

Appellate Law

The Two-Issue Rule and Itemized Verdicts

Walking the Tightrope

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Harmless error: bane to appellants, boon to appellees, and a powerful doctrinal tool of the appellate courts.

Not that there's anything wrong with that. After all, appellate courts review judgments and orders. If, notwithstanding any perceived errors in the proceedings, the judgment or order under review is correct—that is, if the error in process did not yield an error in result—the appellate court is simply doing its job in ignoring even obvious errors, as long as they did not culminate in an erroneous judgment. Although harmless error can take a variety of forms, error is *harmful* (and therefore, at least in civil cases, reversible) only if “it is reasonably probable that a result more favorable to the appellant would have been reached if the error had not been committed.”¹

So what happens in the following situation? The plaintiff brings a two-count complaint, alleging, say, 1) false imprisonment and 2) malicious prosecution. The jury is erroneously instructed on the false imprisonment claim, but correctly instructed on the malicious prosecution claim. The jury returns a verdict for the plaintiff, but does not specify the basis for its verdict. Assuming the appellate court agrees that the false imprisonment instruction was erroneous, the court should reverse, right?

Wrong. Although the appellant has arguably demonstrated harmful error (by showing that had the jury been properly instructed on the

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false imprisonment claim, they “may” have returned a verdict in favor of defendant), the appellate court should nevertheless affirm.

Why? The so-called two-issue rule: “[W]here there is no proper objection to the use of a general verdict, reversal is improper where no error is found as to one of two issues submitted to the jury.”²

The Florida Supreme Court first adopted the two-issue rule in *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181, 1186 (Fla. 1977) (citing out-of-state cases).³ The court reasoned that if an appellant can point to error affecting fewer than all the issues submitted to the jury, but cannot completely negate the possibility that the jury based its verdict on the remaining, error-free issues, then “the appellant is un-

able to establish that he has been prejudiced.”⁴ In other words, the appellant cannot demonstrate harmful error.

Since *Colonial Stores*, Florida courts have refined the jurisprudence surrounding the two-issue rule. For example, in the 1987 decision of *First Interstate Development v. Ablanedo*, 511 So. 2d 536 (Fla. 1987), the Florida Supreme Court held that the rule does not apply when the “two issues” are two theories of liability with two different measures of damages.⁵ Instead, the court said, “[t]his rule applies to those actions that can be brought on two theories of liability, but where a single basis of damages applies.”⁶

Until recently, this statement in *Ablanedo* raised, appropriately enough, at least two issues about the two-issue rule. The first centered around application of the rule to defense verdicts. In both *Colonial Stores*⁷ and *Ablanedo*,⁸ the rule had been invoked by plaintiffs defending verdicts in their favor. In *Charlemagne v. Francis*, 700 So. 2d 157 (Fla. 4th DCA 1997), the Fourth District Court of Appeal held that the rule could not be invoked by a successful defendant to argue that error in an instruction on a statutory defense was harmless.⁹ The court relied expressly on *Ablanedo*'s statement that the rule applies to cases involving “two theories of liability.”¹⁰ Since *Charlemagne* involved only one theory of liability (common-law negligence), the rule simply did not apply.¹¹ The Third District reached a different conclu-

sion, and, without reference to *Ablanedo*, held that the two-issue rule also applied to cases involving two or more *defenses*.¹²

Similarly, *Ablanedo* raised questions about the applicability of the rule where the “two issues” are two or more elements of a single cause of action. Shortly before *Ablanedo* was decided, the Third District held that error in failure to give a requested jury instruction on causation did not warrant reversal, because the failure to give the instruction did not affect the other elements of the plaintiff’s cause of action.¹³ Since, the court reasoned, the jury’s general verdict in favor of

the defendant “may be interpreted either as a finding of no negligence or as a finding of no legal cause, the plaintiffs have failed to show, as they must . . . , that the refusal to give this causation instruction was harmful.”¹⁴ The court rejected the Fourth District’s conclusion in *LoBue v. Travelers Ins. Co.*, 388 So. 2d 1349 (Fla. 4th DCA 1980), that the two-issue rule does not “require a claimant to specifically demonstrate the precise element of the cause of action the jury found lacking.”¹⁵ However, following *Ablanedo*, the Third District seriously questioned the continuing vitality of its earlier decision.¹⁶

