Preservation of Issues in Lower Tribunals

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General Rules; Purpose of Rules

One of the most basic principles of appellate practice is that to present an error to an appellate tribunal, the complaining party must have objected in the lower tribunal. Often referred to as the "contemporaneous objection rule," it is intended to afford the lower tribunal an opportunity to correct errors. Yet, like many rules of law, there are exceptions.

Some errors are harmless and not subject to reversal even if preserved. In other instances, an error may be considered so fundamental that an appellate court will review the error irrespective of an objection having been made. This chapter addresses the contemporaneous objection rule, the exceptions to that rule, and other appellate principles relating to preservation of issues for appellate review.

The Florida Supreme Court observed, "[t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings." *Castor v. State*, 365 So. 2d 701 (Fla. 1978).

In addition to the requirement that a party must timely object in the trial court, appellate courts generally will not consider issues raised for the first time on appeal. The rule that an appellant may not raise issues or objections for the first time on appeal applies to substantive issues and procedural irregularities. *E.g., Sunset Harbour Condominium Association v. Robbins*, 914 So. 2d 925 (Fla. 2005); *Allstate Insurance Company v. Gillespie*, 455 So. 2d 617 (Fla. 2d DCA 1984). See also the discussion below on reviewing unobjected to comments in closing arguments. *Parlier v. Eagle-Picher Industries, Inc.*, 622 So. 2d 479 (Fla. 5th DCA 1993), held the rule applied to an appellant's argument that some appellees had waived the basis for dismissal by not raising it below -- namely, the appellant waived the waiver issue by not raising it below.

The Eleventh Circuit holds, "appellate courts generally will not consider an issue or theory that was not raised in the district court." *Federal Deposit Insurance Corporation v. Verex Assurance, Inc.*, 3 F.3d 391 (11th Cir. 1993)(but the court does note exceptions; see below).

Hamilton v. Allen-Bradley Company, Inc., 244 F.3d 819 (11th Cir. 2001), rejected the appellee's position that the appellate court could not consider an argument the appellant had not raised below, which was based on a case decided three years before the trial court entered summary judgment. The Eleventh Circuit said both the appellant and appellee had the duty to point out the authority to the trial court. The Court concluded: "It seems presumptuous for Allen to now bring

this particular waiver argument before this Court after failing to properly carry out its duties before the district court."

Ruffin v. Kingswood E. Condominium Association, Inc., 719 So. 2d 951 (Fla. 4th DCA 1998), holds the lack of subject matter jurisdiction may be raised sua sponte by an appellate court.

Fundamental Error and Issues Not Ruled Upon by the Trial Court

In *Sanford v. Rubin,* 237 So. 2d 134 (Fla. 1970), the supreme court said: "Fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly."

The doctrine of fundamental error is applied only in rare cases where a jurisdictional error appears or where justice presents a compelling demand for its application. *Ray v. State,* 403 So. 2d 956 (Fla. 1981).

The Court in *Sanford* noted that not every constitutional issue involves fundamental error, and held a city board waived its argument that a statutory award of attorney's fees was unconstitutional because fees were not mentioned in the title of the act. *See also Clark v. State,* 363 So. 2d 331 (Fla. 1978)(criminal defendant has constitutional right not to have prosecutor comment on his silence, but must object to preserve the point), *overturned on other grounds, State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986)(but indicating harmless error rule applies in such instances -- see below); *Armstrong v. State,* 579 So. 2d 734 (Fla. 1991) (Counsel can waive what would have been a fundamental error in a jury charge by requesting or relying on the improper charge. The Court held this was not a situation that required the defendant's personal waiver of the right on the record). *Hooters of America, Inc. v. Carolina Wings, Inc.,* 655 So. 2d 1231 (Fla. 1st DCA 1995), held adequate notice is a fundamental element of the right to due process which could be raised on appeal (reversing damages awarded in a default judgment for claims not pled). *Westerheide v. State,* 831 So. 2d 93 (Fla. 2002), holds the constitutional application of a statute to a factual situation must be raised at trial; however, a facial challenge to a statute's constitutional validity may be raised for the first time on appeal.

Other decisions finding fundamental error in civil cases include *Norville v. Bellsouth Advertising and Publishing Corporation,* 664 So. 2d 16 (Fla. 3d DCA 1995)(judgment entered against a nonparty); *Stevens v. Allegro Leasing, Inc.*, 562 So. 2d 380 (Fla. 4th DCA 1990)(trial court applied the wrong version of a statute that had been amended); *Keyes Company v. Sens*, 382 So. 2d 1273 (Fla. 3d DCA 1980)(judgment based on jury award that was contrary to or not permitted by the law). *O'Brien v. Florida Birth-Related Neurological Injury Compensation Association,* 710 So. 2d 51 (Fla. 4th DCA 1998), discusses the limited use of fundamental error and cites several examples. Some of the cases discussing inconsistent verdicts later in this chapter have done so in the context of fundamental error.

