Preserving the Record for Appeal

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Introduction

When immersed in a trial, most lawyers don't think about how a record will look to an appellate court. They think about winning the case with the jury. And, generally, that is good enough. Some times, however, trials don't go as you expect, or hope. Then you need a solid record to reverse a bad result.

Sometimes, you win at trial but your opponent appeals the judgment. Again, you need a solid record to keep your verdict. A trial lawyer who can win a case at trial generally has jury appeal. But if you don't know how to protect your record, you will hurt yourself in the long run by waiving errors and failing to make appropriate records.

How do you insure that your record protects you? Since appellate courts are all courts of affirmance, they will often look for ways to affirm the trial court's ruling and avoid reaching the merits of a case. They will find waiver, or forfeiture, if you don't preserve errors. You need a solid record to keep a verdict or have a shot at reversal.

Tips for preserving the record

I. **Make sure that you introduce evidence to support each and every element of your case.** Otherwise, you can forget about a successful appeal. (I know this sounds absurdly basic and maybe even insulting, but I regularly see records missing such evidence.

York v. Rush Prysbeterian St. Luke's Medical Center, 222 Ill.2d 147 (2006) is a case in point. In this apparent agency case, the plaintiff, a surgeon himself, whose son was a medical resident at Rush, in the anesthesiology department, sought to hold Rush liable for acts of an attending anesthesiologist, who was an independent contractor. In order to convince the jury that the plaintiff did

not know of the anesthesiologist's independent status, the plaintiff had to testify that he picked Rush for its good doctors and care and that he always relied on the hospital to provide anesthesia services. He testified he did not know that the anesthesiologists were private contractors, not Rush employees. He added that his wife paid all the bills in his home, so that he had never seen bills from anesthesiologists who had provided services to him in the past. Plaintiff also made certain that he presented evidence that the anesthesiologist used Rush equipment, wore Rush scrubs and lab coats, used Rush offices to coordinate the anesthesiology service and that the hospital paid half of the salary for the anesthesiology group's clinical coordinator. Had plaintiff not provided this detailed testimony, the plaintiff could never have convinced the jury that the anesthesiologist was the hospital's apparent agent. Nor would the verdict have stood up on appeal, as the appellate court easily could have found this verdict to be against the manifest weight of the evidence.

In slip and fall cases, it is too easy to lose a case on summary judgment due to the failure to present evidence of proximate cause. Many an honest plaintiff will testify he or she just fell and doesn't really know what caused the fall. This is the kiss of death. See, e.g. *Kimbrough v. Jewel Companies, Inc.*, 92 Ill.App.3d 813 (1981) (summary judgment awarded to defendant in slip and fall case, and affirmed on appeal, where plaintiff, who fell on ramp, repeatedly stated that she did not know what caused her fall). A plaintiff must be able to state what caused the fall. Examples include testimony that there was no handrail and that she would have used handrails had they been there, or that the stairway was worn and uneven and it was difficult to walk on it. See also *Britton v. University of Chicago Hospitals*, 382 Ill.App.3d 1009 (1st Dist. 2008) (summary judgment granted to defendant, and affirmed on appeal, where plaintiff was injured by shattered glass in revolving door and he presented no evidence as to defect in glass or door).

In a case involving a slip and fall on snow and ice, the plaintiff also has to present significant evidence of the cause of the fall to avoid summary judgment. If you aren't willing to retain an expert to testify to the improper grading of the lot, you will generally lose on summary judgment and that judgment will be affirmed on appeal. *Johnson v. National Super Markets, Inc.*, 257 Ill.App.3d 1011 (5th Dist. 1994), is one good case for plaintiffs. In that case the plaintiff was injured when she fell on an ice-encrusted puddle of water in a grocery store parking lot. The snow in the parking lot had been plowed and piled 10 to 15 feet high around the light posts. When the plaintiff got out of her car to go into the store, she saw that water in the puddle was

coming from snow heaped against a nearby light post but by the time she left the store and returned to her car, the ice had formed over the puddle. The grade of the parking lot sloped down toward the building and the safest place to pile the snow would have been at the sides of the building, where it would have drained into the back of the property rather than collecting in the parking lot. The store owner, however, told him not to pile the snow at the sides of the building. On appeal from a verdict in favor of the plaintiff, the Appellate Court affirmed the verdict, holding that the jury properly could have determined that the icy puddle in which the plaintiff fell was the product of an unnatural accumulation of ice caused by water running off snow from the banks onto the parking lot and refreezing. *Johnson*, 257 Ill.App.3d at 1016.

