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PRESERVATION OF ERROR

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I. Answer

A party must file an answer or responsive pleading within 21 days of service of the summons and complaint. Fed. R. Civ. P. 12(a). The following defenses can be raised in a motion to dismiss prior to an answer:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

Fed. R. Civ. P. 12(b)(1-7).

Rule 12 requires that "[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." Fed. R. Civ. P. 12(b). Further, Fed. R. Civ. P. 8(c) provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." The affirmative defenses that must be stated include:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;

- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

Fed. R. Civ. P. 8(c)(1).

It is also good practice to raise any constitutional defenses, such as defenses against punitive damages, in the answer.

Raising every affirmative defense in the answer is vital, because "the general rule is that, when a party fails to raise an affirmative defense in the pleadings, that party waives its right to raise the issue at trial." *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir.1988). It is not enough to try to later raise a defense at summary judgment. If the defense is not raised in the answer, the defense is waived and cannot be raised. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1551 (11th Cir.1991).

Further, be careful to review each allegation carefully. Failing to deny an allegation is deemed admitted. Fed. R. Civ. P. 8(b)(6).

II. Pretrial Order

Fed. R. Civ. P. 16 states that an order issued after a pretrial conference "controls the course of the action unless the court modifies it." Courts have held that a claim or issue raised in a complaint but omitted from the pretrial order is abandoned. See, e.g., *Randolph County v. Ala. Power Co.*, 784 F.2d 1067. 1072 (11th Cir. 1986) (affirming the district court's excluding claims stated in complaint but omitted from pretrial order); *Youren v. Tintic Sch. Dist*., 343 F.3d 1296, 1304-05 (10th Cir. 2003) (affirming trial court's refusal to consider a statute of limitations defense that had been affirmatively pleaded but omitted from the pretrial order).

III. Summary Judgment.

Although making a summary judgment motion is not required to preserve an argument for trial, summary judgment is a good tool to educate the trial court judge about your case. If a summary judgment motion is made, however, there are preservation issues to consider.

First, if your opponent submits summary judgment materials that are objectionable, you must raise the objection to the evidence through a motion to strike. The failure to move to strike the evidence results in a waiver of the objection, and the evidence will be considered by the trial court and appellate court even if the evidence is improper. *Wiley v. U.S*., 20 F.3d 222, 226 (6th Cir. 1994).

Second, an argument must be raised in the summary judgment motion or response if you want to raise the issue on an appeal of an order on the summary judgment motion. "A general principle of appellate review is than an appellate court will not consider issues not presented to the trial court." *McGinnis v. Ingram Equip. Co., Inc.*, 918 F.2d 1491, 1495 (11th Cir. 1990).

IV. Appeal of Evidentiary Rulings

The preservation of error regarding evidentiary rulings is governed by Federal Rule of Evidence 103:

> **Federal Rule of Evidence 103. Rulings on Evidence**
>
> **(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> **(1)** if the ruling admits evidence, a party, on the record:
>
> **(A)** timely objects or moves to strike; and
>
> **(B)** states the specific ground, unless it was apparent from the context; or
>
> **(2)** if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
>
> **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
>
> **(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
>
> **(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
>
> **(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

"To gain a reversal based on a district court's evidentiary ruling, a party must establish that (1) its claim was adequately preserved; (2) the district court abused its discretion in interpreting or applying an evidentiary rule; and (3) this error affected 'a substantial right.'" *Proctor v. Fluor Enterprises, Inc.*, 494 F.3d 1337, 1349 (11th Cir. 2007).

A. Motions in Limine and a Definitive Ruling

Under the Federal Rules of Evidence, "[o]nce the court makes a definitive ruling excluding the evidence, a party need not renew its objections or offer of evidence to preserve the issue on appeal." *Proctor*, 494 F.3d at 1350, citing Fed. R. Evid. 103(a). The 2000 Amendment to Rule 103 made clear that a definitive ruling on a pre-trial motion *in limine* preserves the error for appeal, and that the party does not have to renew the objection at trial. However, "[t]he [2000] amendment [to the Federal Rule of Evidence] imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point." Fed. R. Evid. 103, Comments (2000 Amendment).

"On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently." Fed. R. Evid. 103, Comments (2000 Amendment).

What happens if the trial court changes its mind or the other side violates the ruling? "If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted." Fed. R. Evid. 103, Comments (2000 Amendment). *See also Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277 (11th Cir. 2000) (holding that party failed to preserve error for appeal when it failed to object to testimony which had been excluded by pretrial motion in limine).

"[W]hen a trial court rules *in limine tentatively* to exclude evidence, most courts require that the party seeking admission of the evidence offer the evidence *again* at trial in order to preserve the issue for appeal." *Cook v. Sheriff of Monroe Cty., Fl.*, 402 F.3d 1092, 1109 n. 6 (11th Cir. 2005) (emphasis in original). However, if the trial court rules "tentatively," but tells the

party that he does not have to renew the objection to preserve the error, the Eleventh Circuit will not deem it to be a waiver. *Id.*

Further, an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect. *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997).

