The Basics of Appellate Jurisdiction:

The Concepts of Aggrievement, Appealability & Reviewability in New York Civil Appellate Practice

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I. An introduction to the core concepts of appellate practice

Appellate practice is a specialty and the laws and rules governing appellate procedure are often misunderstood by lawyers who do not regularly appear in the appellate courts of New York. The three concepts of aggrievement, appealability, and reviewability are the fundamentals upon which practice in the appellate courts is built. They fall naturally into the following sequence: *First*, aggrievement involves whether a party may have suffered a wrong to his or her interests in the court of original instance. *Second*, appealability involves whether the State Constitution or a statute authorizes the aggrieved party to ask an appellate court to inquire into the correctness of the order or judgment of which he or she complains; it is the key to the appellate courthouse. *Third*, reviewability involves, among other things, the power of the appellate court to address the particular types of errors that the appellant contends are presented by the order or judgment before it (the scope of review) and the rules that govern the process (the standards of review).

II. Aggrievement

A. Aggrievement and relief are related concepts

Before approaching the subject of aggrievement, it must be understood that lawsuits are about "relief." Relief has been defined as the "redress or benefit … that a party asks of a court" (Black's Law Dictionary 1317 [8th ed]). Ultimate relief is sought in the pleadings (CPLR 3017) and intermediate or ancillary relief is sought by motion (CPLR 2014[a]). Aggrievement has to do with whether the relief sought or opposed by the appellant, that affected his or her interests in the litigation, was granted or withheld.

B. The statute – CPLR 5511

The requirement that an appellant be aggrieved by a judgment or order is contained in CPLR 5511, which states:

> "§ 5511. Permissible appellant and respondent. *An aggrieved party or a person substituted for him may appeal* from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent" (emphasis added).

C. Statement of the aggrievement doctrine

When the Advisory Committee on Practice and Procedure was engaged in drafting the CPLR it determined to retain the requirement that a party be "aggrieved" in order to appeal. Although use of the word had "presented problems" in the past, "no acceptable substitute [had] evolved" and its meaning was therefore left by the revisers to case law (Second Preliminary Report of Advisory Committee on Practice and Procedure, at 321 [1958]; Legislative Studies and Reports, McKinney's Cons Laws of NY, Book 7B, CPLR 5511, at 129).

1. Aggrievement broadly defined

Aggrievement has been defined, somewhat ambiguously, in several ways. "In some cases, the issue has been whether the appellant has sufficient interest in the subject matter involved to be considered a 'party aggrieved', and the resolution of such an issue often depends on the applicable substantive law, though the issue is presented in procedural form. In other cases, the issue has been whether the appellant's rights or interests are adversely affected by the determination in question" (Karger, Powers of the New York Court of Appeals § 11.1, at 378 [rev 3rd ed]).

An attempt at a broad definition of aggrievement was made in the case of *Matter of Richmond County Socy. for Prevention of Cruelty to Children* (11 AD2d 236, 239 [2d Dept 1960], *affd* 9 NY2d 913 [1961]), in which it was said that "the test [of aggrievement] is whether the person seeking to appeal has a direct interest in the controversy which is affected by the result and whether the adjudication has a binding force against the rights, person or property of the party or person seeking to appeal."

The problem with such broad definitions is that they lead to conflating issues regarding the appellant's stake in the controversy that is the subject of the case (standing) with his or her interest in the relief granted or withheld in the order or judgment that is the subject of the appeal (aggrievement). To the extent such broad definitions are useful, they establish that appeals cannot be merely academic and that the provisions of the order or judgment that is the subject of the appeal must have a direct adverse effect upon the appellant's interests in the litigation that are not merely theoretical, remote, or contingent (*see, e.g., State of New York v Philip Morris Inc.*, 61 AD3d 575, 578-579 [1st Dept 2009], *appeal dismissed* 15 NY3d 898 [2010]; *Matter of Landis*, 114 AD3d 458 [1st Dept 2014]).

2. Aggrievement narrowly defined

The case of *Mixon v TBV, Inc.* (76 AD3d 144 [2d Dept 2010]) sets forth the following statement of the aggrievement doctrine that provides a clear, two-part test that can be applied to determine the great majority of all aggrievement questions:

> "First, a person is aggrieved when he or she asks for relief but that relief is denied in whole or in part. Second, a person is aggrieved when someone asks for relief against him or her,[2] which the person opposes,[3] and the relief is granted in whole or in part" (76 AD3d at 156-157 [empha-

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[2] See the discussion of *Tymon v Linoki* (23 AD2d 663, 664 [2d Dept 1965], *mod on other grounds* 16 NY2d 293 [1965]), *infra.* In *Tymon* the appealing defendant against whom no relief was sought, was united in interest with a co-defendant against whom the plaintiff recovered a judgment affecting the appealing defendant's interests. *Tymon* is an example of a recognized, limited exception to the second part of *Mixon's* aggrievement test.

[3] See discussion of judgments or orders made on the default or consent of the appealing party, *infra*.

sis omitted]; *see also,* Albert M. Rosenblatt, Stuart M. Cohen, and Martin H. Brownstein, *"Civil Practice Before the Appellate Division and Other Intermediate Appellate Courts,"* § 37.22 in Ostertag & Benson, General Practice in New York, vol. 24 of West's New York Practice Series).

D. Standing and aggrievement distinguished

The concepts of standing and aggrievement, while similar, are different.

Standing has to do with whether a party has a sufficient stake in a justiciable controversy to seek its resolution in and appropriate relief from the court of original instance. Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right" (Black's Law Dictionary 1536 [9th ed]).

Aggrievement can be thought of as appellate standing and, under the *Mixon* definition, it has to do with whether relief sought by the appellant or sought by his or her adversary and opposed by the appellant was awarded or withheld contrary to the appellant's wishes.

If the concepts of standing and aggrievement were not different, a party whose case has been dismissed for lack of standing to sue could not be said to be aggrieved and therefore could not appeal, leading to the logical conclusion that such appeals, when taken, must be dismissed. However, the fact is that plaintiffs whose cases have been dismissed for lack of standing routinely appeal from the judgments or orders dismissing their pleadings and their appeals are heard and decided on the merits. If the judgment or order appealed from is found to be correct because the appellant lacked standing to sue, the result is an affirmance, not dismissal of the appeal for lack of aggrievement (*see, e.g., 315-321 Realty Co. Assoc., LLC v City of New York,* 33 AD3d 509 [1st Dept 2006]*; Matter of Maddox v Maddox*, 141 AD3d 529 [2d Dept 2016]; *Matter of Ellison v Stanford*, 147 AD3d 1122 [3d Dept 2017] *lv denied* 29 NY3d 908 [2017]; *Bradshaw v National Structures*, 2 AD3d 1282 [4th Dept 2003], *lv denied* 2 NY3d 702 [2004]). Why is this?

