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Trial Litigation from the Appellate Perspective

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Appeals-The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable. La. Code of Civ. Pro. art. 2164.

Because appellate courts can consider only matters that are in the record, a practitioner's pretrial preparation should include plans to develop an advantageous record to ensure success on appeal. Such preparations necessarily include the careful consideration and planning of objections as well as the possibility of applying for supervisory writs when necessary.

Applying for Supervisory Writs with the Court of Appeal

Non-appealable judgments or orders (*e.g*. interlocutory orders) may be reviewed under the appellate court's supervisory writ procedure. La. C.C.P. art. 2201 provides, "[s]upervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction." *See also* La. Const. art. V, § ¶ 10, (A*)* (conferring supervisory appellate jurisdiction to the respective courts of appeal on matters arising within their circuits).

Supervisory writs are typically taken before or during the course of a trial court proceeding and before the trial court issues a final judgment. It is common for litigants to petition a circuit court of appeal to review and/or reverse a trial court's ruling on an exception. A supervisory writ application to the respective courts of appeal must be in conformity with the Uniform Rules Courts of Appeal 4-1. Because

a writ does not deprive the trial court of jurisdiction, litigation often will be ongoing. So, a party seeking supervisory writs may want to consider moving the trial court to stay the proceedings contingent on the appellate court's review. Uniform Rules Courts of Appeal 4-4 provides:

> when an application for writs is sought, further proceedings may be stayed at the trial court's discretion. Any request for a stay of proceedings should be presented first to the trial court. The filing of, or the granting of, a writ application does not stay further proceedings unless the trial court or appellate court expressly orders otherwise.

Look for Irreparable Injury.

Injury is irreparable if, essentially, it cannot be corrected on appeal following a final judgment. Common examples would include:

Improper venue;

Trial by Jury; and

Refusal to order arbitration.

Other candidates for supervisory review would be any issue that meets the familiar criteria set forth in *Herlitz Const. Co., Inc. v, Hotel Investors of New Iberia, Inc.*, 396 S.2d 878 (La. 1981). *Herlitz* specifically provides: "When the overruling of the exception is arguably incorrect, when a reversal will terminate the litigation, and when there is no dispute of fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs should be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits."

NB- The Uniform Rules do not provide a deadline for responding to a writ application. The Fifth Circuit presently does not have a local rule governing when to file an opposition, but it is advisable that if you intend to file a response to a writ application, you immediately telephone the Clerk's Office, inform it of your intention, and establish a deadline for your response.

Appeals Generally

An appeal may be taken from a final judgment whether rendered after a hearing or from a judgment reformed in accordance with remittitur or additur (where the court of appeal may consider the reasonableness of the underlying jury verdict) or a judgment rendered by default. An interlocutory judgment is appealable only when expressly provided by law. La. Code of Civ. Proc. art. 2083.

Appealing a Final Judgment

A final judgment in a case may be appealed. La. C.C.P. art. 2083. A final judgment is one that determines the merits of the case in whole or in part. La. C.C.P. art. 1841. A judgment that determines only preliminary matters is interlocutory. *Ibid*. A final judgment must be signed by the judge, and no appeal can be taken until the judgment is signed.

When confronted with a judgment on appeal that is not final and appealable, the appellate courts are authorized to exercise their discretion to convert the appeal to an application for supervisory writs. However, appellate courts generally will refrain from the exercise of their supervisory jurisdiction if an adequate remedy exists on appeal. For example, an adequate remedy on appeal exists upon the entry of a precise, definite, and certain judgment containing the decretal language necessary for appellate review. For a judgment to contain decretal language, it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. These determinations should be evident from the language of the judgment without reference to other documents in the record.

Appealable Partial Final Judgments

La. C.C.P. art. 1915(A) specifies six types of partial final judgments that are automatically appealable. They are when the court:

> (1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.
>
> (2) Grants a motion for judgment on the pleadings, as provided by Articles 965, 968, and 969.
>
> (3) Grants a motion for summary judgment, as provided by Articles 966 through 969, but not including a summary judgment granted pursuant to Article 966(E).
>
> (4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.
>
> (5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.

(6) Imposes sanctions or disciplinary action pursuant to Article 191, 863, or 864 or Code of Evidence Article 510(G).

