



Appellate Practice Corner

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Waiver, Forfeiture, and Plain Error

Our adversarial system of justice depends upon the competition between adversaries—not just in the sense of opponents with competing claims and interests, but also in the sense of competing arguments and philosophies. Apart from resolving concrete disputes in which parties may be winners and losers, court proceedings are sometimes the setting for a marketplace of ideas related to the law. This function is particularly important in the reviewing courts, whose decisions comprise the body of common law. Those courts depend on the parties to frame the issues thoroughly enough that the courts, as neutral arbiters, can adequately consider them and render meaningful decisions that will stand as precedent. *Jackson v. Bd. of Election Comm'rs*, 2012 IL 111928, ¶ 34.

In a previous edition, the Appellate Practice Corner addressed the importance of preserving trial errors intended to be raised as grounds for appellate relief. *For the Record: Preserving Issues for Appeal*, 24 IDC Quarterly no. 4, 2014, at 9. This edition addresses the failure to preserve an issue for review—either deliberate, called “waiver,” or inadvertent, called “forfeiture”—and what factors may persuade the reviewing court to consider the issue despite such a failure.

Waiver vs. Forfeiture

Though the terms “waiver” and “forfeiture” have often been used interchangeably, they identify different procedural concepts; “[w]hile waiver is the voluntary relinquishment of a known right, forfeiture is the failure to timely comply with procedural requirements.” *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 320 n.2 (2008). In other words, waiver is something done deliberately, with the intention of giving up a particular argument or remedy. Forfeiture, by contrast, is unintentional—often a failure to do something necessary to preserve an argument or remedy.

Only in recent years have the reviewing courts identified the distinction between the two concepts. Indeed, the supreme court rules governing appellate practice and procedure speak only of “waiver,” without using the words “forfeit” or “forfeiture” at all. Rule 341(h)(7), for instance, concerning the content of appellate briefs, provides that “[p]oints not argued [in the appellant’s initial brief] are *waived* and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.” Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (emphasis added). But though the rule refers to points not argued as being “waived,” in recent cases the supreme court has described such omissions as forfeitures. The court held that a plaintiff who failed to adequately develop an argument in its appellate brief had violated this rule, and had therefore “*forfeited* review of this issue.” *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36 (emphasis added). Similarly, when a party failed to argue a point in her opening brief and raised it for the first time at oral argument, the supreme court found that she had violated that same rule—and therefore, in the court’s words, had “forfeited” that point. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23.



It is not clear when the distinction between waiver and forfeiture emerged, but the supreme court decisions discussing it contain nothing to suggest that it is anything new. See, e.g., *James R.D. v. Maria Z.*, 2015 IL 117904, ¶ 17 n.3; *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2013 IL 110505, ¶ 26. At least one court, however, has suggested that the distinction is merely a change in nomenclature with little practical meaning, at least when posttrial motions are concerned: “While the failure to file a posttrial motion in a nonjury case does not limit the scope of the appellate court’s review, the failure to file a posttrial motion in a jury cases [sic] results in waiver, which we now call a forfeiture.” *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 32 (emphasis added). Though the reviewing courts have lately been noting this distinction in terminology, they have not held that it makes any significant difference in the consequences, or suggested that either waiver or forfeiture is any more likely than the other to discourage appellate review of an argument.

“Sound and Uniform Body of Precedent” vs. Plain Error

Whether waiver or forfeiture, however, a party’s failure to raise an argument does not preclude the reviewing courts from considering it. Unlike a failure to timely file something necessary to an appeal, waiver or forfeiture ordinarily does not impair appellate jurisdiction, and usually does not prevent the reviewing court from addressing an argument or considering an issue despite the complaining party’s failure to preserve it. It is a “familiar proposition that waiver and forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court and that courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent.” *Jackson*, 2012 IL 111928, ¶ 33 (citing *Daley v. License Appeal Comm’n*, 311 Ill. App. 3d 194, 200 (1st Dist. 1999) and *Hux v. Raben*, 38 Ill. 2d 223, 224 (1967)).

Since neither waiver nor forfeiture precludes review, reviewing courts sometimes elect to consider arguments that have not been properly preserved. In some cases, they have cited a need to maintain the “sound and uniform body of precedent” the supreme court described in *Jackson*. See, e.g., *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 179 (2011) (citing *O’Casek v. Children’s Home & Aid Society of Illinois*, 229 Ill. 2d 421, 438 (2008)). In others, they have applied the plain-error doctrine, finding that a party was so badly prejudiced by an error—usually resulting from an adversary’s misconduct—that the error must be addressed and remedied. See, e.g., *Zoerner v. Iwan*, 250 Ill. App. 3d 576, 585 (2d Dist. 1993) (finding statements made in closing argument “were sufficiently prejudicial to plaintiff to warrant review, even though plaintiff did not object to them” or challenge them in posttrial motion). These two justifications for considering arguments that were not preserved correspond to the principal judicial functions of reviewing courts. The concern for consistent precedent reflects a recognition of their role in setting forth the common law. The plain-error doctrine reflects their role in ensuring fairness by correcting mistakes made by lower courts.

