THE APPELLATE PROCESS:
FROM THE COURTROOM TO THE SUPREME COURT OF OHIO

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I. THE TRIAL COURT

A. Properly Preserving the Issue Below and Making an Accurate Record

When you have a case where important legal issues exist, all efforts should be made to formulate your strategy to preserve and frame the important legal issues for post-trial proceedings, including appeals and ultimately to the Supreme Court of Ohio. Planning begins long before the notice of appeal is filed. Proper framing of legal issues and arguments in briefing, requests for and objections to jury instructions, and timely proffers of excluded evidence are a few examples of ways to preserve your issues for future appeals. Proper preservation of legal issues will help to develop a record and assist you in honing in on the important legal issues that may be subject to further appeal.

B. Appeals can only be decided based upon what appears in the trial court's record. State ex rel. *Blair v. Balraj,* 69 Ohio St.3d 310, 313, 1994-Ohio-40.

Here are some examples of the type of actions needed to preserve your record:

1. Sidebar:

   If a particular argument was in fact made to the trial court while at sidebar or in the judge's chambers but not in the presence of the court reporter, the argument hasn't been preserved for purposes of an appeal. *Lamar v. Marbury* (1982), 69 Ohio St.2d 274, 277.

2. Motion in Limine:

   Any error will be deemed waived on appeal even when there has been an order granting or denying a motion in limine, which is nothing more than a preliminary ruling. *Starinki v. Pace* (1987), 41 Ohio App.3d 200, 204.

3. Jury Instruction:

Where the record demonstrates that no objection was raised to preserve the trial court's failure to give a particular jury instruction that a party had requested, any error resulting therefrom is waived. See, Civ.R. 51(A); *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, paragraph one of the syllabus.

4. Direct Verdict:

In order to preserve an assigned error in connection with the trial court's denial of a motion for directed verdict made at the close of the plaintiff's case, the defendant must renew the motion at the close of all the evidence, otherwise it is waived. *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, syllabus paragraph one.

5. Trial Court as Fact Finder:

Secure findings of fact and conclusions of law in circumstance where a trial court is required to articulate the facts and/or legal grounds for a particular ruling. Such as when the dispute is tried to the court rather than to a jury, see, Civ.R. 41(B)(2) and 52.

6. Constitutional Concerns:

Constitutional questions and challenges to judgments are deemed waived and cannot be pursued on appeal unless they are raised and preserved in the trial court. *Baker v. West Carrollton*, 64 Ohio St.3d 446, 448.

7. Plain Error:

Although the plain error doctrine is an exception that allows review of alleged errors not properly objected to in the trial court, it is not favored. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, syllabus. Plain error should not be relied upon for reversal of an adverse judgment. Appellate courts will not reverse a jury verdict in a civil action based on the assertion of plain error except in the "extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." See, *Gable v. Gates Mills*, 103-Ohio St.3d-449, 2004-Ohio-5719, ¶43.

C. Examples of Post-Trial Options

1. Motion for Judgment Notwithstanding the Verdict ("JNOV")

    a. 14 days after entry of judgment or after jury is discharged

    b. A party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion either after the verdict is rendered or after the jury retires.

    c. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

    d. If a verdict was returned, the court may reopen the judgment and shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence.

    e. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

2. Motion for New Trial

    a. Irregularity in the proceedings by which an aggrieved party was prevented from having a fair trial;

    b. Misconduct of the jury or prevailing party;

    c. Accident or surprise which ordinary prudence could not have guarded against;

    d. Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

    e. Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

    f. The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

g. The judgment is contrary to law;

h. Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

i. Error of law occurring at the trial and brought to the attention of the trial court by the party making the application;

j. Sound discretion of the court for good cause shown.

3. Relief from Judgment or Order

a. Clerical mistakes. Civ. R. 60(A).

b. Mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, etc. Civ. R. 60(B).

D. Adverse Trial Court Decision or Result: Options and Time Frames

1. Generally, an appeal must be filed 30 days from entry of judgment. See, Civ. R. 4(A).

2. Exceptions to the 30 Day Rule. See, App. R. 4(B).

a. Cross appeals

- Another party may file a notice of appeal within the appeal time period or within ten days of the filing of the first notice of appeal.

b. Post-judgment motions, the time for filing a notice of appeal begins to run when an order disposing of the following is entered:

- JNOV. Civ. R. 50(B).
- New Trial. Civ. R. 59(B).
- Objection to a magistrate's decision. Civ. R 53(D)(4)(e)(i) or (ii).

- Findings of fact and conclusions of law. Civ. R. 52.

