Preservation of Error in Ohio: Waiver Beware

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Appellate practice is not a beginner's game, in fact it is not a game at all. And as COVID-restrictions lift and we all head back into the courtroom, brushing up on how to preserve error at trial, and avoid waiver, is a necessity. This Article offers a step-by-step guide on preserving error at trial for an appeal.

But if there is one thing you take from this Article, let it be this: to preserve an error on appeal you should make a contemporaneous objection, with specificity and obtain a ruling, and if evidence is excluded, make an offer of proof. Adherence to these general pillars will give you the best chance and preserving error, but they do not account for all the traps and pitfalls. So without further ado—let's get into it.

I. Motions in Limine

Prior to the July 1, 2017 amendments, the grant or denial of a motion in limine was not a definitive evidentiary ruling. *State v. Grubb*, 28 Ohio St.3d 199, 200-201 (1986). Instead, it was "a tentative, interlocutory, precautionary ruling by the trial court." *Id.* at 201-202. But the Ohio Supreme Court changed that standard by amending Evid.R. 103 in 2017/ Evid.R. 103 now provides: "Once the court rules ***definitely*** on the record, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." (Emphasis added).

In other words, if a motion in limine is filed, and the court definitively rules on the issue, then the parties need not make a continuous or contemporaneous objection when that evidence is offered at trial. *Setters v. Durrani*, 2020-Ohio-6859, 164 N.E.3d 1159, ¶ 12 (1st Dist.), appeal not allowed, 2021-Ohio-1399, 162 Ohio St. 3d 1439, ¶ 12; *State v. Lewis*, 9th Dist. Summit No. 29696, 2021-Ohio-1575, ¶ 34 (finding trial counsel did not need to renew her motion in limine in order to preserve the argument for appeal). Thus, all in limine rulings—whether they permit or exclude evidence—are now appealable as long as the ruling is not tentative.

PRACTICE NOTE: If there has not been a "definite" ruling, counsel should assert a contemporaneous objection or make an offer of proof, if evidence is excluded. Counsel should not sit back and count on the fact that an appellate court, or the trial court in post-trial briefing, will find the order was "definitely" ruled on under Evid.R. 103. A contemporaneous objection or offer of proof will ensure preservation for appeal.

II. Voir Dire

Civ.R. 47 of the Ohio Rules of Civil Procedure dictates voir dire. Civ.R. 47(B) states:

> Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion to allow the examination of all prospective jurors in the array or, in the alternative, to permit individual examination of each prospective juror seated on a panel, prior to any challenges for cause or peremptory challenges.

Under this rule, trial courts have wide discretion to establish voir dire procedures. *See State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 28. And a trial court has "'great latitude in deciding what questions should be asked on voir dire.'" *State v. Wilson*, 74 Ohio St.3d 381, 386 (1996), quoting *Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991). This means an appellate court typically may

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reverse only upon a showing of abuse of discretion by the trial court.

An objection to a voir dire question, or instructions accompanying voir dire, must be made contemporaneously. *State v. Mason*, 82 Ohio St.3d 144, 164 (1998). And a "failure to object to remaining jurors after the completion of voir dire results in a waiver on appeal of all but plain error." *Pennell v. Dewan*, 5th Dist. Stark No. 2004CA00221, 2005-Ohio-1727, ¶ 25 (collecting cases).

A party can also object to a court's procedure and decisions on peremptory challenges. Civ.R. 47(C) establishes parameters for peremptory challenges—three challenges per party, exercised alternately, plaintiff goes first, and challenges are waived if not used:

> **(C) Challenges to prospective jurors.** In addition to challenges for cause provided by law, each party peremptorily may challenge three prospective jurors. If the interests of multiple litigants are essentially the same, "each party" shall mean "each side."
>
> Peremptory challenges shall be exercised alternately, with the first challenge exercised by the plaintiff. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties or sides, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.
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> A prospective juror peremptorily challenged by either party shall be excused.
>
> Nothing in this rule shall limit the court's discretion to allow challenges to be made outside the hearing of prospective jurors.

Civ. R. 47(C); *see also Crumley v. McCloud*, 10th Dist. Franklin No. 19AP-213, 2020-Ohio-2737, ¶ 10.

