



Pavillion Development, LLC v. JBJ Partnership:

The Court's Struggle with Waiver

by Madeline H. Haikala

Introduction by Chief Justice Sue

Bell Cobb: "During my tenure in Alabama's appellate courts, both at the Court of Criminal Appeals and now on the Supreme Court, I have had many occasions to observe the loss of meritorious arguments on appeal. These issues were not reached because of the failure to comply with the rules and settled case law governing the presentation of issues on appeal. Failures to timely raise arguments, to preserve issues for appellate review, or to support those issues with an appropriate record and briefing often leave an appellate court with no alternative but the rejection of the argument on procedural grounds. A good working knowledge of the Rules of Appellate Procedure and the governing procedure in the trial court, as well as the case law governing the presentation of issues on appeal is essential for successful appellate work. Toward that end, I commend the following article."

Although appellate courts may prefer to reach the merits of an issue, they must hold attorneys' feet to the fire on procedural rules.

None of us likes to lose a case, particularly one we have handled for years, from complaint to appeal. Perhaps the only thing worse than losing on appeal is losing because the court finds that you waived a pivotal issue by virtue of your procedural error either at trial or on appeal. These losses are the most difficult not because they are blows to our competitive nature but because they leave a client who has endured years of litigation with the disappointment of not receiving a final resolution of the merits of his case.

Although appellate courts may prefer to reach the merits of an issue, they must hold attorneys' feet to the fire on procedural rules. And they do. In the past few years, the Alabama Supreme Court found that parties waived arguments on appeal in dozens of civil cases. The court of civil appeals did so as well. The Alabama Supreme Court's recent *Pavilion Development, LLC v. JBJ Partnership* opinion offers rare and helpful insight into the court's concern with waiver issues. This article discusses the main and minority opinions in *Pavilion*, highlights a few procedural hurdles that frequently frustrate appeals and offers suggestions for ways to better prepare appeals to avoid ignominious defeat because of a procedural flaw.

The Waiver Discussion in *Pavilion Development, LLC v. JBJ Partnership*

Although the waiver issue ultimately takes center stage in *Pavilion Development, LLC v. JBJ Partnership*, No. 1040967 (Ala. August 10, 2007), the parties' dispute concerned a statutory right of redemption in realty that JBJ bought in a foreclosure sale. Pavilion, which obtained the statutory right of redemption via an assignment from a previous owner of the property, sought a declaration of the parties' rights in the property and asked the trial court to enforce its right of redemption.¹

JBJ moved for summary judgment, asserting primarily that the assignor had no authority to make the assignment and that Pavilion did not meet the statutory prerequisites for redemption. The trial court ordered JBJ to file a supplemental brief, addressing only the assignment issue. The supplemental brief stated at the outset that JBJ's motion was based on "multiple theories of law," but it focused, per the trial court's order, on the assignment issue. *Id.* at 14.

The trial court entered summary judgment for JBJ, holding that the assignor had no authority to transfer the right of redemption to Pavilion. Pavilion appealed. It challenged only the ruling on the assignment issue in its initial appellant's brief. *Id.* at 16. JBJ argued both the assignment and the failure to fulfill the statutory prerequisite issues in its appellee's brief. In its reply brief, Pavilion

again limited its discussion to the assignment issue. The Alabama Supreme Court reversed, finding that the assignor had the capacity to transfer the right of redemption to Pavilion. *Id.* at 29-30.

The portion of the primary opinion that sparked disagreement among the justices concerns JBJ's alternative statutory prerequisite argument. In the primary opinion, Justice Bolin wrote, "[a]lthough we have stated that an appellate court may affirm a judgment of a trial court for any valid reason, we do not consider JBJ's arguments about the statutory requirements because the record here indicates that the trial court did not make any findings concerning, nor did it intend to base its judgment on, those alternative grounds." *Id.* at 30 (footnote omitted). After tracing the trial court proceedings that produced the summary judgment order grounded on only one issue, the primary opinion states:

We are persuaded that the trial court reached and decided only the authority-to-assign issue when it entered a summary judgment for JBJ on November 4, 2004. That ruling was a threshold finding that pretermitted consideration of the failure-to-comply-with-statutory requirements argument and all other issues raised by [Pavilion's] complaint. Because we hold that the trial court's order was so limited, the 'affirm for any valid reason' principle is inapplicable here because the record indicates that the trial court never intended to address the failure-to-comply argument JBJ reasserted on appeal.