To reiterate: the issue of standing has to do with the party's stake in the controversy that is the subject of the action or proceeding, whereas aggrievement has to do only with the relief granted or withheld by the order or judgment under review and whether it adversely affected the appellant's position in the litigation. This distinction is necessary to vindicate New York's policy designed to provide at least one appeal as of right—and review on the merits—from a judgment, decree, or order that finally determines an action or proceeding (*see, e.g.*, CPLR 5701[a][1]; SCPA 2701; Family Ct Act § 1112[a]). Thus, where lack of standing is raised in the court of original instance and the case is dismissed on that ground, an appeal by the aggrieved plaintiff or petitioner should be reviewed and determined on the merits.

There are cases in which a party's lack of standing is not raised in the court of original instance but instead is raised for the first time on an appeal from an order or judgment that resolves underlying issues on the merits (*see, e.g., Matter of Richmond County Socy. for Prevention of Cruelty to Children,* 11 AD2d, *supra*; *Matter of DeLong*, 89 AD2d 368 [4th Dept 1982], *discussed below, and Matter of Landis*, 114 AD3d, *supra*). However,

cases that have expressly considered whether standing may be raised for the first time on appeal have resulted in conflicting decisions. Some have held that an objection to standing is waived if not properly raised in the court of original instance (*see, e.g., Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]) and others have held that an objection to standing may be raised for the first time on appeal (*see, e.g., JP Morgan Chase, Natl. Assn. v Atedgi*, 162 AD3d 756 [2d Dept 2018]).[4]

Suffice it to say that standing and aggrievement are conceptually different, that broad definitions like the one announced in the *Matter of Richmond County Socy.* case tend to blur the distinction, and that at least where lack of standing is found at nisi prius, an appeal by the aggrieved party is to be determined on the merits and not dismissed.

E. Lack of aggrievement is a jurisdictional defect

Only parties that are aggrieved by an order or judgment may appeal from it (CPLR 5511). The requirement that the appellant be aggrieved is jurisdictional and is a threshold issue that may be raised at any time during the appellate process, either by the respondent by written or oral motion or in a brief, or by the appellate court on its own motion (*Leeds v Leeds*, 60 NY2d 641 [1983]; *Mixon v TBV, Inc.*, 76 AD3d at 146; *Klinge v Ithaca Coll.*, 235 AD2d 724, 726 [3d Dept 1997]; *Dolomite Prods. Co. v Town of Ballston*, 151 AD3d 1328, n. 3 [3d Dept 2017]; Elliott Scheinberg, *Is Standing Jurisdictional to be Raised First Time on Appeal?—Part II*, NYLJ, Jul. 9, 2018).

F. Aggrievement pertains to relief, not reasoning

1. Prevailing parties

Although awarded all the relief he or she demanded, can a party be aggrieved if, in the process, the court rejected some contention of law or made some finding of fact contrary to the position taken by that party in the litigation? Numerous authorities say no. In the leading case of *Parochial Bus Sys. v Board of Educ.* (60 NY2d 539, 544-545 [1983] [citations omitted]) the Court of Appeals adopted what can be called a "relief not reasoning" test for aggrievement, stating that "where the successful party has obtained the full relief sought, he has no grounds for appeal or cross appeal. This is so even where that party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor, or where he failed to prevail on all the issues that had been raised" (*see also, e.g.,* Karger, Powers of the New York Court of Appeals § 11.4, at 382-384 [rev 3rd ed]; 12 Weinstein-Korn-Miller, NY Civ Prac ¶ 5511.06, at 55-75 to 55-76 [2nd ed]; *Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473 [1986]; *Matter of Bayswater Health Related Facility v Karagheuzoff*, 37 NY2d 408, 412-413 [1975]; *Matter of Zaiac*, 279 NY 545, 554 [1939]; *People v Pratt*, 121 AD3d 462 [1st Dept 2014]; *Hodge v Baptiste*, 114 AD3d 830 [2d Dept 2014]; *Matter of*

[4] See Elliot Scheinberg, *Is Standing Jurisdictional to be Raised First Time on Appeal? Parts I and II* (NYLJ, Jul. 6 & 9, 2018) for a review of the subject and the conflicting case law.

Spaziani v City of Oneonta, 302 AD2d 846, 847 [3rd Dept 2003]; *Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322 [4th Dept 2015]; *Morison v New York El. R.R.*, 26 NYS 640, 641 [General Term, 1st Dept 1893]; Thomas R. Newman & Steven J. Ahmuty, Jr., *Appellate Practice: Prevailing Party's Right to Appeal or Obtain Relief*, NYLJ, Nov. 8, 2017).

Some cases antedating *Parochial Bus* found aggrievement where the objectionable ruling of law or finding of fact might be prejudicial to the appealing party in a future action or proceeding (*Becker v Becker,* 36 NY2d 787 [1975][noting that in matrimonial actions, at least, a party was aggrieved even though awarded a divorce, when one of two grounds for that relief was rejected]; *Lincoln v Austic*, 60 AD2d 487, 490 [3d Dept 1978], *lv denied* 44 NY2d 644 [1978]). However, applying the "relief not reasoning" test of *Parochial Bus*, the continued viability of those cases is highly doubtful (*but see*, *Feldman v Planning Bd. of Town of Rochester*, 99 AD3d 1161, 1163 [3d Dept 2012], which cites *Lincoln* with authority notwithstanding the holding in *Parochial Bus*; and *Sabbagh v Copti*, 251 AD2d 149, n 1 [1st Dept 1998] [where an objection to the appellant's aggrievement was not raised by the respondent, the Appellate Division noted that "in a technical sense" the appellant was not aggrieved because she had been awarded the annulment she requested, but it nevertheless reached the merits of a dismissal of an alternate ground for the same relief and modified the judgment to grant an annulment on the alternative ground as well, citing *Becker*]).

A possible alternative to the apparent contradiction of calling the party who obtained all the relief he or she requested aggrieved would be to hold that res judicata and collateral estoppel are inapplicable to determinations that could not be or were not appealed and that therefore adverse rulings of law and findings of fact against that party are not binding in another action (12 Weinstein-Korn-Miller, NY Civ Prac ¶ 5511.06, at 55-77 [2d ed]; *Matter of Held v New York State Workers' Compensation Bd.,* 58 AD3d 971, 972-973 [3d Dept 2009]; *see also, American Para Professional Sys., Inc. v Hooper Holmes, Inc.*, 13 AD3d 167, 168 [1st Dept 2004] implicating the doctrine of the law of the case in a similar context).

