GUEST EDITORIAL

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Come on Judge, you should just know the law!

Well, that title grabbed your attention. This is the takeaway from three recent appellate decisions—including two from the Second District. These decisions may be reshaping the rule of preservation, especially when a judge's error appears for the first time in the final order. While each decision arises in the family-law context, other litigators should take note as well because this changing landscape could easily apply in other civil contexts.

The rule of preservation is simple. Appellate courts will only consider issues raised to and considered by the trial court. *City of Orlando v. Birmingham*, 539 So.2d 1133, 1134 (Fla. 1989). In other words, if a party fails to object or raise a specific argument to the trial court, then the appellate court will not consider it for the first time on appeal. Id. The rule applies equally in all types of cases and exists out of basic fairness to the trial judge and opposing counsel by giving them notice of a possible error so that it can be corrected at the earliest stage of the proceeding. *Id.*

Historically, the rule has been stringently applied. For example, even when an opposing party concedes that the trial court erred, appellate courts would still not reverse if the error was unpreserved. *E.g., Davis v. Dep't of Rev. o/b/o Bartell*, 221 So. 3d 790, 791 (Fla. 2d DCA 2017). And until recently, the very limited exception to this rule was fundamental error, which is "exceedingly rare," especially in civil cases. *Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 646 (Fla. 2015).

The strict application of this rule was typically true for all types of errors, including those first appearing in the judge's written decision. *See, e.g., E.J. Assocs., Inc. v. John E. and Aliese Price Found., Inc.*, 515 So. 2d 763, 763 (Fla. 2d DCA 1987); *Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 324 (Fla. 1st DCA 2011). For example, if a statute or rule required trial judges to support their decision with written factual findings and they failed to do so, then historically the losing party had to file a motion for rehearing to preserve this issue. See, *e.g., D.T. v. Fla. Dep't of Children and Families*, 54 So. 3d 632, 633 (Fla. 1st DCA 2011); *Matyjaszek v. Matyjaszek*, 255 So. 3d 372, 374 (Fla. 4th DCA 2018); *R.B. v. Dep't of Children and Families*, 997 So. 2d 1216, 1218 (Fla. 5th DCA 2008).

But this clear precedent was changed recently by the Fourth District's 7-5 split, *en banc* decision in *Fox v. Fox*, 262 So. 3d 789, 791 (Fla. 4th DCA 2018). In that case, the trial court failed to include the statutorily required factual findings to support awarding permanent alimony, but the error was not preserved by a motion for rehearing. *Id.* Receding from its own precedent and certifying conflict with its sister courts, the Fourth District held that the error was reversible irrespective of preservation. *Id.*

Despite acknowledging that this error did not constitute fundamental error, the Fourth District still reversed because "the rules do not require the filing of a motion [for rehearing], many dissolution appeals are *pro se*, and a family court judge should be aware of the statutory requirements in rendering a decision on alimony, equitable distribution, and child support." *Id.* at 793. The court further reasoned that the rule of preservation was never intended "to allow a trial court to ignore statutory requirements of which it should be aware" and then allow that error to "evade review" simply because "someone forgot or failed to move for rehearing . . . ." *Id.* at 794. After all, "[c]ertainly, a judge sitting in family court should be cognizant of what findings are statutorily required in a final judgment . . . [and] [t]here should be no need to bring those requirements to the trial court's attention." *Id.* at 794.

Seven months later, a Second District panel explicitly adopted *Fox*'s holding in *Engle v. Engle*, No. 2D17-620, 2019 WL 2844186, at *1 (Fla. 2d DCA July 3, 2019). The Court repeated the same

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rationale as the Fourth District, including that " 'a judge sitting in family court should be cognizant of what findings are statutorily required . . . .' " *Id.* at *6.

The *Engle* Court added some additional reasons as well. For example, the Court explained that the line of cases requiring a rehearing to preserve this error all stem from *Broadfoot v. Broadfoot,* 791 So. 2d 584, 585 (Fla. 3d DCA 2001). *Engle*, 2019 WL 2844186, at *2—*3. But according to the Second District, the cases *Broadfoot* cited for support did not concern the failure to make written factual findings, but rather the need for a new trial due to an unreasonable delay between the trial and an order's issuance—which, as an aside, is simply another kind of error appearing for the first time on the face of an order. Id. at *2-*3.

The *Engle* Court also did not understand why this rule should be applied only in family-law cases since in other legal contexts, Florida courts routinely reverse errors appearing on an order's face without indicating whether the error was preserved through a motion for rehearing. *Id.* at *4.

