments serve different purposes depending on the context, and there is thus not the same risk of arousing emotion and sympathy when directed towards liability.⁷¹

Jurors are usually expected to apply the amorphous reasonable person standard without any type of “legal test” to follow.⁷² Some state instructions even remind the jurors that reasonableness is not a predetermined value and is

⁶⁷ *Id.* (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68–69 (2006)).

⁶⁸ *See id.* The court went on to address whether the error warranted a new trial. *Id.* at 361–63. The court looked at the number of inappropriate arguments made by counsel and the actions taken by the district court to mitigate the prejudice and concluded that the efforts taken to cure the resulting prejudice were insufficient. *Id.* at 363.

⁶⁹ *Id.* at 360.

⁷⁰ *See infra* notes 77–89 and accompanying text.

⁷¹ *See infra* notes 77–89 and accompanying text.

⁷² *See* Stephen Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 856 (2001); Richard W. Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425, 432 (2002). For example, most jurisdictions provide the following instruction to jurors: “Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances.” *See* Patrick Kelley & Laurel Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 595 (2002) (giving examples of several states’ model jury instructions on negligence). Such non-legal tests impose no constraints on jurors and inevitably draw upon the jurors’ own subjective life experiences. *Cf.* Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2402–10 (1990) (explaining the theory that jurors apply the negligence standard by reference to “community standards”). In contrast, one example of a reasonable person standard that aspires to be more objective, i.e., provide a “legal test” for jurors to follow, is the Hand formula set forth in *United States v. Carroll Towing Co.* *See* 159 F.2d 169, 173 (2d Cir. 1947). The Hand formula provides jurors with a more guided approach, finding liability when the burden of adequate precautions is outweighed by the probability of an accident times the severity of the injury. *See id.*

for them to decide.⁷³ Courts that do not allow the use of a golden rule argument in the liability context assume that the jury is able to objectively apply a vacuous reasonably prudent person standard.⁷⁴ In most jurisdictions, however, the jury is given little guidance in terms of making such an ostensibly objective determination.⁷⁵ Thus, without further instruction, jurors are left to consider their own subjective notions and experiences of what constitutes social and community standards.⁷⁶

Asking jurors to stand in the shoes of a litigant to determine liability is simply a means of providing more guidance to jurors, reminding them to consider the facts at issue only as the party experienced them at the time the injury occurred.⁷⁷ Furthermore, articulating a golden rule argument in the liability context is also less troublesome because, practically speaking, jurors are bound to have already considered themselves in the place of each party.⁷⁸ In truth, every practical application of a reasonable person standard will be by a

⁷³ See Kelley & Wendt, *supra* note 72, at 608. One typical provision is Michigan's definition of negligence for juries: "The law does not say what a reasonably careful person using ordinary care would or would not do under such circumstances. That is for you to decide." See *id.*

⁷⁴ See Caudle v. District of Columbia, 707 F.3d 354, 361 (D.C. Cir. 2013); see also Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 640 (2003) (arguing that individual conceptions of social and community norms are implicit in all reasonable person determinations); Timothy D. Lytton, Robert L. Rabin, & Peter H. Schuck, *Tort as a Litigation Lottery: A Misconceived Metaphor*, 52 B.C. L. REV. 267, 275–76 (stating the variability of tort verdicts in similar factual situations).

⁷⁵ See Gilles, *supra* note 72, at 856. It is not to argue that there is a specific mathematical test that could be applied, the phrase is simply a convenient one to indicate factors that may be considered. See Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 8 n.7 (1927). Proposed legal tests for reasonableness almost always involve some type of cost-benefit analysis for the jury to engage in to avoid the jury determining what the standard means. See Gilles, *supra* note 72, at 814–15.

