CARLTON FIELDS

Be Wary About A Trial Court's Assurances of Preservation

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Imagine a trial judge is trying to move things along at a charge conference. An issue arises, trial counsel begins to voice objections, and the judge short-circuits the discussion by saying, "Your rights are saved on the issue." Later, the trial is lost, appellate relief is needed, and a question arises about what exactly the incomplete objection preserved. Events much along these lines occurred in *Perrone Leather Apparel, Inc. v. Sleesen*, 2016 WL 3032659 (Mass. App. Div. May 6, 2016). Before being prodded to move on, trial counsel had objected that the evidence did not support certain instructions. On appeal, the party also argued that the instructions were based on affirmative defenses that had not been raised in the pleadings. In an effort to avoid a lack of preservation, the party argued that the trial court's declaration about rights being saved permitted additional arguments to be made on appeal. The appellate court disagreed. It held that the only rights preserved were those relating to objections actually made, on grounds actually raised. **Preservation Issue:**

- All possible grounds for objection should be made on the record, even if the trial court attempts to shorten the discussion by stating that the matter is preserved or saved.

Tip: Be careful when a trial judge attempts to cut short an objection or series of objections. Certainly the trial judge's instructions must be followed, but an opportunity to obtain appellate relief may be lost if the specific grounds to be asserted on appeal were not also asserted at trial. If the judge insists on moving on, respectfully make clear that there is more to be said and utilize the first reasonable opportunity to say it.

Authored By

Matthew J. Conigliaro

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