Cordoba v. Rodriguez, 939 So. 2d 319 (Fla. 4th DCA 2006), found fundamental error where an expert bolstered his opinion that the plaintiffs had not suffered permanent injuries by referencing an inadmissible newspaper article that 99 percent of all auto accidents result in personal injury lawsuits. *Belmont v. Belmont*, 761 So. 2d 406 (Fla. 2d DCA 2000), held the trial court's award of a house that was the husband's premarital asset to the wife "is the equivalent of fundamental error," and so could be raised for the first time at oral argument.

While not characterizing the basis as fundamental error, the court held an appellant could raise for the first time on appeal the trial court's failure to make a specific finding of willfulness when dismissing a complaint as a sanction, and reversed and remanded for the trial court to consider the issue of willfulness in *Walden v. Adekola*, 773 So. 2d 1218 (Fla. 3d DCA 2000).

Cantor v. Davis, 489 So. 2d 18 (Fla. 1986), addressed another exception to the contemporaneous objection rule:

> When the petitioners made their original motion in the trial court to strike or deny attorney's fees, they asserted the statute's unconstitutionality both on its face and as applied. Because the trial court simply ruled the statute to be facially unconstitutional, however, the district court never reached the issue of the constitutionality of section 768.56 as applied to the particular facts in this case. Therefore, because the petitioners did not have a realistic opportunity to argue the matter below, they should not be precluded from raising the unconstitutional application question here.

Numerous decisions state that Florida appellate courts may not or will not decide issues that were not ruled on by a trial court. *E.g., Sierra v. Public Health Trust of Dade County*, 661 So. 2d 1296 (Fla. 3d DCA 1995). But other decisions state that an appellate court does have the authority to consider issues not considered below, although such power should be used sparingly. *E.g., Dralus v. Dralus*, 627 So. 2d 505 (Fla. 2d DCA 1993), quoting from *Cantor v. Davis*: "Prudence dictates that issues. . . should normally be considered at the trial level to assure that such issues are not later deemed waived. *Once this Court has jurisdiction, however, it may, at its discretion, consider any issue affecting the case.*"

The Florida Supreme Court observes that once an appellate court obtains jurisdiction, it has jurisdiction to consider any issue affecting the case, even though it was not raised before the trial court. *PK Ventures, Inc. v. Raymond James & Associates, Inc.*, 690 So. 2d 1296, n.2 (Fla. 1997). While this may appear difficult to reconcile with the general statements of other cases cited in this chapter, the issue of jurisdiction is separate from court-made preservation doctrines. *See Ochran v. United States*, 117 F.3d 495 (11th Cir. 1997)(principle of not considering issues not considered by the trial court is rule of practice, not a jurisdictional limitation).

Clay v. Prudential Insurance Company of America, 670 So. 2d 1153 (Fla. 4th DCA 1996), holds that in order to benefit from a change in the law, an appellant must have raised the point in the

trial court unless it constitutes fundamental error. The court found no fundamental error where the appellant had agreed to a jury instruction on bad faith in an insurance case, which was contrary to a later Florida Supreme Court decision. Also finding no fundamental error regarding jury instructions, *see City of Orlando v. Birmingham*, 539 So. 2d 1133 (Fla. 1989).

Noonan-Judson v. Surrency, 669 So. 2d 1058 (Fla. 5th DCA 1996), held "[w]here an issue is not presented by pleading or litigated by parties during a hearing, a judgment based on that issue is voidable on appeal." *See also, Dillingham v. Dillingham*, 667 So. 2d 337 (Fla. 1st DCA 1995).

In *Carroll v. General Accident Insurance Company of America*, 891 F.2d 1174 (5th Cir. 1990), the court addressed a change in the law while the case was on appeal (see the discussion in the chapter on Dispositions). The appellee argued the appellant waived its right to rely on the change by not raising the point below. The court stated, "the rules of waiver available in other contexts do not prohibit an appellate court from considering the effect of an intervening decision that interprets a substantive statute to preclude a cause of action." n.1.

Skinner v. City of Miami, 62 F.3d 344 (11th Cir. 1995), held the court had discretion to consider a new issue or theory raised for the first time on appeal if it "involves a pure question of law and if the refusal to consider it would result in a miscarriage of justice." *See also, Verex, supra.*

For more on the Eleventh Circuit's standards for considering issues not raised below, see *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347, n.12 (11th Cir. 1998). Federal courts recognize a "plain error" exception, but it is also narrow. *See* Fed R. Evid. 103(d); Fed. R. Crim P. 52(b); *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

The Eleventh Circuit held that an appellant waived an argument by raising it for the first time in the appellate rehearing motion, and not making the argument in the appellate briefs, even though there was contrary Eleventh Circuit authority at the time he filed his briefs. He should have raised the issue in the briefs and argued for a change in the law. *United States v. Pipkins*, 412 F.3d 1251 (11th Cir. 2005).

