Appellate Gurus – No Waiver?

Could use some guidance. I know that for most issues, if you haven't raised them in the trial court, you've waived them on appeal. I am familiar with the cases that say that because appellate courts want you to have created a record to argue the issue on appeal.

My question is: is there an opposite to that position? In other words, are there issues that are NOT waived if you don't raise them at the trial court? For example, if a trial court gets the burden of proof issue wrong, can you argue that issue on appeal (especially since it is purely a legal issue not requiring any record)?

Any guidance is appreciated.

Generally speaking… The rule you refer to holds for civil cases only. Under the rule twelve of the rules of civil procedure the issue of subject matter jurisdiction can be raised at any time. Disfavored pretrial motions and motions in limine can be raised because the issue was before the judge for decision and a decision was made. The general question is whether the issue was sufficiently raised so that the judge could make a decision which can be reviewed on appeal. In other words, was the issue preserved?

More specifically, if you have specific facts you should check the law of your jurisdiction which may allow more.

William M. Driscoll, Massachusetts

As far as I know the question whether the trial court lacked jurisdiction is never waived, and can be raised at any stage of the proceedings.

L. Maxwell Taylor, Vermont

Arkansas has an especially oppressive law on preservation so there may be more hope for you than what I'm about to write:

Here, generally arguments on appeal must have been preserved. The limited exceptions that I firmly know about are where the argument is jurisdictional in nature.

There are a lot of jurisdictional arguments you can make, but the top ones I run into are service issues and deadlines.
Otherwise, the issue is waived and the court refuses to rule on it.

In my opinion, if a court thinks the record is unclear, it should remand to more fully develop the record not tell the appellant they are SOL.

In your hypothetical (judge applies the wrong burden of proof), your argument should be preserved. Arguments are preserved (at least, they are here) where:

- Appellant raised the issue below
- The trial court considered it
- The trial court ruled against it

Presumably, burden of proof came up somewhere in the course of the trial.
As long as that happened, it should be preserved.

Anecdote
One time I had a termination of parental rights case. I was brought in after the court adjudged the children were neglected (Dad accused of sexually abusing them). Their appointed counsel never did discovery and never called any witnesses. I raised the issue in a motion for determination that the adjudication hearing was constitutionally meaningless for ineffective assistance of counsel. I asked for a hearing and the judge assured me there would be one. But at the end of the hearing the judge ruled "Parents had counsel present and availed themselves of cross examination. I find the hearing was not constitutionally meaningless." On appeal, the court said the issue of ineffective assistance of counsel was insufficiently preserved for their review.

C'est la vie.

Matthew A. Kezhaya, Arkansas

Thank you, Bill. I do understand that concept and, yes, I'm talking about a civil case. What I'm looking for are cases (preferably in the 9th Circuit) which discuss (beyond subject matter jurisdiction) how and whether certain issues can always be raised on appeal, e.g. absent an objection or motion on the issue in the lower courts. Specifically, I want to be able to argue that the burden of proof issue was simply presumed by the lower courts and the parties and expressed as such in the opinions, but was never challenged, but the judge in the lower court got it wrong based on

faulty assumptions and a misstatement of the law. I want to still be able to argue that issue on appeal and not be precluded because none of the parties challenged it. Thanks.

Robert Thurston

You can always argue it, but it isn't likely to get traction. Appellate courts start with the presumption that the lower court got it right and you have the burden of overcoming that presumption. The appellate court can always consider plain error, abuse of discretion, and lack of due process; each of which are somewhat nebulous and defy precise definition. If an issue wasn't raised in the trial court, it is considered an error of advocating attorney and the appellate court will not provide relief for an error by counsel.

Duke Drouillard, Nebraska

Nevermind, found the case. Here is the law (if any of you ever encounter this similar issue):

An appellate court ordinarily does not review issues raised for the first time on appeal. E.g., Scott v. Ross, 140 F.3d 1275, 1283 (9th Cir.1998); Bolker v. Comm'r, 760 F.2d 1039, 1042 (9th Cir. 1985). However, appellate courts have discretion to review issues not previously raised if "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed."
Pfingston v. Ronan Engineering Co., 284 F. 3d 999, 1004 (9th Cir. 2002) citing Bolker, 760 F.2d at 1042.

Robert Thurston

I'm not sure how an amicus brief might affect this because I haven't done one. But if you're serving as either party's appeal counsel I think you may be bound by the trial counsel's failure to raise that as an issue.

I think that's pretty squarely a preservation problem; maybe waiver if trial counsel said something like "the burden of proof is X because [the supreme court case said so]."

If the judge agreed with trial counsel then you don't get to appeal because your client didn't get an adverse ruling.

This is why all trial counsel should have an appeals partner. Trial counsel usually don't think of appeal rights until it's too late.