The Florida Supreme Court’s latest pronouncement on the two-issue rule weighs in on both these disputes. In *Barth v. Khubani*, 748 So. 2d 260 (Fla. 1999) the court expressly resolved the conflict as to “whether an appellate court may apply the ‘two issue rule’ to bar review of a general defense verdict where the appellee pled two or more defenses at trial and the appellant alleges error only as to one such defense.” Suggesting that the focus of some district courts of appeal on only the number of theories of liability was “misdirected,” the court held when the jury returns a general verdict for the defendant, the “two-issue” rule

is applied by focusing on the defenses; thus, where two or more defense theories are presented to the jury and it returns a verdict for the defense, an appellate claim of error as to one defense theory will not result in reversal since the verdict may stand based on another theory.¹⁷

Thus, the rule now clearly applies to cases involving two or more defenses, as well as to cases involving two or more theories of liability.¹⁸

However, the Supreme Court giveth and the Supreme Court taketh away. At the conclusion of its opinion in *Barth*, the court established a new maxim: The two-issue rule “only applies when the prevailing plaintiff submits more than one cause of action or the prevailing defendant submits more than one separate and distinct defense theory.”¹⁹ This one word—only—coupled with the court’s aside that “we do not disapprove” of cases like *LoBue* “to the extent they hold or explain that the rule does not apply where there is only one cause of action or one separate and distinct defense theory,”²⁰ more or less signals the court’s disapproval of application of the rule to multiple elements of a single cause of action.

Although *Barth* ostensibly answers two important “what”s about the two-issue rule, several “why”s remain. For example, if the appellate burden of showing harmful error usually requires showing only that the error *may* have affected the outcome with reasonable probability, why does the two-issue rule require an appellant to show that the error *must* have affected the outcome? And if that is the appellate burden when multiple issues are submitted to a jury, why does the burden disappear when the “issues” are two or more elements of a single cause of action?

Interestingly, the answers to both these somewhat academic questions probably stem from a single, very practical consideration: the verdict form. From the outset, the Supreme Court has recognized that the two-issue rule comes into play only when the jury returns a general verdict, and that a request for a special verdict puts to rest any two-issue rule

concerns.²¹ As the Supreme Court put it, “[T]he remedy is always in the hands of counsel.”²² The fact that an appellant can avoid the entire issue by requesting a special verdict may therefore justify a higher appellate burden than that required when the error is beyond that appellant’s control. In other words, the two-issue rule is not just about harmless error and the appellate burden of proof; it is also about preservation of error.

Similarly, concerns about the verdict form—in particular its length and the risk of confusion—may motivate the desire to put at least some issues beyond the rule’s reach. Indeed, the Third District has expressed such a concern. If the rule applies to multiple elements of a single cause of action, then “[i]n order to demonstrate on appeal that an error was harmful, counsel must also tailor a special verdict form wherein the jury can make findings as to every element of every cause of action.”²³ The court also noted that such an application of the rule would cast serious doubts on the adequacy of the Supreme Court’s standard jury instructions.²⁴

Of course, the model verdict forms published with the standard jury instructions are just that: models. Counsel are expected to ensure that the verdict used is tailored to the issues in the case, and that it adequately preserves each issue for a later appeal. But the pressures of preparing for trial, along with the risk of confusing the jury by overitemizing the verdict, often means that the model forms are used even in nonmodel cases.

Adding to the confusion is the fact that F.S. §768.77 purports to require itemization of verdicts to a certain extent in certain cases. Even if the basic requirements of the statute are understood by counsel, the statute was amended in 1999 to require less itemization of some issues and more itemization of other issues. Whether the legislature has the authority to mandate itemization of verdict forms, or whether that attempt violates separation of powers principles, has been the subject of

debate,²⁵ but has not been decided by the courts.²⁶

Unfortunately, even following the statute will not necessarily ensure a proper verdict form.²⁷ For example, the 1999 version of the statute does not require itemization of past and future damages or a determination of the number of years in the future the jury intends to provide compensation, without which it may be impossible for a court to apply, and parties to take advantage of, the provisions allowing for periodic payment of judgments.²⁸ Likewise, the degree to which a verdict is itemized can impact the scope of a new trial on “damages only.”²⁹

It appears relatively clear that counsel can waive the itemization requirements of the statute, either unknowingly or by expressly agreeing to a less itemized form.³⁰ However, if an itemized verdict is requested by either party pursuant to the statute, there is authority that it is error not to allow the requested itemization.³¹

Of course, counsel can request forms that are more itemized than that required in the statute. Again, however, the burden is on trial counsel to itemize the verdict to the extent needed to protect against any later argument of waiver.