If a partial judgment does not fit any of the rubrics of 1915(A), then it is not appealable unless the trial court designates it as final and makes "**an express determination that there is no just reason for delay**." La. C.C.P. art. 1915(B)

Preserving the Issue for Appeal

For an issue to be preserved for review, a party must make a timely objection and state the specific ground for the objection. Failure to contemporaneously object constitutes a waiver of the right to complain on appeal. Further, the reasons for the objection must be brought to the attention of the trial court to allow it the opportunity to make the proper ruling and prevent or cure any error. On appeal, an appellant is limited to the grounds for objection that he articulated in the trial court and a new basis for the objection may not be raised for the first time on appeal.

When planning such objections, always bear in mind the governing standard of review.

Manifest Error or Clearly Wrong

When a trial court's factual findings are based on witness credibility, appellate courts must give great deference to the factfinder's determinations. This means that an appellate court is powerless to set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong.

De Novo

When the appellate court reviews the trial court's findings of fact as if it were the trier of fact, the review is *de novo*.

La. C.C.P. art. 2164 Scope of appeal and action to be taken; costs.

> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

Generally, the failure to object contemporaneously waives the right to complain on appeal. Objecting, alone, is not sufficient to preserve error. The grounds for the objection must be stated. In addition, a party who contends that evidence was improperly excluded must make a proffer of the evidence or will not be heard to complain that exclusion of the evidence in question was erroneous.

Some examples of matters for which an objection must be raised contemporaneously:

1. Grant or denial of a jury trial.

2. Juror bias.

3. Evidentiary issues.

4. Instructing the jury.

5. Objections to opening or closing argument by counsel before the jury.

6. Claimed inconsistencies in the jury's verdict, since the trial court has the ability to take immediate remedial action by sending the jury back for further deliberations or ordering a new trial.

7. Jury interrogatory form or verdict form.

8. Damage award.

9. Matters covered in pretrial orders.

Exceptions

La. C.C.P. art. 1635 Exceptions unnecessary.

> Formal exceptions to rulings or orders of the court are unnecessary. For all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

An exception that subject matter jurisdiction is lacking may be raised at any stage of a proceeding, including at the appellate level. *Colacurcio v. Ledet*, 662 So.2d 65 (La. Ct. App. 4th Cir. 1995). The nonjoinder of a party, peremption, res judicata, the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit, or discharge in bankruptcy, may be noticed by either the trial or appellate court on its own motion. An appellate court's lack of jurisdiction over an appeal based on a party's failure to obtain an order of appeal can be noticed by the court on its own motion at any time. *Snearl v. Mercer*, 780 So. 2d 563 (La. Ct. Ap. 1st Cir. 2001), writ denied, 794 So. 2d 800 (La. 2001).

An exception of prescription is a peremptory exception, which a defendant may raise at any time, including on appeal or after the close of evidence, but prior to the submission of the case after trial. La. C.C.P. arts. 927, 928(B).

La. Civ. Code art. 3452 states that prescription must be pleaded, and courts may not supply a plea of prescription. Additionally, art. C.C.P. 927(B) specifically provides, "[t]he court may not supply the objection of prescription, which shall be specially pleaded."

Proffer:

La. C.C.P. art. 1636 Evidence held inadmissible; record or statement as to nature thereof.

A. When the court rules against the admissibility of any evidence, it shall either permit the party offering such evidence to make a complete record thereof, or permit the party to make a statement setting forth the nature of the evidence.

B. At the request of any party, the court may allow any excluded evidence to be offered, subject to cross-examination: on the record during a recess or such other time as the court shall designate; or by deposition taken before a person authorized by Article 1434 within thirty days subsequent to the exclusion of any such evidence or the completion of the trial or hearing, whichever is later. When the record is completed during a recess or other designated time, or by deposition, there will be no necessity for the requesting party to make a statement setting forth the nature of the evidence.

C. In all cases, the court shall state the reason for its ruling as to the inadmissibility of the evidence. This ruling shall be reviewable on appeal without the necessity of further formality.

D. If the court permits a party to make a complete record of the evidence held inadmissible, it shall allow any other party the opportunity to make a record in the same manner of any evidence bearing upon the evidence held to be inadmissible.

Designating the Record on Appeal:

When the entire record is not needed for your appeal, you can save a lot of time and money by designating only certain items from the record below to constitute the record on appeal. However, the window of time to accomplish this is narrow—three (3) days (excluding holidays) after taking the appeal to file the designation. La. C.C.P. art. 2128. Moreover, art. 2129 requires that where the appellant designates only portions of the record as the record on appeal, he/she/it must serve with the designation a concise statement of the points on which he/she/it intends to rely, and the appeal shall be limited to those points.