2. Partial aggrievement

Many orders and judgments aggrieve a party only in part. Where an order or judgment grants some but not all of the relief requested by the appellant, or grants some but not all of the relief requested by the respondent that the appellant opposed, the appellant is aggrieved by the failure to grant the full relief he or she requested or by the grant of partial relief to the respondent over the appellant's objection (*see, e.g., Scharlack v Richmond Mem. Hosp.*, 127 AD2d 580 [2d Dept 1987] [Defendant hospital moved to strike plaintiff's complaint for failure to make certain discovery or, alternatively, for an order compelling such discovery. Supreme Court denied the hospital's motion on condition that that plaintiff comply and pay a sanction, which the hospital did not accept. Despite the grant of conditional relief to hospital, it was aggrieved by failure to grant the prime relief it re-

quested—an order unconditionally striking the complaint]; *Feldman v Planning Bd. of Town of Rochester*, 99 AD3d 1161, *supra* [In CPLR article 78 proceeding to review and annul a determination granting a special use permit on grounds that it was granted in violation of town zoning ordinance and in violation of open meetings law and SEQRA, Supreme Court rejected claimed zoning violations but annulled determination only on open meetings law and SEQRA grounds, thereby permitting further consideration by planning board. Petitioner was aggrieved by the failure to grant complete relief annulling determination without possibility of further planning board consideration.]).

In the case of partial aggrievement the appeal should be limited only to those parts of the order or judgment that aggrieve the appellant. The limitation can be expressed in two ways, either overtly in the notice of appeal, or impliedly in the appellant's brief by failing to raise issues concerning the part of the order that does not aggrieve him or her. It frequently occurs that a notice of appeal specifies that the appeal is taken from the whole of an order or judgment that includes a part that does not aggrieve the appellant. The decisions and orders of appellate courts usually state the nature of the limitation and the decretal paragraph also reflects the limitation by affirming, reversing, or modifying the order or judgment under review "insofar as appealed from."

G. To be aggrieved, a party must have sought relief, or have opposed relief sought by an adversary, that affects that party directly

1. Co-defendants

It was long the rule that a defendant was not aggrieved by the dismissal of the plaintiff's complaint against his or her codefendant (*Schultz v Alfred*, 11 AD2d 266 [3d Dept 1960]; *see also, Helou v Nationwide Mut. Ins. Co.,* 25 AD2d 179 [3d Dept 1966], *lv denied* 17 NY2d 424 [1966]). However, in 1972 the Appellate Division, Second Department, decided *Stein v Whitehead* (40 AD2d 89). *Stein* dealt with an action that was commenced and tried when the doctrine of contributory negligence, which barred a cross claim for contribution, was still in force. The jury returned a verdict finding both named defendants at fault in the happening of the accident, but the trial court dismissed the plaintiff's complaint against one of them as a matter of law and the other appealed from an interlocutory judgment on the issue of liability against her alone. While the appeal in *Stein* was pending the Court of Appeals decided *Dole v Dow Chem. Co.* (30 NY2d 143 [1972]) which replaced the contributory negligence rule with one of comparative negligence. In those circumstances the court in *Stein* held that the appellant was aggrieved by the dismissal of the plaintiff's complaint against the codefendant because his *Dole* right of contribution against that codefendant was adversely affected by the reasoning given by the trial court for that dismissal. In 1974 the Legislature adopted article 14 of the CPLR which codified the comparative negligence rule of *Dole* and which now requires that a claim for *Dole* contribution be asserted either in a separate action or

by counterclaim, cross claim, or third-party claim in a pending action (*see* CPLR 1403).

In the case of *Robert T. Donaldson, Inc. v Aggregate Surfacing Corp. of Am.* (47 AD2d 852 [2d Dept 1975], *appeal dismissed* 37 NY2d 703 [1975]), the Second Department limited the holding in *Stein* so as to effectively require the assertion and dismissal of a claim for *Dole* contribution under CPLR 1403 in order to find aggrievement, implying that an appellant's claim of aggrievement cannot be founded on the dismissal of the plaintiff's complaint against a codefendant, but only on the dismissal of the appellant's own claim for contribution against that codefendant. Following *Donaldson,* a number of cases have held that the dismissal of a cross claim results in aggrievement, but not the dismissal of the plaintiff's claim against the codefendant (*see, e.g., Nunez v Travelers Ins. Co.,* 139 AD2d 712, 713 [2d Dept 1988]; *Hauser v North Rockland Cent. School Dist. No. 1,* 166 AD2d 553 [2d Dept 1990]; *Grigoropoulos v Moshopoulos,* 44 AD3d 1003 [2d Dept 2007]; *Rojas v Paine*, 125 AD3d 742 [2d Dept 2015]; *Blake Realty v Shiller*, 87 AD2d 729 [3d Dept 1982]; *Scoville v Town of Amherst*, 277 AD2d 1038, 1039 [3d Dept 2000]; *cf., Coons v Beltrone Constr. Co.,* 4 AD3d 584, 585 [3d Dept 2004]).

In *Mixon v TBV, Inc.* (76 AD3d 144, *supra*), the Second Department limited *Stein* to its own unique facts and held that to the extent that *Stein* might be read to hold that a defendant is aggrieved solely by the dismissal of the plaintiffs' complaint against a codefendant, it was effectively overruled by the passage of article 14 of the CPLR and by the holdings of the Court of Appeals in *Parochial Bus Sys. v Board of Educ.* (60 NY2d 539, *supra*) that aggrievement turns upon relief not reasoning and by *Hecht v City of New York* (60 NY2d 57 [1983]) that an appellate court cannot grant relief to a nonappealing party unless it is necessary to do so to afford complete relief to the party who did appeal. In so doing, the *Mixon* court considered the case of *Stone v Williams* (64 NY2d 639, 641 [1984]), in which the Court of Appeals had cited *Stein* with approval. In *Stone* the plaintiff's complaint against the appellants' codefendant, well as the appellants' cross claims for indemnity and contribution from that codefendant, were dismissed. The *Mixon* court read *Stone* consistently with the holdings in *Parochial Bus* and *Hecht* as based upon the dismissal of the appellants' cross claim, the citation to *Stone* notwithstanding. Thus, while the appellants in *Stone* were *aggrieved* only by the dismissal of their cross claim, they were entitled to *review* of the reasoning that supported both the dismissal of the complaint and the cross claim against the codefendant.

A defendant who fails to move or join in a codefendant's motion to dismiss the complaint is not aggrieved by the denial of the codefendant's motion (*DeGennaro v Church of St. Apostle*, 234 AD2d 168, 169 [1st Dept 1996]). A non-party who does not join in a motion of a party and who has not been substituted for the movant is not aggrieved by the denial of that motion (*Matter of Marsh*; 6 AD3d 362, 363 [1st Dept 2004]). However, a party who does join in a motion brought by a coparty is aggrieved by its denial (*Matter of Moriches Inlet Prop. Owners Assn. v Town*

of Brookhaven, 2 AD3d 641 [2d Dept 2003]; *Ciraolo v Melville Ct. Assocs.,* 221 AD2d 582 [2d Dept 1995]).

A defendant is not aggrieved by an order granting the plaintiff's motion to resettle an order reinstating a claim against additional parties with whom it is not united in interest (*Thymann v AFG Mgt.*, 112 AD3d 455 [1st Dept 2013]).