Finally, the Second District rejected the rationale of other district courts, which have said that requiring a rehearing makes it easier for trial courts to correct the error at the earliest stage, rather than waiting until the appellate processes' completion. *Id.* at *4. Although *Engle* agreed that correcting the error early through rehearing is a "best practice" for litigants, the Court did not believe that failing to do so should foreclose litigants from having the error corrected. *Id.* at *4. Imposing such a procedural constraint in the family-law context "elevates judicial convenience over equity." *Id.* at *6.

The *Engle* Court then certified conflict with the First, Third, and Fifth Districts. A month later, a different Second District panel applied the *Engle* holding in *Allen v. Juul*, No. 2D17-2965, 2019 WL 3756075, at *2 (Fla. 2d DCA Aug. 9, 2019). The *Allen* Court re-certified conflict and repeated the quote that "a judge sitting in family court should be cognizant of what findings are statutorily required . . . ." *Id.* To date, the other districts have not directly responded. Despite the Second and Fourth District certifying conflict, no one has sought review in the Florida Supreme Court, though there is still time in the *Allen* case, at least as of the drafting of this article.

Suffice to say, the Second and Fourth District's ruling may seem harsh on what trial judges should or shouldn't know. These decisions seem especially harsh given that a new judge with no family-law background assigned to family-law cases may not be aware of the statutory requirements unless specifically raised by a litigant. What's more, the conclusion that "a judge sitting in family court should be cognizant of what findings are statutorily required" could be equally said about judges in criminal court and the statutory sentencing guidelines or judges in civil court and the common-law requirement for written findings to support an injunction or, well, any judge sitting in any court and the Florida Evidence Code or rules of procedure. Yet, district courts routinely decline to consider unpreserved errors in these contexts.

Other concerns in the Second and Fourth District's rationale exist as well. For example, *Fox*'s reasoning that no rule of procedure requires moving for rehearing to preserve the failure to make statutorily required findings could apply to every preservation issue in every civil matter since the rule of preservation is a common-law rule. *See Dober v. Worrell,* 401 So. 2d 1322, 1323–24 (Fla. 1981). *Engle*'s reasoning that courts routinely reverse errors appearing on an order's face without indicating whether the error was preserved through rehearing is not surprising given that courts do not need to discuss preservation if no one brings that issue to the court's attention. Not to mention, even when raised, district courts routinely consider and reject appellate points without discussion—which is the cornerstone of the per curiam affirmance. See *Bowles v. D. Mitchell Investments, Inc.,* 365 So. 2d 1028, 1029 (Fla. 3d DCA 1978). And *Engle*'s conclusion that mandating rehearing to preserve this issue "elevates judicial convenience over equity" has undoubtedly been the conclusion of every litigant who has fallen victim to the rule of preservation.

A tension also exists between the exception announced in these recent decisions and at least four well-established common-law rules. First, the Supreme Court has clearly established that district courts should not consider unpreserved errors unless they constitute fundamental error. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). Yet, the Second and Fourth District readily conceded that failing to make statutorily required findings is not fundamental error. *Fox*, 262 So. 3d at 794. These decisions also contradict the rule that courts are confined to the matters raised by the parties and should avoid deciding matters not advanced by them. *See, e.g., Miami-Dade Cty. v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 200 (Fla. 2003); *Marocco v. Brabec,* No. 1D17-894, 2019 WL 1498321, at *3 (Fla. 1st DCA Apr. 5, 2019). Underpinning the latter principle is a third rule that these recent decisions also contravene, which is that courts must studiously avoid even the appearance of favoring one party by suggesting how to proceed strategically. *Shore Mariner Condo. Ass'n, Inc. v. Antonious*, 722 So. 2d 247, 248 (Fla. 2d DCA 1998). Finally, the Second and Fourth District's rationale for this new exception runs contrary to the rule that "pro se litigants are bound by the same rules that apply to counsel"—including the rule of preservation. *Stueber v. Gallagher,* 812 So. 2d 454, 457 (Fla. 5th DCA 2002).

In short, while the Second and Fourth District may have had laudable goals in carving out this new exception to preservation, it will be interesting to see how the Supreme Court resolves their express and direct conflict with the other district courts and the Supreme Court's own prior strict application of the preservation rule. It will also be interesting to see whether even the Second and Fourth District will apply their new exception outside of the family-law context, especially when their rationale could apply to undo virtually any preservation problem.