

The Road to the Supremes: A Guide to Avoiding Appellate Potholes

JOHN MORRIS & STEVEN BRUNOLLI

HIGGS FLETCHER & MACK

The Initial Pleadings

- Importance of the initial pleadings:
 - Frames issues for potential appeal
- Common mistakes:
 - Affirmative defenses are deemed waived if not asserted in demurrer or answer. (*Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 807.)
 - Waiver of *personal* jurisdiction (subject matter jurisdiction generally can be raised for the first time on appeal)

Pre-Trial Motions

- Critical motions:

- Demurrers (CCP §430.30)
- Motions to strike (CCP §435)
- Summary judgment (CCP §437c)

- Potholes:

- Earliest time to assert legal arguments to preserve (See *Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal.App.5th 506, 548 [“theories not raised in the trial court cannot be asserted for the first time on appeal”].)
- Failure to adequately brief a point, even if raised, may waive it on appeal. (See, e.g., *Mendoza v. Trans Valley Transport* (2022) 75 Cal.App.5th 748, 769 [point only raised in passing in reply papers forfeited on appeal].)
- Filing an amended pleading forfeits argument that demurrer was improperly sustained as to amended causes of action. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.)
- Failure to object to evidence on summary judgment waives objections to the evidence. Must be in separate document or made on record at the hearing. (CCP §437c(b)(5), (d).)

Trial Court Proceedings

- Critical trial motions:
 - Motions in limine (CRC 3.1112(f))
 - Directed verdict (CCP §630)
 - Nonsuit (CCP §581c)
- Potholes:
 - Failure to object forfeits issues. (CCP §647; *In re Carrie W. (2003) 110 Cal.App.4th 746, 755* [“An appellate court will ordinarily not consider procedural defects or erroneous rulings . . . where an objection could have been but was not presented to the [trial] court by some appropriate method.”].)
 - Objections should be put on the record when possible. (See *American Modern Home Ins. Co. v. Fahmian (2011) 194 Cal.App.4th 162, 170* [objections made during sidebars should be later put on the record].)

Common Waivers at Trial

- Failure to object to opponent's erroneous jury instruction. It is not enough to simply submit your own competing instruction. (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856.)
- Failure to request a jury instruction. (*Martinez v. Rite Aid Corp.* (2021) 63 Cal.App.5th 958, 971, fn. 4 [barred on appeal from arguing failure to instruct].)
- Failure to object to omissions or ambiguities in statement of decision triggers doctrine of implied findings. (*Trenk v. Soheili* (2020) 58 Cal.App.5th 1033, 1046 ["doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment."].)
- Failure to request special verdict form that separates damages components waives argument that any specific component was improper. (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158 [party could not challenge past medical expenses where special verdict included only one term for "past economic damages, including lost earnings/medical expenses"].)

Common Waivers at Trial

- Failure to object to attorney misconduct and *request a jury admonition or mistrial*. It is not enough to simply object. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795.)
- Failure to object to/move to strike evidence presented at trial, even where motion in limine was denied. (*People v. Holloway* (2004) 33 Cal.4th 96, 132.)
 - Failure to request/make *on the record* an offer of proof for excluded evidence. (Evid. Code §354.)
 - Failure to object to jury verdict/polling *before the jury is dismissed*. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 265 [“An objection to a defective verdict must be made before the jury is discharged”].)

Post-Trial Motions

- Post-trial Motions
 - Motion for new trial (CCP §657)
 - Motion for judgment notwithstanding the verdict (JNOV) (CCP §629)
- Potholes:
 - Missing deadlines (CCP §§ 659, 659a, 660)
 - 15 days from notice of entry to file notice of intent
 - 10 days to file brief; 10 days for opposition; 5 days for reply
 - Rules unclear whether JNOV has extra 10 days to file memorandum
 - Generally, not necessary to preserve issues except one critical exception: “A claim of excessive or inadequate damages cannot be raised on appeal unless appellant first urged the error in a timely motion for new trial.” (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759.)

To Writ or Not to Writ

- Writs fare very low chances of success
- Discovery issues fare even lower chances
- In most cases, a writ is not worth the time/expense
- Potholes:
 - Failure to appreciate whether a statutory or common law writ

Initiating the Appeal

- Notice of appeal (CRC 8.100)
 - Timing and procedural rules (60-day/180-day rule, CRC 8.104)
- Designating the record on appeal (CRC 8.120-8.140)
- Potholes:
 - Failing to serve a notice of entry to start time to appeal
 - Failing to include key documents or transcripts
 - Missing notice deadlines (jurisdictional issue)

Appellate Briefing – Selecting Issues

- Structure of briefs (Rule 8.204)
 - Appellant's Opening Brief
 - Respondent's Brief
 - Appellant's Reply Brief
- Standards of review (abuse of discretion, de novo, substantial evidence)
- Potholes:
 - Overlooking key legal standards
 - Selection of issues with poor standards of review (abuse of discretion, substantial evidence)

Oral Argument

- Role of oral argument in California's appellate courts
- The Opinion has already been drafted
- Oral Argument will *not* win your case
- Potholes:
 - Over-reliance on oral argument to clarify the case/arguments

Petition for Review to the California Supreme Court

- Filing a petition for review (Rule 8.500)
 - Basis for review (conflict in the law, state-wide importance)
- Potholes:
 - Insufficient focus on public importance of issues
 - Poor framing of legal issues for the court
 - Responding to opponent's petition for review on the merits

Q&A