Invited Error

Appellate courts recognize that a party cannot successfully complain about an error for which the party is responsible or of a ruling that the party invited the court to make. *Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475 (Fla. 1995). This is known as the doctrine of invited error.

In *Hunter v. Employers Mutual Liability Insurance Company of Wisconsin*, 427 So. 2d 199 (Fla. 2d DCA 1982), the parties stipulated there were no material issues of fact and requested the trial court to decide the case on their cross-motions for summary judgment. When the appellant argued the evidence was not sufficient to sustain the appellee's burden of proof below, the appellate court held:

> [T]he doctrine of invited error leads us to reject appellant's argument. By agreeing with appellee to stipulate that there were no genuine issues of material fact, appellant, in essence, relieved appellee of its burden of conclusively showing the absence of any genuine issues of material fact and, at the same time, agreed to allow the trial court to resolve the dispute by applying the law to the facts *as it found them*.

Compare Clark v. Munroe, 407 So. 2d 1036 (Fla. 1st DCA 1981), reversing a summary judgment based on a material dispute in facts, despite the parties' stipulation the case could be decided on summary judgment. The opinion stated the parties cannot control questions of law by stipulation.

In *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977), the Court stated, "a party cannot complain on appeal of the adoption of a rule of damages in accordance with the theory upon which he tried the cause, although it was the wrong rule."

In *Polk County v. Sofka*, 702 So. 2d 1243 (Fla. 1997), the defendant had successfully moved for a new trial. The parties then stipulated to the entry of judgment and to the intermediate appellate court's jurisdiction. The defendant appealed, seeking a directed verdict. The supreme court held the appellate court lacked jurisdiction because the trial court had not set aside the new trial order (and parties cannot stipulate to subject matter jurisdiction where none exists).

The Eleventh Circuit holds a party cannot challenge as error a ruling it invited. *See Thunderbird, Ltd. v. First Federal Savings and Loan Association of Jacksonville*, 908 F.2d 787 (11th Cir. 1990). The court notes this includes admissions by a party of its inability to pursue a claim. *See also Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 991 F.2d 1533 (11th Cir. 1993)(it is a cardinal rule of appellate procedure that a party may not challenge as error a ruling or other trial proceeding invited by that party). *Association of Community Organizations For Reform Now v. Edgar*, 99 F.3d 261 (7th Cir. 1996), held a party entering into a consent decree had waived its right to appeal by failing to explicitly reserve the right to appeal.

Pleadings and Pretrial Stipulations

Parties who fail to timely include issues in their pleadings risk a directed verdict on those issues. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris v. Bowmar Instrument Corporation*, 537 So. 2d 561 (Fla. 1988). Opposing parties need to object to trying unpled issues, or they risk being deemed to have tried them by consent. *See, e.g., Department of Revenue v. Vanjaria Enterprises, Inc.*, 675 So. 2d 252 (Fla. 5th DCA 1996); *see also* Fla. R. Civ. P. 1.190(b). Parties may waive issues by not preserving them in the pretrial order. *See Cooke v. Insurance Company of North America*, 652 So. 2d 1154 (Fla. 2d DCA 1995).

Stone's Throw Condominium Association, Inc. v. Sand Cove Apartments, Inc., 749 So. 2d 520 (Fla. 2d DCA 1999), holds that a party's failure to re-plead a count after it was dismissed without prejudice waives review of the dismissal. *Lutz v. Protective Life Insurance Company*, 951

So. 2d 884 (Fla. 4th DCA 2007), refused to consider a request to amend made for the first time on appeal.

Maynard v. Florida Board of Education, 34 Fla. L. Weekly D176 (Fla. 2d DCA January 16, 2009), held the defense of a party's lack of standing could be raised for the first time by a motion to set aside the verdict and judgment, and certified that question to the supreme court.

Federal litigants may waive an issue by failing to include it in the pretrial stipulation. *Miles v. Tennessee River Pulp and Paper Company*, 862 F.2d 1525 (11th Cir. 1989)(district court properly refused to permit defendant to present evidence on a defense not listed in the pretrial order).

Making the Record: Evidence, Objections, Rulings and Proffers

Appellate courts limit consideration of issues surrounding the admissibility of evidence to the grounds the parties argued to the trial courts. *See* § 90.104(1), Fla. Stat. Counsel need to clearly state their objections to evidence offered by the other party (or to its conduct). *See* § 90.104(1)(a), Fla. Stat. Counsel should state all grounds for their objection. *E.g., Wilson v. Health Trust, Inc.*, 640 So. 2d 93 (Fla. 4th DCA 1994)(declining to consider argument that evidence should have been excluded when party did not argue ground below).