Matthew A. Kezhaya

I'll be looking for some similar language, thanks. Good luck on appeal!

Matthew A. Kezhaya

That case law may or may not save you. You should also argue fundamental error.

"'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970).

Here's a link to a Florida Supreme Court case (criminal appeal) where the court found using the incorrect burden of proof constituted fundamental error. http://caselaw.findlaw.com/fl-supreme-court/1218665.html

Now you need to find a case that says the same thing in the civil context.
I won a motion for new trial in a civil case on a similar basis about 20 years ago. I had to argue that the jury instruction (that I submitted) was not a correct statement of the law. I fell on my sword, apologized for leading the court astray, but insisted that the error required a new trial.
The court agreed. Unfortunately, the case is unreported.

Fundamental error is a tough appeal to win. But, if you persuade the court, then you don't even have to show that the error was harmful. Harm is presumed.

Andy Simpson, U.S. Virgin Islands

Awesome, wonderful Andy! Great argument.

Robert Thurston

You correctly articulated the general waiver rule as it applies in most appellate courts. The rationale is not just that the appellate court needs a record to review, but also that a party should not be able to sandbag the trial judge by intentionally not raising an issue at trial and then bringing it up at the appellate level.

In Pennsylvania, to prevent that from happening, there is an appellate rule (Rule 1925) that goes into effect after a Notice of Appeal is filed. It gives the trial court the right to ask the appellant to identify the issues on appeal. The trial judge then has an opportunity to write a Rule 1925 opinion (often a second opinion in the case) that addresses each of the issues. An appellant's failure to raise an issue in the 1925(b) statement of errors will result in a waiver of the issue on appeal.

In most courts, there are very few exceptions to the general waiver rule.
One frequently-cited exception is jurisdiction, which in most courts can be raised at any time, including by the court sua sponte. The reason behind that is the larger policy that courts should not be issuing rulings when they lack jurisdiction to do so. Again, that's just a broad principle.

The example you cite, getting the burden of proof wrong, may be one that you can argue on appeal without worrying about waiver because there may not have been an opportunity to make the argument at trial. A trial court error regarding the burden of proof may not be evident until an opinion is issued. Short of moving for reconsideration, your only way to fix that legal error is by appealing the decision.

Appellate courts are often referred to as error correcting courts. A legal error such as applying the wrong standard is the sort of thing that should be fixed on appeal if it affected the outcome of the case.

Waiver is an issue that is often missed by trial lawyers who handle their own appeals. Appellate lawyers, however, are like bloodhounds looking for waiver. Depending on who you represent, you either love it or hate it. If you represent the appellant, you comb the record like crazy to make sure that every argument you are making on appeal was preserved in the trial court. If you represent the appellee, you are often quietly gleeful when you have a strong argument that the appellant's issue was waived, because it greatly increases the likelihood that you'll win. Appellate courts often look for ways to affirm the trial court and waiver gives them an easy way to affirm.

This is a broad summary of these concepts. I am only licensed in Pennsylvania. You should research the law in your jurisdiction to see how it applies to your case.

Hope this is helpful.

Virginia McMichael, Pennsylvania

Virginia:

Thank you very much. I am also licensed in PA and NJ, but this appeal is in the 9th Circuit (I was brought in specifically for the appeal in a special education law case) and I am stuck with what trial counsel did in the District Court (and also at the administrative level). But I think it was never argued or raised because there is an assumption under a U.S.
Supreme Court case on BOP in special ed cases. I'm trying to argue that the Supreme Court case either doesn't apply or my case should be an exception to the rule. I feel that this should be able to be raised on appeal, even if for the first time, because it goes to the fundamental aspects of the case and the result (long explanation about special ed law specifically I don't want to bore you with here). I think a combination of the exception in the case I outlined as well as Andy's argument on fundamental error are my best shot to keep the argument in. Thanks.

Robert Thurston

If you have Westlaw, you should be able to pull Robert's case, find the right headnote, then search your jurisdiction for cases under that headnote. If you don't have Westlaw, let me know: I can run a quick search and send you a citation list.

Lisa Solomon, New York

You hit on the correct legal proposition. I don't think you even need to go so far as to argue fundamental error.

Lisa Solomon

I don't have Westlaw. I would be incredibly grateful for that list of Arkansas cases.

Matthew A. Kezhaya

Though it depends somewhat on the jurisdiction, the fundamental rule is that you have to raise issues that, had you raised them, could have been easily cured. This is so you don't sandbag your opponent on appeal.

Wendy Lascher, California

I am not an appellate guru, but from the appeals I have done, I do know there are some limited exceptions (pure questions of law or situations in which they had been raised at trial court level would not have made a difference since cannot be waived as a matter of law).

Nick Bowers, New York