When there are multiple plaintiffs, or defendants, the term "each party" means "each side" as long as parties have "identical interest or defenses." *Westfall v. Aultman Hosp.*, 2017-Ohio-1250, 87 N.E.3d 735, ¶ 40 (5th Dist.). If their interests, however, are "essentially different or antagonistic, each litigant is ordinarily deemed a party within the contemplation of the statute and entitled [three] peremptory challenges [each]." *Chakeres v. Merchants & Mechanics Fed. Sav. & Loan Ass'n*, 117 Ohio App. 351, 355 (2d Dist.1962). Failure of a party to object to the number of peremptory challenges offered can lead to waiver of the issue on appeal.

If properly preserved, allocation of the peremptory challenges is reviewed for an abuse of discretion. And for an error in allocation to lead to reversal, the challenger must show the allocation affected a substantial right. *Premier Therapy, LLC v. Childs*, 2016-Ohio-7934, 75 N.E.3d 692, ¶ 45 (7th Dist.), citing Civ.R. 61 & R.C. 2309.59. This standard cannot be met if the challenger did not use all allotted peremptory challenges. *See State v. Greer*, 39 Ohio St.3d 236, 245 (1988) ("[A]ppellant utilized only five of the six peremptory challenges granted, and is therefore unable to demonstrate actual prejudice."). In addition, a party waives a peremptory challenge if they do not use it. *Crumley* at ¶¶ 6-10 (finding that the court did not abuse its discretion when it required a party use or lose its peremptory challenge before replacing a previously struck juror).

PRACTICE NOTE: It is important to understand the court's set procedure for how voir dire will be conducted. This will allow you to object at the appropriate time. Further, when in doubt, ask the court for clarity on using peremptory challenges to safeguard against waiver in a "use or lose" situation.

III. Opening/Closing Arguments

Opening statements are confined to facts and anticipated evidence. *Howard v. Columbus Prod. Co.*, 82 Ohio App.3d 129 (10th Dist. 1992). Opening statements should outline a party's anticipated proof and should be confined to what an attorney expects admissible evidence to prove at trial. *Furnier v. Drury*, 163 Ohio App.3d 793, 2004-Ohio-7362, ¶¶ 9-10 (1st Dist). In making an opening statement, counsel has wide latitude. *Redlin v. Rath*, 171

Ohio App.3d 717, 2007-Ohio-2540, ¶¶ 29-32 (6th Dist.). This range, however, is not limitless. Rather, in an opening statement counsel cannot (1) enlarge the allegations in the complaint, (2) make obviously erroneous statements

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of law or fact, (3) discuss questions of law, or (4) make remarks designed to "arouse passion or prejudice." *Maggio v. City of Cleveland*, 151 Ohio St. 136, 38 Ohio Op. 578 (1949); *Furnier v. Drury*, 1st Dist. Hamilton No. C–030067, 163 Ohio App.3d 793, 2004-Ohio-7362, ¶ 10, citing *Jones v. Olcese*, 75 Ohio App. 3d 34 (11th Dist.1991).

Closing argument is counsel's final chance to convince the jury of each their client's position and to help the jury apply the evidence to the law. In a closing statement, counsel may address certain topics including witness credibility and admissible evidence. *Banas v. Shively*, 2011-Ohio-5257, 969 N.E.2d 274, ¶¶ 49-53 (8th Dist.). It also gives a chance to ask the jurors to draw favorable inferences. *Hess v. Norfolk S. Ry. Co.*, 153 Ohio App. 3d 565, 2003-Ohio-4172, ¶¶ 75-77 (8th Dist.).

Closing arguments, however, may not do the following: mention prior proceedings, *Valentino v. Keller*, 15 Ohio App.2d 109, 111 (7th Dist. 1968); mention prior settlement offers to show liability; attack the credibility of a witness without evidentiary support, *Werden v. The Child.'s Hosp. Med. Ctr.*, 1st Dist. Hamilton No. C–040889, 2006-Ohio-4600, 2006 WL 2571942, ¶¶ 57-63; argue the law to the jury, *Person v. Gum*, 7 Ohio App.3d 307, 310 (8th Dist. 1983); or refer to facts never admitted into or excluded from evidence, *Drake v. Caterpillar Tractor Co.*, 15 Ohio St.3d 346, 348 (1984) (per curiam).

Objections to opening and closing argument are waived unless made contemporaneously. If an objection is not made, the issue will only be reviewed for plain error. *State v. Diar*, 120 Ohio St. 3d 460, 2008-Ohio-6266, ¶ 145.

PRACTICE NOTE: Opening and closing arguments are not evidence. Counsel should ensure the judge instructs the jury accordingly. *L & N Partnership v. Lakeside Forest Assn.*, 183 Ohio App.3d 125, 2009-Ohio-2987, ¶ 38 (10th Dist.).

