

TREAD CAREFULLY: PRESERVATION OF ERROR IN FLORIDA

Appellate Practice Section

Co-chairs: Marie A. Borland, Hill Ward Henderson, and Kristin A. Norse, Kynes, Markman & Felman, P.A.



In *Aills v. Boemi*, 29 So. 3d 1105 (Fla. 2010), the Court concluded that counsel did not preserve his trial objection for appellate review because he was not sufficiently specific in stating his legal objection. During trial, defense counsel objected to plaintiff's argument in closing that postoperative negligence had



Recent decisions from the Florida Supreme Court reflect increasing concern for specific and proper preservation.

occurred, on the grounds that there was no evidentiary basis in the record to support the argument. On appeal, the Second District reversed the trial court's order denying the defendant's motion for new trial, but on a different basis: that the issue of postoperative negligence "had

Preservation of error for appeal is crucial. No matter the merits of your case, appeals can rise and fall on whether the ruling you are challenging is properly preserved. And while preservation of error has always been a requirement, recent decisions from the Florida Supreme Court reflect increasing concern for *specific* and *proper* preservation.

Continued on page 19

MEDIATION & ARBITRATION DALAN, KATZ & SIEGEL, P.L.

Attorneys at Law

Rick Dalan:

- Board Certified Civil Trial Lawyer
- Certified Circuit Civil Court Mediator
- Certified Federal Court Mediator
- AV Rated

Jeffrey M. Katz:

- LLM in Taxation
- Certified Circuit Civil Court Mediator
- AV Rated

Mediation Services for:

- Personal Injury Litigation
- Coverage Litigation
- Medical Malpractice
- Wrongful Death
- Products Liability
- Construction Litigation
- Commercial Litigation
- Discrimination Claims
- First Party Insurance Claims

Experienced in:

- Insurance Defense
- Plaintiff Personal Injury
- Civil Litigation
- Premises Liability
- Coverage Litigation
- Products Liability
- Wrongful Death
- UM Claims
- Auto Negligence

Free Wireless Internet Access

2633 McCormick Drive, Suite 101, Clearwater, Florida 33759

www.dalan-katz.com

Phone: (727) 796-1000 or (800) 538-4173

Facsimile: (727) 797-2200

Continued from page 18

neither been pled in the complaint nor tried by consent. "The Florida Supreme Court quashed the district court's ruling, concluding that defense counsel's objection was not preserved for appellate review because he did not "advance the *specific ground* of objection relied upon by the district court for reversal." These expectations of specificity are now par for the course, and *Aills* has already been cited as requiring specific and accurate objections to preserve issues for appeal. See, e.g., *Lewis v. Sun Times Corp.*, 47 So. 3d 872, 874 n.2 (Fla. 3d DCA 2010).

Not only must objections be *specific*, but their form must be *proper*. In *Companiononi v. City of*

Tampa, 51 So. 3d 452 (Fla. 2010), the Supreme Court made clear that a party objecting to attorney misconduct during closing argument must also timely move for a mistrial in order to preserve that objection for appeal. Even though defense counsel objected multiple times to misconduct during closing (all of which were sustained), *and* had moved for a new trial on the basis of those objections, the trial court denied the defendant's motion because it had not "moved for a mistrial" as well. The district court reversed, concluding that "a motion for a mistrial is not a prerequisite to moving for a new trial." The Supreme Court disagreed, holding that even when a party's objection to attorney misconduct is

sustained, the party "must also timely move for a mistrial."

Any trial lawyer should be well aware of the strict guidelines governing preservation of error or should contact an appellate practitioner who can help. Particular rules govern preservation of error in areas ranging from motions *in limine* and *Frye* challenges, to jury selection and jury instructions. Making *specific* and *proper* objections could be the difference between a well-taken appeal and

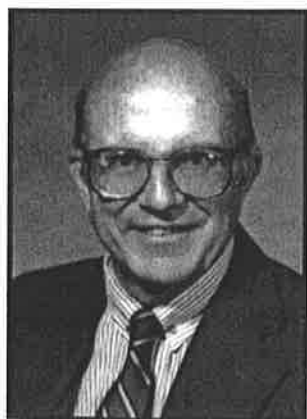
an appeal rejected in the spirit of *Aills* and *Companiononi*. Tread carefully.



Author:
J. Logan Murphy,
Hill Ward Henderson

CARLTON FIELDS

ATTORNEYS AT LAW



A. Broaddus Livingston
1930 - 2011

Remembering Carlton Fields' Former President A. Broaddus Livingston

The lawyers and staff of Carlton Fields
express their deepest sympathies to the family of
Broaddus Livingston on his passing.

Broaddus Livingston passed away on September 25, 2011 in Tampa, Florida at the age of 80. In 1954, he started at Carlton Fields as the firm's first law clerk and then joined the firm one year later as an attorney. He served as Assistant City Attorney for the City of Tampa from 1959 to 1963. Mr. Livingston was Carlton Fields' President for 10 years (1981 to 1991) and then Chair of the firm's Board of Directors (1991 to 1995). He retired in January 2003.

Mr. Livingston was awarded the Herbert G. Goldberg Outstanding Trial Lawyer of the Year Award in 1988 from the Hillsborough County Bar Association and was a Fellow of the American College of Trial Lawyers.

Mr. Livingston's wit, winning smile, and positive energy were his hallmarks, and he will be greatly missed.

www.carltonfields.com

Atlanta | Miami | Orlando | St. Petersburg | Tallahassee | Tampa | West Palm Beach