If faced with an evidentiary objection, counsel should specify the bases for admitting evidence they offer. *E.g., Tillman v. State*, 471 So. 2d 32 (Fla. 1985)(declining to consider if exclusion of evidence correct when party did not argue hearsay exception below); Diaz v. State, 884 So. 2d 387 (Fla. 2d DCA 2004)(to preserve an issue for appeal the specific legal argument or ground on which it is based must be presented to trial court).

The failure to obtain a ruling from the trial court on a motion or objection fails to preserve an issue for appeal. *See Farina v. State*, 937 So. 2d 612 (Fla. 2006). The absence of a clear ruling on the record happens more than one may think. *See Howland v. State*, 412 So. 2d 383 (Fla. 5th DCA 1982)(trial court withheld rulings on indigent defendant's requests for free transcripts, but the defendant failed to take steps to secure ruling on the motion).

When a trial judge sustains an objection and does not allow certain evidence, the party seeking to introduce it must proffer that testimony or evidence into the record, otherwise an appellate court cannot determine if the exclusion of the evidence was prejudicial. § 90.104(1)(b), Fla. Stat.; Fla. R. Civ. P. 1.450(b). The discussion in *Adamo v. Manatee Condominium, Inc.*, 548 So. 2d 287 (Fla. 3d DCA 1989), demonstrates the need to make an adequate proffer (and the danger of an unclear ruling):

> The record reflects that the defendant Manatee Condominium Association filed a pretrial motion in limine seeking to exclude the plaintiffs' expert witness from testifying at trial; the trial court heard argument of counsel on this motion, but took

> no testimony. * * * The trial court granted the motion in part and denied the motion in part, but it is not entirely clear what testimony the trial court, in fact, excluded. This is not surprising as it is often very difficult for a trial court to delineate in a pretrial ruling, as here, exactly what testimony of a witness will be excluded and what will be allowed at trial when the witness has not testified before the court. Thereafter, the plaintiffs elected not to call the witness at trial and, instead, proffered only a deposition of the witness for appellate record purposes. It is therefore impossible to determine from this record what testimony of the plaintiffs' expert was excluded below, and, accordingly, the point has not been preserved for appellate review. [cites omitted].

A court must allow a proffer unless the evidence proffered is beyond the scope of the pleadings. For example, in *Protective Casualty Insurance Company v. Killane*, 459 So. 2d 1037 (Fla. 1984), the trial court properly denied proffer of evidence on the seat belt defense on the basis that the defense was not specifically pled and was not presented as an issue prior to trial. If the court indicates that a proffer would be unavailing, a proffer may be unnecessary. *See Seeba v. Bowden,* 86 So. 2d 432 (Fla. 1956).

Where evidence is admissible for a limited purpose, the party seeking to limit its effect must request a limiting instruction. *See* § 90.107, Fla. Stat.; *State v. Smith*, 573 So. 2d 306 (Fla. 1990).

Fed. R. Evid. 103(a)(1) requires a timely objection or motion to strike on the record, and case law holds an objection on specific grounds does not preserve the error for purposes of appeal on other grounds. *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997).

Fed. R. Evid. 103(a)(2) requires a party make the substance of the excluded evidence known to the court by an offer of proof "unless it was apparent from the context within which the questions were asked." *See also, e.g., Allen v. County of Montgomery, Alabama*, 788 F.2d 1485 (11th Cir. 1986). It is obviously safer to make the proffer.

Some decisions have held a party is not required to renew an objection or request to the court when the court has ruled or it would be a futile act. *E.g., Thomas v. State,* 419 So. 2d 634 (Fla. 1982); *LeRetilley v. Harris*, 354 So. 2d 1213 (Fla. 4th DCA 1978); *see also Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, n.11 (Fla. 5th DCA 1991) (no renewed objection necessary where court had reserved ruling on prior objection); *State Farm Mutual Automobile Insurance Company v. Monacelli,* 486 So. 2d 630, n.1 (Fla. 3d DCA 1986) (counsel need not submit formal written request for instruction court has indicated it will not give). However, a party's consent to introduction of the same evidence to which it had objected acts as a waiver of the prior objection. *Ten Associates v. McCutchen,* 398 So. 2d 860 (Fla. 3d DCA 1981). Counsel may consider it safer to renew the objection.

Holding that a party could raise an issue on appeal that it had raised for the first time in a motion for rehearing, and recognizing conflict with other DCA decisions, is *Elser v. Law Offices of James M. Russ, P.A.*, 679 So. 2d 309 (Fla. 5th DCA 1996).

Brown v. State, 706 So. 2d 74 (Fla. 2d DCA 1998), holds a defendant failed to preserve for review his claim that the trial judge's facial expressions and body language indicated his disbelief of defense, where the defendant did not object and request curative instruction, move for a mistrial, or otherwise bring the matter to the attention of the trial judge.

Thomas v. State, 701 So. 2d 891 (Fla. 1st DCA 1997), holds a defendant who makes a specific objection to testimony is not required to move to strike the response or ask for a curative instruction to preserve the issue for appeal.

