

PRESERVATION OF ERROR

Judge Alok Ahuja, Missouri Court of Appeals, Western District
February 10, 2015

Preliminaries

Must consider appeal issues while case is being litigated in the trial court, not afterwards.

Fundamental principles of preservation: Issues must be presented to the trial court at the earliest opportunity, and at a time when the trial court has an opportunity to cure any potential error, without the necessity of an appeal. The specific relief requested of the appellate court must be requested of the trial court. The trial court must issue definitive rulings on those issues.

With only the rarest exceptions, issues must be raised in some fashion in the trial court, as soon as the issue is apparent.

Three general questions to ask with respect to preservation:

- is it on the record?
- is the record clear?
- is the record sufficient?

Pre-trial Issues

Pleadings

Certain deficiencies in pleadings may prevent issues from being raised on appeal.

E.g., in a petition:

- fraud must be pled with particularity
- grounds for waiving a governmental entity's sovereign immunity must be affirmatively pled
- a contract or other document must be attached to the petition in order to be considered in determining the adequacy of a pleading.

If a petition is dismissed for failure to state a claim, the plaintiff must seek leave to amend if it is alleged that additional or different factual allegations would cure a defect.

In an answer, affirmative defenses must be adequately pled, including pleading of the ultimate facts supporting an affirmative defense. *See* listing of affirmative defenses in Rule 55.08. Example of affirmative defense of reduction of any judgment for settlements.

Also, the rules permit the plaintiff/party seeking affirmative relief to allege certain matters only generally, and put the burden on the party defending the claim to specifically deny those matters. If the specific denial is not made, the matter is deemed confessed. *See, e.g.*, Rule 55.13 (capacity to sue or be sued); Rule 55.14 (existence of partnership); Rule 55.16 (performance of conditions precedent); 55.23 (execution of written instrument).

Note amendments to Rules 55.27, 78.07, and 84.13: prior to 2012, could raise a claim of failure to state a claim or failure to state a legal defense to a claim, or failure to join an indispensable party, for the first time on appeal. Given the 2012 amendments, these issues must now be raised in the trial court.

Motions

Factual allegations in motions are not self-proving. So, if factual issues (such as a defendant's contacts with the jurisdiction, when a cause of action accrued or plaintiff became aware of it, the circumstances justifying a continuance) are relevant to a motion, they must be substantiated by evidentiary materials – contentions of counsel are insufficient

In summary judgment practice, facts are deemed admitted if not specifically controverted, with supporting evidentiary materials.

Trial Issues

“Protect the Record”

Appellate review can be adversely affected by the failure to have a clear record.

- For example, when examining witnesses, refer to exhibits by number, and make clear what motions a witness is making in their testimony (e.g., identifying a person, pointing to a location on a map or diagram).
- If deposition testimony is read, make sure it is transcribed, or that a clear record is maintained as to what portions of depositions were admitted into evidence, and which party offered them.
- Keep a clear record of which party offered jury instructions, and of instructions which were offered but refused.

At every stage of trial, state explicitly and specifically, either orally or in writing, what you are objecting to, why you are objecting to it, and what relief you are requesting

Admission or Exclusion of Evidence

Must make specific, explicit objections the first time evidence is offered. A party can only raise on appeal those grounds of objection to evidence which it explicitly raised in the trial court.

Must object every time the objectionable evidence (or category of evidence) is offered, through any witness or exhibit. An evidentiary error will not be considered if the evidence to which an objection was made is cumulative of other evidence which was admitted without objection.

If a category of evidence will be referenced repeatedly, ask the trial court for a continuing objection, on the record, and get the trial court's express agreement to a continuing objection.

Motions in limine preserve nothing for appeal, at least in Missouri state courts, because a court's ruling on a motion in limine is considered interlocutory only, subject to reconsideration during trial.

- If a motion in limine is denied, the party opposing particular evidence must object when the evidence is actually offered at trial.
- If a motion in limine is granted, the proponent of the evidence must seek to introduce the evidence at trial, and make an offer of proof, preferably through a witness or tender of an exhibit, showing specifically what the evidence is, and how it is relevant.

A statement of "no objection" when evidence is offered will likely waive any appellate review, even review for plain (i.e. unpreserved) error

Mistrials

If a party believes grounds exist for a mistrial, it must request that specific relief, on the record, at the earliest opportunity.

Jury Instructions

Objections to jury instructions must be specific, on the record, and before the jury retires to deliberate. Objections must state "the matter objected to," and "the grounds of the objection." *See* Rule 70.03

- If the objection is to specific words or phrases in an instruction, those specific words should be identified.
- And the specific reason or reasons why an instruction, or phrasing within an instruction, is objectionable must be stated.

Objections during in-chambers conferences are insufficient – one of the most significant sources of waiver of instructional error claims.

Right to Judgment as a Matter of Law/Submissibility of a Claim

If a party believes a claim in a jury-tried case is not submissible due to insufficient evidence, must move for a directed verdict at the close of plaintiff's (or proponent's) evidence, and again at the close of all of the evidence.

As discussed below, issues of submissibility must then be raised in a post-judgment motion for judgment notwithstanding the verdict (JNOV). Rule 72.01(b). But a JNOV motion can raise only those issues which were raised in the earlier directed verdict motions.

Post-Judgment Motions

In bench trials, generally a post judgment motion is not necessary, with the exception of a motion to amend the judgment discussed below. Rule 78.07(b)

In jury trials, with limited exceptions, "allegations of error must be included in a motion for a new trial in order to be preserved for appellate review." Rule 78.07(a). The primary exceptions are issues of subject matter jurisdiction, or cases in which a directed verdict was granted.

Generally, claims of error at trial in jury trial cases are raised by a motion for new trial, Rule 78.07(a), or by a motion for judgment notwithstanding the verdict (JNOV), Rule 72.01(b).

In any case, issues which arise only by virtue of the entry of the judgment, such as the trial court's failure to make required factual findings, must be raised by a motion to amend the judgment under Rule 78.07(c).

- NOTE: Issues beyond the failure to make required findings may appear for the first time in the judgment, *e.g.*, granting unauthorized relief (pre-judgment interest, attorney's fees, etc.). If such relief had not previously been requested, the only opportunity to object to such relief, in the trial court, may be by way of a post-judgment motion.

Generally, post-judgment motions must be filed within 30 days of the trial court's entry of its judgment. Rules 72.01(b), 78.04.