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PRESERVATION OF ERROR FOR APPEAL: PRE-TRIAL, TRIAL, AND POST-TRIAL CONSIDERATIONS

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Failure to properly preserve error at the trial court level will usually be fatal to appellate review, at least on the point not preserved, except in the very rare circumstances such as where there is "plain error."[1] Unfortunately, it is not always apparent how error should be preserved on the record in order to afford proper review. This paper provides an overview of the methods of, and requirements for, preserving error in various pre-trial, trial, and post-trial scenarios.[2]

Pre-trial proceedings

Motions: In order to seek appellate review of pre-trial proceedings, there must be some record from which the appellate court can determine the relief that was sought in the motion or request and determine precisely the ruling of the court. Generally, this requires the entry (meaning filing with the clerk) of a written order of the court granting or denying the relief.[3] If the court's order was made based on an oral motion, a party so moving or objecting should attempt to place on the transcript record the basis for its request or opposition sufficient to demonstrate

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1 See generally McFadden, Georgia Appellate Practice, § 9:5.

2 The author recommends, for further discussion of preservation of error, Judge Christopher McFadden's Georgia Appellate Practice (particularly chapter 9).

3 Titelman v. Stedman, 277 Ga. 460, 460-61 591 S.E.2d 774 (2003). But see State v. Morrell, 281 Ga. 152, 635 S.E.2d 716 (2006) (oral order may be appealable so long as it appears somewhere in record).

that it properly preserved the issue for appeal and did not acquiesce to the ruling or waive the argument. A motion for reconsideration of a written order made in response to an oral motion may be prudent to ensure there is no argument of waiver or consent raised later. Motions in limine, which are technically pre-trial actions though they are often considered just before trial or even after the picking of a jury, are discussed in the following section since the evidentiary issues upon which they are filed often arise at trial.

In some cases, a valid argument regarding the trial court's grant or denial of a motion will be disregarded on appeal because it was not raised below. Although the "right for any reason" rule will allow an appellate court to uphold the grant of a motion even if the specific basis argued by the moving party below did not support that result, this will not protect a party seeking to reverse such a ruling based on a novel argument on appeal, as there is no corresponding "wrong for any reason rule."[4] The general rule is that where an argument is advanced on appeal for the first time, it will not be considered, even though it may be meritorious and otherwise demand reversal.[5] The dissent in *Pfeiffer v. Ga. DOT* demonstrates that this area of law is not entirely clear, and subsequent cases reveal varying results in the application of this rule.[6] Although many attorneys decline to have an oral argument taken down by a court reporter where no evidence is introduced at the

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4 Heard v. City of Villa Rica, 306 Ga. App. 291, 293-94, 701 S.E.2d 915 (2010).
5 Pfeiffer v. Ga. DOT, 275 Ga. 827, 828-29 573 S.E.2d 389 (2002).
6 Pfeiffer v. Ga. DOT, 275 Ga. 827, 830, 573 S.E.2d 389 (2002). See also Procter v. Gwinnett Pulmonology Group, P.C., 312 Ga. App. 486, 718 S.E.2d 860 (2011).

hearing, the transcript may reveal arguments presented that were not specifically raised in the party's brief that would serve to preserve those argument for appellate review.[7]

Depositions: Since no judge is present at depositions, these proceedings merit special consideration. O.C.G.A. § 9-11-30 states that all objections be recorded by the court reporter so that they can be later reviewed. The Civil Practice Act provides that objections to the deposition notice are waived unless made promptly upon the receipt of that notice.[8] Similarly, any objections to the qualifications of the court reporter, to the manner in which the deposition is taken, or to the oath or affirmation are waived if not made upon discovery.[9] But objections to "competency of a witness or to the competency, relevancy, or materiality of testimony" are not generally waived by the failure to assert them at the deposition.[10]

With respect to the actual testimony taken, parties usually stipulate that objections as to the form of the question or responsiveness of the answer will be reserved until the first use of the deposition in court. This is consistent with O.C.G.A. § 9-11-32 (d)(3)(B), which provides, in pertinent part, that "[e]rrors and irregularities occurring at the oral examination [. . .] in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented are waived

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7 Pfeiffer v. Ga. DOT, 275 Ga. 827, 829, 573 S.E.2d 389, fn. 11 (2002).
8 O.C.G.A. § 9-11-32 (d)(1).
9 O.C.G.A. §§ 9-11-32 (d)(2) and (d)(3)(B).
10 O.C.G.A. § 9-11-32 (d)(3)(A).

unless seasonable objection thereto is made at the taking of the deposition."

