


Winner Beware: When the Court Overrules Your Opponent's Objection or Sustains Yours, You May Have a *Special* Problem

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 Every experienced civil trial lawyer knows that when the judge rules against you on an objection at trial, you need to build a record to show that the court's ruling was not only wrong, but harmful. For generations, and in almost every jurisdiction, the "harmless" error rule has placed the burden of persuasion on the *appellant* to show that an error in a civil case was harmful. *E.g.*, *CBR Event Decorators, Inc. v. Gates*, 4 N.E.3d 1210, 1217 (Ind. Ct. App. 2014) (harmless error doctrine "requires the appellant to demonstrate prejudice"); *Esaw v. Esaw*, 965 So. 2d 1261, 1264 (Fla. 2d DCA 2007) (appellant must show "reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed"); *Yield Dynamics, Inc. v. TEA Sys. Corp.*, 66 Cal. Rptr. 3d 1, 12 (Ct. App. 2007), *as modified on denial of reh'g* (Sept. 21, 2007) (appellate must show error "is likely to have affected the outcome"). But in *Special v. West Boca Medical Center*, 160 So. 3d 1251 (Fla. 2015), the Florida Supreme Court changed the game. Reversing the traditional burden, the court held that "the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict." Moreover, "the beneficiary of the error must *prove* that there is *no reasonable possibility* that the error contributed to the verdict." In so doing, Florida joined the exceedingly small minority of jurisdictions that place the burden on the appellee. *See, e.g.*, *State v. McCullough*, 270 P.3d 1142, 1149 (Kan. 2012) (benefitting party "must show there is no reasonable probability the error affected the trial's outcome in light of the entire record"). Florida, however, may be the only jurisdiction describing the burden as one of "proof." So, if the court goes your way on a close call in a minority jurisdiction, what do you do? **Preservation Issue:** On contested objections in minority jurisdictions, the winning trial lawyer on a close, contested objection somehow needs to build a record proving:

- there is no reasonable possibility that the court's decision, if error, contributed to the verdict, or
- there was no "benefit" from the ruling.

Tip: Building this record is bound to be difficult. Even with the burden placed on you to prove no harm, your opponent will likely still be building a record to show the error was harmful. If you are worried that the trial court may have committed error in a ruling, attempt to minimize your use and reliance on that ruling, especially in closing argument. Pushed to shove, if the issue is not vital to your case, you may be better off conceding a close issue even after you have won the argument rather than creating a difficult problem on appeal. The lawyer who consistently “pushes the envelope” at trial is now risking a *Special* reversal on appeal.

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