Id. at 32-33. Justice Bolin added in a footnote:

We are mindful that Pavilion did not address the failure-to-comply arguments in its principal brief, and did not respond to those arguments in its reply brief after JBJ raised them in its appellee's brief. This Court recently found in *Fogarty v. Southworth*, 953 So. 2d 1225 (Ala. 2006), that, when an appellant failed in its principal appellate brief to address an issue that had been before the trial court and that could have warranted a judgment below, the appellant's failure to argue that issue in its principal brief constituted a waiver as to that issue. However, the rule in *Fogarty* applies only where the trial court does not specify a basis for its ruling. ...

Id. at 33 n. 21.

The discussion among the justices on waiver is robust. Justices Lyons and Woodall dissented, stating that the court should have affirmed the summary judgment on the basis of JBJ's statutory prerequisite argument because the argument was plausible, and Pavilion did not respond to it. Chief Justice Cobb and Justices See and Murdock fell between the primary opinion and the dissent, taking issue with both.

In his dissenting opinion, in which Justice Woodall joined, Justice Lyons highlighted the opinions in which the court has held that, "[a]n appellee can defend the trial court's ruling with an argument not raised below," and "an appellate court can affirm a

summary judgment on any valid argument, regardless of whether the argument was presented to, considered by or even rejected by the trial court.” *Id.* at 57-58 (Lyons, J. dissenting)(quoting *Smith v. Equifax Services, Inc.*, 537 So. 2d 463, 465 (Ala. 1988)). On the other hand, “[t]his court will not reverse the trial court’s judgment on a ground raised for the first time on appeal. . . . This difference is predicated on the ‘long-standing, well-established rule that [in order to secure a reversal] the appellant has an affirmative duty of showing error upon the record.” *Id.* Due process, Justice Lyons explained, limits the “affirm on any ground” rule in certain circumstances. *Id.* at 58-59 (citing *Liberty National Life Ins. Co. v. University of Alabama Health Services Fndn, P.C.*, 881 So. 2d 1013, 1020 (Ala. 2003)).

Justice Lyons is of the opinion that when a trial judge does not “specify a ground for its ruling,” the appellant must, in its opening brief, address “all grounds that were presented to the trial court in order to sustain its burden of showing error.” *Id.* at 59. The reason for this rule, per *Fogarty v. Southworth*, 953 So. 2d 1225 (Ala. 2006), is that, “[i]f the rule were otherwise, an appellant could ‘sandbag’ an appellee by withholding an argument on an issue until the reply brief, thereby depriving the appellee of an opportunity to respond.” *Pavillion* at 60.

Justice Lyons reasoned that Pavilion knew about JBJ’s statutory requirements argument because JBJ raised the defense in its summary judgment motion. Therefore, “[b]y failing to assert the invalidity of this basis for affirmance in its opening brief, Pavilion failed to shoulder its affirmative duty of showing error upon the record.” *Id.* at 61. Justice Lyons wrote that limiting the *Fogarty* rule to situations in which the trial judge does not state the basis for its judgment “depart[s] from well-established principles applicable to the obligation of an appellant to demonstrate error in its principal brief. And ignoring the equally well-established rule . . . allowing an appellee to urge affirmance on a ground rejected by the trial court without having to file a cross-appeal to bring the issue before the Court.” *Id.* Pavilion’s error, in Justice Lyons’s view, was compounded by the fact that Pavilion did not respond to JBJ’s statutory prerequisite argument in its reply brief.

With respect to the statutory prerequisite argument in *Pavillion*, Justice Lyons stated that, “[b]ecause a defense on this ground is not frivolous on its face, I would affirm the judgment of the trial court solely on the procedural default of Pavilion without analysis of its merits.” *Id.* at 62. To eliminate the procedural error that he perceived in the appeal, Justice Lyons proposed amendments to the *ARAP* to incorporate Alabama law on this topic into the rules of appellate procedure.²

Justice See disagreed with Justice Lyons, writing: “Notwithstanding the fact that this Court may affirm a judgment for a reason not considered by the trial court, I do not believe that we *must* affirm the judgment of the trial court on a ground that was not relied upon by the trial court, without a consideration of the merits of that ground” despite the fact that the ground is “‘not frivolous on its face.’” *Id.* at 36, See, J., concurring (emphasis supplied). Justice See cautioned that Justice Lyons’s view “would compel this Court to affirm the trial court’s judgment for a possibly invalid reason not relied upon by the trial court.” *Id.* at 44.

Justice See pointed out that the court has not consistently applied the affirm on any valid legal ground rule, stating alternatively in some cases that the court “must” affirm when the appellant fails to demonstrate error on the record and, in other opinions, that the

court “may” affirm. *Id.* at 37-38. The determinative factor, offered Justice See, is “whether the judgment being affirmed is proper and correct. . . . This is true because this Court affirms judgments, not the arguments of parties.” *Id.* at 39. Justice See agreed that the court could decide the appeal on the basis of JBJ’s failure to comply argument but only if the record supported that argument and the summary judgment was correct. *Id.* at 40-41.