The question is often raised as to what constitutes an "objection to form." Unfortunately, Georgia case law does not offer a great deal of guidance on this issue. Given that the statutory waiver under O.C.G.A. § 9-11-32 (d)(3)(B) is broad enough to encompass any issue at the deposition that could be corrected at the time of taking, counsel, while being mindful not to interrupt the proceedings with dilatory interjections (or "speaking objections") during the testimony,[11] should be careful to raise any objection that might result in a changing of the question or the answer based on a poorly asked or misunderstood question. In the few Georgia cases dealing with this issue, it has been held that hearsay objections are not waived by failure to make them at the time of the testimony,[12] while an objection to an attorney's question that allegedly misstated the proper standard of medical causation was deemed to be an objection to form and thus waived.[13] It has also been held that a party's failure to object to an expert witness's qualifications to opine as to medical causation constituted a waiver, since it believed that any lack of qualification or competency could have been remedied had the objection been made.[14] Thus, while perhaps not an absolute rule, a party's failure to object to a witness based on his or her lack of qualification or foundation may well serve to waive any such objection at trial.

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[11] See Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525 (E.D. Pa. 1993).
[12] Bryant v. Food Giant, 184 Ga. App. 155, 361 S.E.2d 38 (1987).
[13] Haynes v. McCambry, 203 Ga. App. 464, 468, 416 S.E.2d 893 (1992).
[14] Jones v. Scarborough, 194 Ga. App. 468, 390 S.E.2d 674 (1990); Andean Motor Co. v. Mulkey, 251 Ga. 32, 302 S.E.2d 550 (1983).

As a general principle, when an objection is made at a deposition, the deponent is allowed to answer subject to that objection.[15] In some circumstances, such as in response to questions touching on particularly sensitive or inappropriate matters, or matters that are alleged to be protected by a privilege, the party may decline to respond, sometimes at the advice of counsel. In those circumstances, the response should be noted on the record and may be subject to a motion to compel should the asking party wish to pursue the question further.

Where a deposition is taken for the purpose of preservation of evidence, the general practice is that the parties modify the usual rule of reserving objections to require that all objections be made on the record at the time of taking. There does not appear to be any statutory or case law governing this practice, however, and thus a party could decline such an agreement and the deposition would presumably continue under the standard reservation rules set forth above. Where a video deposition is taken, a common and helpful practice is for the attorneys to agree to raise a hand prior to making an objection so that the objections can be taken off of the video record, which serves to simplify the task of editing the video for trial. Objections that are made on the record but later waived, as is common, can thus be disregarded without editing since the objections are not on video.

In any case where objections are reserved, those objections must usually be raised at the first use of the deposition. Therefore, technically, a party may be

[15] O.C.G.A. § 9-11-30 (c)(2).

deemed to have waived the right to object to portions of depositions at trial if the deposition transcript was used in connection with a motion for summary judgment or other pre-trial proceeding. Therefore, the better practice is to review depositions the first time they are used for any objections and to assert those, whether in open court (on the record) or in a filing noting those objections.

When a deposition is used for trial, a designation of deposition excerpts should be filed on the record so that it is clear what was actually entered into evidence. Usually, a video deposition is not re-transcribed during trial, and the same is often true of transcripts that are simply read into the record. Without something in the record, whether a formal written and filed designation of pages and line numbers of those portions presented, or an oral statement on the record to the same effect, an appellate court has no way to know what evidence was presented. Because counsel may forget to make an oral announcement of excerpts, or it may be mistranscribed or simply misstated by the attorney, the better practice is to file a formal written designation to remove any possible doubt as to the evidence.