While the two-issue rule requires counsel to sufficiently itemize the verdict, the solution is not to itemize every issue and sub-issue. Excessive itemization can lead to confusion by the jury. Jury confusion puts another burden on trial counsel: the determination of when an inconsistent verdict has been rendered, and the preservation of that issue.³² Itemized verdicts can significantly increase the risk of inconsistent verdicts.³³ Likewise, at least one court has expressed concern that itemized verdicts are actually increasing the number of appeals.³⁴

In sum, potential appellants need to craft verdict forms that are sufficiently itemized to avoid two-issue rule problems and to satisfy the applicable itemized-verdict statute, but not so itemized as to run the risk of an inconsistent verdict. This is not an easy task; the model verdict

forms, while helpful, may not be appropriate in all cases. However, at least being aware of the difficulties will put you ahead of many practitioners. And for all you potential appellees deviously devising the world's least itemized verdict form ("Who wins? How much?"), a final word of warning: a completely different two-issue rule applies in federal court.³⁵ □

¹ *Damico v. Lundberg*, 379 So. 2d 964, 965 (Fla. 2d D.C.A. 1979); see also *Katos v. Cushing*, 601 So. 2d 612, 613 (Fla. 3d D.C.A. 1992) ("The test for harmful error is whether, but for such error, a different result may have been reached."); PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE §9.8 (2d ed. 1997). Note that, in criminal cases, the rule is reversed: the prosecution must show "that there is no reasonable possibility that the error contributed to the conviction." *State v. DeGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (emphasis added). As a result of this shifted appellate burden of proof, the two-issue rule does not apply to criminal cases. See Padovano, *supra*, at §9.9. Thus, the following analysis is confined to civil cases.

² *Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980).

³ In adopting the two-issue rule, the court rejected the contrary rule, which "mandates a reversal where error has affected one issue unless it is clear that the complaining party has not been injured thereby." *Colonial Stores*, 355 So. 2d at 1186 (citing out-of-state cases).

⁴ *Colonial Stores*, 355 So. 2d at 1186.

⁵ See *Ablanado*, 511 So. 2d at 538.

⁶ *Id.*

⁷ See *Colonial Stores*, 355 So. 2d at 1186.

⁸ See *Ablanado*, 511 So. 2d at 538.

⁹ See *Charlemagne*, 700 So. 2d at 160.

¹⁰ *Id.* (citing *Ablanado*, 511 So. 2d at 538) (emphasis added).

¹¹ See *id.*

¹² See *Barth v. Khubani*, 705 So. 2d 72 (Fla. 3d D.C.A. 1997).

¹³ See *Gonzalez v. Leon*, 511 So. 2d 606 (Fla. 3d D.C.A. 1987).

¹⁴ *Id.* at 607.

¹⁵ *LoBue v. Travelers Ins. Co.*, 388 So. 2d 1349, 1351 n.3 (Fla. 4th D.C.A. 1980), cited in *Gonzalez*, 511 So. 2d at 607-08.

¹⁶ See *Brown v. Sims*, 538 So. 2d 901, 907 n.4 (Fla. 3d D.C.A. 1989) ("*Ablanado* can be interpreted as a circumscription of the two-issue rule.>").

¹⁷ *Barth*, 748 So. 2d at 261-62.

¹⁸ Notwithstanding the Supreme Court's use of both terms, "theory of liability" is not necessarily synonymous with "cause of action." See *Zimmer, Inc. v. Birnbaum*, 2000 WL 313560 (Fla. 4th D.C.A. Mar. 29, 2000). In *Zimmer*, it appears that only one cause of action was

presented to the jury. The instruction on that claim, however, contained two theories of liability (based on two different tests for determining "product defect"). The court applied the two-issue rule.

¹⁹ *Barth*, 748 So. 2d at 262 (emphasis added).

²⁰ *Id.* at 262 n.7.

²¹ See *Colonial Stores*, 355 So. 2d at 1185-86.

²² *Id.* at 1186.