Justice Murdock concurred specially, not to address the substance of the primary opinion, but to express disagreement with Justice Lyons’s dissent and to comment upon *Fogarty*, an opinion that the court delivered before Justice Murdock became a member of the court. Justice Murdock noted that the appellant’s burden to make an affirmative showing of error in the record is tied inextricably to the affirm-on-any-legal-ground principle: “Th[e] rule [regarding the appellant’s burden] is premised upon the fundamental proposition that an appellate court will not presume error and will affirm the judgment appealed from if supported on any valid legal ground.” *Id.* at 47 n. 25.

Justice Murdock agreed with Justice See’s observation that the affirm-on-any-ground proposition does not require an appellate court to affirm a lower court judgment. “I do not believe we should transform a rule designed to *allow* an appellate court to affirm a lower court’s judgment on *any ground determined to be valid* into a rule that requires an appellate court to affirm a lower court’s judgment *on any ground, without regard to the validity of the ground*, merely so long as that ground was raised in the trial court by the prevailing party and was not addressed by the appellant on appeal.” *Id.* at 48 (emphasis supplied). “The right-for-any-reason doctrine serves the dual ends of justice and judicial economy by preserving *correct legal results*, even when the specific grounds relied upon by the trial court are erroneous.” *Id.* at 50 (emphasis supplied).

Justice Murdock discounted the concern voiced in *Fogarty* that an appellant, as a tactical maneuver, might try to sabotage an appellee by reserving an argument for a reply brief. Justice Murdock believes that the court’s practice of rejecting arguments that are raised for the first time on appeal in a reply brief already prohibits this strategy, so that no further action is needed either by way of a new rule from the court or a revision to the rules of appellate procedure. *Id.* at 49.

Justice Murdock addressed two practical considerations attendant to Justice Lyons’s proposed waiver rule:

I believe the waiver rule at issue holds the potential for increasing the workload of attorneys and of trial and appellate judges alike. Some litigants may perceive it to be to their advantage to provide to the trial court a multitude of alternative grounds for their position, regardless of the merits of those grounds, in the hope that, if they are successful in the trial court, their opponent might fail to contest one or more of those grounds on appeal, thereby resulting in the affirmance of the judgment by ‘default.’ . . .

Finally, I am not comforted by the notion that there would be an exception to the waiver rule announced in *Fogarty* for grounds deemed ‘frivolous’ by a majority of the members of the appellate court reviewing the case. What is and is not ‘frivolous’ will often be in the eye of the beholder; what is frivolous to one judge may be colorable to another. An unjust result for a litigant is no less so because the

ground upon which the result is based is considered by a majority of an appellate court to be nonfrivolous, though incorrect, rather than frivolous and incorrect. In either case, the result is wrong.

Id. at 54 (citations omitted). Chief Justice Cobb concurred with Justice Murdock's opinion.

This discussion about waiver obviously is neither one that appellate justices take lightly nor is it merely academic. Given that waiver impacts so many appeals, lawyers must choose carefully when sifting through potential issues for appeal. Before turning to strategies for issue selection, other types of waiver that frequently prevent the court from reaching the merits of an appeal bear mention.

Waiver Issues that Plague Appeals

Numerous other procedural errors often prove fatal on appeal. Those that seem to occur most frequently are failure to comply with the requirements of *Ala. R. App. P.* 39 when petitioning the Alabama Supreme Court for a writ of certiorari, failure to provide adequate citations to statutes, case law and other authorities to support an argument on appeal and failure to timely initiate appellate proceedings because of miscalculation of the effect of post-judgment motions in the trial court. *See, e.g., Bagley v. Mazda Motor Corp.*, 864 So. 2d 301, 313 n. 12 (Ala. 2003) (“When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court’s duty nor its function to perform an appellant’s legal research”).

The Rule 39 error may be the most frustrating to the court because the court has amended the rule so often, most recently in 2005, to try to make compliance less difficult. The comment to Rule 39 explains “a high number of petitions have been denied because the Supreme Court had no facts to review. Facts may be considered by the Supreme Court only if presented to the Court in the form required by Rule 39.” Rule 39(d)(5) sets forth the procedure for bringing to the court’s attention facts that are not included in the court of appeals’ opinion or unpublished memorandum. Moreover, lawyers often overlook the fact that there are limited grounds on which a party may seek a writ of certiorari directed to the court of civil or criminal appeals. Rule 39(a) specifies those grounds.