Absent a stipulation, the unsworn statements of counsel are not evidence. *See Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd.*, 636 So. 2d 838 (Fla. 2d DCA 1994); *but see, Noto v. Greenbrook Jacaranda Associates III, Ltd.*, 458 So. 2d 773 (Fla. 4th DCA 1984)(the appellate court reversed an ex parte order, where the basis for reversal was set forth in counsel's unsworn motion for rehearing).

The Eleventh Circuit has held, "[s]tatements made by counsel in the course of closing arguments are not evidence." *Green v. School Board of Hillsborough County, Florida*, 25 F.3d 974 (11th Cir. 1994).

Counsel should be careful in making "standing" objections, and should ensure they assert specific grounds for each objection. *See United States v. Roach*, 164 F.3d 403 (8th Cir. 1998). Holding that one party can rely on the objection of another, *see United States v. Sanchez-Sotelo*, 8 F.3d 202 (5th Cir. 1993). Counsel may wish to consider specifically adopting co-counsel's objection.

Practice Tips:

Counsel should plan the evidence they will offer on each element of each claim or defense. They should consider the witness or other means they will use to get each piece of documentary or physical evidence admitted. For example, overcoming a hearsay objection and getting evidence admitted on the grounds it is not offered to prove the "truth of the matter" could be fatal if there is no other evidence to support that element of the case. *See Doran v. Session*, 576 So. 2d 385 (Fla. 2d DCA 1991). Trial counsel should not assume the factfinder knows what counsel does because pretrial discovery generally "disappears" unless introduced at trial.

To preserve an objection to an affidavit offered regarding summary judgment, a party must object on the record (order a court reporter), or by filing a motion to strike. *Scott v. NCNB National Bank of Florida*, 489 So. 2d 221 (Fla. 2d DCA 1986). When seeking to avoid, or moving for summary judgment, make sure all relevant evidence is filed. *See* Rule 1.510(c); *but see, Ferguson v. V.S.L. Corporation*, 528 So. 2d 32 (Fla. 3d DCA 1988)(sufficient that depositions physically before court, although not filed). *Daeda v. Blue Cross & Blue Shield of Florida, Inc.*, 698 So. 2d 617 (Fla. 2d DCA 1997), holds a motion for summary judgment may only be based on admissible evidence. Of course, the opposing party should object to in-admissible evidence.

Moyer v. Reynolds, 780 So. 2d 205 (Fla. 5th DCA 2001), holds that a in deposition taken to present trial testimony all objections must be made at the time the question was asked, and grounds therefor stated (as contrasted with a discovery deposition where objections to form normally must be made during the deposition or are waived, Fla. R. Civ. P. 1.330(d)(3)).

Transcripts of Proceedings

Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979), addressed a case where the appellant bank did not provide a transcript or a substitute (see the chapter on the Record). The trial court imposed a constructive trust in favor of the Applegates. The district court of appeal reversed, but the supreme court reinstated the trust, stating:

> The trial court's imposition of a constructive trust could well be supported by evidence adduced at trial but not stated in the judge's order or otherwise apparent in the incomplete record on appeal. The question raised by Barnett Bank clearly involves underlying issues of fact. When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error. * * *.

Failure to provide a transcript of the proceedings can be fatal in hearings where the court considers evidence. *See, e.g., Ram Coating Technology Corp. v. Courtaulds Coatings, Inc.*, 625 So. 2d 97 (Fla. 1st DCA 1993)(without transcript the appellate court could not tell whether service of process was effective and whether the default judgment should have been set aside); *Southeast Florida Cable, Inc. v. Islandia I Condominium Association, Inc.*, 661 So. 2d 91 (Fla. 4th DCA 1995)(without transcript showing trial court's reasoning for reducing expert fee awards, it was impossible to tell if the trial court abused its discretion).

Even in the absence of a trial transcript or stipulated statement, the appellate court can review errors that appear on the face of the judgment, *Sugrim v. Sugrim*, 649 So. 2d 936 (Fla. 5th DCA 1995); *Kilgore v. Kilgore*, 729 So. 2d 402 (Fla. 1st DCA 1998); and issues that turn solely on a legal question. *Albert v. Goldman-Link, P.A.*, 661 So. 2d 1293 (Fla. 4th DCA 1995). *Northeast Transportation, Ltd. v. Lavender*, 643 So. 2d 1193 (Fla. 5th DCA 1994), held the appellate court could review a personal jurisdiction challenge without a hearing transcript where trial court's order reflected it considered the complaint, affidavits, applicable case law and argument.

The appellate rules do not authorize the use of deposition videotapes on appeal in lieu of a written transcript. Thus, counsel should ensure the court reporter transcribes the videotape as it is played for the factfinder. *Travieso v. Golden*, 643 So. 2d 1134 (Fla. 4th DCA 1994).

