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# TIPS FROM THE TRENCHES

## Motions *in Limine* & Issue Preservation

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Alabama's Rule of Appellate Procedure 28(a)(5) was amended effective August 1, 2015 "...to require that the appellant's brief in civil cases cite all adverse rulings from which the appeal is taken and include references to the record on appeal where those adverse rulings can be found."<sup>3</sup> The Rule, as now amended states "[I]n civil cases, a statement of the case should also identify the adverse ruling or rulings from which the appeal is taken and asserted as error on appeal, with a reference to the pages of the record on appeal at which the adverse ruling or rulings can be found."<sup>4</sup>

So, how does one preserve for appellate review trial court rulings relative to motions *in limine*?

The Alabama Supreme Court recognizes "two types of motions *in limine*, 'prohibitive preliminary' and 'prohibitive absolute.'" *Cannon v. Lucas*, 346 So. 3d 949, 953 (Ala. 2021) quoting *Phelps v. Dempsey*, 656 So. 2d 377, 381, n. 1 (Ala. 1995), citing *Keller v. Goodyear Tire & Rubber Co.*, 521 So. 2d 1312 (Ala. 1988). "Preliminary motions *in limine* seek only to prohibit the opposing party from offering or mentioning certain evidence without first obtaining a ruling from the judge during trial."<sup>5</sup> "With a preliminary motion *in limine*, the nonmoving party must make an offer of proof and indicate why the evidence should be admitted, in order to preserve for review any error in the trial court's ruling."<sup>6</sup> "However, with an absolute motion *in limine*, no such offer of proof need be made at trial in order to preserve for review any alleged error in the trial court's order granting such a motion."<sup>7</sup>

"As with all evidentiary matters, the trial court has broad discretion in ruling on motions *in limine*."<sup>8</sup>

What then is a party's burden to preserve for appellate review a trial court's discretionary ruling granting a motion *in limine*? *Evans v. Fruehauf Corp.*, 647 So. 2d 718, 720 (Ala. 1994) explains

In keeping with the vesting of broad discretion in the trial court in [evidentiary matters], it is generally held that the *granting* of a motion *in limine* can never be reversible error. The non-moving party may repeat

at trial, preferably out of the hearing of the jury, his request for permission to prove the contested matter. This offer of proof is required in order to isolate the error for appeal. It is the refusal at trial to accept the proffered evidence, not the granting of a pretrial motion *in limine*, that serves as the basis for reversible error."<sup>9</sup>

The Supreme Court further explained in *Pensacola Motor Sales, Inc. v. Daphne Automotive, LLC*, 155 So. 3d 930 (Ala. 2013)

When there is no indication in the record that a trial court's ruling on a motion *in limine* was absolute or unconditional, the proponent of the contested evidence must attempt to admit the evidence at trial and obtain a specific adverse ruling in order to preserve the issue for appellate review. ... Although the trial court did grant [plaintiff's] motion *in limine* seeking to exclude any reference to the prior federal litigation, [defendant] does not contend that he attempted to admit the contested evidence at trial and received an adverse ruling. Thus, for all that appears, this issue has not been preserved for review."<sup>10</sup>

When the issue of the trial court's ruling on a motion *in limine* is properly preserved for appellate review, the consequences can be profound. In *Phelps v. Dempsey*, *supra*, the Supreme Court reversed a jury verdict for a physician in a medical negligence action upon concluding the trial court erred in denying plaintiff's motion for new trial. Despite the "strong presumption of correctness" which "attaches to a trial court's ruling on a motion for new trial" that "will not be disturbed by this Court unless some legal right is abused and the record plainly and palpably shows the trial judge to be in error," the Supreme Court held the trial court improperly granted the physician's motion *in limine* seeking to exclude expert testimony and material test results.<sup>11</sup> The Court stated

... We conclude that the trial court erred in granting

Dr. Dempsey's motion *in limine* as it related to the documents showing the results of the color-Doppler tests. Because the trial court erred in ruling that the Phelps' could not admit those documents at trial, we must conclude that it also erred in denying the Phelps' motion for a new trial. ...<sup>12</sup>

Similarly, in *Cannon v. Lucas*, *supra*, the Supreme Court concluded the trial court reversibly erred in granting an absolute motion *in limine* which had the effect of precluding impeachment evidence deemed admissible per Ala. R. Evid. 60g. Consequently, a substantial jury verdict for a motorcyclist injured in a collision with a motorist was reversed. The Supreme Court reasoned

... To the extent that the trial court found that Cannon could not introduce evidence of Lucas' 2018 conviction because it was irrelevant and because the danger of unfair prejudice to Lucas substantially outweighed the probative value of the evidence, those findings were erroneous. ...

... We conclude that the trial court erred in granting Lucas' motion *in limine* to exclude evidence regarding his 2018 conviction for presenting a forged drug prescription. Because the trial court erred in ruling that Cannon could not present such evidence at trial, we must conclude that it also erred in denying Cannon's motion for a new trial.<sup>13</sup>

## **CONCLUSION**

Unless your motion *in limine* is treated as a "prohibitive absolute" motion where the trial court indicates on the record that no evidentiary objections or proffers are required during the trial, the prudent practitioner must make timely objections/proffers during trial else be deemed to have failed to preserve such discretionary evidentiary rulings for appellate review. Always be mindful that Ala. R. App. P. 28(a)(5) now requires the appellant to point to the pages in the record where the issue was timely raised and adequately preserved. The prudent trial lawyer must insure the record reflects timely substantive objections to inadmissible evidence and timely substantive proffers of admissible evidence when improperly excluded by the trial court.

(Endnotes)

- 3 Committee Comment to Amendment to Rule 28(a)(5) effective August 1, 2015.
- 4 Rule 28(a)(5).
- 5 *Cannon v. Lucas*, 346 So. 3d at 953, quoting *Phelps v. Dempsey* 656 So. 2d at 381, n.1.
- 6 *Id.*
- 7 *Ibid.* See also *Higgs v. Higgs*, 270 So. 3d 280, 286, n. 3 (Ala.Civ.App. 2018) ("[B]ecause the trial court's ruling on the former wife's motion in limine, which sought

an unconditional bar to economic-condition evidence pertaining to her, was absolute rather than preliminary, no offer of proof was necessary in order to preserve that ruling for review.").

- 8 Ally Windsor Howell, *Trial Handbook for Alabama Lawyers* (3d ed.), § 3.2, n.4, citing *State v. Askew*, 455 So. 2d 36 (Ala.Civ.App. 1984); see also *Cannon v. Lucas*, 346 So. 3d at 952 ("in reviewing a ruling on the admissibility of evidence, ... the standard is whether the trial court exceeded its discretion in excluding the evidence.").
- 9 *Id.* at 720 (underlined emphasis added).
- 10 *Id.*, 155 So. 3d at 936-37; see also *Baldwin County Elec. Membership Corp. v. City of Fairhope*, 999 So. 2d 448 (Ala. 2008) (motion in limine by itself is insufficient to preserve question of admissibility for appellate review).
- 11 *Phelps v. Dempsey*, 656 So. 2d 377 at 382.
- 12 *Id.*
- 13 *Cannon v. Lucas*, 346 So. 3d at 956.



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