2. Bystander parties—a rare exception

Can a party who neither seeks nor opposes relief be aggrieved? In the case of *Tymon v Linoki* the plaintiff-vendee Tymon sued the vendor Linoki under a contract for the sale of real property and named Hayes, the vendee under a subsequent contract for the sale of the same property, as an additional party defendant. Hayes sought no relief and was not mentioned in the judgment in favor of Tymon directing Linoki to convey the property to Tymon. Nevertheless, Hayes was held to be aggrieved because if Tymon did not prevail, Hayes would have been entitled to the conveyance (*Tymon v Linoki*, 23 AD2d 663, 664 [2d Dept 1965], *mod on other grounds* 16 NY2d 293 [1965]). In *Mixon v TBV, Inc.* (76 AD3d 144, *supra*), the court cited *Tymon v Linoki* as an example of a rare instance in which a person against whom no relief was sought might be aggrieved by the granting of relief to an adversary against a party with whom he or she is united in interest.

3. Attorney for a party

Counsel for a deceased plaintiff, for whom a personal representative has not been substituted, is not aggrieved by the dismissal of the complaint, over his objection, for failure to effect a timely substitution (*Thomas v Benedictine Hosp.*, 8 AD3d 781, 782 [3d Dept 2004]). The attorney is not a party and has no personal interest in the outcome of the case.

4. Order or judgment in action or proceeding designed to protect the interest of others

It sometimes occurs that a party will appear and unsuccessfully seek relief in an action or proceeding designed chiefly to protect the interests of others. Can such a party be said to be aggrieved by the denial of his or her request for relief?

In *Matter of Richmond County Socy. for Prevention of Cruelty to Children* (11 AD2d 236, *supra*) a dissolved charitable corporation petitioned for a direction as to the disposition of its assets under the *cy pres* doctrine to an organization or organizations organized for kindred charitable purposes. Notice of the proceeding was given to a number of such organizations and the Staten Island Mental Health Society was permitted to intervene and serve an answer requesting that the assets be distributed to it. After a hearing, the Supreme Court determined that the assets should be distributed to two other organizations and the Staten Island Mental Health Society appealed. The Appellate Division held that the ultimate beneficiaries of the assets of the dissolved corporation were the children it was created to protect and who were in the care of the state as *parens patriae*. Their interests were

represented by the Attorney-General who did not appeal. Because the Staten Island Mental Health Society had no legal right to the funds, it was not aggrieved by the order appealed from and its appeal was dismissed.

In *Matter of DeLong* (89 AD2d 896 [4th Dept 1982]), the administrator of a decedent's estate reached a settlement of its wrongful death claim against the County of Erie during trial after summations but before the case was submitted to the jury. The jury was permitted to deliberate and then rendered a verdict on the issue of damages in favor of the plaintiff and against another defendant in an amount far higher than agreed upon in the settlement. The estate's administrator applied to the Surrogate's Court for approval of the settlement and the County appeared and made its own application for the same relief. The Surrogate denied the applications and the County appealed. Citing the *Matter of Richmond County Socy.* case, the Third Department, in an opinion by then-Justice Hancock, held that the real parties in interest to the settlement were the decedent's distributes and not the appellant County, whose interests were actually adverse to those of the distributes and who, therefore, was not a proper appellant under CPLR 5511.

Both the *Matter of Richmond County Socy.* and *Matter of DeLong* cases are effectively ones dealing with questions of standing, not aggrievement. In both, the appellants had been permitted to appear and seek relief and their applications had been denied on the merits. Under the *Mixon* definition of aggrievement, they were aggrieved parties. Their lack of standing was raised for the first time on appeal. Whether that is permissible in the future will ultimately depend on resolution of the conflict between the cases that hold an objection to standing is waived if not properly raised in the court of original instance and those that hold an objection to standing can be raised for the first time on appeal.[5]

H. Status as a party

Although CPLR 5511 states that "[a]n aggrieved *party* or a person substituted for him may appeal," case law has expanded and explained what is meant by the use of the word "party" in the statute. It means a "party" to the order or judgment appealed from.

"It is a mistake to suppose that no one can appeal from an order made in an action unless he [or she] be a party to the action. Every one who can properly be called a party to the order, and who is aggrieved thereby, may appeal" (*Hobart v Hobart*, 86 NY 636, 637 [1881]). Where a nonparty is expressly bound by a judgment or order, and is aggrieved thereby, he or she may prosecute an appeal pursuant to CPLR 5511 (*Brady v Ottaway Newspapers*, 97 AD2d 451 [2d Dept 1983], *affd* 63 NY2d 1031 [1984]; *see also, Stewart v Stewart,* 118 AD2d 455, 458-459 [1st Dept 1986]; *Posen v Cowdin*, 267 App Div 158, 160 [1st Dept 1943]; *Matter of Male Infant B.*, 96 AD2d 1055; 1056 [2d Dept 1983]; *Petroski v Petroski*, 6 AD3d 1194 [4th Dept 2004]; 12 Weinstein-Korn-Miller, NY Civ Prac ¶ 5511.04 [2d ed]).

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[5] See footnote 4 and accompanying text.

I. Judgments or orders made on the default or consent of the appealing party

It has often been held that a judgment or order made on the default of the appealing party is not appealable (CPLR 5511; *Matter of Monique Tawana C.* [*Thomas A.*], 246 AD2d 351 [1st Dept 1998]; *Katz v Katz*, 68 AD2d 536, 540-541 [2d Dept 1979]; *Glickman v Sami*, 149 AD2d 458 [2d Dept 1989]; *Farhadi-Jou v Key Bank of N.Y.*, 2 AD3d 1041, 1042 [3d Dept 2003]). The remedy is to move to vacate the default under CPLR 5015(a)(1) and, if that motion is denied, to appeal from the order denying vacatur (*Batra v State Farm Fire & Cas. Co.*, 205 AD2d 480 [1st Dept 1994]; *Eller v Eller*, 116 AD2d 617, 618 [2d Dept 1986]). The rule is the same for orders made on the consent of the appealing party (*Smith v Hooker Chem. & Plastics Corp.*, 69 NY2d 1029 [1987]; *Matter of Colletti v Colletti*, 56 AD2d 845 [2d Dept 1977]; *Chemical Bank v Zisholtz*, 227 AD2d 580 [2d Dept 1996]; *Matter of Avery v Aery,* 55 AD3d 1095 [3d Dept 2008]).

Although almost always phrased in terms of the non-appealability of orders or judgments entered on default or consent, the rule is probably better understood as a part of the aggrievement doctrine (*see*, Rosenblatt, Cohen, and Brownstein, *supra*, § 37.23). It is founded on the theory that the function of appellate courts is the correction of errors. A court cannot be said to have committed an error when it was never called upon to exercise its judgment by reason of the default of one of the parties. The failure of a party to raise an objection to relief requested by an opponent is deemed acquiescence in that request. One who consents or acquiesces cannot be said to be aggrieved (*Flake v Van Wagenen*, 54 NY 25, 27-28 [1873]).