Practice Tip:

With the possible exception of small claims cases or certain ex parte proceedings, if a case is worth trying, it is worth reporting. In state civil cases, it is not the function of the judge or the clerk to obtain a court reporter; it is up to the advocates. Federal trial judges typically have official reporters. If counsel are uncertain, they should check to ensure the reporter will appear at a hearing at the desired time and place.

"Definitive Rulings" and "Opening the Door"

A party may make a motion in limine in an effort to exclude or limit evidence the party anticipates its opponent will seek to introduce at trial. Before 2001, Florida opinions held making an unsuccessful motion in limine did not preserve the party's objection to evidence offered at trial, and a party losing a motion in limine needed to reiterate its request to admit the evidence during trial and proffer the evidence it would have introduced.

Sheffield v. Superior Insurance Company, 800 So. 2d 197 (Fla. 2001), holds "once a trial court makes an unequivocal ruling admitting evidence over a movant's motion in limine, the movant's subsequent introduction of that evidence does not constitute a waiver of the error for appellate review." As amended in 2003, Section 90.104(1)(b), Florida Statutes (2003), tracks Fed. R. Evid. 103(a), and provides, "If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The Florida Supreme Court approved this rule in *Amendments to the Florida Evidence Code*, 914 So. 2d 940 (Fla. 2005).

Myron v. Doctors General Hospital, Ltd., 704 So. 2d 1083 (Fla. 4th DCA 1997), contrasts a party "opening the door" to adverse evidence, with the party introducing "anticipatory rehabilitation" to "soften the blow" of anticipated inquiries, after "the trial court once again denied the motion in limine" to exclude the adverse evidence.

Since 2000, Fed. R. Evid. 103(a) has provided the "definitive ruling" exception for preservation. The advisory committee notes state this is designed to resolve the conflict of whether a party must revisit a motion in limine during the trial. The notes caution that counsel have the duty to clarify whether an in limine ruling is definitive where there is doubt on that point. They point out that, during the trial, counsel can still ask the court to reconsider a ruling (a good idea). The notes say the revised rule does not address whether a party who unsuccessfully objects to evidence waives the right to appeal by introducing the evidence to soften the blow.

Ohler v. United States, 529 U.S. 753, 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000), holds a party who introduces evidence in direct testimony after losing a motion in limine waives the objection.

Directed Verdict

The defendant should move for directed verdict at the end of the plaintiff's case, and must at the end of all of the evidence, to be entitled to move for a judgment in accordance with the motion for directed verdict (f/k/a Judgment NOV). Fla. R. Civ. P. 1.480.

In *Prime Motor Inns, Inc. v. Waltman*, 480 So. 2d 88 (Fla. 1985), the defendant moved for a directed verdict during the charge conference, while the trial was still in progress and while evidence was still being received. The defendant's failure to move for a directed verdict at the close of all the evidence was fatal to it obtaining a directed verdict: "one who submits his cause to the trier of fact without first moving for directed verdict at the end of all evidence has waived the right to make that motion. The limited exceptions to this rule are not involved in this case."

Pursuant to Fla. R. Civ. P. 1.480(b), after moving for a directed verdict, the movant should also move for judgment in accordance with motion for directed verdict if it wishes to appeal the denial of the d.v. *or* the sufficiency of the evidence. *See Honda Motor Company, Ltd. v. Marcus*, 440 So. 2d 373 (Fla. 3d DCA 1983). *Adee Resort Corporation v. Brewer & Company, Inc.*, 653 So. 2d 1052 (Fla. 4th DCA 1995), holds a party must move for judgment in accordance with motion for directed verdict whether the trial court has denied the directed verdict motion or reserved ruling.

Fulton County Administrator v. Sullivan, 753 So. 549 (Fla. 1999), holds that while a party should renew its motion for directed verdict within ten days of the verdict, a motion for new trial on the same ground empowers the appellate court to direct the entry of a judgment in the movant's favor. The motion for judgment may be joined with the motion for new trial. Rule 1.480 (c).

If the defendant was entitled to a directed verdict at the close of the plaintiff's case, but the trial court denied it, any deficiencies that existed in the plaintiff's case may be cured by evidence admitted in the defendant's case, because the trial court's ruling on a d.v. motion at the end of the case is based on all of the evidence. *McCain v. Florida Power Corporation*, 593 So. 2d 500 (Fla. 1992).

Fed. R. Civ. P. 50(b) requires a party move for a judgment as a matter of law at the close of all evidence in order to renew its motion for judgment as a matter of law after the trial. *See, e.g., Austin-Westshore Construction Co., Inc. v. Federated Department Stores, Inc.*, 934 F.2d 1217 (11th Cir. 1991); *but see Scottish Heritable Trust v. Peat Marwick Main & Co.*, 81 F.3d 606 (5th Cir. 1996) (sufficient where motion based on insufficiency of evidence at end of plaintiff's case was not renewed at close of all evidence, but same objections to lack of evidence were posed at conclusion of all evidence to elements of the proposed jury charge).