IV. Objections at trial

Objections to the admission of evidence must be made contemporaneously; otherwise the objection is waived. Evid.R. 103(A)(1); *State v. Pullen*, 2d Dist. Montgomery No. 19232, 2003-Ohio-6078, ¶ 28 (finding appellant waived his right to challenge an error on appeal because he failed to assert a contemporaneous objection at trial).

And not only do objections need to be contemporaneous, they also need to be specific. Thus, if multiple grounds for an objection exist, all must be asserted. Failure to do so could lead to waiver on appeal. *Portofe v. Portofe*, 153 Ohio App.3d 207, 2003-Ohio-3469, ¶ 12 (7th Dist.) (Plaintiffs waived any alleged error in method in which equipment of dissolved partnership was sold; plaintiffs failed to object to manner in which equipment was sold, and encouraged method of sale because of difficulty of performing inventory and appraisal.).

PRACTICE NOTE: Counsel should not rely on simply stating "objection" at trial. Rather, counsel should be specific, or inadvertent waiver of an issue on appeal could arise. *See, e.g.*, *State v. Bentz*, 2017-Ohio-5483, 93 N.E.3d 358, ¶ 127 (3d Dist.) (finding an objection to admitted evidence was waived even though counsel made a contemporaneous objection, because his objection was on a different basis than the grounds he raised on appeal).

V. Offers of proof at trial

Under Evid.R. 103(A)(2), a party must make an offer of proof when evidence is excluded. An offer of proof applies when an objection is sustained, evidence is excluded, or a line of questioning is prohibited. An offer of proof is a presentation by counsel, on the record, of what counsel believes a particular witness will say or a particular item of evidence will show. The rationale behind this is rule is without an offer of proof, it is impossible to determine whether the trial court erred and whether the error was harmful.

A proper offer describes the evidence, what it tends to show, and the grounds for admitting the evidence. From such an offer, an appellate court can determine whether exclusion of the evidence by the trial judge affected the

substantial rights of the offering party. An oral or written statement by counsel describing the evidence he intends to admit is technically sufficient. *Maggard v. Zervos*, 11th Dist. Lake No. 2001–L–072, 2003-Ohio-6688, ¶ 26. ***But this method is NOT preferred***.

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PRACTICE NOTE: An offer of proof should submit all evidence that was excluded. If it is a witness, counsel can seek to question the witness during a break in order to obtain the excluded line of questioning. If questioning is not an option, counsel should detail the anticipated testimony it its offer of proof.

VI. Jury Instructions

Civ.R. 51 governs jury instructions, including: how to request them, the court's obligations when instructing, and how to object. Under Civ.R. 51(A), each party must submit proposed written jury instructions to the court before the close of evidence. The rule also allows the court to give cautionary and other instructions of law and acquaint the jury generally with the nature of the case.

Any objection to a jury instruction must be made ***before*** the jury is charged. Civ.R. 51(A) ("a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection"); *see also Wilson v. Ward*, 183 Ohio App. 3d 494, 2009-Ohio-2078, ¶ 17 (9th Dist.). The failure to object to a jury instruction, or the failure to give a jury instruction, waives any claim of error. *Blust v. Lamar Advert. of Mobile, Inc.*, 183 Ohio App. 3d 478, 2009-Ohio-3947, ¶ 37. Counsel also must "state specifically the matter objected to." Civ.R. 51(A).

The Ohio Supreme Court recognizes two exceptions to the objection requirement. First, an objection to a jury instruction is not required if the record establishes (1) the court was fully apprised of the correct law governing a material issue in dispute; and (2) the complaining party unsuccessfully requested including that law in the court's charge. *Presley v. City of Norwood*, 36 Ohio St. 2d 29 (1973). Second, a court will overlook the failure to object when plain error exists. *State v. Hancock*, 108 Ohio St. 3d 57, 2006-Ohio-160, ¶ 74 (explaining that plain error "exists only where it is clear that the verdict would have been otherwise but for the error").

PRACTICE NOTE: Counsel should object to a jury instruction, or failure to give a jury instruction, even if it already submitted a written instruction that differs from the charged instruction. *See* Civ.R. 51(A) ("On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection."). In other words, it is not enough just to submit the instructions, counsel must also object to the final instruction to assign error on appeal.