A note of caution: while the Federal Rules of Evidence state that a definitive ruling on a motion *in limine* preserves the objection, some states have different rules and require that an objection also be made at trial, or require that the trial court give express acquiescence to a continuing objection. Make sure you look carefully at the jurisdiction you are in.

B. Offer of Proof

"To preserve an objection to the district court's exclusion of evidence, 'the substance of the evidence [must be] made known to the court by offer or [be] apparent from the context within which questions were asked." *Proctor*, 494 F.3d at 1350, quoting Fed. R. Evid. 103(a)(2).

C. Specificity

"The objecting party must state a 'specific ground of objection.' . . . An objection on one ground will not preserve an error for appeal on other grounds." *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir. 1997). To preserve an issue for appeal, "one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought." *United States v. Dennis*. 786 F.2f 1029, 1042 (11th Cir. 1986).

When a party fails to state his objection with specificity, or states an objection on an improper ground, the error is reviewed for plain error. *U.S. v. Sorondo*, 845 F.2d 945, 948 (11th Cir. 1988).

D. Timeliness

The purpose of requiring a timely objection, and penalizing the failure to make a timely objection by limiting review to the plain error rule, "is to enforce the requirement that parties object to errors at trial in a timely manner so as to provide the trial judge an opportunity to avoid or correct any error, and thus avoid the costs of reversal." *U.S. v. Sorondo*, 845 F.2d 945, 948-949 (11th Cir. 1988). As a general rule, an objection to evidence is timely if made when the evidence is offered. Further, an objection will generally be found timely if made:

- as soon as the objecting party knows or should know that an error occurred;
- at the first opportunity;
- as soon as the grounds for the objection become apparent;
- if possible, before the evidence is admitted;
- as soon as the objector learns the evidence is objectionable, unless there is a specific reason for postponing the objection.

75 Am. Jur. 2d Trial §321.

An objection will generally be untimely:

- after the evidence is admitted without objection, or the opposing party admitted or testified to the same evidence without objection, *see, e.g., Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985)(objection made after evidence was earlier admitted without objection was not sufficient to preserve error);
- if made too late to give the opposing party an opportunity to cure;
- after the answer is given;
- first made in a motion for new trial;
- after the return of the jury's verdict.

75 Am. Jur. 2d Trial §321.

E. Plain Error

"Under the plain error standard, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *U.S. v. Williams*, 445 F.3d 1302, 1308 (11th Cir. 2006).

V. Objections To Questions Posed By The District Court Judge

The district court has the authority to ask questions of the witnesses in a jury trial. If a party has an objection to the questions asked by the court, the objection will be timely if made "at the next available time when the jury is not present." *Watkins v. Bowden*, 105 F.3d 1344, n. 16 (11th Cir. 1997). Otherwise, the objection will be waived, unless it constitutes plain error. *Id.*

VI. Objections To Improper Arguments Of Counsel

The "general rule is that a timely objection is necessary to bring to the district court's attention errors is counsel's arguments." *Oxford Furniture Companies, Inc. v. Drexel Heritage Furnishings, Inc.*, 984 F.2d 1118, 1128 (11th Cir. 1993). "When no objections are raised, we review the arguments for plain error, but a finding of plain error 'is seldom justified in reviewing argument of counsel in a civil case.'" *Id.*

Among the reasons for requiring a timely objection, the Court in *Oxford Furniture Companies* identified the following:

> Requiring timely objection prohibits counsel from "sandbagging" the court by remaining silent and then, if the result is unsatisfactory, claiming error. Second, there are a number of good reasons why skilled trial counsel may make a tactical decision not to object to improper argument: (1) an argument that looks highly

> improper in a cold record may strike counsel as being wholly lacking in effect; (2) because of the 'chemistry' of the courtroom counsel may think that the improper argument may offend and in effect backfire; and (3) the improper argument may open the door to a response that will be of more value than a sustained objection.

Id. at 984 F.2d at 1128-1129.

VII. Jury Instructions

Fed. R. Civ. P. 51(b)(2) states that the trial court "must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered." Rule 51 further provides that "a party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the ground for the objection." Fed. R. Civ. P. 51(c)(1). An objection is timely, and thus preserved, if made when given the opportunity by the court, Fed. R. Civ. P. 51(c)(2)(A), or if "a party was not informed of an instruction or action before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused." Fed. R. Civ. P. 51(c)(2)(B).

A party may assign error to an instruction given if it was properly objected to, Fed. R. Civ. P. 51(d)(1)(A), or to an instruction not given if it was requested and, unless the court definitively rejected it on the record, the party objected to the failure to give the instruction. Fed. R. Civ. P. 51(d)(1)(B).

The Eleventh Circuit has stated that "we interpret Rule 51 strictly, and require a party to object to a jury instruction or jury verdict form *prior* to jury deliberations in order to preserve the issue on appeal. . . . A party who fails to raise an objection to a verdict form, interrogatory or jury instruction prior to jury deliberations waives its right to raise the issue on appeal." *Farley v.*

Nationwide Mutual Ins. Co., 197 F.3d 1322, 1329 (11th Cir. 1999)(emphasis in original)(internal citations omitted).