Of the two justifications, the importance of precedent is ordinarily a less compelling reason for the appellate court to consider an argument that has been waived or forfeited. While a court may be concerned that a trial court’s ruling was at odds with precedent, such a ruling is not itself precedential. Moreover, it was the aggrieved party’s burden to preserve the issue for review; if the court believes that the trial court’s ruling was contrary to precedent but that the party did not preserve the issue, the court may decline to address that issue. There is little if any precedential effect to a decision not to address an argument, especially if waiver or forfeiture is the reason for not addressing it. Precedent is even less a concern when the appellate court issues a decision as an “unpublished” order under Supreme Court Rule 23—though because the recent online availability of such orders makes it easier to locate them, even such orders have the potential to create mischief and confusion. See Ill. S. Ct. R. 23(b) (eff. July 1, 2011).

These considerations may have a considerably different impact in the supreme court, especially if it is a decision of the appellate court that is claimed to be at odds with the previously existing “body of precedent,” and even more so if that decision is a published one that creates a conflict in the law. Likewise, the supreme court may elect to consider an unpreserved issue for the purpose of resolving an existing conflict—or avoiding a potential one—in the decisions of the appellate court. See *O’Casek*, 229 Ill. 2d at 438.

A more compelling justification for considering unpreserved issues is the reviewing courts’ function of correcting errors, especially those that are egregious and prejudicial enough to be treated as plain error. An error might not have any meaningful effect on the body of precedent, while still having a significant impact on the parties. If one party has been unfairly prejudiced by another’s misconduct, then there is a substantive reason for review even if the procedural requisites have not been satisfied. That concern is heightened when the error implicates conduct that affects the integrity of the judicial system, possibly rising to the level of plain error. The effect of an appellate court’s decision may be limited, in the short term, to the parties to the case before it. But addressing and correcting an instance of plain error may also serve a deterrent effect, especially in published decisions, by alerting the bar that some misconduct is so far beyond the pale that it will not be immune to reversal just because an adversary fails to object.

The plain-error doctrine originated in the criminal context and is much more frequently applied there. See *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375 (1990) (citing M. Graham, Cleary & Graham’s Handbook of Illinois Evidence § 103.10 (4th ed. 1984)). In that context, the doctrine allows a reviewing court to remedy a “clear or obvious error” in two circumstances, even when the criminal defendant has failed to preserve the error for review: “(1) where the evidence in the case is so closely balanced that the jury’s guilty verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial.” *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009) (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), and *People v. Herron*, 215 Ill. 2d 167, 178–79 (2005)).

The Illinois Supreme Court first applied the plain-error doctrine in the civil context in *Belfield v. Coop*, 8 Ill. 2d 293 (1956). In *Belfield*, the court expressed concern not only for the parties, but for the judicial system as well:

If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon.

Belfield, 8 Ill. 2d at 313.

Because civil cases do not implicate liberty concerns, the reviewing courts are understandably more reluctant in such cases to address issues that have not been properly preserved. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 856 (1st Dist. 2010) (quoting *Palanti v. Dillon*, 303 Ill. App. 3d 58, 66 (1st Dist. 1991)). Application of the plain-error doctrine to civil cases should be “exceedingly rare and limited to circumstances amounting to an affront to the judicial process.” *Fakes v. Eloy*, 2014 IL App (4th) 121100, ¶ 120 (internal quotations omitted). Civil cases applying the plain-error doctrine generally involve “blatant mischaracterization of fact, character assassination, or base appeals to emotion and prejudice.” *Fakes*, 2014 IL App (4th) 121100, ¶ 120 (citing *Gillespie*, 135 Ill. 2d at 377).