Some proof that the default judgment rule may be considered an offshoot of the aggrievement doctrine is *James v Powell* (19 NY2d 249, 256, n 3 [1967]). In *James* it was held that, contrary to the express wording of CPLR 5511, default judgments are appealable, but only "matters which were the subject of contest below" are presented for review, such as the denial of a request for an adjournment (*see, e.g., Hawes v Lewis*, 127 AD3d 921, 922 [2d Dept. 2015], *Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004], and cases therein cited).

It was once held that the remedy to correct the provisions of a judgment that did not conform to a party's consent was a motion to vacate the portion that did not conform and to appeal from the denial of the motion (*Bolles v Cantor*, 6 App Div 365 [1st Dept 1896]). However, the rule of the *Bolles* case is no longer followed; such a motion is, in effect, one to resettle the decretal paragraphs of the judgment to conform to the consent, from the denial of which no appeal lies (*see*, *Hatsis v Hatsis*, 122 AD2d 111 [2d Dept 1986]; *Hale v Hale*, 16 AD3d 231, 232 [1st Dept 2005]). It is now the rule that if an order or judgment recites that it was entered on consent but fails to conform to that consent, the appellant is aggrieved to the extent the relief granted exceeds or differs therefrom (*Hatsis v Hatsis*, *supra*; *Silber v Silber*, 204 AD2d 527, 528 [2d Dept 1994], *lv dismissed* 85 NY2d 856 [1995]; *Jordan v Horstmeyer*, 152 AD3d 1097 [3d Dept 2017]; *Warner v Warner*, 94 AD3d 1524 [4th Dept 2012]).

J. Loss of aggrieved status—Relinquishment or loss of interest

An appellant who assigns his or her interest in the subject matter of the action to another and thus loses standing in the action is no longer an aggrieved party within the meaning of CPLR 5511 (*Matter of Luckenbach*, 303 NY 491, 495-496 [1952]; *Prudential Sav. Bank v Panchar Realty Corp.,* 72 AD2d 792, 793 [2d Dept 1979]). Reassignment of the interest to the appellant will not serve to cure the loss of aggrieved status (*Langeloth Found. v Dickerson Pond Assocs.*, 149 AD2d 408, 409 [2d Dept 1989]).

K. Who are respondents?

Respondents are those persons who have an interest in sustaining the order or judgment appealed from (*New York Trust Co. v Weaver,* 270 App Div 989 [1st Dept 1946], *affd* 298 NY 1 [1949]; *Jones v H. Freeman, Inc.,* 249 App Div 710 [4th Dept 1936]). In short, any party to the order or judgment that might be aggrieved by its reversal or modification is a respondent on the appeal.

III. Appealability

Appealability is the key to the appellate courthouse. It turns on three points. First, is the determination to which the aggrieved party objects embodied in a judgment or order? Second, is appeal from that judgment or order authorized by law? Third, if an appeal is authorized, does it lie as of right or only by permission and, if so, the permission of whom?

A. Determining appealability is a three-step process

1. Determine whether the item sought to be appealed constitutes "appealable paper"

CPLR 5512(a) defines "appealable paper," stating "[a]n initial appeal shall be taken from the judgment or order of the court of original instance." No appeal lies from a decision, verdict, report, finding of fact, or ruling.

The CPLR contemplates that all civil orders and judgments be reduced to writing (CPLR 2219[a]; 5011; 1 Buzard & Newman, NY Appellate Prac § 3.04[1], at 3-18 to 3-22). An order, other than one of an appellate court, must be signed by the judge (CPLR 2219[a]) and a judgment must be signed by the clerk of the court (CPLR 5016). Some judgments are signed by both the judge and the clerk (22 NYCRR 202.48; 8B Carmody-Wait 2d, Judgments § 63:21). A purported order that is unsigned is not appealable (*Bankers Trust Co. of Cal. v Ward*, 269 AD2d 480, 481 [2d Dept 2000]). An order deciding a motion made on supporting papers has additional attributes. It must "be signed with the judge's signature or initials by the judge who made it, state the court of which he or she is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper" (CPLR 2219[a]).

2. Determine if the State Constitution or a statute authorizes an appeal from that type of item.

"There is no inherent right to appeal a court's determination. The right to appeal depends upon express constitutional or statutory authorization" (*Friedman v State of New York,* 24 NY2d 528, 535 [1969]; *Matter of Timothy L.*, 128 AD2d 63, 66-67 [1st Dept 1987], *affd* 71 NY2d 835 [1988]; *Gastel v Bridges*, 110 AD2d 146 [4th Dept 1985]).

3. If so, determine whether appeal lies as of right or by permission. If permission is required, which court or courts may grant it?

B. The sources of appellate jurisdiction

1. Appeals to the County Court or the Appellate Term

Appeals from Village, Town, or City Justice Courts; City Courts, and District Courts, lie to the County Court in the county in which they are located unless the Appellate Division in that Judicial Department has established an Appellate Term of the Supreme Court. Appellate Terms have been established in the First and Second Departments.

a. NY Constitution, art VI, § 11(c); § 8(d), (e)

b. 22 NYCRR 640.1, 730.1

c. UJCA 1701; UCCA 1701; UDCA 1701

2. Appeals to the Appellate Division or the Appellate Term

Appeals from the Civil Court of the City of New York, the Criminal Court of the City of New York, and from the County Court lie to the Appellate Division in the department in which the action or proceeding is pending unless that court has established an Appellate Term. Where such an Appellate Term has been created, appeals from orders or judgments of the County Court made in civil actions or proceedings and from orders, sentences, or judgments of the Criminal Court of the City of New York lie to the Appellate Term, and appeals from orders, sentences, or judgments of the County Court made in criminal actions lie to the Appellate Division.

a. NY Constitution, art VI, § 8(d), (e)

b. CPLR 5701(a); UCCA 1701; CPL 460.50

3. Appeals to the Appellate Division

a. NY Constitution, art VI, § 4(k)

b. CPLR 5701 — Appeals to Appellate Division from supreme and county courts

c. CPLR 5702 — Appeals to Appellate Division from other courts of original instance

i. Court of Claims Act § 24

ii. Family Court Act § 1112(a); §§ 365.1, 365.2; § 439(e)

iii. SCPA 2701

d. CPLR 5703 — Appeals to Appellate Division from appellate courts

e. CPLR 7011 — Appeals in habeas corpus proceedings

4. Appeals to the Court of Appeals

a. NY Constitution, art VI, § 3(b) — Jurisdiction of Court of Appeals

b. CPLR 5601 — Appeals to the Court of Appeals as of right

c. CPLR 5602 — Appeals to the Court of Appeals by permission

C. Appealability in the Appellate Division

1. Appealable as of right

a. CPLR 5701(a)(1) — Interlocutory or final judgments, decrees, final orders

b. CPLR 5701(a)(2) — Orders

i. Must decide a motion

An order directing a judicial hearing to aid in the disposition of a motion does not decide the motion and does not affect a substantial right, and is, therefore, not appealable as of right (*Hochhauser v Electric Ins. Co.*, 46 AD3d 174, 185 [2d Dept 2007]; *Astuto v New York Univ. Med. Ctr.,* 97 AD2d 805 [2d Dept 1983]). Similarly, an order that refers branches of a motion to the trial court defers determination of those branches of the motion and is not appealable as of right (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714-715 [2d Dept 2013]; *Kaplan v Rosiello*, 16 AD3d 626, 626-627 [2d Dept 2005]).