Answering the Appeal:

An appellee does not need to answer the appeal unless a modification or reversal of the judgment is sought by appellee, or if the appellee seeks damages for a frivolous appeal. Appellee's answer is equivalent to a cross-appeal from any portion of the judgment rendered against the appellee in favor of appellant. *See* La. C.C.P. art. 2133(A).

Practice Tip: Answering an appeal is not the same as a cross-appeal against a party other than the appellant. In order for an appellee to get relief against a party other than the appellant, the appellee must take his/her/its own appeal.

Requesting Oral Argument:

The lodging of the record triggers the deadline to request oral argument. Within 30 days after lodging, either party may file a request for oral argument. If any party timely requests oral argument, all parties will be allowed to present oral argument. Yet, a party forfeits oral argument if he/she/it fails to file a timely brief. Should no one make a timely request for oral argument, the appeal will be decided on the briefs. *See* Uniform Rule 2-11.4.

Deeper Looks:

A trial court's determinations based on factual findings, are subject to the manifest error standard of review. This means that an appellate court is powerless to set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* at 844. In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Stobart v. State, through Dep't of Transp. and Dev*., 617 So.2d 880, 882 (La.1993). Thus, when there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous. *Id*. at 883.

For an issue to be preserved for review, a party must make a timely objection and state the specific ground for the objection. Failure to contemporaneously object constitutes a waiver of the right to complain on appeal. Further, the reasons for the objection must be brought to the attention of the trial court to allow it the opportunity to make the proper ruling and prevent or cure any error. *Willis v. Noble Drilling (US), Inc*., 11–598 (La.App. 5 Cir. 11/13/12), 105 So.3d 828, 835–36. On appeal, an appellant is limited to the grounds for objection that he articulated in the trial court and a new basis for the objection may not be raised for the first time on appeal. *State v. Grimes*, 09–2 (La.App. 5 Cir. 5/26/09), 16 So.3d 418, 424.

Plaintiff also argues that the trial court failed to control defendants' closing arguments, in which plaintiff complains that defense counsel made prejudicial and inflammatory comments, many times characterizing plaintiff and Mr. Avery as "liars." The record reveals that at no time during closing arguments did plaintiff's counsel object to any arguments or statements made by defense counsel. As in the case of evidentiary matters, objections to statements made during closing argument must be made contemporaneously. Failure to lodge a contemporaneous objection in the trial court waives the right to complain on appeal. *Karagiannopoulos v. State Farm Fire & Casualty Co*., 94–1048 (La.App. 5 Cir. 11/10/99), 752 So.2d 202, 209.

Valid Final Judgments

A valid judgment must be "precise, definite, and certain." *Laird v. St. Tammany Parish Safe Harbor*, 2002-0045 (La. App. 1 Cir. 12/20/02), 836 So.2d 364, 365. Moreover, a final appealable judgment must contain decretal language, and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. Carter v. Williamson Eye Center, 2001-2016 (La. App. 1 Cir. 11/27/02), 837 So.2d 43, 44. These determinations should be evident from the language of the judgment without reference to other documents in the record. Laird, 836 So.2d at 366.

Appealable Judgments

To preserve an issue for appeal, counsel must raise it in a manner permitting the court at trial to rule on it. Notably, an issue raised on motion for summary judgment is not properly preserved for appeal where summary judgment is denied and the issue is not raised again at the trial court level. *Massey v. Decca Drilling Co., Inc*., 647 So. 2d 1196 (La. Ct. App. 2d Cir. 1994), *writ denied*, 653 So. 2d 563 (La. 1995) and *writ denied*, 653 So. 2d 564 (La. 1995).

However, in some instances courts have cited the language in C.C.P. art. 2164 giving the appellate court authority to render any judgment "which is just, legal, and proper upon the record on appeal" as authority to address an issue on appeal despite the appellant's failure to specifically raise the issue in the trial court. *See First Bank & Trust v. Bayou Land and Marine Contractors, Inc*., 103 So. 3d 1148 (La. Ct. App. 5th Cir. 2012)(court of appeal had authority to address on appellant's challenge to trial court's denial of his motion to annul default judgment against him the issue of whether the judgment was a nullity on the basis that he had not received notice of the preliminary judgment of default against him, though appellant had failed to specifically raise this issue in the trial court, where the trial court committed an error of law in confirming the judgment of default against appellant). One such court noted an official comment to Article 2164 which recited the purpose of the Article as giving the appellate court "freedom to do justice on the record irrespective of whether a particular legal point or theory was made, argued, or passed on by the court below." *First Bank & Trust v. Bayou Land and Marine Contractors, Inc*., 103 So. 3d 1148, n.3 (La. Ct. App. 5th Cir. 2012), quoting official comment (a) to Article 2164).

