PRESERVING ERROR FOR APPEAL

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TABLE OF CONTENTS:

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There are thousands of Georgia cases that contain some variant of a finding along the lines of "[o]bjections presented for the first time on appeal furnish nothing for us to review. . ." *E.g., Tise v. State*, 273 Ga. App. 201, 202, 614 S.E.2d 832, 834 (2005). The goal of this paper and presentation is to help provide an understanding of some of the key rules and concepts involved to make sure your next appeal does not add to that ever-growing body of similar findings.

I. FIRST THINGS FIRST: WHY IS PRESERVATION NECESSARY?

Practitioners often memorize evidentiary rules or other legal concepts without giving a second's thought to why the rule or concept exists when exploring that more fundamental question can illuminate the downstream practice pragmatics that reflect the "rules" in the first place. So, given that more philosophical approach, let's start with why we worry about preservation of error in the first place. The reasoning is quite simple: because appellate courts are to correct errors, not serve as a second bite at the proverbial trial appeal. As former Court of Appeals Chief Judge Marion Pope put it:

> As an intermediate appellate court, we are a court for the correction of errors which are properly preserved below and which are properly raised in this court. It is not the function of this court to raise and decide issues not complained of by the parties. It follows that our review of this case is limited to those issues properly raised by defendant on appeal to this court.

Cole v. State, 211 Ga. App. 236, 237-38, 438 S.E.2d 694, 696 (1993) (whole court). There is also the notion, of course, that a litigant needs to bring potential error to the trial court's attention at the time the error is being committed, as that might very well give the trial court an opportunity to prevent or correct a particular error.

That framework also reflects the proper institutional roles of trial courts, vis-à-vis appellate courts. *City of Gainesville v. Dodd*, 275 Ga. 834, 838, 573 S.E.2d 369, 372 (2002) ("The tenet that the appellate courts do not rule on issues not ruled on by the trial courts preserves the appellate courts' jurisdiction and delineates the proper roles of the courts at the trial and appellate levels. The primary role of the appellate courts, and, in general, their jurisdiction, is properly preserved only when there is a ruling below."). And that framework also preserves an essential element of fairness – litigation is not a game in which serial attempts at victory are appreciated.[1] *Pfeiffer v. Ga. DOT*, 275 Ga. 827, 829, 573 S.E.2d 389, 391 (2002) ("[O]ur appellate courts are courts for the correction of errors of law committed in the trial court. Fairness to the trial court and to the parties demands that legal issues be asserted in the trial court. If the rule were otherwise, a party opposing a motion for summary judgment need not raise any legal issue, spend the next year thinking up and researching additional issues for the appellate court to address, and require the opposing party to address those issues within the narrow time frame of appellate practice rules.")

With that bit of background, we can move onto the framework that drives almost every preservation dispute or issue.

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[1] Like every good legal rule, there are exceptions. The Georgia Supreme Court has carved out certain "special circumstances" that would allow consideration of issues raised for the first time on appeal. To date, the most commonly identified are "a jurisdictional challenge, a claim of sovereign immunity, a serious issue of public policy, a change in the law, or an error that works manifest injustice." *Pfeiffer*, 275 Ga. at 829 n.10, 573 S.E.2d at 391. Some of those exceptions are easy to understand – since a trial court cannot waive a lack of subject matter jurisdiction, an appellate court can reverse on those grounds even if not argued below. *Abushmais v. Erby*, 282 Ga. 619, 622, 652 S.E.d 549, 551 (2007). Given the rather ambiguous parameters of at least some of the remaining circumstances, though, they are best left for another CLE day.

II. THE GENERAL FRAMEWORK

If you have but one takeaway from this paper or presentation, I hope it is this: to preserve an argument for appellate review, you must make

- a contemporaneous objection;
- with specificity; and
- obtain a ruling.

Failure to adhere to this triad will result in a waiver of the argument, almost every time. *E.g.*, *Miller v. State*, 243 Ga. App. 764, 767-68, 533 S.E.2d 787, 792 (2000) ("To preserve a specific point for appellate review, an objection based on that specific ground must be made in the trial court. Because no such contemporaneous objection was made here, the issue was not preserved for our review."). Given the importance of some of the nuances here, additional discussion on each subcomponent is likely necessary.

A. Contemporaneous Objections

A litigant is under a duty to object at the time of the complained-of occurrence. *Walls v. State*, 204 Ga. App. 348, 349, 419 S.E.2d 344, 345 (1992). At its core, this rule seems fundamentally fair. After all, "[a] party cannot during the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later." *Smith v. State*, 277 Ga. 213, 219, 586 S.E.2d 639, 644 (2003); *See also McKissick v. Aydelott*, 307 Ga. App. 688. 692, 705 S.E.2dd 897, 901 (2011) ("No matter how erroneous a ruling of a trial court might be, a litigant cannot submit to a ruling or

acquiesce in the holding, and then complain of the same on appeal. He must stand his ground. Acquiescence deprives him of the right to complain further.").