For a comprehensive list of procedural errors that frequently arise on appeal, Ed Haden’s article, “Preventing Waiver of Arguments on Appeal,” *Alabama Lawyer* May 2007, is mandatory reading. Ed’s article provides an overview of waiver traps for the unwary from complaint to appeal.

Practical Advice for Avoiding Waiver

How should the bar respond to the court’s concerns about waiver? The first and most obvious answer is that a lawyer filing an appellate brief must read and follow the rules of appellate procedure. When the rules seem unclear or when you have a case that seems to fall into a gray area, call the office of the clerk of the appellate court. If someone there cannot answer your question, the clerk’s office will connect you to a staff attorney who will try to help you. If you still are unsure of how to proceed, you probably will have to address the procedural issue in your brief.

Additionally, the Alabama State Bar has an Appellate Law Section. If you join this section, you will receive updates about changes in the rules of appellate procedure and other significant developments in appellate law in Alabama.

You may find it helpful to attend one of the appellate CLE conferences that are offered annually. The conferences contain a wealth of helpful information about procedural hurdles, new developments in the rules of appellate procedure and tactical ideas for effective appellate advocacy. These are well-attended by our appellate judges, so they offer a unique opportunity to get the court’s perspective on a variety of issues. If you are unable to attend, consider ordering the written materials from the program. They are the next best alternative to being there.

Finally, (caution-shameless plug ahead) *Alabama Appellate Watch* is a blog devoted to procedural issues that arise in civil appellate cases in Alabama and in the Eleventh Circuit Court of Appeals. The blog is organized by category so that you may search for recent opinions concerning procedural issues that you may face on appeal (www.alabamaappellatewatch.com).

Pressing beyond the rules of appellate procedure to the more challenging matter of issue selection, lawyers may find themselves between the proverbial rock and the hard place. As the *Pavilion* and *Fogarty* opinions illustrate, lawyers must be mindful of the array of procedural rules that impact issue selection. But those rules often bump up against strategic considerations that typically drive issue selection.

From a strategic perspective, the fundamental rule of issue selection is the fewer, the better. As Judge Godbold wrote in “Twenty Pages and Twenty Minutes,” a standard text for appellate lawyers, “It is a lawyer’s job to pick with a dispassionate and detached mind the issues that common sense and experience suggest will likely be dispositive. Other issues must be rejected or given short treatment.” *The Litigation Manual, Special Problems and Appeals*, featuring Godbold, J., “Twenty Pages and Twenty Minutes,” p. 110. Judge Godbold quotes Justice Jackson, “The mind of an appellate judge is habitually receptive to the suggestion that the lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at a lack of confidence.” *Id.* Stated differently in James W.

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McElhaney's "Twelve Ways to Write a Bad Brief," *Litigation* December 1996, "A brief that raises too many issues lacks focus and direction . . . Even a legal gem that could point the way to the law of the future can get lost when it's buried in doctrinal quiddities." These admonitions are grounded not only in the principal that he who protests too much probably has nothing of substance to protest about, but also in the reality that a judge and his clerk read volumes each day. To win, a lawyer must hone his arguments to make his brief as concise and persuasive as possible.

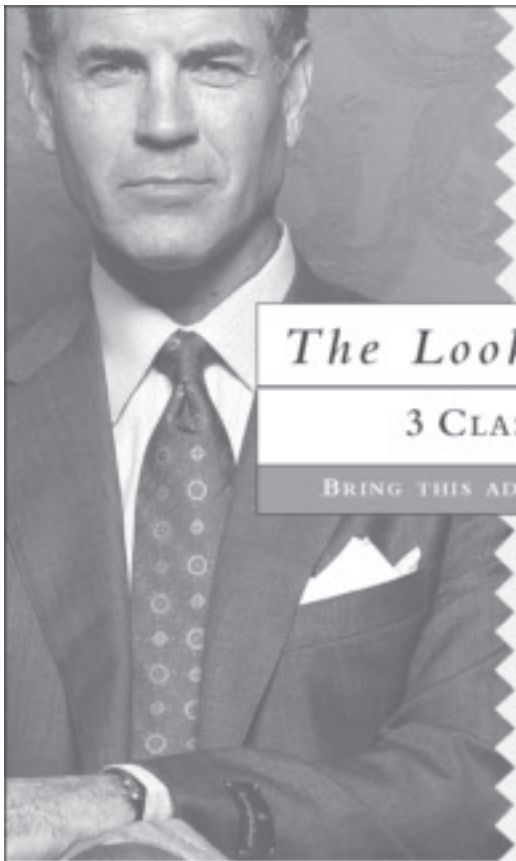
Conversely, ignoring an issue that is unfavorable to your client in an opening brief in the hope that opposing counsel will overlook the issue is risky business. With rare exceptions, it is better to anticipate issues that your opponent will raise. By presenting an issue first in your opening brief, you have the opportunity to frame the issue in the light most favorable to your client and to take the wind out of your opponent's sails. A judge, seeing for the first time in an appellee's brief an issue that changes the complexion of an appeal, would be wise to question the motive of the appellant in omitting the issue entirely in his opening brief.