Objecting to Preserve the Issue for Appeal

Generally, the failure to object contemporaneously waives the right to complain on appeal. *Brister v. Continental Ins. Co*., 712 So. 2d 177 (La. Ct. App. 2d Cir. 1998); *Territo v. Schwegmann Giant Supermarkets, Inc*., 662 So. 2d 44 (La. Ct. App. 5th Cir. 1995), writ denied, 664 So. 2d 445 (La. 1995). Objecting, alone, is not sufficient to preserve error. The grounds for the objection must be stated. *Hasney v. Allstate Ins. Co*., 781 So. 2d 598 (La. Ct. App. 4th Cir. 2001); *Osborne v. Ladner*, 691 So. 2d 1245 (La. Ct. App. 1st Cir. 1997); *Martinez v. Soignier*, 570 So. 2d 23 (La. Ct. App. 3d Cir. 1990), writ denied, 572 So. 2d 94 (La. 1991). In addition, a party who contends that evidence was improperly excluded must make a proffer of the evidence or will not be heard to complain that exclusion of the evidence in

question was erroneous. *Hurts v. Woodis*, 676 So. 2d 1166 (La. Ct. App. 1st Cir. 1996); *Osborne v. Ladner*, 691 So. 2d 1245 (La. Ct. App. 1st Cir. 1997).

Some examples of matters for which an objection must be contemporaneously made:

1. **Grant or denial of a jury trial**. *Holmes v. Peoples State Bank*, 796 So. 2d 176 (La. Ct. App. 2d Cir. 2001), *writ denied*, 808 So. 2d 342 (La. 2002) (must complain prior to trial, either by application for writs or other appropriate means).

2. **Juror bias**. *Joseph v. Archdiocese of New Orleans*, 52 So. 3d 203 (La. Ct. App. 4th Cir. 2010) (motorist did not preserve for appeal argument that jurors were biased in his action against another motorist, where record did not contain transcript of the voir dire of potential jurors).

3. **Evidentiary issues**. *Frost v. Carter*, 140 So. 3d 59 (La. Ct. App. 4th Cir. 2014); *Guidry v. City of Rayne Police Dept*., 26 So. 3d 900 (La. Ct. App. 3d Cir. 2009) (claim by motorist, who was injured when his car was struck by a police patrol car being driven by a police officer, that the trial court erred in allowing the statements of the paramedics on the scene of the accident to be admitted into evidence was not properly preserved since the motorist failed to object at trial to the paramedics' statements, which were attached to the trooper's investigative report which was submitted into evidence, and therefore, it was not before the appellate court for review); *West v. G & H Seed Co*., 832 So. 2d 274 (La. Ct. App. 3d Cir. 2002) (hearsay); *Woods v. Cameco Industries, Inc*., 815 So. 2d 370 (La. Ct. App. 1st Cir. 2002) (error on ruling admitting evidence cannot be availed of on appeal unless a substantial right of the party is affected and a timely, contemporaneous objection is made stating the ground of the objection); *Kose v. Cablevision of Shreveport*, 755 So. 2d 1039 (La. Ct. App. 2d Cir. 2000), *writ denied*, 764 So. 2d 964 (La. 2000) and *writ denied*, 765 So. 2d 340 (La. 2000); *Achee v. National Tea Co*., 686 So. 2d 121 (La. Ct. App. 1st Cir. 1996).

Defendants failed to preserve for appellate review their claim that court erred in overruling their objection to examination of medical review panel physician on opinions from a pediatric infectious disease specialist regarding the effect of the administration of antibiotics, where defendants failed to object at trial when plaintiff's counsel asked the physician whether he had any reason to disagree with

the opinion given by the infectious disease specialist. *Etcher v. Neumann*, 806 So. 2d 826 (La. Ct. App. 1st Cir. 2001), *writ denied*, 817 So. 2d 105 (La. 2002).

Injured tavern patron failed to preserve for review on appeal challenge to trial court's *sua sponte* release from subpoena owner of property where tavern was located, where patron failed to object to trial court's releasing of owner and acquiesced to trial court's alleged ruling in chambers to introduce property owner's deposition testimony. *Luminais v. O.R.S.T. Inc*., 951 So. 2d 1200 (La. Ct. App. 5th Cir. 2007).

