Preservation of Issues for Appeal

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JUSTICE REBECCA DUNCAN, OREGON SUPREME COURT

JUDGE ROBYN AOYAGI, OREGON COURT OF APPEALS

ORAP 5.45

"No matter claimed as error will be considered on appeal unless the claim of error was **preserved in the lower court** and is **assigned as error in the opening brief** in accordance with this rule, provided that the appellate court may consider an error apparent on the face of the record."

- ORAP 5.45 contains *detailed* requirements for the preservation section of the opening brief.
- Telling the appellate court **when and how** the claim of error was preserved is especially important because appellate courts have an **independent obligation** to assess preservation.

Reasons for preservation requirement

- **Judicial efficiency.** "Preservation gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal."
- **Fairness to the parties.** "Preservation also ensures fairness to an opposing party, by permitting the opposing party to respond to a contention and by otherwise not taking the opposing party by surprise."
- **Aiding judicial review.** "Finally, preservation fosters full development of the record, which aids the trial court in making a decision and the appellate court in reviewing it."

Peeples v. Lampert, 345 Or 209, 219 (2008).

Pragmatic test

- "As a general rule, appellate courts will not consider claims of error that were not raised in the trial court. * * * To adequately preserve an issue, a party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted." *State v. Wyatt*, 331 Or 335, 341, 343 (2000).

- "Preservation rules are pragmatic as well as prudential. What is required of a party to adequately present a contention to the trial court can vary depending on the nature of the claim or argument; the touchstone in that regard, ultimately, is procedural fairness to the parties and to the trial court." *Peeples*, 345 Or at 219.

- "Ultimately, the preservation rule is a practical one, and close calls * * * inevitably will turn on whether, given the particular record of a case, the court concludes that the policies underlying the rule have been sufficiently served." *State v. Walker,* 350 Or 540, 548 (2011).

Examples of pragmatic considerations/questions

- Would the trial court or agency have understood the party to be making the essential argument that the party now presents on appeal?
- Is the *theory* raised on appeal the same as the *theory* upon which the party relied below?
- Would the other litigants have understood the party to be making that argument and, therefore, had a fair opportunity to respond to it?
- If the party had raised the same argument below as it raises on appeal, might the record have developed differently?
- Did another party make the argument that appellant raises on appeal, even though *appellant* did not?
- Did the trial court expressly base its ruling on the theory raised on appeal, even though parties focused on other issues in their arguments? If so, the purposes of preservation may have been adequately served, depending on the circumstances.
- Did the argument shift fundamentally between trial and appeal, depriving opposing counsel a chance to respond or make an appropriate record? Or, conversely, is any shift in the framing of the argument a result of the way the trial court viewed the issues?

10 Tips for Preservation

Tip #1: Be as clear and specific as possible, but no "magic words" are required.

- Raising the issue in the trial court is essential. Citing the specific authority is less so, as is making the argument in exactly the same way as presented on appeal. *State v. Hitz*, 307 Or 183, 188 (1988); *see also State v. Bray*, 363 Or 226, 246 (2018) ("Evolution of argument from the pressures of trial to reflection on review is not uncommon.").
- Ultimately, the question is, have the purposes of preservation been met?

Tip #2: Think about the cold record.

- Be cautious about using shorthand.
- It's not enough that everyone in the room understood at the time.
- Don't invite error in an attempt to be "polite." (Invited error doctrine.)
- Watch out for off-the-record or sidebar conversations. "Discussion off the record of matters as to which issues on appeal could arise is ill-advised, either because no official record is made of the matters or because whatever record that is made often is summary in nature." *State v. Williams*, 322 Or 620, 624 n 7, *cert den*, 519 US 854 (1996).
- Better late than never. At least sometimes.

Tip #3: Put it in writing if possible.

- Not always possible, but always a good idea if it is possible, especially for important issues. *E.g.*, DV motions, SJ motions, motions *in limine*, etc.
- "[A]n issue is preserved for … review if it is presented clearly in a written motion, notwithstanding a party's failure to reiterate all of its arguments at a subsequent hearing." *State v. Mejia*, 287 Or App 17, 22, 401 P3d 1222 (2017).

Tip #4: Raise it again, as appropriate.

- For most *pretrial* issues that you lost, raise them again at trial to preserve the issue for review. Examples:
  - Unless a trial court made a **definitive ruling** on a motion *in limine* or motion to suppress, object to the evidence again at trial.
  - If you lost a motion to dismiss or strike an allegation or defense, raise it again at trial with a motion for directed verdict.
  - If a trial court excluded your expert in a criminal case, raise it again at trial if a new reason develops to call the expert.

