No Magic Words Required: A Brief Guide To Preserving Error In Florida State Courts From Opening Statements To The Discharge Of The Jury

INTRODUCTION

Every now and then, when I am consulted regarding a new appellate matter, trial counsel is sure that the trial judge committed an egregious error that is sure to result in a reversal. But, all too often, the issue has not been properly preserved for appellate review. No objection was raised, no ruling was obtained, or some required motion was overlooked.

This article aims to provide a brief overview of preserving error during trial in civil cases. It will focus on issues that may arise after the jury has been sworn, as a recent article addressed issues that arise through jury selection.[1] And this article will address the basic outline for preservation of error in Florida state courts, which differs in some respects from the rules that apply in federal courts. This article will begin with some practical considerations and basic principles of preservation that generally apply throughout trial. The remainder of the article will address specific preservation rules that apply at various stages of a trial.

PRACTICAL CONSIDERATIONS

Make sure you have a court reporter. If the trial court makes an adverse ruling, counsel will have the burden of showing that the ruling was erroneous.[2] The appellate court needs to understand the factual context of the ruling and any alternative theories reflected in the record that may support the trial court's decision.[3] Without a transcript, the appellate court will be unable to determine whether the trial court erred.[4] An appeal without a trial transcript will most likely result in a per curiam affirmance with a citation to *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979), where the Florida Supreme Court held "[t]he trial court should have been affirmed because the record brought forward by the appellant [was] inadequate to demonstrate reversible error."[5]

Describe verbally anything that the court reporter cannot hear. The role of the court reporter is twofold. First, the court reporter must listen to all testimony and objections that occur during the trial. And, second, the court reporter must simultaneously make a written record of all such testimony and objections. This is an arduous task with one important limitation that affects the preservation of error: the court reporter cannot transcribe what he or she cannot hear. So anything that happens outside the court reporter's hearing does not exist for appellate purposes.

For example, the court reporter cannot record what is depicted on a chart or photograph that counsel is showing to the jury during opening statements. The court reporter cannot record when a witness smirks at a question, cries while giving an answer, or makes an obscene gesture. And the court reporter cannot record a sidebar conference to which he or she is not invited.[6]

Counsel should verbally describe what is happening or has happened. Opposing counsel can then challenge the description or add anything else that may be important. If the attorneys cannot agree to an accurate description, then the trial court can resolve any discrepancies to ensure that the record accurately reflects what happened.

Avoid ambiguities regarding the parties' exhibits. Counsel should clearly identify any exhibits for the record. When handing an exhibit to a witness, counsel should identify the exhibit by announcing the number assigned to it as it is handed to the witness. If the witness will be using the exhibit to clarify his or her testimony by pointing to or marking the exhibit, then counsel should have the exhibit initialed by the witness and numbered for identification. The exhibit should also be submitted to the clerk for inclusion in the appellate record so that the appellate court can compare the exhibit to the transcript of the witness's testimony. Counsel should also identify any exhibits, by their assigned number, that are used during

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closing argument. And counsel should request that all exhibits be retained by the clerk at the end of the case for inclusion in the appellate record.

GENERAL PRINCIPLES OF PRESERVATION

Contemporaneous Objection Rule. The main principle to keep in mind during trial is the contemporaneous objection rule. This rule is made up of three parts. First, counsel must make a timely objection at the time of the alleged error.[7] In multi-party litigation, each party must object or join in another party's objection to preserve the issue for appellate review.[8] If the objection is late, then the issue is not preserved.[9] The purpose of this first requirement is to "prevent[ ] a party from rolling the dice with the jury, confident that an unvoiced objection will garner a new trial if the verdict is unfavorable."[10] The timeliness of the objection depends of the nature of the error. For example, errors during *voir dire* must be raised and renewed before the jury is sworn.[11] The timeliness requirement for various kinds of trial objections will be further discussed below.