Fed. R. Civ. P. 50(a)(2) provides the motion shall specify the law and facts on which the moving party is entitled to the judgment. *Rankin v. Evans*, 133 F.3d 1425 (11th Cir. 1998), holds a motion that did not specify the grounds is not procedurally barred where the trial court and plaintiff's counsel were aware of the asserted basis for the motion. *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286 (11th Cir. 1998), emphasizes the need for a record of the party's motion for judgment as a matter of law. Absent a record of the grounds, the appellate court will not look for substantial evidence to sustain the verdict, but for any evidence that would sustain it. Counsel should ensure the court reporter transcribes the hearing on their motion for judgment as a matter of law.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), holds the Court should review all evidence when considering a motion for directed verdict, and draw all reasonable inferences in favor of the nonmoving party.

Fed. R. Civ. P. 50(b) also permits a party to join a motion for judgment as a matter of law with a new trial motion.

Closing Arguments and Mistrial Motions

As with other alleged errors, objections to closing arguments and motions for mistrial based on allegedly improper arguments must be made timely. In *Ed Ricke and Sons, Inc. v. Green*, 468 So. 2d 908 (Fla. 1985), the Court stated:

> We refuse to change the general procedure that must be followed in order for a party to preserve a motion for a mistrial for appellate review. Unless the improper argument constitutes a fundamental error, a motion for a mistrial must be made "at the time the improper comment was made." * * * However to avoid interruption in the continuity of the closing argument and more plainly to afford defendant [or plaintiff] an opportunity to evaluate the prejudicial nature of the objectionable comments in the context of the total closing argument, we do not impose a strict rule requiring that a motion for mistrial be made in the next breath following the objection to the remark. [cites omitted]

The Court went on to hold a party could ask the trial court to wait to rule on a motion for mistrial without waiving it: "a motion for a mistrial coupled with a request that the court reserve ruling until the jury completes their deliberations is merely a motion for a mistrial. Any ruling on such a motion is preserved for appellate review. The judge may, at his discretion, order a new trial immediately following the motion for a mistrial or reserve ruling on the motion until after the jury deliberates."

Ricks v. Loyola, 822 So. 2d 502 (Fla. 2002), extends *Ed Ricke* temporally, holding the trial court did not abuse its discretion in granting a new trial when it had reserved ruling on a mistrial motion made during opening statements.

Keene Brothers Trucking, Inc. v. Pennell, 614 So. 2d 1083 (Fla. 1993), holds if the trial court grants a motion for mistrial before the jury is discharged, motions for new trial and JNOV are nullities.

Murphy v. International Robotic Systems, Inc., 766 So. 2d 1010 (Fla. 2000), resolved a conflict over improper but unobjected-to closing arguments. The supreme court held:

> (A) the party seeking relief must have at least moved for a new trial based on the argument, even if the party did not object during trial (namely, the issue cannot be raised for the first time on appeal);
>
> (B) for the trial court to grant a new trial:
>
> > (1) the argument must be improper;
> >
> > (2) the argument must be harmful (noting not every violation of Fla. R. Prof Conduct 4-3.4 is harmful);
> >
> > (3) the argument must be incurable (namely, if the party had objected, the harm could not have been cured by an instruction to the jury);
> >
> > (4) the argument must have so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial (noting such arguments would include appeals to racial, ethnic or religious prejudices);
>
> (C) the trial court granting a new trial must identify the improper arguments and the actions of the jury resulting from those arguments;
>
> (D) on appeal the appellate court applies an abuse of discretion standard to review the grant or denial of a new trial motion based on unobjected-to closing arguments.

The Court observed that while it had "not absolutely 'closed the door' on appellate review of unpreserved challenges to closing argument," it had come as close to doing so as it believed was consistent with notions of due process that deserve public trust in the judicial system.

Telemundo Network, Inc. v. Spanish Television Services, Inc., 812 So. 2d 461 (Fla. 3d DCA 2002), *review dismissed*, 831 So. 2d 673 (Fla. 2002), certified the question of whether unobjected to closing argument comments appealing to the jury's racial, ethnic, religious, or xenophobic prejudices would justify a finding of fundamental error.

Walt Disney World Company v. Blalock, 640 So. 2d 1156 (Fla. 5th DCA 1994), had agreed that the salutary effect of giving curative instructions to disregard such offensive arguments was "aptly summed up by the trial judge in the case of *O'Rear v. Fruehauf Corp*., 554 F.2d 1304, 1309

(5th Cir. 1977): '[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.'"

If a party's objection is sustained, the party needs to move for a mistrial to preserve the point. *Hasegawa v. Anderson*, 742 So. 2d 504 (Fla. 2d DCA 1999).

McElhaney v. Uebrich, 699 So. 2d 1033 (Fla. 4th DCA 1997), suggests an objection by one defendant will not preserve the point for a co-defendant who does not join in the objection.