Trial

Motions in limine: A motion in limine may be made either in writing or orally.[16] But any hearing on the motion should be on the record, and, to the extent

[16] See, e.g., Reno v. Reno, 249 Ga. 855, 295 S.E.2d 94 (1982) (oral motion).

that any factual matters are considered in the trial court's ruling on the motion, the lack of a transcript may result in a presumption that the facts supported the ruling.[17] The general rule is that a party alleging error as to the granting or denial of a motion in limine need not raise a further objection at trial when the evidence either comes in or the party believes it should be admitted. But counsel should be careful to recognize that the preservation of error as to a motion in limine can be waived or lost based on conduct at trial.[18]

If the court has granted a motion in limine, no further action is generally required to preserve the right to appeal the opposing party's introduction of evidence in violation of the granted motion.[19] The Supreme Court has recently ruled that where the party moving successfully in limine has opened the door as to the evidence sought to be excluded, violation of the motion by the opponent will not be grounds for a reversal.[20] It is possible that a court could rule that the plaintiff's act of answering a prohibited question on cross-examination, even if the question was improper to begin with, may constitute opening the door. It may, therefore, be prudent to object to any line of questioning that could result in a witness discussing the prohibited evidence in order to ensure that there is no waiver argument made at

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17 Studard v. Department of Transp., 219 Ga. App. 643, 466 S.E.2d 236 (2002). It should be noted, however, that this holding was based largely on a presumption that public employees were following the law.

18 See generally Paul S. Milich, Ga. Rules of Evidence § 3:6.

19 Reno v. Reno, 249 Ga. 855, 295 S.E.2d 94 (1982).

20 CSX Transp., Inc., v. Smith, 289 Ga. 903, 717 S.E.2d 209 (2011).

the appellate level.[21]

The party opposing a motion in limine that is ultimately granted does not need to attempt to introduce the prohibited evidence or draw the court's attention to the objection at trial in order to argue error before the appeals court on the propriety of that evidence being presented, assuming that the opposition to exclusion is documented in the record from the time it was raised.[22] If the court denies a party's motion in limine, there is no need to re-object at trial when the evidence that the party sought to keep out is introduced.[23] But if an attorney, having moved unsuccessfully in limine for exclusion of evidence, states at trial that there is no objection to the evidence, the objection made in limine will be waived.[24] Finally, the revised version of O.C.G.A. § 24-1-103, effective January 1, 2013, expressly provides that "[o]nce the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal."

Voir Dire: Counsel often elect not to have voir dire transcribed in order to save on expenses, but without a record of the jury selection process there is no way to review whether a ruling on juror exclusion was in error. Jurors may be excluded from a number of reasons, including failure to properly qualify as jurors (e.g., they are not actually residents of the county in which the trial is being held or are felons

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21 *Id.*
22 Automated Print, Inc., v. Edgar, 288 Ga. App. 326, 654 S.E.2d 413 (2007).
23 Harley-Davidson Motor Co. v. Daniel, 244 Ga. 284, 260 S.E.2d 20 (1979).
24 See, e.g., Givens v. State, 281 Ga. App. 370, 636 S.E.2d 94 (2006).

convicted of certain offenses), or having a relationship with a party or personal views that would bias their decision-making.[25] O.C.G.A. § 15-12-133 provides for the right to individual examination of jurors in order to discovery any such bias, while O.C.G.A. §§ 15-12-120 through 142 cover the selection process generally. The judge will generally ask counsel whether there are any challenges for cause outside the presence of the jury after individual questioning.[26] But a court is not required to strike a juror for cause sua sponte, and therefore it is essential that counsel raise the objection and articulate the basis thereof as thoroughly as possible.[27] The right to examination itself is just that – a right – and is not subject to the judge's discretion. Therefore, denial of the right is reversible error, but counsel should make an objection to the denial of examination, or the denial of the right to inquire into a particular area, on the record.[28] It is worth considering that a judge may be more likely to allow a more thorough inquiry if she knows that voir dire is being transcribed and thus could be subject to appellate review.

Although O.C.G.A. § 15-12-133 provides that

> counsel for either party shall have the right to inquire of the individual prospective jurors examined touching any matter or thing which would illustrate any interest of the prospective juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the prospective juror with the parties or

[25] See generally Ruskell, Davis and Shulman's Georgia Practice and Procedure, §§ 20:5 through 20:12.
[26] See, e.g., Elliott v. Home Depot U.S.A., Inc., 275 Ga. App. 865, 622 S.E.2d 77 (2005).
[27] Phillips v. State, 275 Ga. 595, 571 S.E.2d 361 (2002).
[28] Thomas v. State, 247 Ga. 7; 273 S.E.2d 396 (1961) (motion for further examination made on record).

