



# Arkansas Association of Defense Counsel

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## Laying the Foundation for a Successful Appeal: Be Specific With Your Trial Arguments

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Lawyers juggle a multitude of tasks during trial. In addition to courtroom advocacy, a trial lawyer must coordinate and prepare witnesses, marshal exhibits, prepare and revise witness examinations, conduct on the spot legal research, craft various motions, and prepare closing arguments. All performed under pressure in a very condensed timeframe. There is a reason that most great trial lawyers are fantastic multitaskers.

Presenting a winning case to the jury or bench that results in a favorable verdict for your client is only part of the battle. To hold onto that winning judgment post-trial, a great trial lawyer must be intentionally aware at all times during trial of the foundation that he is laying for appeal — something that can sometimes become a secondary consideration when in the intense setting characteristic of a typical trial.

Possibly the most important (and often forgotten) thing that a trial lawyer can do to strengthen their case on appeal is to make sure to be as specific as possible when making motions, objections, or other arguments to the trial court. This can be particularly easy to forget when making routine motions. It is important to remember that you are not just arguing to the trial judge that is

immediately in front of you. You are also making your argument to any appellate court that may later review the case. A trial lawyer has only one chance to create a great record.

We often think of a great record as including all of the foundational testimony and exhibits that are needed to support the factual components of our case. Creating a winning appellate record, however, also includes making sure that your arguments to the court contain sufficient detail to allow an appellate court to understand what it is reviewing without the contextual understanding that a trial court would have.

A good trial lawyer will remember to make all the proper motions. A great trial lawyer will ensure that any oral motion includes a detailed description of the grounds for that motion. It does not matter if you have already argued the same issue to the trial court at a previous stage of the litigation. An appellate court only has designated portions of the transcript and filings before it, and can only review your case based on that record.

The Arkansas Court of Appeals recently underscored the importance of being specific in *Williams v. Shackelford*, 2017 Ark. App. 149 (March 9, 2017). At the conclusion of the plaintiff's medical malpractice case, defense counsel moved for directed verdict on “all issues in the case, damage, proximate cause, and standard of care.”

At the completion of the defense's case, counsel renewed the motion, stating only that he would "incorporate by reference all previous statements and arguments made in reference" to his original motion. The Court of Appeals found this shortcut to be fatal to the defendant's appeal of the sufficiency of the evidence supporting the ultimate jury verdict, holding that defense counsel had not done enough to preserve the issue for review. *Id.* at \*3.

There have been many other similar occasions where a party has found itself unable to assert an argument on appeal because, though perhaps clear to the trial court who had the benefit of context, the record did not contain a description of the grounds for motion that was specific enough to preserve the issue for appeal.

Examples include *Ouachita Wilderness Institute, Inc. v. Mergen*, 329 Ark. 405, 413-14, 947 S.W.2d 780, 785 (1997), where "[m]erely asserting that the plaintiff failed to establish a negligence case" was not enough to allow the Court to review the sufficiency of the evidence on appeal. Likewise, in *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 236, 148 S.W.3d 754, 757 (2004), an oral motion stating only that "the plaintiff hasn't made the cause of action in this case because he hasn't showed negligence . . . .", was not enough to preserve an issue for appeal since it failed to specify in what respect the evidence was deficient.

Save yourself heartache and an adverse ruling on appeal by heeding the warnings of these decisions. Avoid shortchanging your motion by rushing through it. Make a list of the specific items you need to cover with each argument made so you do not forget in the heat of trial. There is nothing worse than scouring the transcript after trial for an argument you think you made, but did not. Be intentional about creating a solid record with each argument you make, and you will find yourself in a much better position to succeed on appeal.

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