Second, counsel must state the grounds for the objection.[12] No magic words are necessary.[13] Counsel, however, must be sufficiently specific to alert the trial court of the alleged error and to allow intelligent review on appeal.[14] This means that the essence of the argument must be presented to the trial judge, but the argument need not be as detailed as an appellate brief.[15]

And, third, trial counsel should assert all applicable grounds in support of the objection. The argument on appeal will be limited to the grounds asserted by trial counsel.[16] If the trial court overrules the objection, then appellate counsel will have alternative bases to argue for a reversal. And, if the trial court accepts one or more grounds, then appellate counsel will have one or more grounds to argue that the trial court reached the correct result under the "Tipsy Coachman" doctrine.[17]

After making a contemporaneous objection, counsel must ensure that the trial court makes a ruling. "The preservation of error requirement is not ordinarily completed until the aggrieved party has obtained a ruling on the motion or objection made in the lower tribunal."[18] The appellate court will not usually consider an issue without a ruling from the trial court.

Motions for Mistrial. A contemporaneous objection and a ruling from the trial court may be insufficient to preserve certain issues for appellate review. If the trial court overrules the objection, nothing else is required to preserve the issue for appellate review.[19] But if the court sustains the objection, then counsel may also need to move for a mistrial.[20] The trial court may reserve ruling on the motion for mistrial until after the jury deliberates.[21] But the principles behind the contemporaneous objection rule apply to the motion for mistrial,[22] so counsel must secure a ruling on any motions for mistrial before the court is adjourned. Consequently, a party may waive the right to a new trial by withdrawing a motion for mistrial.[23]

Fundamental Error. In rare circumstances, an issue may be raised for the first time on appeal without a contemporaneous objection in the trial court.[24] However, the issue must rise to the level of "fundamental error."[25] Florida courts define "fundamental error" in civil cases as error that goes to the foundation of the case or goes to the merits of the cause of action.[26] To qualify as fundamental error, the error must amount to a denial of due process.[27] For example, a trial court commits fundamental error if it gives an instruction that improperly removes the main disputed issue from consideration by the jury.[28] An actual denial of due process also constitutes fundamental error, so it can be raised for the first time in the appellate court.[29] But counsel should not rely on the possibility that an issue may be raised on appeal as fundamental error.[30] The better practice is to raise any potential issue at trial and to obtain a ruling from the trial judge.

Invited Error Doctrine. Trial counsel should be mindful of the invited error doctrine. Under that doctrine, counsel cannot lead the trial court into error and then exploit that error on appeal.[31] A party that leads a trial court to commit an error is deemed to have waived the right to ask the appellate court to correct the error.[32] The danger of inviting error is great because even fundamental error is subject to the invited error doctrine.[33] As the old saying warns, "Be careful what you ask for because you just might get it."

Harmless Error Rule. One final principle to keep in mind is the harmless error rule. That rule is based on section 59.041, Florida Statutes, which bars a reversal unless the appellate court "after an examination of the entire case" finds "that the error complained of has resulted in a miscarriage of justice." For a long time, many Florida courts applied the harmless error rule by looking at the effect the error had on the ultimate outcome of the case: an error was considered harmful where "a result more favorable to the appellant would have been reached if the error had not been committed."[34] However, in 2014, the Florida Supreme Court rejected this results-oriented approach.[35] So now the "harmless error analysis is not limited to the result in a given case, but it necessarily concerns the process of arriving at that result."[36] The appellate court has "to focus on the effect of the error on the trier-of-fact and avoid engaging in analysis that looks only to the result in order to determine harmless error."[37] Based on this change, counsel may want to add to his or her objections an explanation about how the alleged error impacts the jurors, their deliberations, or their verdict.

ARGUMENTS AND CONDUCT OF COUNSEL

The preservation of issues regarding improper arguments or conduct by opposing counsel (during *voir dire*, opening statements, or closing arguments) requires multiple steps. The first step is a contemporaneous objection at the time of the improper comment or conduct. Counsel cannot wait until the end of the opposing attorney's closing argument to raise an objection.[38]

The second step is to obtain a ruling from the trial court. The failure to obtain a ruling waives the issue for appellate review, unless the trial court patently and deliberately refuses to rule on the objection.[39]

If the objection is sustained, counsel must take the extra step of moving for a mistrial.[40] The motion for mistrial must be made by the end of opposing counsel's argument, at the latest.[41] But careful trial counsel will move for mistrial both during and at the end of opposing counsel's argument.[42] Doing so makes sense in cases where there is an argument that the cumulative effect of the improper comments requires a new trial.[43] (This extra step of moving for mistrial is not required if the objection is overruled.[44])

If counsel makes no objection or fails to follow the steps mentioned above, then counsel may raise the improper comments in a post-trial motion for new trial.[45] The improper comments, however, must pass the stringent fundamental error analysis set forth in *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000).[46] The *Murphy* standard limits relief to a narrow scope of improper comments, including those that appeal to racial, ethnic, or religious prejudices.[47] Because very few cases will satisfy the *Murphy* standard, counsel should not rely the availability of post-trial motions to preserve these issues.