²³ *Brown v. Sims*, 538 So. 2d 901, 907 n.4 (Fla. 3d D.C.A. 1987).

²⁴ See *id.*

²⁵ See *Model Verdict Form 8.1*, Comment 1, Supreme Court Committee on Standard Jury Instructions (Civil); *Burton v. Powell*, 547 So. 2d 330 (Fla. 5th D.C.A. 1989) (noting but declining to address the constitutional issue). In fact, the Supreme Court noted the issue when approving the model verdict form. See *In re Standard Jury Instructions (Civil)*, 541 So. 2d 90 (Fla. 1989) ("It has been suggested that we should ignore the provisions of §§768.77 and 768.78 in structuring verdict forms because of a perceived legislative invasion of a judicial function. Without passing on any constitutional objections we accept the committee's recommendations as a good faith effort to accommodate the legislature and the courts and thus approve the publication as requested.")

²⁶ While the courts have not addressed this issue, it appears that the legislature recognizes it. The 1999 amendments to §768.77 were part of the 1999 Tort Reform Act. The legislature specified that to the extent any part of that act was later found to infringe upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts, the infringing part should be construed as a request for rule change. See 1999 Fla. Laws ch. 225, §34.

²⁷ See *McElhaney v. Uebrick*, 699 So. 2d 1033 (Fla. 4th D.C.A. 1997) ("This case presents a classic example of why the requirements of §768.77, Florida Statutes (1995), prescribing the use of itemized verdicts, are so unmanageable.")

²⁸ See FLA. STAT. §768.78.

²⁹ See *ITT Hartford Ins. Co. v. Owens*, 2000 WL 390393 (Fla. 3d D.C.A. Apr. 19, 2000).

³⁰ See *Barhoush v. Louis*, 452 So. 2d 1075 (Fla. 4th D.C.A. 1984) (emphasizing that a two-issue rule problem could have been avoided had the defendant's counsel requested the itemized verdict "to which he was entitled" under the statute). But see *Food Lion v. Jackson*, 712 So. 2d 800 (Fla. 5th D.C.A. 1998) (rejecting the argument that the plaintiff's failure to request an itemized verdict precluded awarding the plaintiff a new trial on damages "in view of the opportunities given to all of the parties to complain about the noncompliance with the verdict form required by section 768.77").

³¹ See *Perry v. Allen*, 720 So. 2d 614

(Fla. 1st D.C.A. 1998); *Kriston v. Webster*, 688 So. 2d 346, 347 (Fla. 5th D.C.A. 1997) ("It is our view that the itemized verdict required by the statute is mandatory when requested by a party.")

³² Where no objection is made to a defective verdict form or inconsistent verdict before the jury is discharged, any defect or inconsistency is waived. See *Nix v. Summitt*, 52 So. 2d 419 (Fla. 1951); *Higbee v. Dorigo*, 66 So. 2d 684 (Fla. 1953); *Moorman v. American Safety Equip.*, 594 So. 2d 795, 799 (Fla. 4th D.C.A. 1992); *Southeastern Income Properties v. Terrell*, 587 So. 2d 670 (Fla. 5th D.C.A. 1991); *Alamo Rent-A-Car, Inc. v. Clay*, 586 So. 2d 394, 395 (Fla. 3d D.C.A. 1991).

³³ See *Cowen v. Thornton*, 621 So. 2d 684 (Fla. 2d D.C.A. 1993) (Altenbernd, J., concurring) ("Since the enactment of section 768.77, Florida Statutes (1991), most tort cases are now submitted to the jury with an interrogatory verdict form that usually causes a zero verdict to be both inconsistent and inadequate.")

³⁴ See *Doughty v. Ins. Co. of N. Am.*, 701 So. 2d 1225 (Fla. 4th D.C.A. 1997) ("It appears to us that itemized verdicts are producing many more appeals, because in order to have a ground for an appeal [with an itemized verdict], the entire amount awarded need not be inadequate.")

³⁵ See, e.g., *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 330 U.S. 19 (1962); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1098 (11th Cir. 1983); *American Sugar Refining Co. v. J.E. Jones & Co.*, 293 F. 560 (5th Cir. 1923). In fact, the rule is almost exactly reversed: "If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld...." *Sunkist Growers*, 330 U.S. at 30 (quoting *Maryland v. Baldwin*, 112 U.S. 490 (1884)).

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