> counsel therefor, any fact or circumstance indicating any inclination, leaning, or bias which the prospective juror might have respecting the subject matter of the action or the counsel or parties thereto, and the religious, social, and fraternal connections of the prospective juror,

within those guidelines the trial judge has discretion to allow or disallow particular questions, which will not be disturbed absent manifest abuse.[29] If counsel or a party becomes aware of a basis to exclude a juror after voir dire but before the verdict, this fact should be brought to the attention of the court as soon as possible.[30]

Counsel should be careful to ensure that the record correctly and sufficiently reflects what occurred during the jury selection process. Many attorneys and judges have prospective jurors hold up numbers for identification, and while this may expedite the process (especially during general questioning), care must be taken to ensure that it is clear from the record which jurors are being referred to during the process. Therefore, with respect to any juror for whom there may be a challenge for cause, counsel should identify the juror by both name and pre-assigned number on the record to avoid any question arising from an unclear transcript. Additionally, it may be advantageous, if allowed by the judge, to have the juror strike sheet entered into the record to show who struck which jurors should a question arise on appeal. Finally, in some cases, judges may take up strikes for cause at a bench conference, and simply disregard those jurors during the striking process without ever making a formal announcement on the record. In these cases, counsel, outside the presence

[29] Ridgeway v. State, 174 Ga. App. 663; 330 S.E.2d 916 (1985).
[30] Georgia Power Co. v. Mozingo, 132 Ga. App. 666, 209 S.E.2d 66 (1974).

of the jury, should ensure that a statement is made on the record as to jurors that were struck for cause as well as those that counsel believes should have been, but were not, struck for cause.

Opening statement/closing argument: In order to raise an objection to the conduct of opposing counsel in opening or closing, it is necessary to raise a timely objection, which generally means doing so immediately upon the making of the statement.[31] Doing so at the conclusion of the statement or argument will probably result in waiver of error as to that statement.[32] The possibility remains, however, that if a party can show that counsel's improper statement probably changed the outcome of trial, the failure to object during the attorney's argument may not be fatal.[33] Still, it is probably better to make the objection at the time the statement is made, unless counsel is worried that doing so would undermine his own credibility with the jury. The Court of Appeals has also held that where the judge directs the parties to reserve objections until the end of arguments, any objections made in that manner will be deemed preserved.[34]

Evidence and testimony: Assuming that particular evidentiary matters are not otherwise subject to a motion in limine, it is incumbent upon a party unsuccessful in introducing or excluding evidence or testimony to make a proper record of the objection for appellate review. A party is required to make a timely

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[31] See generally O.C.G.A. § 9-10-185 regarding improper conduct of counsel.
[32] Mullins v. Thompson, 274 Ga. 366; 553 S.E.2d 154 (2001).
[33] Benton v. Chatham County, 206 Ga. App. 285, 425 S.E.2d 317 (1992).
[34] Nationwide Mut. Fire Ins. CO. v. Rhee, 160 Ga. App. 468, 287 S.E.2d 257 (1981).

objection on the record, with as much specificity as possible, to the introduction of evidence that it believes should be excluded. The appellate courts have held that the party must "stand his ground and fight in order to successfully enumerate as error an (alleged) erroneous ruling by the trial judge."[35] A mere colloquy with the judge wherein a party raises concerns about the evidence, without a firm and specific objection, is insufficient to preserve the error.[36] The same is generally true of imprecise statements such as "I object," "objection," and "irrelevant and immaterial," without further elaboration.[37]

With regard to evidence that is excluded over a party's objection, the same specificity in objecting is required. Significantly, however, the party denied introduction of the evidence must make an offer of proof in order to provide the appellate court with error to review.[38] Failure of the trial court to allow such an offer is itself error.[39] In the case of testimony, the record must show that the question was asked of the witness, that the testimony was disallowed, and that the testimony would have benefited the offering party.[40] With regard to documentary or other evidence, the offering party should introduce the document itself into the record for appellate review.[41]