Injured driver failed to preserve for appellate review his contention that the trial court erred, in the trial on his negligence claims, by permitting testimony on a page from a social networking website that was not previously listed in defendants' witness and exhibit list, where the driver failed to make a contemporaneous objection at the time of the testimony. *Mouton v. Old Republic Ins. Co*., 74 So. 3d 1245 (La. Ct. App. 3d Cir. 2011).

Admissibility of the excluded testimony and the revised version of the report showing instances when natural gas provided by the gas supplier was turned on without authority was not properly before the reviewing court on appeal of a judgment finding the supplier liable for the victims' injuries from a gas explosion, given that the supplier failed to proffer the excluded testimony or report. *Jones v. Centerpoint Energy Entex*, 66 So. 3d 539 (La. Ct. App. 3d Cir. 2011).

The Department of Transportation and Development (DOTD) failed to preserve for appeal the argument that certain maintenance records for the highway were prejudicial and should not have been admitted in the truck driver's action against the DOTD alleging that a defective roadway was the cause of a vehicle accident, where the DOTD failed to make a contemporaneous objection when the documents were introduced. *Vestal v. Kirkland*, 81 So. 3d 748 (La. Ct. App. 3d Cir. 2011).

The Department of Transportation and Development's failure to offer more than a generalized statement regarding the proffer of a witness' testimony in support of a force majeure defense, and its failure to actually produce the deposition of the witness whose testimony was excluded resulted in the inability of the court of appeals to review an issue on appeal in a class action brought by property owners seeking damages for flooding allegedly caused by a road built by the department. *Boudreaux v. State, Dept. of Transp. and Development*, 780 So. 2d 1163 (La. Ct. App. 1st Cir. 2001), writ granted, 794 So. 2d 804 (La. 2001) and *writ dismissed*, 815 So. 2d 7 (La. 2002).

The failure to allege informed consent in the pleadings precluded plaintiffs from exploring this issue during cross-examination. Their failure to proffer evidence that defendant physician failed to seek decedent's informed consent by not discussing the risks of not being hospitalized precluded plaintiffs from complaining of the exclusion of the witness's testimony on appeal. *Magee v. Pittman*, 761 So. 2d 731 (La. Ct. App. 1st Cir. 2000), *writ denied*, 768 So. 2d 602 (La. 2000) and *writ denied*, 768 So. 2d 31 (La. 2000); *Murphy v. 1st Lake Properties, Inc*., 116 So. 3d 964 (La. Ct. App. 5th Cir. 2013), *writ not considered*, 124 So. 3d 1088 (La. 2013) (injured apartment resident visitor failed to preserve for appellate review (1) claim that adequate foundation was not laid for documents used to show her witness' bias and inconsistent statements, where objection to exhibits at trial was only that documents were not relevant because the witness was not party to the litigation nor a witness to the accident, (2) claim that trial court improperly "bifurcated" an exhibit by separating the apartment complex's incident report of visitor's fall down an exterior stairwell from photographs of the stairwell, where she raised no objection to introduction of the exhibit, and (3) challenge to admission of exhibit with respect to previous lawsuit she filed arising out of different accident, based on alleged lack of foundation, where objection at trial was that evidence was not relevant to impeach her credibility after visitor denied having knowledge of prior lawsuit).

Automobile insurer waived for appellate review its claim that insurance policy was not introduced into evidence at bench trial, where insurer did not raise issue of insurance coverage at trial, insurer did not object to introduction into evidence of letters it sent to insurer acknowledging existence of "flood damage" insurance coverage, and insurer argued in trial court that damage to automobile was not flood-related. *Jacobs v. GEICO Indemnity Company*, 256 So. 3d 449 (La. Ct. App. 2d Cir. 2018).

4. **Instructing the jury**.

Guilbeaux v. Housing Authority of City of Opelousas, 978 So. 2d 1132 (La. Ct. App. 3d Cir. 2008), writ denied, 983 So. 2d 898 (La. 2008) (appellate court would not consider claim by plaintiff former executive director of city housing authority, who had brought suit against housing authority relating to termination of his employment, that trial court should have instructed jury on applicability of statutes barring a public body from taking binding action in executive session, where plaintiff failed to object before jury retired to deliberate or immediately after jury was instructed by trial court and, instead, acquiesced when the trial court informed attorneys at jury charge

conference that instruction on the statutes would not be given, he failed to object when court circulated final jury instructions among parties, and he did not attempt to raise the issue until his post-trial memorandum after jury reached a verdict);

