CARLTON FIELDS
ATTORNEYS AT LAW

Appellate Practice Pointer

Recent Decisions Addressing Preservation of Error

The Fourth District Court of Appeal recently reiterated in Ocwen Financial Corp. v. Kidder, Nos. 4D05-2466, 4D06-15 (Fla. 4th DCA Feb. 21, 2007), that, in order to preserve an argument for a new trial based on the improper introduction of evidence during trial, a party must move for a mistrial during trial.

In Kidder, the trial court granted the defendant's motion in limine to preclude any reference to a particular incident. That incident, however, was mentioned several times during the trial. At each instance, the defendant objected and asked for a curative instruction, which the trial court granted and gave. The defendant did not at any point during trial move for a mistrial.

The defendant argued that, based on the language of section 90.104(1)(b), Florida Statutes (2003), a motion for mistrial was no longer required. Section 90.104(1)(b) provides that "[i]f the court has made a definitive ruling on the record . . . excluding evidence, either at or before trial, a party need not renew an objection . . . to preserve a claim of error for appeal." The Court rejected this argument, stating that this statute deals only with objections and does not overrule prior cases holding that a party must move for a mistrial to preserve the argument.

Also with regard to preservation, the Third District Court of Appeal in Zuniga v. Eisinger, No. 3D06-1131 (Fla. 3d DCA Feb 21, 2007) reiterated the heightened standard of review applied to determining whether a party is entitled to a new trial based on unobjected-to statements made by opposing counsel during closing argument. In such a situation, the party must (1) raise the issue in a motion for new trial, (2) establish that the argument was improper, (3) demonstrate that the argument was incurable, and (4) establish that the argument so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial.

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