"To preserve an allegation of improper argument on appeal, timely objection must be made to bring the trial court's attention to the alleged error. . . . This rule applies even when an argument is inflammatory, prejudicial or improper." *Dempsey v. Mac Towing, Inc.*, 876 F.2d 1538 (11th Cir. 1989).

Harmful Error and Motions for New Trial or Rehearing

As noted above, the appellant must show error from which to appeal, and it cannot be harmless error. If the appellant lost the trial on a fact question and there is no argument that the appellee should have lost as a matter of law, the appellant faces a tough road ahead. Absent errors that would entitle the appellant to a new trial, it should lose if there is any competent substantial evidence to support the judgment. *See Welfare v. Seaboard Coast Line Railroad Company*, 373 So. 2d 886 (Fla. 1979).

The appellant can attempt to show an error of law or that the judge misinterpreted the legal effect of facts. *See Hamilton v. Title Insurance Agency of Tampa, Inc.*, 338 So. 2d 569 (Fla. 2d DCA 1976).

The appellant can urge it is entitled to a new trial because the verdict is not supported by competent substantial evidence. Appellate courts can examine the "sufficiency of the evidence," but will not weigh the evidence. *Smith v. Brown*, 525 So. 2d 868 (Fla. 1988), discusses the standard for reversal when the verdict is "against the manifest weight of the evidence":

> Clearly, it is a jury function to evaluate the credibility of any given witness. [cite omitted] Moreover, the trial judge should refrain from acting as an additional juror. [cite omitted] Nevertheless, the trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict. [cite omitted] In making this decision, the trial judge must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence. [cite omitted] The trial judge should only intervene when the *manifest* weight of the evidence dictates such action. However, when a new trial is ordered, the abuse of discretion test becomes applicable on appellate review. The mere showing that there was evidence in the record to support the jury verdict does not demonstrate an abuse of discretion.

Reiterating the standard for granting a new trial based on the manifest weight of the evidence and for appellate review of such a new trial order, *see Brown v. Estate of Stuckey*, 749 So. 2d 490 (Fla. 1999). The trial judge has the discretion to grant a new trial based on the manifest weight of the evidence even though it is not "clear, obvious and indisputable that the jury was wrong." *Ricks v. Loyola*, 822 So. 2d 502 (Fla. 2002).

National Healthcorp Ltd. Partnership v. Cascio, 725 So. 2d 1190 (Fla. 2d DCA 1998), held successor judge who did not attend a civil trial may rule on a motion for new trial, but the successor judge's ruling is not entitled to the same deference on appeal as the ruling of a judge who presided at trial.

Poole v. Veterans Auto Sales and Leasing Company, Inc., 668 So. 2d 189 (Fla. 1996), observed the abuse of discretion standard of review for new trial orders may seem difficult to harmonize with the rule that a trial judge should not sit as a "seventh juror" and substitute his or her resolution of factual issues for that of the jury, but stated they "address separate standards of review made by different actors within the judicial system." See the chapter below for more on standards of review.

Fla. R. Civ. P. 1.530(f) provides all orders granting a new trial shall "specify the specific grounds therefor." It also provides that if the order does not state the grounds and is appealed, the appellate court shall relinquish jurisdiction to the trial court for entry of an order specifying the grounds.

Regarding the high standards in federal court for reversing a denial of a new trial, see *Hercaire International, Inc. v. Argentina*, 821 F.2d 559 (11th Cir. 1987), and the chapter on Standards of Review.

Motions for new trial are not necessary to review questions of law that were raised during the trial or questions as to admissibility of evidence, jury charges or other such rulings, but are necessary if a party wishes to argue that the verdict is against the manifest weight of the evidence. *See Winn & Lovett Grocery Co. v. Luke*, 156 Fla. 638, 24 So. 2d 310 (1945); *Leonardi v. Walgreen Co.*, 146 So. 2d 773 (Fla. 2d DCA 1962); *see also*, *Borenstein v. Raskin*, 401 So. 2d 884 (Fla. 3d DCA 1981); *compare* Fla. R. Civ. P. 1.530(e) (motion for new trial unnecessary to test sufficiency of evidence when action tried to court without a jury).

Some decisions hold a party seeking to appeal the absence of statutorily required findings in a dissolution judgment must first move for a rehearing to preserve the points for appeal. *Mathieu v. Mathieu*, 877 So. 2d 740 (Fla. 5th DCA 2004); *Broadfoot v. Broadfoot*, 791 So. 2d 584 (Fla. 3d DCA 2001). The courts said they could still reverse or send the case back for statutory findings if the absence frustrates the court's review.

C. W. v. State, 861 So. 2d 1243 (Fla. 2d DCA 2003), holds a motion for rehearing is sufficient to preserve for appeal the error from a bench trial in convicting a defendant of a crime for which he was not charged and which is not a lesser-included offense.