Preserved, Actually: Preservation of Arguments Definitively Rejected by the Trial Court

APPELLATE & TRIAL SUPPORT | LITIGATION AND TRIALS | FEBRUARY 20, 2019


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Does a party have to reassert an argument previously rejected by the trial court in order to preserve it for appeal? The Seventh Circuit recently explained that in some circumstances, the answer is no, though the party must still adequately raise it on appeal.

In *Ward v. Soo Line Railroad Company* , 901 F.3d 868 (7th Cir. 2018), an injured railroad employee argued in response to a motion to dismiss that his state law negligence claims were premised on violations of federal statutory standards of care. The district court erroneously rejected that argument and dismissed all claims against the manufacturer defendants, leaving only state law negligence claims against the railroad. In response to the railroad's subsequent motion for judgment on the pleadings, the plaintiff pivoted away from his previous argument, instead arguing that while his dismissed claims were preempted by federal law, his remaining state law failure-to-warn claim was not. The district court concluded that the plaintiff had conceded preemption of all state law tort claims and granted judgment for the railroad.

The Seventh Circuit disagreed. It explained that the plaintiff had been correct in his initial argument that certain negligence claims could be premised on federal statutory standards of care, and the plaintiff had not waived that argument when he pivoted to new arguments. The district court had "ruled definitively" against the plaintiff's initial theory for recovery, and he and his "lawyers were not required to keep fighting that fight in the district court." The Court explained that it is not waiver, but "prudence and economy" for parties to move on from positions that the trial judge has rejected. Indeed, "continual repetition of spurned arguments would not be useful," and had the plaintiff reasserted this claim, the trial court would have dismissed it – "not only with prejudice, but with annoyance."

Unfortunately for the plaintiff, however, his claim, while preserved before the trial court, was not sufficiently developed in his appellate briefing, and the Court held it had been waived on appeal.

Importantly, the Seventh Circuit clarified that the rule is different for denials of motions to dismiss or motions for summary judgment, which are not final and definitive and must be renewed at later stages, such as through a Rule 50 motion at trial.

Preservation Tips

- As always, know your jurisdiction's rules on preserving arguments for appeal. If you are not required to re-raise arguments the court has already definitively rejected, you can avoid "annoy[ing]" the court by unnecessarily repeating those arguments.
- If you believe a claim was adequately preserved before the trial court, make sure to adequately address the merits of that claim on appeal.
- If an argument or claim has not been definitively rejected (e.g., a motion to dismiss or summary judgment has been denied), it must be renewed at later stages in the litigation.