ii. Motion must be made on notice — *see* CPLR 2211

An order made sua sponte or at a conference is not appealable as of right because it does not decide a motion made on notice (*Sholes v Meagher*, 100 NY2d 333 [2003]; *Davidson v Regan Fund Mgt., Ltd.*, 15 AD3d 172 [1st Dept 2005]; *Cohalan v Johnson Elec. Constr. Corp.*, 105 AD2d 770 [2d Dept 1984]; *Brown v State of New York*, 9 AD3d 23, 28 [3d Dept 2004]; *Matter of Majuk v Carbone*, 129 AD3d 1485 [4th Dept 2015]). The remedy is to move to vacate

the order and then appeal from any order denying vacatur (*Scholes v Meagher*, *supra* at 335).

iii. Must satisfy one or more of the criteria set forth in CPLR 5701(a)(2)(i) to (viii), including, among others, orders that involve some part of the merits, or affect a substantial right, or grant a motion for leave to reargue or determine a motion for leave to renew.

c. CPLR 5701(a)(3) — Order determining a motion made on notice refusing to vacate or modify a prior order that would have been appealable as of right had it decided a motion made on notice.

2. CPLR 5701(b) — Specifically not appealable as of right

a. Orders made in CPLR article 78 proceedings

b. Orders that require or refuse to require a more definite statement in a pleading

c. Orders that strike or refuse to strike scandalous or prejudicial matter from a pleading

3. CPLR 5701(c) — Appealable by permission

CPLR 5701(c) provides that in an action originating in the Supreme Court or County Court "any order which is not appealable as of right" is appealable to the Appellate Division by permission. The rule is subject to many case-law exceptions, some of which are reviewed below.

Permission may be granted by "permission of the judge who made the order granted before application to a justice of the appellate division; or by … a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application" (CPLR 5701[c]).

4. CPLR 5703 — Appeals to the Appellate Division from Appellate Courts

An appeal may be taken to the Appellate Division from an order of the Appellate Term that determines an appeal from a judgment or order of a lower court by permission of the Appellate Term, or in case of refusal, by permission of the Appellate Division (CPLR 5703[a]).

An appeal may be taken to the Appellate Division as of right from an order of a County Court or a special term of the Supreme Court which determines an appeal from a judgment of a lower court (CPLR 5703[b]).

5. Not appealable

a. Rulings

No appeal lies from rulings made during the course of an examination before trial (*Tri-State Pipe Lines Corp. v Sinclair Refining Co*., 26 AD2d 285, 286 [1st Dept 1966]), even if reduced to an order and signed (*Hall v Wood*, 5 AD2d 998 [2d Dept 1958]; *Matter of Beeman*, 108 AD2d 1010 [3d Dept 1985]). Where, however, a party makes a motion on notice to reopen the examination for the purpose of permitting disputed questions to be answered or to seek a protective order against such discovery, the Second Department has held that an order determining such a motion is appealable by permission (*Rockwood Nat. Corp. v Peat, Marwick, Mitchell & Co.*, 59 AD2d 573 [2d Dept 1977]; *cf. Matter of Beeman, supra,* at 1011) and is not appealable as of right (*Sainz v New York City Health & Hosps. Corp*., 106 AD2d 500 [2d Dept 1984]). In *Caraballo v New York Hosp*. (170 AD2d 190 [1st Dept 1991]) the First Department dismissed an appeal from such an order, holding that it was "nonappealable" (*but see, Holland v Presbyterian Hosp. in City of N.Y*., 122 AD2d 750 [1st Dept 1986] [holding such an order appealable as of right]; *New England Mut. Life Ins. Co. v Kelly*, 113 AD2d 285, 289 [1st Dept 1985] [entertaining an appeal from such an order, raising issues involving the privilege against self-incrimination, as of right]; *Tommy Hilfiger U.S.A. v Insurance Co. of N. Am*., 239 AD2d 255 [1st Dept 1997] [implying that such an order is appealable by permission]).

No appeal lies from evidentiary rulings made during trial, even if reduced to an order and signed (*Kopstein v City of New York*, 87 AD2d 547 [1st Dept 1982][dismissing such an appeal taken by permission of the trial judge]; *Matter of Skyliner Diner Corp. v Board of Assessors of County of Nassau*, 45 AD2d 712 [2d Dept 1974]), or from an order deciding a motion in limine to adjudicate in advance the admissibility of evidence at trial (*Cotgreave v Public Administrator of Imperial County* [*Cal.*], 91 AD2d 600 [2d Dept 1982]; *Weatherbee Constr. Corp. v Miele*, 270 AD2d 182 [1st Dept 2000]; *Strait v Ogden Med. Ctr.*, 246 AD2d 12, 14 [3d Dept 1998]; *George C. Miller Brick Co. v Stark Ceramics*, 2 AD3d 1341, 1342-1343 [4th Dept 2003]; *but see, Scalp & Blade v Advest, Inc.,* 309 AD2d 219, 223-224 [4th Dept 2003]). However, an order that decides a motion seeking in advance of trial to limit the issues to be tried, as opposed to the evidence that may be adduced at trial with respect to a given issue, is appealable (*see, Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 810 [2d Dept 2003]; *Frankel v Vernon & Ginsberg, LLP*, 118 AD3d 479 [1st Dept 2014]).

b. Decisions

Appeal does not lie from a decision, but only from an order or judgment entered thereon (*Cioffi v City of New York*, 14 AD2d 741 [1st Dept 1961]; *Matter of Bloeth v Cyrta*, 21 AD2d 979 [2d Dept 1963]; *Dudick*

v Gulyas, 4 AD3d 604 [3d Dept 2004]). Nor does an appeal lie from an order denying a motion to vacate or set aside a decision (*Matter of Colonial Penn Ins. Co. v Culley*, 144 AD2d 363 [2d Dept 1988]; *Guella v Hempstead Gardens*, 4 AD3d 450, 451 [2d Dept 2004]).

A decision embodies the reasoning of a court for determining a motion, or an action tried to a judge alone, in a certain way. It contemplates the subsequent making and entry of a formal order or judgment thereon. Phrases such as "submit order" or "settle order on notice" at the foot of a judicial document are telltales that the document is a decision.