Regardless of whether an objection was properly made, and regardless of

[35] CSX Transp., Inc. v. McCord, 202 Ga. App. 365, 414 S.E.2d 508 (1991).
[36] Horan v. Pirkle, 197 Ga. App. 151,397 S.E.2d 734 (1990).
[37] See, e.g., Davenport v. State, 283 Ga. 171, 656 S.E.2d 844 (2008).
[38] See generally McFadden, Georgia Appellate Practice, § 9:7.
[39] Steele v. Dept. of Transp., 295 Ga. App. 244, 671 S.E.2d 275 (2008).
[40] Zohbe v. First Nat'l Bank, 162 Ga. App. 604, 292 S.E.2d 444 (1982).
[41] Sasser v. Adkinson, 258 Ga. App. 699, 574 S.E.2d 907 (2002).

whether it was sustained or overruled, counsel should take care to renew any such objection should the evidence at issue come up again, and if the court attempts to provide a curative instruction that counsel deems insufficient, an objection to the instruction should also be made on the record. Additionally, where an objection is sustained as to evidence that the jury has already seen or heard, it may be necessary to make an appropriate motion to strike, or for a mistrial, to cure the harm from any such evidence having been introduced in the first place.[42]

Finally, a separate question exists as to whether a particular item of evidence should go out with the jury, and an objection to the introduction of the evidence, by itself, will not suffice as an objection to its going to the jury room. Therefore, where counsel argues, for example, that a medical narrative or other evidence that could fall under the "continuing witness rule" should not go back with the jury, this objection should be made on the record separately from the objection made when the document was first admitted.[43] Although it is probably sufficient to do so at the close of the evidence or after closing arguments (and many judges will ask the parties for objections on this basis before sending that evidence back with the jury), it may be advisable to raise this issue at the same time as the general objection.

Directed verdict/judgment notwithstanding the verdict: At the close of evidence, a party may move for directed verdict based on an opponent's alleged

[42] James v. State, 196 Ga. App. 569, 396 S.E.2d 306 (1990).
[43] Varner v. State, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

failure to present evidence sufficient to authorize a verdict in the opponent's favor.[44] The defendant may so move at the close of the plaintiff's case-in-chief, while either party may do so at the close of all evidence.[45] A defendant that moved for directed verdict at the close of the plaintiff's case-in-chief is not required to renew its motion at the close of all evidence in order to preserve the issue for appeal, although it may do so.[46] A motion that is made prematurely, however, such as before the close of the opponent's evidence, is insufficient to preserve error based on denial of the motion.[47] A party moving for directed verdict must state the specific basis for the relief sought, and error alleged on appeal may only be based on the grounds raised before the trial court. Therefore, where a party believes it is entitled to directed verdict on alternate grounds, all of the grounds should be made on the trial court record.[48]

Following a verdict, a party may also move for judgment notwithstanding the verdict (sometimes, and historically, referred to as judgment *non obstante veredicto*, or J.N.O.V.), which is in essence a renewal of the motion for directed verdict alleging that, despite the jury verdict against it, the moving party is nevertheless entitled to judgment as a matter of law. A party is not entitled to move for judgment notwithstanding the verdict unless it has previously moved for directed verdict on the grounds is seeks judgment.[49] The opposite is not true, however, and a party

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[44] O.C.G.A. § 9-11-50.
[45] Anderson v. Universal C. I. T. Credit Corp., 134 Ga. App. 931, 931-32, 216 S.E.2d 719 (1975).
[46] Lexmark Carpet Mills, Inc. v. Color Concepts, Inc., 261 Ga. App. 622, 626, 583 S.E.2d 458 (2003).
[47] Krause v. Vance, 207 Ga. App. 615, 619, 428 S.E.2d 595 (1983).
[48] Sun-Pacific Enterprises, Inc. v. Girardot, 251 Ga. App. 101, 104, 553 S.E.2d 638 (2001).
[49] Bailey v. Annistown Road Baptist Church, Inc., 301 Ga. App. 677, 689 689 S.E.2d 62 (2009).

need not move for judgment notwithstanding the verdict in order to argue on appeal that the court erred in denying a motion for directed verdict raised earlier.[50]

The Federal Rules of Civil Procedure now refer to motions for directed verdict and judgment notwithstanding the verdict/J.N.O.V as a motions for judgment as a matter of law and renewed motions for judgment as a matter of law, reflecting a trend toward simplified terminology and also eliminating any perceived substantive difference between the evidentiary considerations raised in each motion.[51]

Jury charges: Uniform State/Superior Court Rule 10.3 provides that

> All requests to charge shall be numbered consecutively on separate sheets of paper and submitted to the court in duplicate by counsel for all parties at the commencement of trial, unless otherwise provided by pre trial order; provided, however, that additional requests may be submitted to cover unanticipated points which arise thereafter.

