So You're Telling Me There's A Chance! – The Difference Between Waiver and Forfeiture

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Appellate attorneys (hopefully!) understand the need to preserve arguments for appeal by raising them before the trial court and in their opening briefing. But what about the difference between waiver and forfeiture of arguments, and the impact it makes on an appellate court's review?

The Third Circuit recently addressed the difference in *Barna v. Board of School Directors of Panther Valley School District*, 877 F.3d 136 (3d Cir. 2017), where an appellant failed — before the district court and in his opening brief — to directly address controlling precedent under which the appellee was conclusively not entitled to qualified immunity. Despite this precedent, the appellee argued it was entitled to the district court's grant of qualified immunity due to the appellant's failure to preserve the issue.

The Third Circuit disagreed. It noted that the effect of failing to preserve an argument depends on whether the argument was waived or forfeited, and that — though often used interchangeably by jurists and litigants — the distinction can carry great significance. The court explained that waiver is the *intentional* relinquishment or abandonment of a known right, while forfeiture is the failure, often inadvertent, to make the timely assertion of a right. Although waived claims may not be resurrected on appeal, forfeited claims might be reviewed under "exceptional circumstances," such as when the public interest requires that the issue be heard or when a manifest injustice would otherwise result. Moreover, courts are "slightly less reluctant" to bar a forfeited issue that is a pure question of law. *See id.* at 146–47.

The court concluded that the appellant's failure to preserve the issue was inadvertent and constituted a forfeiture, not a waiver. It then held that exceptional circumstances compelled its review despite the forfeiture. Notably, the availability of qualified immunity was a pure question of law; the public interest would be better served by addressing the issue than ignoring it; and none of the prudential concerns — including unduly causing surprise — would be implicated because the appellee itself had raised the issue and the parties had provided supplemental briefing on the issue. *See id.* at 148–49.

The distinction between forfeiture and waiver is recognized to various extents in other federal circuits, but derives from well-established U.S. Supreme Court precedent. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 658, 646) (1938)).

Tips:

- As always, check the rules and law of your jurisdiction, and when arguing that an appellant did not properly preserve an argument, be sure to use the correct terminology. In federal circuits, a waived argument is intentional, and may not be resurrected on appeal. A forfeited argument results from an inadvertent failure to raise that argument, and may be nonetheless reviewed in very limited circumstances.
- Be sure that all appellate briefs set forth and address each specific argument you wish to pursue on appeal, and support all arguments with specific reasoning and citation to authorities and the parts of the record on which you rely.