Hebert v. Old Republic Ins. Co., 807 So. 2d 1114 (La. Ct. App. 5th Cir. 2002)(motorist could not object to improper jury charges where he failed to do so at time of judge's ruling on jury charges);

Quebedeaux v. Dow Chemical Co., 809 So. 2d 983 (La. Ct. App. 1st Cir. 2001), judgment rev'd in part, 820 So. 2d 542 (La. 2002) (employer's failure to object to jury instructions precluded him from raising issues for first time on appeal);

Abshire v. Wilkenson, 787 So. 2d 1158 (La. Ct. App. 3d Cir. 2001) (driver precluded from raising claims that trial court erred by failing to charge jury that tortfeasor and insurer were solidarily liable and by charging jury that it could consider the force of the collision, where driver failed to object to trial court's inclusion or failure to include the charges either prior to or immediately after the jury retired to deliberate);

Fusilier v. Dauterive, 779 So. 2d 950 (La. Ct. App. 3d Cir. 2001) (plaintiffs abandoned issue of loss of consortium by failing to request jury instructions on the issue); *Pate v. Skate Country, Inc*., 682 So. 2d 288 (La. Ct. App. 4th Cir. 1996); *Delaney v. Whitney Nat. Bank*, 703 So. 2d 709 (La. Ct. App. 4th Cir. 1997), *writ denied*, 715 So. 2d 1211 (La. 1998).

Article 1793(C) of the Code of Civil Procedure governing the assignment of error for the failure to give a jury instruction requires that the litigant object to the refusal to give each special charge and state the grounds for the objection. *Etcher v. Neumann*, 806 So. 2d 826 (La. Ct. App. 1st Cir. 2001), *writ denied*, 817 So. 2d 105 (La. 2002).

However, contemporaneous objection requirement may not be necessary where there is plain, fundamental error. *Abney v. Smith*, 35 So. 3d 279 (La. Ct. App. 1st Cir. 2010) (Department of Transportation and Development (DOTD) was not required to preserve its right to appeal verdict form pursuant to statute that required a party to object to a jury instruction before the jury retired, in driver and passenger's actions against DOTD for damages arising from vehicular accident; interrogatories and supplemental instruction provided by the trial court on the issue of whether the jury had to assess damages in favor of each of the plaintiffs misstated the law and contained a plain and fundamental error that allowed the relaxation of the contemporaneous objection requirement);

Berg v. Zummo, 786 So. 2d 708 (La. 2001) (bar not precluded from raising on appeal issue of whether jury improperly assessed punitive damages against it, even though bar failed to object to jury instructions or special jury interrogatories regarding punitivide damages, where instructions and interrogatories regarding punitive damages misstated law*); Kose v. Cablevision of Shreveport*, 755 So. 2d 1039 (La. Ct. App. 2d Cir. 2000), *writ denied*, 764 So. 2d 964 (La. 2000) and *writ denied*, 765 So. 2d 340 (La. 2000).

Note also that it is only when jury instructions or interrogatories contain a plain and fundamental error that the contemporaneous objection requirement is relaxed and appellate review is not prohibited. *Warner v. USAA General Indemnity Insurance Company*, 237 So. 3d 1241 (La. Ct. App. 5th Cir. 2017).

What the court of appeal is looking for to adequately preserve the issue for review is an objection to the final verdict form and a specific statement of how the form was inadequate, incomplete, or insufficient. *Warner v. USAA General Indemnity Insurance Company*, 237 So. 3d 1241 (La. Ct. App. 5th Cir. 2017).

Franchisees did not preserve for appeal their argument that the portion of the jury instruction on detrimental reliance was misleading, even if the franchisees objected to a supplemental jury charge on the same issue, where the franchisees did not object to the specific part of the instruction complained of on appeal. *Glod v. Baker*, 998 So. 2d 308 (La. Ct. App. 3d Cir. 2008), *writ denied*, 1 So. 3d 497 (La. 2009). *See Howell v. Union Pacific R. Co.*, 980 So. 2d 854 (La. Ct. App. 3d Cir. 2008), writ not considered, 992 So. 2d 975 (La. 2008) (appellants failed to preserve for appellate review in negligence action their claim that trial court erred in failing to give certain jury instructions that were proposed by appellants, although appellants objected to failure to give proposed instructions at conclusion of trial, where appellants did not inform trial court of grounds for objection).

For examples of cases finding failure to preserve trial court's failure to give requested jury instruction, *see: Warner v. USAA General Indemnity Insurance Company*, 237 So. 3d 1241 (La. Ct. App. 5th Cir. 2017).