Thus, it is appropriate for a court to require written requests, although courts may also, in their discretion, waive the uniform rule requirement as necessary.[52]

In order to properly preserve an objection as to a charge not given, but that the party argues should have been, it is important that the charge actually be submitted to the court. Although the court is obligated to charge the jury on certain matters, these are far less extensive than in criminal cases and a civil litigant should not rely on the court to give the most appropriate or relevant charges. In

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50 O.C.G.A. § 5-6-26.
51 Fed. R. Civ. P. 50.
52 Kelley v. State, 301 Ga. App. 43, 686 S.E.2d 810 (2009).

order to object to a charge given or not given upon request, a party must make an objection on the record after the charge is given but before the jury returns with the verdict.[53] An objection made solely at the charge conference is not sufficient to preserve an issue for appellate review, although it may be considered by the appellate court in determining the propriety of the given charge, and therefore it would be prudent to object both at the charge conference and after the charges are given to any charge the party believes was erroneously given or omitted.[54]

A distinction exists between the level of specificity required in objecting to the court's failure to give a requested instruction and its giving of an instruction over objection. As to the former, it has been held that it is sufficient to merely state that the party objects, while as to the latter the party should state the specific basis for the objection.[55] Nevertheless, the Court of Appeals has held that "the better practice, and the one we would urge the litigants and courts of this state to follow, is that the grounds of objection, i.e., the reasons urged for the requested charge, should be placed somewhere on the record."[56]

Verdict form: If a party objects to any item on a verdict form, it must raise a timely and specific objection. "To be reviewable on appeal, an objection must clearly direct the attention of the trial court to the claimed error and must be stated with

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53 O.C.G.A. § 5-5-24.

54 Christie v. Rainmaster Irrigation, Inc., 299 Ga. App. 383, 682 S.E.2d 687 (2009); Golden Peanut Co. v. Bass, 249 Ga. App. 224, 547 S.E.2d 637 (2001).

55 Golden Peanut Co. v. Bass, 249 Ga. App. 224, 547 S.E.2d 637 (2001). Federal courts do not follow this distinction. See Fed. R. Civ. P. 51.

56 Golden Peanut Co. v. Bass, 249 Ga. App. 224, 547 S.E.2d 637 (2001).

sufficient particularity to leave no doubt as to the specific ground upon which the charge is challenged. In addition, a party must voice its objection to a verdict form at the time of its rendition or otherwise such technicality is waived. This is so because a verdict may be reformed or remodeled in the presence of the jury before they have retired from the box."[57] It should be noted, however, that there is a distinction between a verdict that is void and one that is voidable. Failure to object to a void verdict, such as one that is inconsistent on its face, may not constitute a waiver of the objection while failure to object to one that is merely voidable most likely will.[58]

Post-trial

Following trial, a party may move for judgment notwithstanding the verdict as well as for a new trial. Procedures for a motion for judgment notwithstanding the verdict are discussed in the preceding section and are governed by O.C.G.A. § 9-11-50. Motions for new trial are governed by O.C.G.A. Title 5, Chapter 5.[59] Significantly, motions for new trial and for judgment notwithstanding the verdict are "resetting motions" for purposes of appeal, meaning that the 30-day time period for filing a notice of appeal does not begin to run until a ruling has been made on

[57] Torres v. Tandy Corp., 264 Ga. App. 686, 592 S.E.2d 111 (2003) (cits. omitted).
[58] Anthony v. Gator Cochran Constr., 288 Ga. 79, 702 S.E.2d 139 (2010).
[59] For a comprehensive discussion of the procedures and law surrounding motions for new trial, see McFadden, Georgia Appellate Practice, §§ 11:2 through 6.

the motions, assuming the motions were timely made to begin with.[60] A grant of a motion for new trial is not directly appealable, and therefore a party seeking review must seek interlocutory review as provided by O.C.G.A. § 5-6-34. A party moving for new trial must submit a rule nisi with the motion.[61]

