

# THE NATIONAL LAW REVIEW

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## Using Post-Trial Motions to Argue Error for the First Time

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Thursday, April 18, 2019

Among the many benefits of utilizing appellate counsel at trial is that appellate counsel can assist in timely raising possible errors, and if error is not asserted when it occurs, then appellate counsel may be able to raise the issue at another point in the trial or even through post-trial motions. Post-trial motions, though, can be particularly challenging when it comes to asserting error for the first time.

*Cougar Canyon Loan, LLC v. Cypress Fund, LLC*, No. 20170413-CA, 2019 WL 1388786 (Utah Ct. App. Mar. 28, 2019), a recent decision from the Utah Court of Appeals, helps illustrate the point. Following an adverse verdict on securities fraud claims, the defendant moved for a new trial, arguing that a statute of limitations barred the claim because a corporate agent's early knowledge of the fraud should have been imputed to the plaintiff corporation, but the jury was not instructed on that point of law. That argument had not been previously raised.

Unfortunate for the defendant, the trial court denied the defendant's post-trial motions and did so without addressing the merits of the limitations argument. The appellate court explained that, as a result, the challenge was not preserved. Utah law permits an argument to be raised for the first time in a new trial motion, but if the trial court does not reach the merits, including if the court finds the issue waived, then it is not preserved for appeal. The appellate court proceeded to examine the argument under Utah's plain error doctrine and ruled that the higher showing required for plain error had not been made.

Could the defendant have done something to nudge the trial court to address the merits of the limitations argument? We cannot know. We can suggest that if appellate counsel is participating at the post-trial stage and appreciates the need for the trial court to reach an otherwise unpreserved error, there may be steps that counsel can take to improve the chances that the trial court does so.

### Practice Tip

When preparing post-trial motions, involve appellate counsel, who can assess the jurisdiction's preservation rules. If a point is being raised for the first time in post-trial motions and the trial court must reach its merits for it to be preserved for appeal, then appellate counsel should assist in crafting and presenting the argument in the manner that maximizes the chances that the trial court does so.

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