II. THE COURT OF APPEALS: APPEAL AS OF RIGHT

A. Applicable Standard of Review

It is important to be aware of the standard of review on appeal when examining any alleged errors. This will help focus attention on the battles that are truly worth fighting. In general the types of appellate review are:

1. Review for Legal Error or of the Legal Sufficiency of the Evidence

    a. No deference is given to the trial court's ruling and the appellate court conducts its own analysis of the trial court record.

    b. This de novo standard of review is employed, for instance, when the court of appeals is examining a trial court's legal interpretations and conclusions as well as rulings in regard to motions to dismiss, for summary judgment, directed verdict and judgment notwithstanding the verdict.

2. Review of the Weight of the Evidence

    a. When reviewing a judgment under a manifest weight of the evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81.

    b. Greater deference is afforded to the trial court or jury when an appellate court reviews a verdict or judgment to see if it is supported by the weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, syllabus ("Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence").

3. Review of the Trial Court's Exercise of its Discretionary Authority.

    The greatest deference is going to be given to the trial court when reversal of a judgment is sought based upon a trial court's abuse of

discretion. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The abuse of discretion standard will govern, for example, rulings regarding the scope of pretrial discovery and admissibility of evidence.

B. Adverse Decision at Court of Appeals: Options and Time Frames

1. A Notice of Appeal and Memorandum in Support of Jurisdiction Must Be Filed 45 Days from Entry of Judgment. See, S. Ct. Prac. R. 2.2(A)(1).

2. Although There Are No Extensions of Time Allowed, Time May Be Tolled Depending on Post-Appellate Decision Activities.

   a. An application for reconsideration in the court of appeals pursuant to App. R. 26(A)(1) tolls the time for filing a notice of appeal. See, S. Ct. Prac. R. 2.2(A)(5).

      - Must be made within 10 days of the announcement of the court's decision.

      - The test applied to an application for reconsideration is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue that was properly before the court but was either not considered at all or not fully considered by the court when it should have been. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117, 127.

   b. An application for en banc consideration in the court of appeals pursuant to App. R. 26(A)(2) tolls the time for filing a notice of appeal. See, S. Ct. Prac. R. 2.2(A)(6).

      - An intra-district conflict between two or more decisions of a court of appeals.

      - Majority of the court of appeals judges may order consideration en banc, i.e. all full-time judges of the appellate district.

- Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case.

- Must be made within 10 days of the announcement of the court's decision.

- Can be combined with a motion for reconsideration in one document.

- Conflicting intra-district decisions are more likely in larger appellate districts. For example, the 8th District has 12 judges so there is a greater chance of having a completely different panel of judges decide the same issue. In comparison, only in the most rare circumstances will an appellate district with just 4 judges have a completely different panel decide the same issue.

3. Motion to Certify Conflict. App. R. 25.

- Does not toll the time for appeal.

- 10 days after the judgment or order of the court that creates a conflict with a judgment or order of another court of appeals.

- Discussed below in Section III. (B)(2).

III. THE SUPREME COURT OF OHIO: DISCRETIONARY APPEAL

A. Factors to Consider When Deciding Whether to Appeal to the Supreme Court of Ohio

1. The Risk of Making "Bad" Law

The most obvious disincentive to an appeal is the possibility that the Supreme Court may affirm the court of appeals' decision from which you are appealing. The result would then be that the court of appeals' decision that you disagree with becomes the law in the State of Ohio, not just in the appellate district in which it was decided.

2. The Composition of the Current Court

Determine whether the composition of the current Supreme Court of Ohio would be interested in your case. Does the court consist of a majority of justices who are more conservative and sensitive to the concerns of business than in years past? Is this a court that may take a more plaintiff-friendly approach to this particular issue?

There is no way of predicting with any degree of certainty how any justice might vote in deciding first, whether to hear a particular case, and then whether to affirm or reverse the appellate court. However, it is important to know the make-up of the current court and decide whether it would be receptive to the arguments being made in your case.

3. Hurdles to Overturning Supreme Court of Ohio Precedent

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, is widely known for its reversal of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, but the long-term legacy and import of the *Galatis* opinion lies in the three-pronged standard put in place by the Supreme Court that must be met before the Court will consider reversing one of its own opinions. Per that test, a prior decision of the Supreme Court may be overruled when all three of the following circumstances are found to exist:

a. The decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision,

b. The decision defies practical workability, and

c. Abandoning the precedent would not create an undue hardship for those who have relied upon it.

Galatis, syllabus paragraph one.

The Supreme Court has invoked this tripartite test on several occasions. When the three prongs have been established, the Supreme Court has been willing to overrule precedent. See, e.g., *State ex rel. Advanced Metal Precision Prods. v. Indus. Comm.*, 111 Ohio St.3d 109, 2006-Ohio-5336, at ¶19; *State ex rel. Stevens v. Indus. Comm.*, 110 Ohio St.3d 32, 2006-Ohio-3456, ¶12. But, most often, the Supreme Court has refused to overrule prior case law, usually because the appealing party failed to

establish each prong of the test. See, e.g., *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, ¶14; *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, ¶27; *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶14. Simply arguing that a prior case was wrongly decided is not sufficient to justify overruling a prior decision. *State ex rel. Grimes Aerospace Co., Inc. v. Indus. Comm.*, 112 Ohio St.3d 85, 2006-Ohio-6504, ¶6. The litigant advocating for a change in Supreme Court precedent carries the burden of establishing all three prongs which is a burden that cannot be met simply with conclusory statements lacking factual or empirical support. *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, at ¶¶15-21.