A worker, who was injured in an accident that occurred when a truck operator pulled away from the loading dock while the worker was on the forklift in the back of the truck, causing him to fall several feet out of the back of the truck to the concrete pavement, waived appellate review of the argument, made for the first time on appeal, that jury instructions on mitigation were incomplete and misleading, in his personal injury action against the truck owner and operator, where the worker made

no objection to the jury instruction regarding mitigation. *Thomas v. Boyd*, 51-621 (La. App. 2 Cir. 11/15/17, 2017) WL 5474113 (La. Ct. App. 2d Cir. 2017).

The driver of the second vehicle and his employer waived for appellate review any objections to jury instructions on causation or the jury verdict form in the motorist's personal injury action against them for injuries sustained to his back during the automobile accident, where counsel for the driver and employer participated in an extensive jury charge conference, during which no objections on the issue of causation were made by counsel, on the final day of trial, the trial court asked whether counsel wanted one last look at the instructions to see if there were any other edits to be made, to which there was no response, there were no objections to the instructions or jury verdict form noted in the record, and, even after the jury retired to deliberate, counsel voiced no objections to the instructions or form. *Kennedy v. Davis*, 229 So. 3d 558 (La. Ct. App. 3d Cir. 2017).

5. Objections to opening or closing argument by counsel before the jury.

Cooper v. United Southern Assur. Co., 718 So. 2d 1029 (La. Ct. App. 1st Cir. 1998).

6. Claimed inconsistencies in the jury's verdict.

The trial court has the ability to take immediate remedial action by sending the jury back for further deliberations or ordering a new trial. *Morris v. United Services Auto. Ass'n*, 756 So. 2d 549 (La. Ct. App. 2d Cir. 2000).

7. Jury interrogatory form or verdict form.

Gonzalez v. Government Employees Ins. Co., 32 So. 3d 919 (La. Ct. App. 5th Cir. 2010); *Arrington v. Galen-Med, Inc*., 838 So. 2d 895 (La. Ct. App. 3d Cir. 2003); *Hebert v. Old Republic Ins. Co*., 807 So. 2d 1114 (La. Ct. App. 5th Cir. 2002); *Kose v. Cablevision of Shreveport*, 755 So. 2d 1039 (La. Ct. App. 2d Cir. 2000), *writ denied*, 764 So. 2d 964 (La. 2000) and *writ denied*, 765 So. 2d 340 (La. 2000).

It is only when jury instructions or interrogatories contain a plain and fundamental error that the contemporaneous objection requirement is relaxed, and appellate review is not prohibited. *Campbell v. Hospital Service Dist. No. 1 Caldwell Parish*, 862 So. 2d 338 (La. Ct. App. 2d Cir. 2003), *writ denied*, 869 So. 2d 852 (La. 2004).

State Patient's Compensation Fund failed to preserve for appellate review claim that trial court erred in not having jury determine actual cost of future medical care in medical malpractice action where fund did not lodge contemporaneous objection to

jury verdict form. *Blocker v. Rapides Regional Medical Center*, 862 So. 2d 1220 (La. Ct. App. 3d Cir. 2003), *writ denied*, 871 So. 2d 351 (La. 2004).

Unobjected-to jury interrogatory in a negligence action, answered by the jury in the negative, as to whether an accident had occurred on or about a particular date, and whether, if an accident occurred, the accident injured plaintiff, contained a plain and fundamental error such that the court of appeal would give no weight to the jury's verdict; the court of appeal could not determine what facts the jury actually found, and it could not be determined from the record if nine of the 12 jurors concurred on any finding of fact, as necessary to render a verdict. *Bourque v. Essex Ins. Co.*, 2011-587 La. App. 3 Cir. 3/14/12, 2012 WL 832748 (La. Ct. App. 3d Cir. 2012).