In attorney *quantum meruit* cases, it's a lot easier to win at trial and keep the fee award when the attorney keeps contemporaneous time records. (No plaintiff's attorney wants to do this, but it is far better to keep track of your time than to try to recreate it.) But see, *Will v. Northwestern Memorial Hospital*, (discharged attorney obtained full value of contingency fee even though client discharged him)

In medical malpractice cases, you must insure that your medical expert has sufficient experience in the area at issue. Object to qualifications and move to strike unqualified expert. Expert needs to be in same school and have experience, not the same specialty. See e.g. *Garley v. Columbia LaGrange Hospital*, 351 Ill.App.3d 398 (2004) (doctor is not competent to testify as to nurse's negligence no matter how much experience he or she has teaching nurses or working with them). But see, *Richter v. Northwesten Memorial Hospital*, 177 iae 247 (1st Dist. 1988) (neurosurgeon competent to testify as to respiratory care due to experience).

In medical malpractice cases, you must also insure that the expert clearly testifies to proximate cause and does not give speculative opinions. If, during a deposition, the defendant keeps asking hypothetical questions that do not apply to the facts of your case, make sure you correct any mis-perceptions or you will risk summary judgment. *Johnson v. Ingalls Memorial Hospital*, 931 N.E.2d 835 (2010), is illustrative. In that medical negligence case a baby died shortly after birth because the treating OB/GYN and other defendants failed to properly monitor the mother and explain to her the significance of her contractions and her increased risk of a ruptured uterus. The mother did not know that she had to present herself for delivery before she went into labor. Not knowing this, the mother did not go to the hospital until she was in active

labor and by then it was too late to save the baby. The defendants repeatedly asked plaintiff's expert OB/GYN hypothetical questions at his deposition about what would have happened under circumstances that never existed, i.e. what more extensive fetal monitoring would have shown. Summary judgment was granted to defendants, and affirmed on appeal where the Court held that plaintiff never had the expert testify that had the mother been properly treated, the death would have been averted. This could have been avoided had the expert testified that a C-section was required prior to the uterine rupture.

A tip for the appeal is to make sure that you have video evidence depositions read into the record. Otherwise, you will have to file the redacted paper copy into the record. This can lead to unpleasant disagreements with opposing counsel as to what was actually said on the record.

Do not allow the trial court to hold important conferences, i.e. jury instructions, off the record. If this occurs, firmly ask the court to repeat relevant comments on the record.

When you are having a witness point to a particular spot on a photograph, you should follow-up that testimony with a description of what the witness has just pointed out. The Appellate Court will not accept large blown-up photographic exhibits to be included in a record and if becomes very difficult to tell a story when your trial transcript consists of pages that read like this:

Q. I'm going to show you what has been marked previously as Plaintiff's Exhibit No. 73 for identification. Does this photograph show better where the boys were?

A. Yes.

Q. And where do you recall that they were?

A. More over here.

Q. Over toward where the red –

A. Yes.

Q. – car is?

A. Yes.

II. On your post trial motion, throw in everything that might be error.

A post trial motion is only required to be sufficiently specific to preserve error. If any argument is omitted from the post trial motion, it cannot be argued on appeal in a jury case. As the Supreme Court stated in *Brown v. Decatur Memorial Hospital* (1980):

> The purpose of the post-trial motion specificity rule is threefold. First, it allows the decision maker who is most familiar with the events of the trial, the trial judge, to review his decisions without the pressure of an ongoing trial and to grant a new trial if, on reconsideration, he concludes that his earlier decision was incorrect. [Citations omitted.] Second, by requiring the statement of the specific grounds urged as support for the claim of error, the rule allows a reviewing court to ascertain from the record whether the trial court has been afforded an adequate opportunity to reassess the allegedly erroneous rulings. Third, by requiring the litigants to state the specific grounds in support of their contentions, it prevents them from stating mere general objections and subsequently raising on appeal arguments which the trial judge was never given an opportunity to consider. [Citations omitted.] The rule, which is not limited to questions concerning jury instructions, has the salutary effect of promoting both the accuracy of decision making and the elimination of unnecessary appeals.