EVIDENTIARY ISSUES

Admission of Inadmissible Evidence. To preserve the argument that the trial court erroneously admitted inadmissible evidence, counsel must make a timely objection or motion to strike.[48] This means that counsel must object to improper questions and questions that call for inadmissible evidence before the witness answers.[49] By contrast, counsel must move to strike when a witness gives an improper answer to a proper question.[50]

Counsel must also state the specific grounds for the objection or motion.[51] For example, a "relevance" objection is insufficient to preserve the argument that the evidence is inflammatory or unfairly prejudicial.[52] General objections on the grounds of "lack of foundation" or "improper predicate" are insufficient to preserve the improper admission of the evidence.[53] Counsel should state what is missing from the foundation or predicate.

Counsel may also need to move for a mistrial depending on the nature of the improper evidence before the jury. A mistrial may be granted based on the improper admission of the existence of liability insurance.[54] A mistrial may also be required where a witness states that a party received a traffic citation.[55]

Exclusion of Admissible Evidence. If the trial court improperly excludes admissible evidence, then counsel must make an offer of proof.[56] In other words, counsel must make the substance of the excluded evidence known to the court.[57] This proffer of evidence is necessary to allow the appellate court to determine exactly what was excluded to decide whether the exclusion requires a reversal.[58]

The usual way in which the offer is made is by questioning the witness on the record, but outside the presence of the jury.[59] Alternatively, the proffer may be made through counsel's oral or written statement summarizing the testimony that the witness would give.[60] When the excluded evidence is a document or some other exhibit, the proffer should be made by marking the item for identification, submitting it to the clerk, and including it in the appellate record.[61]

"Generally, refusal of the trial court to allow a proffer prevents a determination of the propriety of the trial court's ruling and is reversible error."[62]

MOTIONS FOR DIRECTED VERDICT

Florida law requires a motion for directed verdict to preserve a challenge to the sufficiency of the evidence in a jury trial.[63] Florida Rule of Civil Procedure 1.480 sets out the procedure for making such motions. First, the motion must be made at the close of the evidence offered by the opposing party.[64] Second, the motion must state the specific grounds for the directed verdict.[65] And third, if the court does not grant the motion, the movant must renew his or her arguments in a post-trial motion for judgment in accordance with the motion for directed verdict within 15 days of the verdict (or, if no verdict is returned, after discharge of the jury).[66]

A prior version of rule 1.480(b) required that any motion for directed verdict had to be renewed at the close of all the evidence.[67] Many older cases hold that a failure to renew the motion at the close of all of the evidence waived any challenge to the sufficiency of the evidence.[68] However, in 2010, the Florida Supreme Court amended rule 1.480(b) to eliminate the requirement that a motion for directed verdict must be renewed at the close of all the evidence.[69]

The procedure for preserving a challenge to the sufficiency of the evidence is different in a bench trial. Florida Rule of Civil Procedure 1.420(b) states that, after a party seeking affirmative relief concludes his or her case, the opposing party may move for an involuntary dismissal.

But Florida Rule of Civil Procedure 1.530(e) provides that:

> When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal whether or not the party raising the question has made any objection thereto in the trial court or made a motion for rehearing, for new trial, or to alter or amend the judgment.

