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A P P E L L A T E L A W

'Exacting' Standard for Litigants Seeking to Avoid Waiver

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Special to the Legal

When a litigant wants to raise an argument on appeal, the litigant must have made that argument before the trial court, i.e., “preserved” the argument, or else the appellate court will deem the argument waived. The appellate court will generally ignore any waived argument absent certain extraordinary circumstances or if the argument is nonwaivable, e.g., subject-matter jurisdiction. Thus, it is essential that litigants properly raise arguments in the trial court to avoid waiving them on appeal.

In a recent decision, *United States v. Joseph*, No. 12-3808 (Sept. 19, 2013), the U.S. Court of Appeals for the Third Circuit held that the degree of particularity required to preserve an argument is “exacting.” Thus, it is not enough for the appellant to have raised a general issue before the trial court; the appellant must have raised the “same argument” below. Although *Joseph* was a criminal case, the court’s reasoning



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and conclusions likely will be applied across the entire spectrum of civil and criminal cases in the Third Circuit. Thus, it is essential that all trial lawyers within the Third Circuit understand and apply its teachings.

In *Joseph*, the defendant, Akeem Joseph, had moved to suppress evidence — counterfeit bills — that the police had found after arresting and searching him. In the district court, Joseph argued that the police did not possess the requisite probable cause for the arrest because no one at the scene of the arrest had sufficient expertise to determine whether the bills were in fact counterfeit. The

district court denied Joseph’s motion and a jury found him guilty.

On appeal, Joseph sought to argue for the first time that the officers lacked probable cause because they had insufficient evidence to establish his intent to defraud when he passed the counterfeit bills. Joseph contended that by raising the issue of probable cause in the district court, he could argue the absence of probable cause for any reason on appeal.

Noting that “good facts make good law,” the Third Circuit issued a sweeping decision that was designed to “rectify imprecisions in our case law” regarding the waiver of arguments on appeal. The court first recognized that its prior decisions had used various terms when describing when a party waives an argument, e.g., in different cases the court had written that an appellant waived an argument if it wasn’t the “same theory” raised below, wasn’t within the “overarching question” raised below, or wasn’t the “specific issue” raised below. The court then reasoned that “the crucial difference between these words goes to the degree of specificity they entail,”

and that “the synonymous words ‘question’ and ‘issue’ are broader in scope than the synonymous words ‘argument,’ ‘contention,’ ‘theory,’ ‘ground,’ or ‘basis,’” because “the former words can encompass more than one of the latter.”

The court then concluded that simply raising an “issue” is not sufficient to preserve any “argument” within that issue. Instead, to preserve an argument for appeal, a party must make that same argument in the district court. The court recognized that litigants must have some flexibility in how they present and support an argument, and can place greater emphasis, more fully explain, and, in a limited sense, “reframe” their argument. But the court made clear that “they may not change the substance” of the arguments.

But how is a party to know the difference between an “issue” and an “argument”? The Third Circuit explained that arguments “do not contain subsidiary legal frameworks of analysis. ... The determination of whether the legal challenge is an issue or an argument for purposes of waiver depends on whether it can be distilled into separate lines of legal analysis. A legal challenge that presents multiple avenues for granting relief is a broad issue. But if the legal challenge presents a single point of contention, which may not be recast or reframed to address a conceptually distinct contention, then what has been advanced is an argument.”

The Third Circuit also counseled

litigants on how to determine if an argument made in the district court is the same argument that has been advanced on appeal. The court explained that there are “two characteristics that identical arguments always have. First, they depend on the same legal rule or standard. Second, the arguments depend on the same facts.” Thus, to avoid waiver, an argument on appeal must depend on the same legal rule and the same facts as the argument presented below.

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Applying this test to the facts before it, the court held that the argument raised on appeal had been waived. Specifically, although the defendant in *Joseph* had argued to the district court that the police officers lacked probable cause to arrest him because they did not have sufficient evidence that the bills were counterfeit, the defendant waived the argument that the officers lacked probable cause because they did not have evidence to establish his intent to defraud. Because

the two arguments depended on different legal elements and different facts, the court held that the new argument was waived.

Going forward, litigants must be wary of *Joseph*’s formulation regarding the preservation and waiver of arguments on appeal. As always, litigants must be certain to raise before the district court the key arguments in their favor or else face the consequences of waiver. When doing so, litigants must now be careful not only to raise a particular issue (or a particular argument regarding an issue), but to raise all of the discrete arguments that they may want to raise on appeal.

Although the *Joseph* court noted that, “We do not have occasion to consider whether the framework explained here applies in other waiver contexts, such as Federal Rules of Criminal Procedure 52(b) and waiver in civil cases,” nothing in the court’s reasoning or conclusion suggests that its framework will not ultimately spread to encompass all civil and criminal appeals. Accordingly, all litigants would be wise to study the court’s distinction between “issues” and “arguments,” as well as the degree of particularity required to preserve arguments for appeal. •