APPELLATE TIP: PRESERVING ARGUMENTS FROM DENIED MOTIONS FOR SUMMARY JUDGMENT

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If the court has denied your motion on the ground that a question of fact exists, it is important to ensure that you preserve your argument that the undisputed facts entitle your client to judgment as a matter of law, because once trial begins, "summary judgment motions effectively become moot." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 539, ¶ 19 (App. 2004). Therefore if you proceed to trial, make sure you take the necessary steps to preserve your argument for appeal. The only exception to this rule is if your summary judgment motion raised a pure issue of law – that is, "one that does not require the determination of any predicate facts, namely, the facts are not merely undisputed but immaterial." Id., at 539 n. 5; *Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 48, ¶ 20 (App. 2011). Because this is a narrow exception, it is wise to take the following steps to ensure that you have preserved your issue for appeal.

The court of appeals will not consider any argument that involves a weighing of the evidence unless the appellant has first timely moved for a new trial on that issue after entry of the final judgment. A.R.S. § 12-2102. Case law also states that an issue is adequately preserved for appeal by a motion for judgment as a matter of law under Rule 50(b) or other post-trial motion. *John C. Lincoln*, 208 Ariz. at 539. Importantly, these arguments must be raised in appropriate post-trial motions, in-trial motions are insufficient to preserve these issues for appeal. *Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, 183, ¶ 13 (App. 2011) (holding that a rule 50(a) motion for judgment as a matter of law made during trial is insufficient to preserve an issue for appeal, but a rule 50(b) motion made after the verdict is sufficient). It is still important to make the in-trial motions, though, because a Rule 50(a) motion is a necessary prerequisite to making a Rule50(b) motion.

To preserve an argument for appeal, a motion for new trial—or other post-trial motion—must specifically address the issues to be raised on appeal. For example, making an argument concerning the sufficiency of the evidence of one element of a claim will not preserve arguments on the sufficiency of the evidence of other elements of that claim. *Acuna v. Kroack*, 212 Ariz. 104, 111, ¶¶ 26-27 (App. 2006); *Morales v. Barnett*, 2008 WL 4638133, at *5 (App. Feb. 25, 2008) (holding that an argument concerning sufficiency of the evidence on the intent element of an intentional infliction of emotional distress claim was waived when the defendant only challenged the sufficiency of the evidence on the severe emotional distress element in the trial motions). "In other words, a motion for new trial must be made before the scope of the appeal may be enlarged to include the sufficiency of the evidence to sustain the verdict or judgment," and "[t]hat scope may not be enlarged … beyond the matters assigned as error in the motion for new trial." *Gabriel v. Murphy*, 4 Ariz.App. 440, 442 (1966).

In general, we recommend that any potentially dispositive issue be raised whenever possible to ensure that the issue is preserved for appeal. This includes in-trial motions for judgment as a matter of law and post-trial motions for new trial, judgment as a matter of law, or other relief from the judgment.