Based on this rule, in a bench trial, counsel can challenge the sufficiency of the evidence on appeal even if there was no contemporaneous objection or motion for involuntary dismissal in the lower court.[70]

JURY INSTRUCTIONS

The contemporaneous objection rule applies to alleged errors regarding jury instructions.[71] Generally, most objections to the jury instructions must be made during the charge conference.[72] But counsel should be ready to object to jury instructions at other times. For example, counsel must object during the reading of the instructions if the court deviates from the language in the written instruction.[73]

The level of specificity required to preserve the error depends on whether the court gave the instruction or refused to give the instruction. To preserve an objection to an instruction requested by the opposing party and given by the court, a distinct and specific objection is necessary.[74] This means that saying something like "we object to plaintiff's instruction number 3" is insufficient.[75] The objection should instead:

- identify the instruction at issue; and
- explain why the instruction is improper (e.g., it does not accurately state the law, is not supported by the facts in the case, and/or is not necessary for the jury to properly resolve the issues).[76]

The party objecting to the instruction must also propose a corrected instruction, at least in cases where the challenged instruction does not accurately state the law.[77]

In contrast, no specific objection is required when a party's request for a jury instruction is rejected by the trial court.[78] However, the party must file the request for the jury instruction in writing.[79] And the requested instruction must be brought to the trial court's attention during the charge conference.[80]

The lack of a contemporaneous objection is likely fatal in this area. The Florida Supreme Court has rejected arguments that the failure to give a proper jury instruction in a civil case amounts to fundamental error.[81] One court has explained that "[i]n a civil case, the policies behind the requirement of Rule 1.470(b), that objections to jury instructions be properly preserved, override the necessity that a jury be correctly charged on the law."[82] Courts are concerned that application of the fundamental error rule in this context would result in many retrials that would have been unnecessary if trial counsel had made a contemporaneous objection.[83]

VERDICT FORM

A party must timely object to any error pertaining to the verdict form before it is submitted to the jury.[84] Florida courts will not fault the jury for doing what it was instructed to do.[85] Instead, the blame will fall on the attorney that failed to object to an improper verdict form.[86] An attorney that agrees to an improper verdict form will be found to have invited any error regarding the verdict form.[87]

The verdict form can also create preservation problems based on the "two-issue rule." Under that rule, an appellate court will not reverse where a general verdict form was used and "no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced."[88] The rule applies where a plaintiff presents two or more theories of liability (or causes of action) or where a defendant raises two or more affirmative defenses.[89] In such cases, to avoid the "two-issue rule," counsel should request a special verdict form and submit a written copy of that special verdict form along with the necessary explanatory jury instructions during the charge conference.[90]

JURY DELIBERATIONS

Potential errors that arise during the jury's deliberations may be waived if not raised before the jury returns a verdict.[91] For example, in one case, the court responded to the jury's request for a definition while the parties and their attorneys were out at lunch.[92] Upon their return to the courtroom, the judge told them about the jury's question and his response.[93] There was no objection before the jury returned its verdict.[94] The appellate court held that any error had been waived because counsel was aware of the misconduct, but failed to object, before the jury had returned its verdict.[95]

In contrast, in another case, the jury asked the bailiff questions about the jury instructions and the definition of "negligence."[96] The bailiff told the judge about the questions when he saw the judge in the hallway.[97] The bailiff then told the jury that the court would not give the requested instructions.[98] After the jury returned its verdict, counsel learned of the ex parte communications between the court and the jury.[99] Under these facts, the appellate court held that counsel had not waived the error.[100]

If the jury indicates it is deadlocked, then any issues regarding an *Allen*[101] charge must also be preserved with a contemporaneous objection. The party challenging the

Allen charge must object to preserve any error regarding the decision to give the instruction.[102] To preserve a challenge to the wording of the *Allen* charge, counsel must suggest an alternate formulation of the words to use in the instruction.[103] (These requirements are analogous to the preservation of an error regarding the jury instructions.[104]) Counsel should also request any other relief, including a mistrial, if appropriate.[105]

VERDICT

Any argument that the verdict is inconsistent must be raised before the jury is discharged.[106] For this reason, it is crucial to understand what qualifies as an "inconsistent" verdict. The Florida Supreme Court has explained that "an inconsistent verdict is defined as when two definite findings of fact material to the judgment are mutually exclusive."[107] For example, a verdict is inconsistent if it finds that both the plaintiff's negligence and the defendant's negligence caused the plaintiff's injuries, but then apportions 100% of the fault on the defendant.[108] Such inconsistent verdicts must be brought to the court's attention while the jurors are still present to correct the error.[109] Counsel must specifically ask the trial court to resubmit the case to the jury.[110]

Keep in mind that "[a] verdict is not necessarily inconsistent simply because it fails to award enough money or even no money at all."[111] Counsel need not challenge the adequacy of a verdict before the jury is discharged.[112] Instead, counsel can object to a verdict's inadequacy or excessiveness in post-trial motions for additur, remittitur, or new trial.[113]

Once the court is adjourned, counsel must rely on post-trial motions to renew objections and preserve other issues for appeal. Those post-trial motions merit separate treatment and are beyond the scope of this article.