While a motion for new trial is not a prerequisite for seeking appellate review and sometimes serves only to delay the inevitable appeal, it may be worthwhile in the appropriate case as a result of the broad discretion given to the trial judge, often referred to as the "thirteenth juror" while passing on such a motion.[62] "In Georgia, the trial judge is vested with the strongest of discretions to review the case and to set the verdict aside if he is not satisfied with it. As required by O.C.G.A. § 5-5-50, the first grant of a new trial is not to be reversed by an appellate court unless the verdict set aside by the trial court was absolutely demanded."[63] As a result of that discretion, irregularities in the proceedings that might not rise to the level of reversible error on appeal may nevertheless be sufficient to persuade a trial judge that enough doubt exists to retry the case.

O.C.G.A. §§ 5-5-20 through 25 set forth the specific grounds for new trial, and should be stated with specificity in the motion and brief with appropriate citations to the record. Specifically, the a court is authorized to grant a new trial where it finds that:

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60 O.C.G.A. § 5-6-38 (a).
61 O.C.G.A. § 5-5-44.
62 Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).
63 Gibson v. Carter, 248 Ga. App. 280, 281, 545 S.E.2d 698 (2001).

1. The verdict is contrary to evidence and the principles of justice and equity;[64]

2. The verdict is decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding;[65]

3. Any material evidence may have been illegally admitted to or illegally withheld from the jury over the objection of the movant;[66]

4. Any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial;[67]

4. Jury charges were erroneously given or refused;[68] or

5. There exist, in the court's sound discretion, other grounds not specifically provided for in the code that would make a new trial proper.[69]

The Code also provides for additur and remittitur – that is, the trial court has the authority in tort cases to increase or decrease the jury's verdict as an alternative to new trial.[70] This statute specifically provides that the trial court may condition its denial of a new trial on the opposing party's acceptance of the court's modification, through additur (increase of the damages award) or remittitur (decrease of award).

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[64] O.C.G.A. § 5-5-20.
[65] O.C.G.A. § 5-5-21.
[66] O.C.G.A. § 5-5-22.
[67] O.C.G.A. § 5-5-23.
[68] O.C.G.A. § 5-5-24.
[69] O.C.G.A. § 5-5-25.
[70] O.C.G.A. § 51-12-12.

Although disfavored, the Code allows for an extraordinary motion for new trial, made after the expiration of the 30-day period normally allowed, upon a showing of a good reason for failing to have submitted a timely motion.[71] Although the case law suggests such a motion is far more prevalent in criminal cases (and the Code itself contemplates scenarios where a conviction is manifestly shown to have been erroneous), it may be made following a civil action, principally in cases of newly discovered evidence.[72] It may also be made, however, where there is a sufficient showing that the failure to file was not the fault of the party seeking relief. In *Martin v. Children's Sesame, Inc.*, for example, an extraordinary motion for new trial was allowed based on a clerk's error as to the date of entry of a final judgment.[73]

In addition, where there was a deficiency in the underlying action, a party may be able to successfully move to set aside the judgment under O.C.G.A. § 9-11-60, which also provides for correction of clerical mistakes in the judgment. In some cases, such motions must be brought within the same term of court that the judgment is entered,[74] while other motions for relief from judgments must be brought within three years of the judgment complained of, assuming the term-of-court limitation does not require a shorter time limit.[75] A party seeking to set aside a judgment on the basis that it is void, however, such as where there was no

[71] O.C.G.A. § 5-5-41.
[72] Martin v. Children's Sesame, 188 Ga. App. 242, 242, 372 S.E.2d 648 (1988).
[73] Martin v. Children's Sesame, 188 Ga. App. 242, 242, 372 S.E.2d 648 (1988).
[74] Gabel v. Revels, 203 Ga. App. 131, 132, 416 S.E.2d 103 (1992).
[75] O.C.G.A. § 9-11-60 (f).

personal jurisdictional over the defendant, may do so at anytime, even beyond the three-year limitation.[76] Denial of a motion to set aside judgment may be appealed under the discretionary procedures established in O.C.G.A. § 5-6-35.

[76] Ricks v. Liberty Loan Corp., 146 Ga. App. 594, 247 S.E.2d 133 (1978).