No appeal lies from a decision, whether in writing (*Schicchi v Green Constr. Corp.*, 100 AD2d 509 [2d Dept 1984]) or oral and recorded in a transcript of proceedings in open court. An unsigned transcript of an oral decision that does not comply with the requirements of CPLR 2219(a) is not appealable (*Ojeda v Metropolitan Playhouse*, 120 AD2d 717 [2d Dept 1986]; *Blaine v Meyer*, 126 AD2d 508 [2d Dept 1987]). The statement in a transcript that "this shall constitute the decision and order of the court" does not make it so.

c. Reargument

No appeal lies from an order denying reargument (*Charney v North Jersey Trading Corp.*, 184 AD2d 409 [1st Dept 1992]; *Matter of Robinson*, 30 AD2d 702 [2d Dept 1968], *appeal dismissed* 22 NY2d 938 [1968]; 12 Weinstein-Korn-Miller, NY Civ Prac ¶ 5701.23 [2d ed]). The theory of such a motion is that the court, by overlooking or misapprehending the applicable law or facts, mistakenly arrived at its decision. Only the court that heard the original motion can judge if it failed to consider any of the points raised, and its determination on such a point must be final (*Matter of Underhill,* 193 App Div 957 [2d Dept 1920]).

d. Resettlement

No appeal lies from an order denying a motion to resettle an order or judgment in its substantive or decretal provisions (*Waltham Mfg. Co. v Brady*, 67 App Div 102 [1st Dept 1901]; *Bergin v Anderson*, 216 App Div 844 [2d Dept 1926]; *Masters, Inc. v White House Discounts*, 119 AD2d 639 [2d Dept 1986]; *Foertsch v Foertsch*, 187 AD2d 635 [2d Dept 1992]). However, appeal does lie from an order that denies resettlement so as to correct the recital of the papers read on a motion, strike factual recitals, etc. (*Farmers' Nat. Bank v Underwood*, 12 App Div 269 [1st Dept 1896]; *American Audit Co. v Industrial Fedn. of Am.,* 87 App Div 275 [1st Dept 1903]; *Bergin v Anderson, supra*).

D. Loss of appealability

1. Superseded orders and judgments

Prior to 1951 it was the rule that an appeal that was properly taken from an order or judgment had to be dismissed where that paper was superseded upon the granting of reargument or the granting of resettlement, or upon the denial of renewal (*see,* 17th Ann Report of NY Jud Council, at 205-211 [1951]). Thereafter, by statute, such appeals have not been affected by the making of the later order (CPLR 5517[a]).

2. Appeal from intermediate order falls upon entry of final judgment

The right of direct appeal from an intermediate order terminates with the entry of judgment in the action (*Matter of Aho*, 39 NY2d 241, 248 [1976]). However, if the order "necessarily affects" the final judgment it is brought up for review on appeal from the latter (CPLR 5501[a][1]).

3. Waiver

A plaintiff who obtains payment of a judgment while appealing from that judgment on the ground of inadequacy has not waived his or her right to appeal (*Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 73 [1966]; Karger, Powers of the New York Court of Appeals, § 11:10, at 400-401 [rev 3d ed]). However, the doctrine of waiver has been held applicable where a determination adverse to the appellant is made subject to a condition that the appellant accepts. Thus, where a plaintiff's complaint is dismissed but he or she is granted leave to replead (*New York Auction Co. Div. of Std. Prudential Corp. v Belt*, 49 NY2d 890 [1980]) or to bring another action (*Wood v American Sports Co.*, 58 NY2d 777 [1982]), the plaintiff is held to have waived the right to appeal if he or she avails him or herself of the alternate remedy offered by the court (Karger, Powers of the New York Court of Appeals, § 11:10, at 401-402 [rev 3rd ed]). Similarly, where a determination is rendered in favor of a party on condition that he or she pay a sum of money to an opponent, the latter is said to have waived the right to appeal by accepting the payment (*see, e.g., Witz v Renner Realty Corp.*, 55 AD2d 517, 518 [1st Dept 1976]; *Campion v Alert Coach Lines*, 137 AD2d 647 [2d Dept 1988]).

IV. Reviewability

Once an aggrieved party has properly taken an appeal from a judgment or order, analysis turns to the power of the court to which the appeal is taken to inquire into the errors claimed by the appellant and to the rules it uses to guide its work. The concept of reviewability covers a number of related subjects. What is the "scope of review" of the court to which the appeal is taken to examine the types of issues presented by the appeal? What are the "standards of review" by which the appellate court conducts the process? Are additional rulings, orders, and interlocutory judgments "brought up for review" on the appeal before the court? Is review confined by the

contents of the record on appeal? Must asserted errors have been preserved in the court of original instance?

A. Issues subject to review

1. Issues of fact—examples:

The basic principle is that a question of fact is presented if there is a conflict either in the evidence or in the inferences that can reasonably be drawn from the evidence (Karger, Powers of the New York Court of Appeals, § 13.2, at 450-451 [rev 3d ed]).

2. Issues of law—examples:

a. Interpretation of
   i. Statutes
   ii. Common Law
   iii. Contracts

b. Legal sufficiency of evidence at trial

For a court to conclude that a jury verdict is not supported by legally sufficient evidence, it must find that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

In cases tried to a court without a jury, as in the Family Court, each of the elements of the case must be supported by some evidence in the record sufficient to permit the court to draw its findings of fact therefrom reasonably (*see,* Karger, Powers of the New York Court of Appeals, § 13.6, at 465-470 [rev 3d ed])

3. Matters of discretion—examples

a. Making court rules

b. Granting leave to amend pleadings, add new parties, etc.

c. Granting calendar preferences or adjournments

d. Opening defaults

4. Mixed questions of fact and discretion—examples

Mixed questions of discretion and fact are present when the court is required to exercise its discretion in light of the answers to questions of fact and the parties are in dispute both as to how those questions of fact are to be resolved and how the discretion is to be exercised (Karger, Powers of the New York Court of Appeals § 16.3, at 575-577 [rev 3d ed]).

a. Setting aside a factual determination as against the weight of the evidence (see, Cohen v Hallmark Cards, supra at 498 [1978]; Nicastro v Park, 113 AD2d 129, 132 [2d Dept 1985]).

b. Fixing child support and maintenance

c. Equitable distribution

B. Scope of review

The scope of review of an appellate court depends upon the powers granted to it by the constitution or statute. Except in certain rare cases, the scope of review by the Court of Appeals is confined to errors of law. When considering appeals, the Appellate Division has broad powers to review errors of law and fact, and the exercise of discretion. However, the scope of review by the Appellate Division is limited when, in a proceeding transferred to it pursuant to CPLR 7803(4), it reviews an administrative determination made after a hearing at which evidence was taken.