8. **Constitutional questions.**

Council of City of New Orleans v. Washington, 9 So. 3d 854 (La. 2009) (on appeal from district court's decision granting city council's request for preliminary injunction, enjoining managing director of justice institute and the institute from transferring e-mail communications of council members to any other person, appellate court erred when it reached director's and institute's constitutional arguments that the district court's decision violated their rights under the First Amendment, given that director and institute raised constitutional issue for first time in appellate court and no particularized constitutional claims were pleaded in the district court, nor was any record developed on this issue in the district court);

Perez v. Trahant, 806 So. 2d 110 (La. Ct. App. 1st Cir. 2001), *writ denied*, 823 So. 2d 953 (La. 2002) (legal malpractice statute of limitations);

St. Pierre v. Louisiana S.W. Transp., Inc., 14 So. 3d 593 (La. Ct. App. 5th Cir. 2009) (appellate court's order permitting widow to file motion, which asserted that statute granting immunity to state and their employees and agents for operational activities related to Hurricane Katrina was unconstitutional as applied, was improvidently granted by court on widow's appeal of summary judgment in wrongful death action, where issue was not properly raised in district court, and exceptions to rule requiring litigants to raise constitutional attacks in trial court, not appellate courts, did not apply);

Louisiana Hand & Upper Extremity Institute, Inc. v. City of Shreveport, 781 So. 2d 695 (La. Ct. App. 2d Cir. 2001) (revised zoning ordinance resulted in unconstitutional taking).

Claim by taxpayers that city ordinances, which established a registry of domestic partnerships and extended health insurance coverage and benefits to unmarried domestic partners of city employees, violated the Defense of Marriage Act provision in the Louisiana Constitution was not before the appellate court, where such claim was not raised by petition, answer or exception, and was not served on the attorney general as required by statute. *Ralph v. City of New Orleans*, 4 So. 3d 146 (La. Ct. App. 4th Cir. 2009).

9. Argument that a party was allowed an inadequate number of peremptory challenges is waived if not raised at trial or in brief before court of appeal.

Abadie v. Metropolitan Life Ins. Co., 784 So. 2d 46 (La. Ct. App. 5th Cir. 2001), *writ denied*, 804 So. 2d 642 (La. 2001) and *writ denied*, 804 So. 2d 643 (La. 2001) and *writ denied,* 804 So. 2d 644 (La. 2001).

10. Argument that loss of consortium claims were barred by immunity provisions of Louisiana law could not be considered by appellate court, where issue was not briefed below and there was no reference to spouse's loss of consortium claims in denial of summary judgment from which insurance company appealed. *Coates v. Anco Insulations, Inc*., 786 So. 2d 749 (La. Ct. App. 4th Cir. 2001).

11. Grounds of defense.

Affirmative defenses must be specifically pleaded or are waived on appeal. *White v. City of New Orleans*, 806 So. 2d 675 (La. Ct. App. 4th Cir. 2001).

Children of deceased father could not raise issues of whether father's wife was father's agent or mandatary or whether father made donations to wife that were invalid in conversion action against wife for first time on appeal, even though children raised the issues in a post-trial rebuttal memorandum, where the children failed to present issues in a petition or supplemental petition presented to the trial court. *Crawford v. Reagan*, 779 So. 2d 1116 (La. Ct. App. 2d Cir. 2001).

In building contract actions, defenses regarding defects in the manner in which a general contractor notified a subcontractor of default cannot be raised for the first time on a subcontractor's appeal of a judgment for a general contractor. *Gootee Const., Inc. v. Amwest Sur. Ins. Co.*, 781 So. 2d 792 (La. Ct. App. 5th Cir. 2001), *writ denied*, 792 So. 2d 739 (La. 2001). Claims that a federal suit interrupted prescription. *Aetna Cas. and Sur. Co. v. Stewart Const. Co., Inc*., 780 So. 2d 1253

(La. Ct. App. 5th Cir. 2001). *See Treen Const., Inc. v. Reasonover*, 30 So. 3d 933 (La. Ct. App. 5th Cir. 2009)(estoppel).

The supreme court would not consider assertion of testator's mother that her legal malpractice petition against attorney who drafted will, which petition was basis for attorney's defamation claim, was protected by a qualified privilege, where mother failed to plead affirmative defense of privilege in trial court and raised the issue for the first time on appeal. *Costello v. Hardy*, 864 So. 2d 129 (La. 2004).

12. Damage award.

Etcher v. Neumann, 806 So. 2d 826 (La. Ct. App. 1st Cir. 2001), *writ denied*, 817 So. 2d 105 (La. 2002) (appellate court could not consider plaintiff's claim that damage award was low where plaintiff failed to file an answer to appeal or cross-appeal).

Whether a promissory note holder failed to mitigate her damages by refusing the maker's tendered payments was not an issue the maker raised in the trial court in pleadings, in opposition to the motion for summary judgment, or in a motion for a new trial, and, therefore, the issue was not preserved for consideration on appeal. *Warner v. Alex Enterprises, Inc.*, 4 So. 3d 922 (La. Ct. App. 4th Cir. 2009).