The contemporaneous objection rule means exactly what it sounds like. Waiting until a break at trial generally is not sufficient. *Hamilton v. Shumpert*, 299 Ga. App. 137, 144, 682 S.E.2d 159, 165 (2009) provides some valuable lessons on this point. In *Hamilton*, defense counsel made an arguably improper remark in closing concerning the plaintiff's contingency fee arrangement.[2] The comment was made late in the closing, as the Court of Appeals noted that the remark occurred at the 29th page of a 31-page closing. *Id.* 299 Ga. App. at 692 n.23. "Moments later," defense counsel concluded, and plaintiff's counsel immediately raised the issue with the court. *Id.* Though the trial court ultimately thought little of the comment and refused to provide any relief such as a curative instruction, that seeming error turned out not to matter on appeal.

Instead, embracing a strict interpretation of the contemporaneous objection rule, the Court of Appeals held that there was no immediate objection during closing, and as such, the issue was simply not preserved for immediate review. *Id.* "Although their objection was apparently moments after the cited remarks and even before the trial had advanced to either another phase or another (here, the plaintiffs' final) closing argument, **. . .** the Hamiltons' objection was untimely.").

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[2] "[A] jury may not generally consider plaintiff's attorney fees when awarding damages. . . [t]he source of payment of attorney fees is irrelevant to the issue of damages. Evidence of it would be inadmissible, and argument on it is doubly wrong." *Stoner v. Eden*, 199 Ga. App. 135, 137, 404 S.E.2d 283, 285 (1991).

1. ***Objections During Closing Arguments***

Many practitioners are reticent to object during closing arguments, often for fear of bringing the jury's attention to a particular argument or piece of evidence, or otherwise highlighting it. There are few practitioners who actually feel like a curative instruction does anything at all to alleviate the problems of an argument improperly made or raised, so the question is, to object during closing arguments or not? If you think the argument is important enough to truly implicate your client's rights and likelihood of success, I would suggest asking to approach the bench and make your record there.[3]

2. ***Multiple Defendants***

In the fairly common scenario of multiple defendants on one side of the "v," a litigant must expressly join in any objection made by a co-defendant, if he or she wishes to raise the potential error on appeal.

> It is well established that appellate courts may not consider objections to evidence not raised at trial. If several parties are entitled to make an objection, and it is made by any number less than all, it **does not inure to the advantage of the party or parties not joining in it**. Thus, where a defendant does not expressly adopt the objection of a co-defendant, he thereby waives that objection and may not utilize it to gain review.

Heard v. State, 204 Ga. App. 757, 759, 420 S.E.2d 639, 642 (1992) (internal citations and punctuation omitted, emphasis added). So, at the risk of being obvious, make and stand by your own objections, not a co-defendant's.

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[3] It is important to note that the trial court record must reflect the objection, and many courts do not routinely take down sidebars. If that is the case, you have several options. You can ask the Court to have the jury step out so that the objection can be fully voiced (arguably, the most disruptive option) or make the objection at the bench, and then make a proffer of what was said at the next available opportunity (probably your best bet.)

3. ***The "Continuing" Objection***

Some practitioners attempt to avoid the burdens of a contemporaneous objection rule by seeking the so-called "continuing" objection, a concept that is not spelled out in the Georgia Civil Practice Act (or actually even mentioned) and is the subject of scant case law. What little guidance that exists bespeaks of caution, if one seeks to rely on a continuing objection to preserve an issue for review. *E.g.*, *State v. Larocque*, 268 Ga. 352, 353, 489 S.E.2d 806, 808 (1997) (granting certiorari to consider import and effect of continuing objections; "Continuing objections eliminate the need to repeat an objection where the trial court's ruling on the first objection **clearly covers** subsequent proceedings and the court has granted a party the right to have a continuing objection."). The lesson: the trial court must clearly grant the right to a continuing objection, and the scope of the objection must squarely address the error to be complained of. Govern yourself accordingly.