Tip #5: Evidentiary objections

- Evidentiary objections should be *timely* (when the evidence is offered) and *specific*.
- An objection to **evidence as a whole** is inadequate if only part is inadmissible. *See, e.g., State v. Sims*, 105 Or App 318 (1991) (part of an immunity agreement was irrelevant, but other parts were admissible, so no error in denying objection to admission of entire agreement).
- For evidentiary exclusions, make an **offer of proof**. "Ordinarily, when the trial court has excluded testimony, the proponent of the disputed evidence must make an offer of proof." *State v. Krieger*, 291 Or App 450, 455 (2018). Offers of proof can be made by examination of witness on the stand or as a narrative summary of the evidence, but the offer must demonstrate the content of the evidence sought to be admitted.
- If the trial court allows a **continuing objection**, a party can rely on that to preserve an issue. But evidentiary challenges often depend on context and must be specific, so, if in doubt, raise the objection again.

Tip #6: Directed verdict motions

- Move for DV if you are entitled to judgment in your favor on claim (*i.e.*, the claim is invalid for insufficient evidence or the claim is invalid as a matter of law).
- DV motion is to be made at end of your opponents' case and/or at end of trial.
- State every ground for DV motion. You will not be able to raise any new grounds in any later motion for judgment notwithstanding verdict or new trial.

Tip #7: Be careful about jury instructions.

- Make sure that your jury instructions are accurate. The trial court does not err in declining to give a jury instruction that is incorrect in any respect. And you may prevail at trial but lose on appeal if a jury instruction made it possible for the jury to reach a verdict on legally erroneous grounds.
- Make sure that your objections are timely and specific. You must object on the record and state with particularity why an instruction is wrong (or why it is error not to give an instruction).
- File your proposed jury instructions and make sure to include prior drafts of jury instructions in the record if relevant.
- File written objections to jury instructions, including all grounds for claimed error.
- Remember that an objection on one ground to a jury instruction will not preserve a claim of error on another ground.
- This is an area to be very cautious of off-the-record arguments and discussions.

Tip #8: Be careful about verdict forms.

- Claims of error relating to the verdict form must be raised before submission of the verdict form to the jury.
- General verdict forms or specific verdict forms?

Tip #9: Mistrials and defective verdicts

- Mistrials: To preserve error, a motion for a mistrial must be made as soon as the objectionable statement or event occurs.
- Defective verdicts: The time to object to a defective verdict is while the jury is still on hand so that the trial court can resubmit the matter with proper instructions.

Tip #10: Post-trial motions

- Motion for JNOV or new trial generally is not necessary to preserve objections made at trial.
- One exception: A motion for new trial is required to preserve challenges to the amount of a punitive damages award.
- A motion for JNOV that does not include an alternative motion for new trial will waive new trial as remedy.

Preservation Exceptions

There are **very limited exceptions** to the preservation requirement, of which the most common are:

- **Subject matter jurisdiction**
- **No practical opportunity to raise an issue**
- **"Plain error" review**. Available only for errors of law that are not reasonably in dispute and are apparent on the face of the record. Party must *request* plain-error review. It is *always* discretionary to the COA/SC whether to reverse on plain-error grounds.
- **Alternative basis to affirm that was not raised in the trial court.** Unpreserved alternative bases for *affirmance* may be raised by the respondent on appeal, but only if the new argument raises an *issue of law* and the *record is the same* as it would have been if the issue had been raised in the trial court. It is *always* discretionary to the COA/SC whether to reverse on such a basis.

Appellate briefing

Opening Brief

- "Each assignment of error must identify precisely the legal, procedural, factual, or other ruling that is being challenged." ORAP 5.45(3).
- When a trial court's ruling is based on two independent and alternative grounds, the appellant must assign error to both grounds (at or least challenge both grounds) to be entitled to relief. *Strawn v. Farmers Ins. Co.*, 350 Or 336, 368 (2011), *adh'd to on recons*, 350 Or 521 (2011).

Reply Brief

- "Moreover, regardless of whether the alternative theory of error was preserved, plaintiff failed to raise it in its opening brief on appeal. We generally will not consider a basis as to why the trial court erred that was not assigned as error in the opening brief but was raised for the first time by way of reply brief." *Clinical Research Inst. v. Kemper Ins. Co.*, 191 Or App 595, 608 (2004).

Questions?