VII. Motion for a Directed Verdict

Under Civ.R. 50(A)(1), a motion for a directed verdict may be made: (1) after your opponent's opening statement; (2) at the close of your opponent's evidence; or (3) at the close of all evidence. A motion for directed verdict made at any other time is improper. *Langford v. Dean*, 8th Dist. Cuyahoga No. 74854, 1999 WL 777862, at *4 (Sept. 30, 1999). Civ. R. 50(A)(1), however, does not set adeadline for the court to rule on a motion for directed verdict. *Maghie & Savage, Inc. v. P.J. Dick Inc.*, 10th Dist. Franklin No. 08APP–487, 2009-Ohio 2164, ¶ 23 (a court may "reserve ruling on a motion for a directed verdict until after the jury has returned a verdict").

Under Civ. R. 50(A)(4), the court must direct a verdict against a party when on "any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." Civ. R. 50(A)(4) further mandates that the court "construe the evidence most strongly in favor of the party against whom the motion is directed." Under this standard, the court should not weigh the evidence or determine witness credibility. *Est. of Cowling v. Est. of Cowling*, 109 Ohio St. 3d 276, 2006-Ohio-2418, ¶ 31.

If granted, the court must "state the basis for its decision in writing *prior to or simultaneous with the entry of judgment*." (Emphasis added). Civ.R. 50(E). But this requirement is waived if counsel does not object by,

for example, filing a motion requesting compliance. *Lewandowski v. Penske Auto Grp.*, 8th Dist. Cuyahoga No. 94377, 2010-Ohio-6160, ¶ 20. If not waived, a trial court's failure to comply with this requirement will lead to reversal on appeal. *Kimble Mixer Co. v. Bruce Hall & Bruce Hall Co., L.P.A.*, 5th Dist. Tuscarawas No. 2003 AP 01 0003, 2004-Ohio-1740 (remanding to trial court for it to comply with Civ. R. 50(E)).

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PRACTICE NOTE: If the motion is denied at the close of the plaintiff's case, a defendant must renew the motion after all the evidence to preserve the issue for appeal. *Chem. Bank of New York v. Neman*, 52 Ohio St. 3d 204 (1990).

VIII. Judgment Notwithstanding the Verdict & Motion for a New Trial

Civ. R. 50(B) provides that "not later than twenty-eight days after entry of judgment, a party may serve a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion." A party need not file a previous motion for directed verdict before filing a motion for JNOV. Civ.R. 50(B).[1] The standard for JNOV is the same as that for a directed verdict: all evidence is construed in favor of the non-moving party and the court cannot consider credibility or weigh evidence. *Osler v. City of Lorain*, 28 Ohio St. 3d 345 (1986).

Civ.R. 50(B) provides that "[a] motion for new trial may be joined with" a motion for judgment notwithstanding the verdict or "a new trial may be prayed for in the alternative." But an error is only grounds for a new trial when it meets one of the requirements delineated in Civ.R. 59(A)(1)-(9). These grounds include:

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

To succeed on a motion for a new trial, the moving party must "not only show some error but must also show that such error was prejudicial." *Evans v. Thobe*, 195 Ohio App. 3d 1, 2011-Ohio-3501, ¶ 30 (11th Dist.), citing Baldwin's Ohio Civil Practice, Section 59:6.

If judgment notwithstanding the verdict is granted, the court must state the basis for its decision and conditionally rule on any new trial motion. Civ.R. 50(E). In addition, the party whose verdict is set aside may serve a motion for new trial under Civ. R. 59 within 28 days after entry of the judgment notwithstanding the verdict. Civ.R. 50(C)(2).

PRACTICE NOTE: While a proper and timely motion for a new trial need not include an evidentiary error preserved under Evid.R. 103 or errors on jury instructions under Civ.R. 51, counsel should assert all available grounds in its motion for new trial to present the issue to the court again and ensure it is preserved for appeal. *Gonzalez v. Henceroth Enterprises, Inc.*, 135 Ohio App. 3d 646, 653 (1999).

IX. Conclusion

Like it or not, appeals often turn on choices and objections at the trial court level. And waiver is lurking around every corner. Everyone wants to avoid a "procedural" loss and hearing from the court of appeals that an argument was waived. Those are the hardest ones swallow; and the toughest to bring back to your client. So make your objection timely, make it correctly, and make it with specificity. Then your appeal will be decided on the merits. In sum, read the rules, object correctly, and stay safe out there.

Endnote

1 This differs from Fed Civ.R. 50(b).

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