If the error was not properly preserved, the appellate court can still review the error for "plain error." Fed. R. Civ. P. 51(d)(2). The "[p]lain error review is an extremely stringent form of review." *Farley*, 197 F.3d at 1329. "[R]eversal for plain error in the jury instructions or verdict form will occur 'only in *exceptional cases* where the error is 'so fundamental as to result in a miscarriage of justice.'" *Id.* (internal citations omitted)(emphasis added by court).

VIII. Motions For Judgment as a Matter of Law and For New Trial.

In 2006, Fed. R. Civ. P. 50 was amended to do away with the requirement that a motion for judgment as a matter of law must be made at the close of all the evidence, and not earlier. Fed. R. Civ. P. 50, Comments to 2006 Amendment. Now, under Fed. R. Civ. P. 50(a)(2), a party may move for a judgment as a matter of law "at any time before the case is submitted to the jury." The motion "must specify the judgment sought and the law and the facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2).

If the motion for judgment as a matter of law asserted during trial is denied, the party must renew the motion within 28 days after entry of the jury verdict to preserve the motion as a matter of law for appeal. Fed. R. Civ. P. 50(b). "Because the Rule 50(b) motion is only a renewal of the pre-verdict motion, it can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50, Comments to 2006 Amendment. The purpose of this rule is to inform the court of the grounds of the motion, and to give the opposing party an opportunity to cure any defects. The failure to make a Rule 50(b) renewed motion for judgment as a matter of law precludes a party from seeking a judgment as a matter of law on appeal. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006).

Also within 28 days of the entry of judgment, a party may file a motion for new trial under Fed. R. Civ. P. 59. A motion for new trial may be made in the alternative to a renewed motion for judgment as a matter of law, Fed. R. Civ. P. 50(b); however, a party also may seek a new trial without filing a Rule 50 motion for judgment as a matter of law. *Rand v. National Financial Ins. Co.*, 304 F.3d 1049 (11th Cir. 2002).

Unlike the requirement that a party make a motion for judgment as a matter of law in the trial court to preserve the issue for appeal, the "settled rule in federal courts is that a party may assert on appeal any question that has been properly raised in the trial court. Parties are not required to make a motion for new trial challenging the supposed errors as a prerequisite to appeal." *Rand*, 304 F.3d at 1052 (quoting 11 Wright, et al *Federal Practice and Procedure* §2818 (2d ed. 1995)).

There are, however, exceptions to the rule that a motion for new trial in the trial court is not necessary to preserve seeking a new trial on appeal. For example, a party cannot circumvent the requirement that a party file a renewed motion for judgment as a matter of law for the insufficiency of evidence under Rule 50 by recasting the issue on appeal as seeking a new trial. *See Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). Also, a party must first raise a challenge to the damages awarded by way of a post-judgment motion to preserve that issue for appeal. *Electro Servs., Inc. v. Exide Corp.*, 847 F.2d 1524, 1530 (11th Cir. 1988) (holding that a party may not seek a new trial for damages for the first time on appeal).

IX. The Notice of Appeal.

The notice of appeal must be filed within 30 days of the entry of judgment, or within 30 days of the ruling on certain post-judgment motion. Fed. R. App. P. 4.

Fed. R. App. P. 3(c) states that the notice of appeal must "designate the judgment, order, or part thereof being appealed." "The appeal from a final judgment draws in question all prior non-final orders and rulings which procured the judgment." *Barfield v. Bierton*, 883 F.2d 923, 930 (11th Cir. 1989). The Courts of Appeals have "jurisdiction to review only those judgments or orders specified—expressly or impliedly—in the notice of appeal. Where a notice of appeal specifies a particular judgment or ruling, [the Court] infer[s] that others are not part of the appeal." *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 785 (11th Cir. 2004).

X. Arguments In Appellate Courts.

"A general principle of appellate review is than an appellate court will not consider issues not presented to the trial court. Judicial economy is served and prejudice avoided by binding the parties to the theories argued below." *McGinnis v. Ingram Equip. Co., Inc.*, 918 F.2d 1491, 1495 (11th Cir. 1990).

An argument not raised in an appellant's brief is considered abandoned. "It is well settled in this circuit that an argument not included in the appellant's brief is deemed abandoned. . . . And presenting the argument in the appellant's reply does not somehow resurrect it." *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 973 (11th Cir. 2008)(internal citations omitted).

"[B]riefs should be read liberally to ascertain the issues raised on appeal." *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994). Despite this liberal reading, simply mentioning an argument is not enough to preserve it. For example, the Eleventh Circuit had held that mentioning an argument in a footnote is not sufficient to adequately present and preserve the argument in an appellate brief. *Tallahassee Mem. Regional Med. Ctr. V. Bowen*, 815 F.2d 1435, 1446 n. 16 (11th Cir. 1987).