Given the facts of *Belfield*, it is easy to understand why the supreme court was willing to expand the plain-error doctrine to cover the civil setting. At issue in that case, an appeal of the judgment in a will contest, were several

inflammatory remarks made by the plaintiff's counsel in closing argument before the jury. The plaintiff's counsel had characterized the defendants collectively as "thieves," "usurpers," and "defrauders," despite evidence implicating only one of them in any impropriety; impugned the reputation of one of the defendants' attorneys; and praised their own conduct and ethics. *Belfield*, 8 Ill. 2d at 312. In addition, one of the plaintiffs' attorneys, a judge from a neighboring county, told the jury of his "extensive experience" dealing with wills in his own court, and suggested "that there must be something wrong with this will or he would not be in the circuit court representing the contestants." *Id.* The defendants' counsel had not objected to those remarks at trial, and the supreme court acknowledged the general rule that such complaints are not entertained on appeal "unless objection to the alleged prejudicial argument has been made in the trial court, a ruling of the court obtained and the record showing the objection and the ruling preserved." *Id.* But it entertained them nonetheless, holding that it was proper to overlook the aggrieved party's failure to object if "the parties litigant cannot receive a fair trial and the judicial process stand without deterioration." *Id.* at 313. Finding that to be the case there, the court reversed the judgment and remanded for a new trial. *Id.*

But while the egregious facts of *Belfield* may have given the court a reason to expand the plain-error doctrine to that civil case, they also set a high bar for applying it to subsequent ones. In *Gillespie*, for instance, the supreme court found that an alleged error did not meet that standard. *Gillespie*, 135 Ill. 2d at 377. The trial court in *Gillespie* had granted the plaintiff's motion for a new trial in his product-liability case; it agreed that he was unfairly prejudiced by the admission of a nurse's note, intended to impeach him but otherwise inadmissible as hearsay, because the defense had not proved up the impeachment by calling the nurse to testify. *Id.* at 371–72. During the trial, however, the plaintiff had neither objected to testimony about the note nor moved to strike it. The appellate court acknowledged that omission, but affirmed the grant of a new trial nonetheless. It concluded that the defense conduct was plain error, and that the plaintiff was entitled to a new trial despite his failure to preserve the error by objecting to it. *Id.* at 370–71.

The supreme court disagreed, holding that the trial court had abused its discretion by granting a new trial, partly because the plaintiff had neither objected to the lack of proof at the time the note was introduced nor moved to strike it later. *Id.* at 371–73. Describing these failures as "waiver," despite circumstances that would probably be called "forfeiture" today, the supreme court examined the appellate court's holding that that the issue involved plain error. *Id.* at 374. But it was unpersuaded by that holding, recounting its own history of strictly applying the waiver doctrine "unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion, rather than an impartial consideration of the evidence." *Id.* at 375–76 (collecting cases). It summarized those cases, including the seminal *Belfield*, as each involving prejudicial error "so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process itself." *Id.* at 377 (emphasis in original). Though it expressed no view as to whether the admission of the evidence was error at all, the court was unconvinced that it met the standard of plain error, and went on to hold that it had caused the plaintiff no unfair prejudice. *Id.* at 373, 377–78.

Gillespie suggests that prejudice to the aggrieved party is relevant to plain error only insofar as it is extreme enough to damage the integrity of the judicial system as well. This demanding standard makes for an inherent contradiction in nearly any attempt by a party to rely on the plain-error doctrine as a substitute for properly preserving an objection to improper conduct. In order to satisfy the doctrine and persuade a reviewing court to consider an argument not made below, the party must show that the conduct at issue was not just improper, but so egregious that to countenance it would be to jeopardize the adversarial system of justice. Yet the party citing the plain-error doctrine presumably failed to object to such egregious conduct when it occurred. In *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, the court



alluded to this contradiction, and was openly skeptical of the defendant's contention that the plaintiff's counsel's remarks in closing argument were so improper and prejudicial that reversal was warranted even without a defense objection at trial: "Bovis does not attempt to explain why the comments were so egregious that they denied Bovis a fair trial or substantially impaired the integrity of the judicial process." *Calloway*, 2013 IL App (1st) 112746, ¶ 101.

Conclusion

As in *Calloway*, any reviewing court can be expected to wonder why, if the conduct really was so far beyond the bounds of decency as to be treated as plain error, the complaining party did not immediately object to it at trial. The party claiming plain error should anticipate that question, and have an answer to it before it is asked. This intrinsic shortcoming in the plain-error doctrine—that it allows waiver and forfeiture to be overlooked chiefly in circumstances where they are least likely to occur—makes it an obvious last resort for those cases in which a party wants to make an argument for reversal but failed to preserve it at the proper time. Because it is often a transparently desperate effort to get a reviewing court to consider something that was not preserved, it usually depends upon the court's discretion and indulgence. Bolstering the plain-error doctrine with an appeal to the court's interest in precedent may better one's chances of getting a waived or forfeited argument reviewed.

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