CONCLUSION

The main points from this brief overview have been condensed into a *Basic Checklist for Preserving Appellate Issues* that is included with this article. The checklist is not comprehensive and is a poor substitute for having an appellate specialist at trial to assist with the preservation of any complicated issues. But, in the absence of appellate counsel, this article and the *Checklist* should help you preserve most issues that may arise in your next trial.

1 Scott J. Frank, Trial Essentials: Guideline to Voir Dire Issues and Challenges for Cause, Trial Advoc. Q. Vol. 36, No. 3, at 17 (Summer 2017).
2 *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).
3 *Id.*
4 *Id.*
5 *E.g.*, *Francis-Harbin v. Sensormatic Elecs., LLC*, No. 3D17-407, 2018 WL 1936813, at *3 (Fla. 3d DCA Apr. 25, 2018); *Reid v. Guardianship of Reid*, 213 So. 3d 368 (Fla. 4th DCA 2017).
6 *Marks v. Delcastillo*, 386 So. 2d 1259, 1266-67 (Fla. 3d DCA 1980).
7 *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010).
8 *Eagleman v. Korzeniowski*, 924 So. 2d 855, 859 (Fla. 4th DCA 2006).
9 *See R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 310 (Fla. 1st DCA 2012) (finding that issue was not preserved where counsel waited until the end of closing arguments to object to specific portions of the argument).
10 *Hargrove v. CSX Transp., Inc.*, 631 So. 2d 345, 346 (Fla. 2d DCA 1994).
11 *Wallace v. Holiday Isle Resort & Marina, Inc.*, 706 So. 2d 346, 347 (Fla. 3d DCA 1998).
12 *Aills*, 29 So. 3d at 1108.
13 *Id.* at 1109.
14 *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 64 (Fla. 2012).
15 *See Ruddy v. Carelli*, 54 So. 3d 1055, 1056 (Fla. 5th DCA 2011) (holding issue was preserved where the general proposition was presented to the trial judge).
16 *Aills*, 29 So. 3d at 1108-09.
17 *See Taylor v. State*, 146 So. 3d 113, 115 (Fla. 5th DCA 2014) (affirming based on argument rejected by the trial court).
18 *Hamilton v. R.L. Best Int'l*, 996 So. 2d 233, 235 (Fla. 1st DCA 2008).
19 *Simpson v. State*, 418 So. 2d 984, 986 (Fla. 1982); *R.J. Reynolds Tobacco Co. v. Grossman*, 211 So. 3d 221, 226 (Fla. 4th DCA 2017).
20 *Companioni v. City of Tampa*, 51 So. 3d 452, 456 (Fla. 2010); *Couch v. Dunn Ave. Shell, Inc.*, 803 So. 2d 803, 805-06 (Fla. 1st DCA 2001); *see also Kmart Corp. v. Hayes*, 707 So. 2d 957, 958 (Fla. 3d DCA 1998) (noting the remedy for a party's use of false testimony was either a motion for mistrial or a motion for continuance).
21 *Ed Ricke & Sons, Inc. v. Green ex rel. Swan*, 468 So. 2d 908, 910 (Fla. 1985).
22 *Companioni*, 51 So. 3d at 455-56.
23 *Publix Super Markets, Inc. v. Griffin*, 837 So. 2d 1139, 1141 (Fla. 2d DCA 2003).
24 *Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 646 (Fla. 2015).
25 *Id.*
26 *Warfel*, 82 So. 3d at 64.
27 *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995).
28 *Warfel*, 82 So. 3d at 64.
29 *Withers v. Blomberg*, 41 So. 3d 398, 401 (Fla. 2d DCA 2010); *Verizon Bus. Network Servs., Inc. ex rel MCI Commc'ns, Inc. v. Dep't of Corrs.*, 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008).
30 *See Grau v. Branham*, 761 So. 2d 375, 378 (Fla. 4th DCA 2000) (noting appellate courts have "all but closed the door on fundamental error in civil trials").
31 *Warfel*, 82 So. 3d at 65.
32 *See Yampol v. Schindler Elevator Corp.*, 186 So. 3d 616, 617 (Fla. 3d DCA 2016) (holding appellant waived issue by inviting error below).
33 *Id.*
34 *In re Commitment of DeBolt*, 19 So. 3d 335, 337 (Fla. 2d DCA 2009) (en banc).
35 *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251 (Fla. 2014).
36 *Id.* at 1257.
37 *Id.* at 1256.
38 *Townsend*, 90 So. 3d at 310.
39 *City of Orlando v. Pineiro*, 66 So. 3d 1064, 1071 (Fla. 5th DCA 2011); *LeRetilley v. Harris*, 354 So. 2d 1213, 1214 (Fla. 4th DCA 1978).
40 *Newton v. S. Fla. Baptist Hosp.*, 614 So. 2d 1195, 1196 (Fla. 2d DCA 1993).
41 *Grossman*, 211 So. 3d at 226.
42 *Wyatt v. Marcus*, 949 So. 2d 1204, 1205 (Fla. 3d DCA 2007).
43 *See Carnival Corp. v. Pajares*, 972 So. 2d 973, 979 (Fla. 3d DCA 2007) (reversing and remanding for a new trial based on the cumulative effect of improper comments during closing).
44 *Newton*, 614 So. 2d at 1196.
45 *Companioni*, 51 So. 3d at 456; *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1027 (Fla. 2000).
46 *Companioni*, 51 So. 3d at 456.
47 *Murphy*, 766 So. 2d at 1030.
48 § 90.104(1)(a), Fla. Stat.
49 *Kight v. Am. Eagle Fire Ins. Co. of N.Y.*, 170 So. 664, 667 (Fla.