Once a case has been identified as one involving issues that could ultimately be appealed to the Supreme Court, the groundwork for meeting – or defeating – the *Galatis* tripartite test (i.e., evidence of changed circumstances, unworkability, no undue hardship) can and should take shape and be developed, perhaps through discovery, while the case is still in the trial court.

B. Types of Cases That are Accepted for Review

1. Your Case May Be Important to You, but it Also Needs to Be Important to Everyone Else Too.

   To accept an appeal, the justices must be persuaded that the case presents a substantial constitutional question or an issue of public or great general interest. S.Ct. Prac.R. 3.1(2). In other words, just because the appellate court made errors in its decision is not enough to get it before the Supreme Court.

   Sample Case: *Environmental Network Corp. v. Goodman Weiss Miller LLP*, 119 Ohio St. 3d 209, 2008-Ohio-3833 ("ENC")

   Why it was important enough to get the Supreme Court of Ohio?

   Before this case was appealed, the leading national treatise on legal malpractice stated: "In Ohio, causation needs clarification by the state's supreme court." 4 Mallen & Smith, Legal Malpractice 688 (2007 ed.), Section 30:52. This case presented the ideal vehicle for the Court to provide the needed clarification regarding the appropriate standard of proof of causation and resulting damages in legal malpractice actions. Prior to *ENC*, the Court's decision in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259,

led to the confused and contradictory lower court decisions in this important area of law, resulting in decisions that defied common sense and logic.

2. Conflicts among Various Appellate Districts Help to Establish That an Issue Is of Sufficient General and Wide-Spread Interest.

When a court of appeals issues an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, any interested party to the proceeding may institute an appeal by filing a notice of certified conflict in the Supreme Court. S.Ct. Prac. R. 4.1. If the Supreme Court determines that a conflict does not exist, it will issue an order dismissing the case. S.Ct. Prac. R. 4.2 (C). If the Supreme Court determines that a conflict exists, it will issue an order finding a conflict, identifying those issues raised in the case that will be considered by the Supreme Court on appeal, and ordering those issues to be briefed. S.Ct. Prac. R. 4.2 (D).

If a motion to certify a conflict is still pending after the discretionary appeal has been filed, upon notice, the Supreme Court will stay consideration of the jurisdictional memoranda filed in the discretionary appeal or claimed appeal of right until the court of appeals has determined whether to certify a conflict in the case. S.Ct. Prac. R. 4.4.

Sample Case: *Barth v. Barth*, 113 Ohio St. 3d 27, 2007-Ohio-973

Pursuant to App.R. 25(A) and Article IV, Section 3(b)(4) of the Ohio Constitution, the Eighth Appellate District certified the case to the Supreme Court finding that its decision conflicted with *McMaken v. McMaken* (1994), 96 Ohio App.3d 402, and *Heath v. Heath* (Mar. 7, 1997), Lucas App. No. L-96-288. The issue certified was: "Whether the sixth-month residency requirement for jurisdiction set forth in R.C. 3105.03 is a strict test or may a court examine one party's intent and the other party's fraudulent inducement in abandoning Ohio as their domicile."

3. Certified Question from the United States District Court on Unsettled State Law Questions.

When a federal court is hearing a case and is in doubt on "a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of [the] Supreme Court," the federal court may request the Supreme Court of Ohio to decide the legal issue by certifying the question to the Supreme Court for determination of the answer.

S.Ct. Prac. R.18.1. While the Supreme Court of Ohio is not obligated to consider the issue, "[i]f the Supreme Court decides to answer a question or questions certified to it, it will issue a written opinion stating the law governing the question or questions certified." S.Ct. Prac. R.18.8.

Sample Case: *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546

At the time that *Groch* was pending before the United States District Court for the Northern District of Ohio, Western Division, the constitutionality of Ohio's then newly enacted statute of repose (R.C. 2305.10 (C) (1)) was unsettled. R.C. 2305.10 (C) (1) prohibits product liability claims from being asserted against manufacturers later than ten years from the date that the product was delivered to its first purchaser. In enacting the statute the General Assembly determined that the statute of repose was a vital instrument that provided time limits, closure, and peace of mind to potential parties of lawsuits. The United States District Court for the Northern District of Ohio, Western Division, certified questions to the Ohio Supreme Court because the state's high court had not yet made a determination as to the constitutionality of the statute of repose. The Ohio Supreme Court accepted certified questions for review with respect to the statute of repose and upheld it as constitutional.