B. Specificity

Just as important as the timing of an objection is the content. "[O]bjections must be specific such that the objecting party must advise the trial court as to what action it wants taken." *Old Stone Co. I, LLC v. Hughes*, 284 Ga. 259, 261, 663 S.E.2d 687, 690 (2008). Specificity in objections gives the trial court an opportunity to backtrack on a path to error and fix the proceedings. "[T]he failure to make an objection which is both timely and specific is treated as a waiver." *Francis v. Francis*, 279 Ga. 248, 249, 611 S.E.2d 45, 46 (2005)

Aside from being specific, a better way of putting it might be to say that an objection must be specific *and* comprehensive, because "objecting on specific grounds

waives the grounds not asserted." *Id.* Perhaps distilled most accurately, whatever objection is made must be specific enough to provide for review, and any review is limited to the grounds actually asserted. *Id.* ("The rule is that the scope of review is limited to the scope of the ruling in the trial court as shown by the trial record and cannot be enlarged or transformed through a process of switching (or) shifting."); *see Ehlers v. Schwall & Huett*, 177 Ga. App. 548, 550, 340 S.E.2d 207, 210 (1986) ("[W]here the objection urged below is not argued here it must be treated as abandoned, and where an entirely different basis of objection is argued on appeal which was not presented at trial, we will not consider this as error, for we are limited on appeal to those grounds presented to and ruled upon by the trial court and then enumerated as error.").

In practice, litigants often object to evidence or argument as "improper", without additional explanation, or some do far worse and simply shout the uninformative "Objection!" that we so often see in courtroom television shows. Both of these risks waiving any right to raise the objection on appeal, whether the objection is one as to evidence or argument. *Carroll v. State*, 147 Ga. App. 332, 335, 248 S.E.2d 702, 705 (1978) ("A mere objection to alleged improper argument of counsel, without more, is not sufficient to invoke a ruling of the court."); *Hunt v. State*, 268 Ga. App. 568, 575, 602 S.E.2d 312, 317 (2004) ("At trial Hunt's attorney asserted no specific grounds in support of his objection to the prosecutor's argument. Instead, the sole basis for his objection was that the argument was improper. This objection was so vague and general that it did not present any precise question for determination by the trial court, and certainly did not ask the trial court to rule on the two specific grounds now asserted on appeal.

Since those grounds were not properly raised in the trial court, they were waived and we cannot consider them for the first time on appeal.").

The comparatively new Evidence Code reflects the necessity of a specific objection (or proffer) as well.

> Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and: [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the **specific ground** of objection, if the specific ground was not apparent from the context.

O.C.G.A. § 24-1-103(a)(1) (emphasis added). Lesson: Don't be the litigant that tests what "apparent from the context" means in Georgia. Be specific.

C. Obtaining a Ruling

Lastly, even if you've made a timely and specific objection, no issue will be preserved for appellate review unless the trial court actually rules on the issue. *Rental Equip. Grp., LLC v. MACI, LLC*, 263 Ga. App. 155, 160, 587 S.E.2d 364, 369 (2003) ("Not only must the objection be timely raised in the trial court, but the trial judge must rule upon the same issue as raised upon appeal to preserve the issue for our consideration."). If there is a true "rule" here, it is that

> [s]tandard practice in Georgia has long required a party to make and obtain a ruling on an objection to evidence in the trial court, before or as the evidence is admitted, in order to preserve the objection for appeal, and standard practice also allows parties to raise on appeal only the same objections that were properly preserved below.

Whitehead v. State, 287 Ga. 242, 246, 695 S.E.2d 255, 259 (2010). The Court of Appeals is not a court of first impression – it reviews alleged legal errors, not hypothetical ones that were not ruled on by the trial court.

Once you receive a ruling from the trial court, you need not renew the objection. Instead, "[o]]nce the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal." O.C.G.A. § 24-1-103(a).

III. PROFFERS/OFFERS OF PROOF

It is almost certain that there will be a time in your career as a trial lawyer where you will seek to have evidence (testimonial or otherwise) admitted and that request will be rejected by a trial judge. In such a scenario, a proffer is an essential, yet often forgotten about tool. Failure to make a proffer can be fatal on appeal. If the favorable evidence (and for this example, let's presume it is testimony) isn't in the record, an appellate court is unlikely (read: won't) find harmful error. O.C.G.A. § 24-1-103(a)(2) ("Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and: . . . In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.").

When you are on the losing end of an attempt to admit evidence, your proffer or offer of proof is not really delineated by anything other than pragmatics at that point. You do not have to interrupt the trial flow to put up a witness, out of hearing of the jury; as long as the disputed evidence is in the record when the case goes to the Court of Appeals, that is likely sufficient. That said, it is more convenient to go ahead and get all of a witness's testimony in one sitting, so typically a trial court will wait until a break and then allow the offer of proof to be put on the record. Some practitioners prefer question-by-question records, because it is easier to viscerally demonstrate error on appeal if the

court has the precise evidence being fought over before it. Other practitioners simply state what the expected testimony would have been, which is sufficient but not as persuasive. *Williams v. State*, 332 Ga. App. 546, 548, 774 S.E.2d 126, 129 (2015) ("better practice" is a specific proffer). As for physical evidence, an offer of proof is simple – make your tender (with all necessary authentication predicates) for the record, but don't send the exhibit back with the jury.