1936); *Thompson v. State*, 46 So. 842, 843 (Fla. 1908).
[50] *Thompson*, 46 So. at 843.
[51] § 90.104(1)(a), Fla. Stat.
[52] *Datus v. State*, 126 So. 3d 363, 365-66 (Fla. 4th DCA 2013).
[53] *Couzo v. State*, 830 So. 2d 177, 179 (Fla. 4th DCA 2002).
[54] *Crowell v. Fink*, 135 So. 2d 766, 769 (Fla. 1st DCA 1961).
[55] *Perez v. Byrd*, 682 So. 2d 643, 643 (Fla. 5th DCA 1996).
[56] § 90.104(1)(b), Fla. Stat.
[57] *Id.*
[58] *Musachia v. Terry*, 140 So. 2d 605, 608 (Fla. 3d DCA 1962).
[59] *See id.*
[60] *Porro v. State*, 656 So. 2d 587, 587 n.* (Fla. 3d DCA 1995).
[61] *Brantley v. Snapper Power Equip.*, 665 So. 2d 241, 243 (Fla. 3d DCA 1995).
[62] *In re K.C.*, 582 So. 2d 741, 742 n.1 (Fla. 4th DCA 1991).
[63] *City of Pompano Beach v. Edwards*, 129 So. 2d 144, 147 (Fla. 2d DCA 1961).
[64] Fla. R. Civ. P. 1.480(a).
[65] *Id.*
[66] Fla. R. Civ. P. 1.480(b).
[67] *In re Amendments to the Fla. Rules of Civ. Proc.*, 52 So. 3d 579, 589 (Fla. 2010).
[68] *E.g.*, *Prime Motor Inns, Inc. v. Waltman*, 480 So. 2d 88, 90 (Fla. 1985); *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 251 (Fla. 4th DCA 2009); *6551 Collins Ave. Corp. v. Millen*, 97 So. 2d 490, 494 (Fla. 3d DCA 1957).
[69] *In re Amendments*, 52 So. 3d at 589.
[70] *Winchel v. Pennymac Corp.*, 222 So. 3d 639, 644 (Fla. 2d DCA 2017).
[71] *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 517 (Fla. 2015) ("To properly preserve this error, there must be a timely, specific objection to the jury instruction.").
[72] *See* Fla. R. Civ. P. 1.470(b) ("At such conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions as it will give.").
[73] *Klepper v. J.C. Penney Co.*, 340 So. 2d 1170, 1171 (Fla. 4th DCA 1976).
[74] *Middelveen v. Sibson Realty, Inc.*, 417 So. 2d 275, 276-77 (Fla. 5th DCA 1982).
[75] *Id.*
[76] *See R.J. Reynolds Tobacco Co. v. O'Hara*, 228 So. 3d 1168, 1171 (Fla. 1st DCA 2017) (analyzing these issues to determine whether court erred in giving jury instruction).
[77] *See Feliciano v. Sch. Bd. of Palm Beach Cnty.*, 776 So. 2d 306, 307 (Fla. 4th DCA 2000) ("She objected to defendant's proposed pretext objection during the charge, *but did not* offer a written instruction of her own to address this issue.") (emphasis in original).
[78] *Persaud v. Cortes*, 219 So. 3d 241, 244 (Fla. 5th DCA 2017); *Luthi v. Owens-Corning Fiberglass Corp.*, 672 So. 2d 650, 652 (Fla. 4th DCA 1996).
[79] Fla. R. Civ. P. 1.470(b).
[80] *Luthi*, 672 So .2d 651-52.
[81] *City of Orlando v. Birmingham*, 539 So. 2d 1133, 1135 (Fla. 1989). *But see Warfel*, 82 So. 3d at 64 (holding erroneous jury instruction amounted to fundamental error).
[82] *Feliciano*, 776 So. 2d at 308.
[83] *Id.*
[84] *See Keller Indus., Inc. v. Morgart*, 412 So. 2d 950, 950 (Fla. 5th DCA 1982) (finding error regarding the verdict was not preserved because the appellant did not object to the form of the verdict before it was submitted to the jury); *see also Hurley v. Gov't Emps. Ins. Co.*, 619 So. 2d 477, 480 (Fla. 2d DCA 1993) (holding a contemporaneous objection is required to preserve any error regarding the use of a general verdict form).
[85] *Plana v. Sainz*, 990 So. 2d 554, 557 (Fla. 3d DCA 2008).
[86] *See Papcun v. Piggy Bag Disc. Souvenirs, Food & Gas Corp.*, 472 So. 2d 880, 881 (Fla. 5th DCA 1985) ("It is well established that a failure to object to a verdict form regarding defects not of a constitutional or fundamental character constitutes a waiver of such defects.").
[87] *Schaffer v. Pulido*, 492 So. 2d 1157, 1157-58 (Fla. 3d DCA 1986).
[88] *Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980).
[89] *Barth v. Khubani*, 748 So. 2d 260, 261-62 (Fla. 1999).
[90] *Whitman*, 383 So. 2d at 620.
[91] *See Rooney v. Hannon*, 732 So. 2d 408, 410 (Fla. 4th DCA 1999) ("Where a lawyer knows of an incident potentially compromising the jury before a verdict is returned, but fails to object or alert the court until after the verdict is announced, the incident may not be raised as a ground for a new trial.").
[92] *Phelps v. Johnson*, 113 So. 3d 924, 926 (Fla. 2d DCA 2013).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Sears Roebuck & Co. v. Polchinski*, 636 So. 2d 1369, 1370 (Fla. 4th DCA 1994).
[97] *Id.*
[98] *Id.*
[99] *Id.* at 1371.
[100] *Id.*; *see also Hatin v. Mitjans*, 578 So. 2d 289, 291 (Fla. 3d DCA 1991) ("Conversely, appellant's counsel in this case was not provided an adequate opportunity to formulate an objection because he was not in possession of all the material facts.").
[101] *Allen v. United States*, 164 U.S. 492 (1896).
[102] *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So. 2d 547, 549 (Fla. 4th DCA 2003).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Coba*, 164 So. 3d at 644.
[107] *Id.* at 643.
[108] *Southland Corp. v. Crane*, 699 So. 2d 332, 334 (Fla. 5th DCA 1997).
[109] *Coba*, 164 So. 3d at 644.
[110] *Barreto v. Wray*, 40 So. 3d 779, 779 (Fla. 3d DCA 2010).
[111] *Coba*, 164 So. 3d at 643.
[112] *Id.*
[113] *Id.*

BASIC CHECKLIST FOR PRESERVING APPELLATE ISSUES

1 Practical Considerations

- ☐ Obtain a court reporter
- ☐ Describe verbally anything that happens outside the court reporter's hearing that you want reflected in the record
- ☐ Clearly identify any exhibits or demonstrative aids used by the attorneys or the witnesses

2 General Principles of Preservation

- ☐ Make contemporaneous objections
  - ❍ Object at the time of the alleged error
  - ❍ State the grounds for the objection with enough specificity to alert the trial court of the alleged error
  - ❍ Obtain a ruling from the trial court
  - ❍ If the objection is sustained, move for a mistrial
- ☐ Do not rely on the possibility that an issue may be raised on appeal as fundamental error
- ☐ Be careful what you ask for (avoid invited error)
- ☐ If possible, explain the impact the alleged error will have on the jurors, their deliberations, and their verdict

3 Improper Arguments and Conduct of Counsel

- ☐ Make a contemporaneous objection at the time of the improper comment or conduct
- ☐ Obtain a ruling
- ☐ If the objection is sustained, move for a mistrial by the end of opposing counsel's argument
- ☐ Raise any unobjected-to and improperly-objected-to comments in a post-trial motion for new trial

4 Evidentiary Issues

- ☐ Admission of Inadmissible Evidence
  - ❍ Make a contemporaneous objection to improper questions and questions that call for improper answers before the witness answers
  - ❍ Move to strike when a witness gives an improper answer to a proper question
  - ❍ If the objection is sustained or the motion to strike is granted, a motion for mistrial may be necessary
- ☐ Exclusion of Admissible Evidence
  - ❍ Make a proffer, i.e. make the substance of the excluded evidence known to the court
  - ❍ Question the witness on the record, but outside the presence of the jury
  - ❍ Give an oral or written summary of the testimony that the witness would give
  - ❍ Mark for identification any documentary or tangible items excluded, and provide them to the clerk for inclusion in the court file

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5 Motions for Directed Verdict

- ☐ Challenge the sufficiency of the evidence by moving for directed verdict (or involuntary dismissal in a bench trial) at the close of the evidence by the opposing party
- ☐ State the specific grounds for the motion
- ☐ If the objection is denied in a jury trial, renew the arguments in a timely post-trial motion for judgment in accordance with the prior motion for directed verdict

6 Jury Instructions

- ☐ Make a contemporaneous objection to any improper instructions proposed by opposing counsel during the charge conference
  - ❍ Identify the instruction at issue
  - ❍ Explain why the instruction is improper
  - ❍ Propose a corrected instruction in writing
- ☐ Make a record of any instruction you request that is rejected by the court
  - ❍ File a written copy of the requested instruction
  - ❍ Bring the requested instruction to the court's attention during the charge conference
- ☐ Make a contemporaneous objection if the court's oral instructions deviate from the written instructions, and consider moving for mistrial

7 Verdict Forms

- ☐ Make a contemporaneous objection to any error in the verdict form before it is submitted to the jury
  - ❍ Do not agree to an improper verdict form (avoid invited error)
  - ❍ Object to a general verdict form if the plaintiff raises two or more theories of liability or the defendant raises two or more affirmative defenses
  - ❍ File a written copy of any proposed special interrogatory verdict form
  - ❍ Bring the requested special interrogatory verdict form to the court's attention during the charge conference

8 Jury Deliberations

- ☐ Make a contemporaneous objection before the jury returns a verdict
- ☐ When challenging an *Allen* charge, suggest any alternate formulation of the words to use in the instruction
- ☐ Move for a mistrial, if appropriate

9 The Verdict

- ☐ Inconsistent Verdicts
  - ❍ Make a contemporaneous objection before the jury is discharged
  - ❍ Specifically request that the case be resubmitted to the jury
- ☐ Inadequate Verdicts
  - ❍ Object to the inadequacy or excessiveness of the verdict in a post-trial motion
- ☐ Renew any pending motions for mistrial, and obtain a ruling

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