⁷⁶ See Hetcher, *supra* note 74, at 640. For example, one author illustrates how reasonableness will always be based in jurors' conceptions of social norms by posing the hypothetical question of whether it is reasonable to build a hayrick without an aperture. See *id.* Inevitably, a set of jurors living in a region where the norm is to build hayricks *with* an aperture will reach the opposite conclusion from a set of jurors living in a region where the norm is to build hayricks *without* apertures. *Id.* Thus, the result of the formal standard is determined through the normative lens of the jurors empanelled. See *id.* See generally Ashley Votruba, Comment, *Will the Real Reasonable Person Please Stand Up? Using Psychology to Better Understand How Juries Interpret and Apply the Reasonable Person Standard*, 45 ARIZ. ST. L.J. 703 (2013) (discussing the lack of understanding among courts and scholars of how a jury functionally applies the reasonable person standard and suggesting the need for further empirical study).

⁷⁷ See McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1071 n.3 (11th Cir. 1996); Shultz v. Rice, 809 F.2d 643, 651–52 (10th Cir. 1986); Burrage v. Harrell, 537 F.2d 837, 839 (5th Cir. 1976).

⁷⁸ See Har-Pen Truck Lines, Inc. v. Millis, 378 F.2d 705, 714 (5th Cir. 1967); Hetcher, *supra* note 74, at 640.

particular set of jurors examining their own notions of the actions or feelings of an ordinary, reasonable, or prudent person.⁷⁹

Although the U.S. Courts of Appeals for the Second, Fifth, Tenth, and Eleventh Circuits may not expressly rely on these pragmatic observations, they nevertheless appear to be the implicit motivation behind drawing the damages-liability distinction.⁸⁰ As recognized by these courts, a golden rule argument posed in the context of liability is best interpreted as an attempt to direct the jury towards a better understanding of the reasonable person standard.⁸¹ Allowing golden rule arguments in this context recognizes that jurors apply the reasonable person standard through their own perceived social norms, based on their common sense and life experiences.⁸² Therefore, reminding the jury to make the reasonableness determination by thinking of themselves in the same situation and in light of all the evidence presented is not prejudicial, but is rather a further elucidation of how a reasonableness determination is made.⁸³

As a result, whether a golden rule argument in the context of ultimate liability is appropriate should be left to the discretion of the trial judge, rather than considered per se improper.⁸⁴ In essence, when counsel asks the

⁷⁹ See Hetcher, *supra* note 74, at 642; Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059, 1062 (2005); see also Stephen G. Giles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1049 (1994) (discussing the rejection of a model cost-benefit negligence instruction by Los Angeles trial court judges on the grounds that it would invade the jury's province).

⁸⁰ See *Burrage*, 537 F.2d at 839 (holding that the liability-context golden rule argument was designed solely to aid jurors in determining "the reasonableness of [the defendant's] actions"); see also *McNely*, 99 F.3d at 1071 n.3 (citing the *Burrage* court's reasoning); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1289 (2d Cir. 1990) (same); *Shultz*, 809 F.2d at 651–52 (explaining that the liability-context golden rule argument was intended "to direct the minds of the jury towards the ultimate question of [the defendant's] liability").

⁸¹ *Shultz*, 809 F.2d at 652; see *McNely*, 99 F.3d at 1071 n.3; *Johnson*, 899 F.2d at 1289; *Burrage*, 537 F.2d at 839. For an example of a state jurisdiction that also approves of the damages-liability distinction, see *Lopez v. Langer*, 761 P.2d 1225, 1230–31 (Idaho 1988) (holding a golden rule argument permissible in the context of determining the liability of a father for the negligent entrustment of an automobile to his 19-year-old son).

⁸² See *Shultz*, 809 F.2d at 652; Wells, *supra* note 72, at 2406; see also *Shaffer v. Ward*, 510 So. 2d 602, 603 (Fla. Dist. Ct. App. 1987) (holding that counsel's golden rule argument was "an attempt to ask the jury to use their common, everyday experience in deciding the case," and therefore, not impermissible).

⁸³ See *Shultz*, 809 F.2d at 652; *Shaffer*, 510 So. 2d at 603; *Lopez*, 761 P.2d at 1230–31.