Importantly, the proffered testimony or evidence must actually be in the record. A reference in a brief, to be later cited on appeal, is not good enough. *Jones v. Equip. King Int'l*, 287 Ga. App. 867, 868 n.5, 652 S.E.2d 811, 813 n.5 (2007) ("A brief or an attachment thereto cannot be used as a procedural vehicle for adding evidence to the record. We must take our evidence from the record and not from the brief of either party.").

IV. MOTIONS *IN LIMINE*

A quick word about motions *in limine*:

> A motion in limine is a pretrial motion which may be used two ways: 1) The movant seeks, not a **final** ruling on the admissibility of evidence, but only to prevent the mention by anyone, during the trial, of a certain item of evidence or area of inquiry until its admissibility can be determined **during the course of the trial** outside the presence of the jury. 2) The movant seeks a ruling on the admissibility of evidence prior to the trial.

Telcom Cost Consulting, Inc. v. Warren, 275 Ga. App. 830, 832, 621 S.E.2d 864, 866 (2005). Motions *in limine* are common and knowing the implications of having a motion *in limine* granted or denied is critical to the preservation landscape.

Under both the old and new Evidence Codes, a trial court's denial of a motion *in limine* means that you need not object again when the evidence comes in at trial. *Accord Simpson v. State*, 277 Ga. 356, 357, 589 S.E.2d 90, 92 (2003) (old Code);

O.C.G.A. § 24-1-103(a) ("Once the court makes a definitive ruling on the record admitting or excluding any evidence, either **at or before** trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal.") (emphasis added). And that is correct, as "[a]ll the purposes of an objection have already been fulfilled by the proceedings on the motion in limine. The trial court has been apprised of the possible error in admitting the evidence and has made its ruling, and the record has been perfected for appeal purposes." *Reno v. Reno*, 249 Ga. 855, 855, 295 S.E.2d 94, 95 (1982).

The same is obviously true for a granted motion *in limine*. If the trial court essentially sustains an objection, the issue is preserved for appellate purposes. "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 from the jury's consideration." *Id.*, 249 Ga. at 856, 295 S.E.2d at 96.

V. ARE THERE ANY ALTERNATIVES TO PRESERVATION?

One big caveat to all of the waiver concepts explained thus far; there is the concept of "plain error" review – that is, an appellate court can review an enumeration of error involving "plain error[] affecting substantial rights," even though "such errors were not brought to the attention of the [trial] court." O.C.G.A. § 24-1-103(d). That seems to flip the "contemporaneous objection" rule upside down, in a sense, but the exception is

delimited. For one, it only applies to evidentiary rulings and charging errors,[4] and not closing argument errors that go unobjected to. *Gates v. State*, 298 Ga. 324, 329, 781 S.E.2d 772, 776 (2016) ("Because the Georgia legislature has not yet made plain error review available for errors relating to alleged improper remarks being made during closing argument, our prior case law relating to the waiver of issues on appeal stemming from improper closing arguments that were not objected to at trial remains unaffected by OCGA § 24-1-103 of Georgia's new Evidence Code.").

But even if an alleged error related to evidence of jury charges, as noted, the standard is incredibly difficult to meet:

> First, there must be an error or defect — some sort of deviation from a legal rule — that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error — discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id., 298 Ga. at 327, 781 S.E.2d at 775 (internal punctuation omitted). And there are no helpful presumptions – an appellant must affirmatively demonstrate that the outcome of the trial would have been different, had the unobjected to evidence or charge error not occurred. *Id.*

[4] Because the failure to charge statute contains an express statutory subpart allowing for plain error review. O.C.G.A. § 5-5-24(c).

CONCLUSION[5]

As one Georgia appellate practitioner puts it, “The Court of Appeals loves a good waiver.”[6] While this statement may be a bit oversimplified, the Court of Appeals caseload does not make it likely that a problematic waiver below will simply be ignored and the merits nonetheless reached.

Like it or not, Appeals are won and lost at the trial court level. One sure route to losing on appeal is by not objecting with specificity at the right time. “Procedural” losses are the hardest ones swallow; if you have a good argument or objection, make it correctly, with specificity, and at the proper time so that your appeal can at least get to the merits.

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[5] In an effort to be as concise as possible, this paper does not go into detail on many of the contexts where we see the need to preserve error on appeal (i.e. expert testimony, jury charges, juror misconduct, post-trial motions, and the like.) These examples have instead been inserted into the corresponding presentation to preserve some element of excitement.

[6] As espoused in multiple CLE presentations and papers by civil appellate practitioner Darren Summerville.