In writing post trial motions, you are not required to supply the trial transcript, or quote it, but if you can afford to do it, it's a good idea. If you anticipate an appeal, you might as well get yourself prepared at the post-trial stage. In responding to post trial motions, it is also really helpful to have the transcript available because then you can show waiver if your opponent did not properly object to a question or preserve error. This can save you money in the long run as it can persuade an opponent to throw in the towel.

III. In non-jury case, no post trial motion is required.

City of Evanston v. Piotrowicz, 20 Ill.2d 512, 515 (1960). A post trial motion is not required with a directed verdict either. *Mohn v. Posegate*, 184 Ill.2d 540 (1998). And, if partial summary judgment is granted to a defendant and then a jury trial follows as to other defendants, the plaintiff need not address the summary judgment issues in his or her post trial motion. *Mohn, supra.*

IV. It is imperative to know that in post trial proceedings, motions for extensions of time must be filed within 30 days or within the time allowed by extension AND THE EXTENSION MUST BE OBTAINED WITHIN THE DEADLINE. 75 ILCS 5/2-1202(c). You cannot just file a motion for an extension of time within the 30 days and get a hearing later. **This is jurisdictional**.

V. The Appellate Court loves the waiver doctrine and will use it whenever possible. This is a growing trend. Although waiver is a limitation on the parties and not on the jurisdiction the court (*Herzog v. Lexington Township,* 167 Ill.2d 288, 300 (1995), this is rarely a persuasive argument. If the issue raised on appeal is one of law, however, and is fully briefed and argued by the parties, the court may relax the waiver rule and consider the issue even if it was not raised in the trial court. *Committee for Educational Rights v. Edgar,* 174 Ill.2d 1, 11 (1996). I hate to rely on this doctrine.

VI. Miscellaneous points to remember.

A specific objection waives all others. *People v. Eyler,* 133 Ill.2d 173, 219 268 (1989).

Failure to object to a jury instruction at the jury instruction conference waives the right to object on appeal. *Ozik v. Gramins,* 345 Ill.App.3d 502, 520(2003).

Rule 213 objections are tricky. Whether an opinion is undisclosed or a logical corollary of a given opinion can go either way and the trial court's ruling is difficult to reverse, because, of course, the trial court has broad discretion in the admission of evidence. See e.g. *Skubak v. Lutheran General Health Care Systems*, 339 Ill.App.3d 30 (2003) and cases cited in it.

Motions *in limine* are interlocutory and must be repeated at trial or else they are waived. *Chubb/Home Ins. Companies v. Outboard Marine Corp.*, 238 Ill.App.3d 558 (1992).

If you bring in damning evidence after losing a motion *in limnine*, you cannot argue on appeal that the evidence was wrongly admitted and you had to introduce it yourself to minimize its impact on the jury. This is a tactical decision. See e.g. *Collins by Collins v. Roseland Community Hospital*, 219 Ill.App.3d 766 (1994).

Offers of proof are generally required to preserve error. *Cummings v. Jha*, 394 Ill.App.3d 439 (2009).

Make sure your jury instruction conference is on the record, or come back on record to repeat arguments. Make sure proposed instructions are filed. If you are dis-satisfied with an instruction, you generally must provide the court with an alternative.

As appellant, you cannot argue one position at trial and make a contrary argument on the same point on appeal. *Velarde V. Ill. Cent. R.R. Co.*, 354 Ill.App.3d 523 (2004); *Auton v. Logan Landfill*, 105 Ill.2d 537 (1984).

VII. The trial court has the power to award a new trial on all issues even though plaintiff does not ask for such relief in her opening post trial motion. *Cardona v. DelGranado*, 377 Ill.App.3d 379 (1st Dist. 2007) (Rule of Civil Procedure, which provides that a party must state all points relied upon when filing a motion for a new trial and provides that a party who fails to seek a new trial waives the right to apply for a new trial, does not limit a trial court's authority to order a new trial on all issues, whether or not a party requests such relief. S.H.A. 735 ILCS 5/2-1202(b, e, f)).

VIII. Finally, don't do your own appeals! Trial lawyers are rarely objective. Also, trial skills are very different from appellate skills.