1. Review powers of the Court of Appeals

a. NY Constitution, art VI, § 3(a)

b. CPLR 5501(b)

2. Review powers of the Appellate Division

a. On appeals

i. CPLR 5501(c) – questions of law and fact

ii. Common law – matters of discretion

b. In transferred CPLR article 78 proceedings

i. CPLR 7803(4) – substantial evidence

c. Other Administrative determinations – CPLR 7803(1)-(3)

C. Standards of Review

1. De novo

a. Questions of law

b. Matters of discretion

i. Abuses of discretion

"Abuse of discretion" is a code phrase for an error in the exercise of discretion that is so bad that it amounts to an error of law (*Patron v Patron*, 40 NY2d 582, 584 [1976]; *People v Washington*, 71 NY2d 916, 918 [1988]).

ii. Substitution of discretion for that of nisi prius

The Appellate Division is vested with the same power and discretion as the Supreme Court and may substitute its discretion for that of the latter court, even in the absence of abuse (*Brady v Ottaway Newspapers*, 63 NY2d 1031, *supra* at 1032 [1984]). Determinations involving the exercise of discretion with which the Appellate Division simply disagrees are often termed "improvident."

2. Issues of fact

a. Issues tried to a jury

A jury verdict should not be set aside unless the jury could not have reached the verdict it did on any fair interpretation of the evidence (*Nicastro v Park*, 113 AD2d 129, *supra* at 133-135 [2d Dept 1985]). Appropriate corrective action is a new trial (*Cohen v Hallmark Cards*, 45 NY2d 493, *supra* at 498 [1978]).

b. Issues tried to a court

On an appeal from a judgment entered after a nonjury trial the power of the Appellate Division to find facts is as broad as the trial judge (*Stempel v Rosen*, 140 AD2d 326, 328-329 [2d Dept. 1988]). The appropriate corrective action in the Appellate Division is a reversal of the erroneous findings, the making of new findings, and the award of judgment accordingly.

c. Where issues of credibility are involved

Where a verdict turns on the credibility of witnesses, the determination of the trier of fact, who saw and heard those witnesses is entitled to great weight on appeal (*Amend v Hurley*, 293 NY 587, 594 [1944*]; People v Gaimari*, 176 NY 84, 94 [1903]). "The memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by [the trier of fact] who sees and hears the witnesses than by appellate judges who simply read the printed record" (*Barnet v Cannizzaro*, 3 AD2d 745, 747 [2d Dept 1957]).

d. Where itemized verdict is involved— the "deviates materially" standard

In reviewing a money judgment in an action in which an itemized verdict is required by CPLR 4111 on an appeal in which it is contended that the jury's award is excessive or inadequate and that a new trial should be granted unless a stipulation is entered to a different award (so-called additur or remittitur), the standard of review by the Appellate Division is limited by the last sentence of CPLR 5501(c) to determining whether the

award "deviates materially from what would be reasonable compensation."

D. Review of other judgments, orders and rulings

1. Review of *prior* intermediate orders and rulings on appeal from final judgment - CPLR 5501(a).

CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review

"any non-final judgment or order which *necessarily affects* the final judgment, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken." (emphasis added).

In *Parochial Bus Sys. v Board of Educ.* (60 NY2d, *supra,* at 545-546) the Court of Appeals explained:

This rule permits a respondent to obtain review of a determination incorrectly rendered below where, otherwise, he might suffer a reversal of the final judgment or order upon some other ground. Hence, the successful party, who is not aggrieved by the judgment or order appealed from and who, therefore, has no right to bring an appeal, is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in his favor.

The "necessarily affects" provision of CPLR 5501(a) has been interpreted to mean that an appeal from a final judgment brings up for review prior orders in the case that affected its outcome. However, attempts to formulate a generally applicable definition of the meaning of the term "necessarily affects" have been unavailing, case law on the subject has been inconsistent, and application of the rule has been found to be "particularly vexing" in some instances (*see, Oakes v Patel*, 20 NY3d 633, 644 [2013]).

The meaning of the "necessarily affects" rule was the subject of the case of *Siegmund Strauss, Inc. v East 149th Realty Corp.* (81 AD3d 260 [1st Dept 2010], *mod* 20 NY3d 37, 42-43 [2012]) in which a narrow interpretation of the rule by the First Department was rejected by the Court of Appeals in favor of one more consistent with the notion that any intermediate order that affects the outcome of the case and the granting or withholding of ultimate relief in the final judgment is brought up for review on appeal from the latter. Subsequently in *Oaks v Patel* (*supra*, at 644-645) the Court of Appeals, in overruling a line of prior cases, held that when an order granting or denying a motion to amend relates to a proposed new pleading that contains a new cause of action or defense, the order necessarily affects the final judgment.

2. Review of a *subsequent* order or judgment

a. CPLR 5517(b) – Orders granting reargument or resettlement, or denying renewal are brought up for review on the appeal from the prior order.

b. CPLR 5501(c) – A judgment entered upon an order granting summary judgment is brought up for review on appeal from the prior order.

E. Review limited to matters actually in the record

1. Matters de hors the record

The general rule is that issues not raised in the court of original instance will not be considered for the first time on appeal (*see*, Thomas R. Newman & Steven J. Ahmuty, Jr., *Appellate Practice: Staying Within the Record*, NYLJ, Dec. 6, 2006, p. 3, col. 1).

2. Exceptions

The rule is subject to limited exceptions such as the ability of appellate courts to take judicial notice of matters of public record, incontrovertible documentary evidence, or incontestable physical facts, or to consider changes of law occurring since the making of the order or judgment under review (*see*, Thomas R. Newman & Steven J. Ahmuty, Jr., *Appellate Practice: Permissible Matter Outside the Record*, NYLJ, Mar. 7, 2007, p. 3, col. 1).

F. Loss of right of review of error

1. Preservation

The general rule is that a party must preserve error for later review by calling the alleged error to the attention of the trial court in time to correct it.

2. Exception

The general rule is subject to many exceptions, chief among which is the power of the Appellate Division to reach unpreserved errors in the exercise of its interest of justice jurisdiction.

V. Conclusion

In deciding whether to take an appeal or in considering an appeal taken by an adversary, a practitioner can begin to put the concepts of aggrievement, appealability, and reviewability to use by asking certain basic questions:

- Does the appellant have an "appealable paper?" If so, what does the order or judgment in question do? What relief does it grant or withhold?

- Is the appellant aggrieved? If so, is he or she aggrieved by the entire order or judgment or only by a part thereof?
- Who are those whose interests would be adversely affected by a reversal and are thus respondents on the appeal? Are there parties whose interests would not be affected by the outcome and who are therefore not respondents?
- Is the paper appealable? What statute authorizes the appeal? Does appeal lie as of right or only by permission? If by permission, has that permission been properly obtained?
- Are the issues raised within the power of the appellate court to review and correct? Were those issues preserved for appellate review in the court of original instance? What is the appellate court's scope of review? What standard of review applies?

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