⁸⁴ *Compare Caudle*, 707 F.3d at 360 (finding liability-context golden rule arguments to be per se invalid because of their shared concerns with damages-context golden rule arguments), and *Edwards v. City of Philadelphia*, 860 F.2d 568, 574 n.6 (3d Cir. 1988) (same), with *supra* notes 71–79 (illustrating how liability-context golden rule arguments are less troublesome than damages-context golden rule arguments and can actually provide a benefit to jurors). See also *Stokes v. Delcambre*, 710 F.2d 1120, 1128 (5th Cir. 1983) ("We do not view juries as emotional slot machines and do not suppose them to be so. Instead we review this type of hyperbolic statement with some level of confidence in the maturity of twelve citizens."); *Burrage*, 537 F.2d at 839 (illustrat-

jury to put themselves in the place of a party to determine liability, it is generally not an attempt to encourage the jury to base their decision on emotion.⁸⁵ The *Caudle* court incorrectly assumed that by posing a golden rule argument in the context of liability, counsel was asking the jurors if they, completely individually and subjectively, would have felt a certain way or done a certain act.⁸⁶ In reality, by posing liability-context golden rule arguments, counsel is asking each juror if, based on common sense and understanding of social norms, the juror would find the disputed feelings or actions reasonable when faced with the circumstances in evidence.⁸⁷ Therefore, counsel's argument is simply a rewording of the reasonable person standard to aid the jurors in applying it properly.⁸⁸ If, however, an attorney's use of the golden rule is an attempt to arouse undue sympathy or emotion, then it should be the trial judge's duty to declare the argument improper.⁸⁹

CONCLUSION

In the 2013 case *Caudle v. District of Columbia*, the U.S. Court of Appeals for the District of Columbia declined to draw a distinction between damages- and liability-context golden rule arguments due to the concern that both have the propensity to incite jurors' emotions. In so doing, the court departed from the reasoning adopted by the Second, Fifth, Tenth, and Eleven Circuits that previously addressed the issue. The court instead followed the Third Circuit's reasoning that golden rule arguments not only create a danger of disproportionate damage awards, but can also improperly motivate jury verdicts on the issue of liability. Importantly though, the dangers perceived by the court are already inherent in the reasonable person standard. Furthermore, liability-context golden rule arguments provide a benefit to jurors in the form of reminding them to only consider the evidence as it existed at the time in

ing how trial judges can exercise their discretion with regard to liability-context golden rule arguments by holding that such an argument was not prejudicial based on the specific facts of the case).

⁸⁵ See *Shultz*, 809 F.2d at 652 (explaining that the meaning of counsel's golden rule argument was to focus the jury on the defendant's knowledge at the time of the alleged negligent act); *Shaffer*, 510 So. 2d at 603 (holding that the golden rule argument's intent was to remind jurors to use "common, everyday experience in deciding the case").

⁸⁶ See *Shaffer*, 510 So. 2d at 603 (illustrating how liability-context golden rule arguments are not emotional appeals, but instead provide guidance to jurors' application of the reasonable person standard); Hetcher, *supra* note 74, at 640. See generally *Caudle*, 707 F.3d at 361 (stating that counsel's golden rule arguments were an attempt to exploit the jurors subjective feelings).

⁸⁷ See Hetcher, *supra* note 74, at 642; see also *Shaffer*, 510 So. 2d at 603 ("[The golden rule arguments] were an attempt to ask the jury to use their common, everyday experience in deciding the case.").

⁸⁸ See *Shultz*, 809 F.2d at 652; *Burrage*, 537 F.2d at 839; *Shaffer*, 510 So. 2d at 603; *Lopez*, 761 P.2d at 1230–31.

⁸⁹ See *Stokes*, 710 F.2d at 1128; *Burrage*, 537 F.2d at 839.

question. By preventing counsel from making arguments that essentially elucidate the applicable standard, the per se ban on liability-context golden rule arguments functions as an unnecessary restraint on counsel's ability to advocate for their client.

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