So here is the rock-raising every potential issue on appeal may dilute your ability to persuade by dispersing attention from your strongest arguments and giving the impression that you have no confidence in any one argument—you lose. And here is the hard place—if you omit an issue in an opening brief in an effort to maintain focus on your strongest arguments and if your opponent raises the argument in his brief, the appellate court may find that you waived the issue—you lose. The solution—communicate with your client. If you decide that in the big picture, your client will

be best served by pursuing only his strongest arguments on appeal, advise your client of your plan and let him know that a finding of waiver is a potential downside to your strategy. A loss in these circumstances is disappointing, but it is a calculated risk that you and your client have accepted.

Of course, waiver occasionally is unintentional. An important issue simply may be overlooked. Often, such an omission stems from the fact that issues at the appellate level shift: issues that were insignificant in the trial court gain importance in appellate proceedings, while issues that held everyone's attention at the trial level sometimes fade, at least relative to the issues that rise to the surface on appeal. Understandably, a lawyer who has lived with a case for years may forget some of the subtleties of the record, having devoted so much attention to the big issues that were crucial to the trial court proceedings.

This is where an appellate lawyer comes in handy. Appellate lawyers are familiar with the nuances of issue reconstruction on appeal and sift through an appellate record with an eye toward adjusting and framing issues for appeal. If your firm does not have a designated appellate attorney and if your client is not in a position to hire one, then ask another litigator in your office to help you review the record. A fresh set of eyes may spot issues that otherwise would be overlooked. If that is not an option, then consider this advice from Judge Ed Smith, a federal appellate judge who taught appellate advocacy at Cumberland Law School for years. When reviewing the record to select issues, work out of order; start at the end of the record and finish at the beginning. Taking the pieces out of context may enable you to



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view them in a new light. Finally, if you mistakenly overlook an issue in an opening brief, acknowledge the oversight and address the issue in a reply brief. The appellate court will appreciate your honesty and will treat your client fairly.

At the end of the day, lawyers must give appellate judges confidence that omissions on appeal are deliberate and are in a client's best interest. We can do that only if we are well-versed in the appellate rules (both those in the rules of appellate procedure and those that have become well-settled in case law), and if we consistently demonstrate our understanding of those rules. Justice Lyons rightly places responsibility for allegiance to the rules on the shoulders of attorneys, and Justice Murdock correctly notes that if those rules are expanded in an attempt to anticipate and address every procedural misstep of an attorney, the preventative rules may create a quagmire worse than the original infraction. So choose your way, proceed with informed caution (and a rule book at your side), and make certain that your client is on board. No one likes to lose, and none of us should lose because of a procedural blunder. ▲▼▲

Endnotes

1. There are a number of predecessors in interest to the parties to this appeal. Additionally, a fairly complicated sequence of events led to the summary judgment at issue. For simplicity's sake, I have used the names of the parties in the caption of the court's decision, and I have omitted the procedural events that preceded the summary judgment at issue.
2. So as to incorporate what I consider to be the law of this state at this time and not by way of announcement of a new rule, I would recommend that the Standing

Committee on Rules of Appellate Procedure consider the following amendments to Rule 28, *Ala. R. App. P.*:

Add the following sentence to Rule 28(a)(10):

Where multiple or alternative grounds are presented to the trial court and the trial court does not expressly limit its consideration of such grounds, the argument must address the merits of each ground before the trial court, including any ground expressly rejected by the trial court, in the opening brief. Issues not argued are waived.

Add the following sentence to Rule 28(b):

A waiver by the appellant pursuant to Rule 28(a)(10) with respect to multiple or alternative grounds will be disregarded in the event the appellee argues the merits of such grounds.

Add the following to Rule 28(c):

Where a waiver pursuant to Rule 28(a)(10) with respect to multiple or alternative grounds is disregarded pursuant to Rule 28(b) by reason of the appellee's argument of the merits of such grounds, the failure of the appellant to reply to the merits of such grounds shall constitute a waiver of those issues."

Opinion, p. 63 (Lyons, J., dissenting).



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