# PRESERVATION, JUDICIAL NOTICE, AND THE HARMLESS ERROR RULE

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An Introductory Note on the Court of Appeals

Except for a few matters, the state constitution declares that the "jurisdiction of the court of appeals shall be limited to the review of questions of law." N.Y. Consti. Art. 6, § 3(a). *See also*, CPLR § 5501(b); CPL § 470.35.

The Court strictly interprets this constitutional limitation on its power, and it is therefore the responsibility of counsel to appropriately raise and preserve questions of law for Court of Appeals review.

In general, a party raises a question of law by making a claim or an argument, or by registering an objection or a protest in the trial court. While the objection or protest need not take any particular form, it must be sufficient to make known to the trial court the action counsel wishes the court to take, or his objection to the action the court has taken. CPLR § 4017; CPL § 470.05(2).

Court of Appeals decisions indicate that preservation of an issue for review requires a high degree of specificity with respect to the objection and the reasons for the objection. As the Court has noted, for example, "in a criminal case, arguments

that were not raised or considered in the court of first instance are not 'questions of law' within our constitutional powers." *People v. Knowles*, 88 N.Y.2d 763, 768 n.l (1996).

Even if the parties do not raise the preservation issue in their briefs, the Court can consider and determine the question on its own, *Halloran v. Virginia Chemicals, Inc.,* 41 N.Y.2d 386, 393 (1977). *See also,* