Preserving Issues for Appeal

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I. Pre-Trial Appeal Issues

No one goes into a case with the idea that it will end up in an appellate court. As Plaintiff's lawyers, we know that getting the case resolved, sooner rather than later, is always the goal; and an appeal only delays the ultimate resolution. That said, cases do often end up going beyond the trial stage, and preparing for that eventuality at the outset can actually ensure a better result in the trial court.

A. Make a Case Plan.

Prepare a thorough analysis of the theories and legal issues in the case. Consider both the claims you plan to make, as well as the likely defenses to those allegations. Include in the case plan analysis of the standards necessary to make your claims, and those necessary for a successful defense. An excellent way to do this is to consider what jury charges will be necessary from the outset. Most of us tend to prepare jury charges at the very end of the case – often at the last minute; but it is actually a very good idea to prepare the plaintiff's jury charges at the beginning of the case, as a sort of outline of the proof you will need, so that throughout the case you can be sure that you have everything necessary to meet your burden of proof. If you consider and check off the various items on your case plan throughout the litigation, you will find that it will provide a very good basis for the appellate record in the event the case is appealed. Further, consider

the charges routinely proffered by the defense, to make sure that your case doesn't accidentally get gutted after a lengthy trial simply because you didn't anticipate the strength of some of the defense-biased charges. And don't assume that all of these damaging charges must be given; prepare your objections in advance.

B. Build the record.

(1) "If it's not in the record, it doesn't exist."

The appellate court can and will only review what's in the record, so make sure that whatever you've got to say or offer is in there. As they say, if it's not in the record, it didn't happen. Further, the appellate court is not the place to raise an issue for the first time. On appeal, one "must stand or fall on the position taken in the trial court." *Pfeiffer v. Ga. DOT*, 275 GA. 827, 829, 573 S.E.2d 389 (2002). Therefore, consider that all pleadings filed in a case may ultimately form the basis of an appeal, so write well and accurately. Make sure that all issues are thoroughly briefed in the context of summary judgment motions, *Daubert* motions and the like.

(2) Are your pleadings in order?

File motions in limine and trial briefs when there are legal issues that should be presented the trial court. Do not assume that any ruling the court makes is automatically part of the record. If the court rules orally, but the matter is not reported or subsequently reduced to writing, it's not in the record.

It goes without saying that you want to make sure that all your pleadings have actually been filed with the clerk. If something is handled by letter brief, or informally in some fashion, it will likely not be in the record. Similarly, if there is

something that needs to be in the record in order for the trial court to properly consider an issue, such as deposition transcripts to be considered on motion for summary judgment, the party has the burden of insuring that the transcripts are properly filed. *All Fleet Refinishing, Inc. v. West Georgia Nat. Bank*, 280 Ga. App. 676, 678, 634 S.E.2d 802 (2006).

(3) Record and Transcribe

If a hearing is held on an issue, have it reported. Even if the other side doesn't want to share in the take down, if the issue is important enough, you want to make sure there is a record. You can always wait to have the court reporter transcribe the proceedings, and pay for the transcript, when you determine you need it.

II. Preserving the Record During Trial

At trial, the record will consist of all pleadings and motions filed relating the trial itself, and all of the evidence – what was said (as transcribed by the court reporter), and what was read, tendered or proffered in the case.

A. Unreported Events

As with pretrial hearings, be wary of "off the record" sidebar conferences that occur during trial. Often these discussions pertain to matters that will be critical to an appellate review, such as a ruling on an important piece of evidence. You may request that the court reporter be brought in to take down the discussions; but if that doesn't happen, go ahead and make a record after the discussion and/or decision, so that it is clear what happened "off line." If appropriate, you can also submit a proposed order for an official record of the ruling.

B. Waiver

The cardinal rule of record preservation is that one must "raise it or waive it." Objections not raised at trial cannot be raised on appeal. So, when in doubt, object! There is a rationale for the raise it or waive it requirement, and that is that the trial court should be given an opportunity to correct or cure an error while it is still possible to do so. Not only is it a good idea to raise the issue for appeal reasons, but there is always the chance that the trial court will reconsider and reverse its ruling.

Keep in mind that a waiver can be either express or implied. Obviously, if counsel affirmatively agrees or even acquiesces in a ruling, the waiver is expressed. An implied waiver occurs any time an objection is not made.

C. Evidentiary Issues

A potential issue arises any time a party attempts to admit evidence, which is not allowed, or the opposing party succeeds in getting evidence admitted that you believe should be excluded. In either situation, you need to take certain steps in order to preserve the issue for appeal.

In order to preserve a ground of objection related to the exclusion of oral testimony, it is necessary for the complaining party to show what he expects to prove and that the evidence is material, relevant and beneficial. *Hendrix v. Byers Bldg. Supply, Inc.*, 167 Ga. App. 878, 307 S.E.2d 759 (1983). Although trial judges sometimes do not want to take the time for a proffer to be made, "where an offer of proof is necessary it is error for the trial judge to deny counsel an opportunity to state what he proposes to prove by the evidence offered." *Id.* at 879. If the offer of proof involves a document or some other type of exhibit, the

exhibit should be marked for identification in order to ensure that is included in the record.

If you object to the admission of evidence by an opponent, you must make a timely objection to the admission – preferably by way of motion in limine, *Daubert* motion or motion to strike prior to trial.

D. Deposition Testimony

There are unique issues that can arise when presenting deposition testimony at trial. When a deposition is read into the record, the court reporter usually takes the testimony down as if an actual witness is on the stand, so the testimony is in the record. If a video deposition is played, however, the court reporter will sometimes not record the testimony that is played. If this is the case, it is essential that the written transcript is in the record *and* the record is clear as to what portions of the deposition will or have been played.

E. Renewing Objections Following Rulings on Motions in Limine

Unlike the rule in federal court, in Georgia, you need not renew your objection if you obtain a favorable ruling on a motion in limine and the opposing party offers evidence that has been excluded. This is actually a very good rule, because to require otherwise essentially brings attention to the elephant in the room and defeats the entire purpose of the limine ruling. In *Harley-Davidson Motor Co. v. Daniel*, 244 Ga. 284, 285, 260 S.E.2d 20 (1979), the Supreme Court stated the following in holding that an objection is not required to preserve the denial of a motion in limine:

> The purpose in filing a motion in limine to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suite. **It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which the motion in limine is intended to reach.**

The reasoning also applies when a motion in limine is granted.

> To hold otherwise, and require the successful movant to object when evidence encompassed by the motion in limine is nevertheless offered at trial, would defeat the purpose of the motion in limine, as the movant would be forced, in the presence of the jury, to call special attention to prejudicial evidence which the trial court had previously ordered to be excluded form the jury's consideration.

Reno v. Reno, 249 Ga. 855, 856, 295 S.E.2d 94 (1982). Keep in mind, however, that a litigant who obtained a favorable ruling on a motion to keep evidence out cannot be heard to complain about its admission later on if it was that party that offered the evidence. *E.g. Smith v. CSX Transp.*, 306 Ga. App. 897, 703 S.E.2d 671 (2010).

III. Preservation of Error in Jury Instructions

Jury instructions are often the most fertile ground for appellate issues. Because of the unique issues that arise when a trial court's charge is considered

erroneous, some special attention to preservation of errors in jury instructions is warranted.

O.C.G.A. § 5-5-24 provides a mechanism for correcting erroneous jury charges. The basic purpose is to ensure that the jury is given correct legal instructions to base its findings.

In order to preserve an objection to a jury instruction for appellate review, the objection "need only be as reasonably definite as the circumstances will permit." O.C.G.A. § 5-5-24(a). That Code Section specifically states that the "objection need not be made with the particularity formerly required of assignments of error." *Id.* The purpose of the objection is to allow the correction of errors in the charge when there is still time to do so. *Vaughn v. Protective Ins. Co.*, 243 Ga. App. 79, 81, 532 S.E.2d 159 (2000) (plaintiff's objection to recharge on assumption of the risk adequate to preserve error, despite having agreed to court's original charge on same defense).

The purpose of noting an objection is to put the trial court on notice of the litigant's objection concerning the court's charge so that a correction can be made before the jury reaches its verdict. Significantly, this may be accomplished without a great deal of specificity. *See Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 16-17, 195 S.E.2d 417 (1973). "[N]o useful purpose could possibly be served by requiring that the grounds upon which counsel contend the charge should be given be repeated after the court has announced to counsel its decision that the requested charge will not be given and had instructed the jury omitting such requested charge." *Id.* at 17. *See also Kres v. Winn-Dixie Stores*, 183 Ga. App. 854, 360 S.E.2d 415 (1987). Thus, the Court of Appeals has expressly

overruled cases that required something more than a "minimalist objection" to the trial court's failure to give a proffered charge in order to preserve the issue for appellate review. *Golden Peanut Co. v. Bass*, 249 Ga. App. 224, 547 S.E.2d 637 (2001), *aff'd* 275 Ga. 145, 563 S.E.2d 116 (2002).

The Supreme Court has specifically rejected the idea that certain magic words are required to note a proper objection, as "putting form over substance – [is] a result we should always endeavor to avoid." *Continental Cas. Co. v. Union Camp Corp.,* 230 Ga. at 17.

All that being said, you can find volumes and volumes of case law discussing and critiquing litigants' efforts to make their objections known. Thus, to the extent allowed by a given judge, speak up!

A. When to Object

The simple answer to the question of when to object is that a party must alert the court of any concern regarding a charge in sufficient time for it to have an opportunity to consider the charge and make any correction *before* the jury reaches a result. Specifically, O.C.G.A. § 5-5-24(a) states:

> Except as otherwise provided in this Code section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

See, e.g. Vaughn v. Protective Ins. Co., 243 Ga. App. 79, 532 S.E.2d 159 (2000) ("The purpose of O.C.G.A. §5-5-24(a) is to allow correction of errors in the charge

when there is still time to do so. [cit] The court could have withdrawn the charge and instructed the jury to no longer consider assumption of risk, or it could have revised instructions sufficient to clarity the law applicable to the case."); *Smithson v. Parker*, 242 Ga. App. 133, 528 S.E.2d 886 (2000) (plaintiff waived objection to charge because plaintiff failed to except to the charge before the verdict.)

The more realistic answer is that an objection should be made early and often. In other words, to avoid any question that an objection has been properly preserved, it should be made at the charge conference, when the court indicates what its charge will be, and after the court actually instructs the jury. However, if an objection is not made the first time the charge is discussed, or even given, it can be made at a later time -- for example after a re-charge. *E.g. Vaughn v. Protective Ins. Co.*, 243 Ga. App. 79, 532 S.E.2d 159 (2000).

B. What is the Objection?

An exception to a jury charge can take two forms. You can object to the court *giving* a particular instruction, or you can object to the court's *failure* to give a charge you've requested. With respect to the charge actually given, you must take exception to what was said after the court instructs the jury. The same is true when the court refuses to give a charge you've asked for. While it might seem obvious that you except to an instruction you've proposed, it is not sufficient to preserve your right to appeal the court's failure to give a charge merely by offering it. You must also except to the court's failure to give it before the jury returns its verdict.

"In order for a refusal to charge to be error, the request must be entirely correct and accurate; adjusted to the pleadings, law, and evidence; and not otherwise covered in the general charge." *Coile v. Gamble*, 270 Ga. 521, 522, 510 S.E.2d 828 (1999).

C. Appellate Review

Despite the fact that numerous appellate opinions suggest that little is necessary to preserve an error relating to the trial court's charge, the opposite appears to be true. The appellate court will consider an error in the jury charge, but it must find that the error has been properly preserved, *and* it must find that the error made a difference in the case. A great deal of deference is given to the trial court's decision to give or not give a charge, and it can be very difficult to get a case reversed based on an erroneous charge.

(1) Plain Error

There are occasions where a proper objection has not been raised at the trial court. Perhaps the intricacies of the Court's charge were not apparent at the time; or perhaps counsel was just not paying attention. In any event, if the charge given was not simply objectionable, but was out and out *wrong*, the appellate court can and should still review the charge. Ensuring the jury instructions embody correct principles of law is so important that O.C.G.A. § 5-5-24(c) permits appellate courts to review and correct erroneous charges even where litigants do not object at trial. "[T]he appellate courts ***shall*** consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not." O.C.G.A. § 5-5-24(c) (emphasis added). *See also Brown v.*

Garrett, 261 Ga. App. 823, 584 S.E.2d 48 (2003) (reversing jury verdict where trial court's erroneous recharge was "so blatantly in error as to raise the question whether . . . appellant was deprived of a fair trial," holding that error was a prejudicial error of law because the charge went to a primary issue in the case.)

(2) Invited Error

The concept of plain error seems to suggest that the ultimate responsibility for instructing the jury properly is on the court irrespective of whatever the parties do; therefore, bad lawyering should not provide the basis for upholding a bad charge. However, that's not how it works. If the court finds that the objecting party did anything to *invite* the error, the court will abandon its review. As the Supreme Court has explained:

> In a civil case, a party may not be heard to complain of the giving or the failure to give a jury instruction unless the party objects before the jury returns its verdict and distinctly states an objection and the grounds for it. The failure to except before verdict, generally is a waiver of any defects in a charge absent a substantial error blatantly apparent and prejudicial, resulting in a gross miscarriage of justice. But, even the review of substantial error under OCGA § 5-5-24(c) is not available when the giving of an instruction, or the failure to give an instruction, is induced during trial by counsel for the complaining party or specifically acquiesced in by counsel.

Moody v. Dykes, 269 Ga. 217, 219-220(3), 496 S.E.2d 907 (1998)(citations omitted).

Typically, the court will find that an error was invited when the litigants either completely failed to object to the charge as given, accepted the charge as given or offered the exact language of the charge complained about -- or all of the above. *E.g. Community Bank v. Handy Auto Parts*, 270 Ga. App. 640, 645, 607 S.E.2d 241 (2004) (finding that "Bank readily admits that it failed to request charges on circumstantial evidence and speculative damages and did not object to the charge given by the trial court."); *Moody v. Dykes*, 269 Ga. 217, 219, 496 S.E.2d 907 (1998) (holding defendant could not complain about verdict form on appeal, as he failed to object to the form used and his own proposed form was structured in the way he claimed was error); *Courier v. State*, 270 Ga. App. 622, 625-626, 607 S.E.2d 221 (2004) (defendant acknowledged that he did not object nor reserve objections to the charge when the court asked for any objections, and had offered the same language of the charge in his own proposed jury instruction); *Queen v. Lambert*, 259 Ga. App. 385, 388, 577 S.E.2d 72 (2003) ("Queen failed to preserve exceptions to the charge. Moreover, the court gave each of the fraud charges Queen requested in writing, the very charges about which he now complains."); and *Thrash v. Rahn*, 249 Ga. App. 351, 352, 547 S.E.2d 694 (2001) (after the charge was given the court specifically inquired about objections; however, the plaintiff simply adopted objections made in charge conference and did not indicate the need to charge further).

(3) Harmless Error

A party cannot successfully complain about the refusal to give a requested jury charge unless it satisfies its burden of showing that the refusal was both erroneous and harmful. *Buford-Clairmont Co., Ltd. v. Radio Shack Corp.*275

Ga.App. 802, 622 S.E.2d 14 (2005). It can be difficult to establish harm, because an appellate court will not overturn a trial court's decision to give a particular jury instruction if there was any evidence presented at trial to support giving the charge. *E.g. Swanson v. Hall*, 275 Ga.App. 452, 620 S.E.2d 576 (2005).

An example of harmless error is *AT Systems Southeast, Inc. v. Carnes,*272 Ga.App. 671, 613 S.E.2d 150 (2005). There, the court found that even if the trial court erred in giving presumption of evidence jury instruction regarding presumption arising from party's failure to present evidence to repeal any claim against it, the error was harmless. This was an action by the passenger of a minivan against an armored truck operator for injuries the passenger received when the armored truck collided with the minivan. The presumption charge was deemed irrelevant, as the armored truck operator admitted liability in case, and evidence in question went to liability and not damages.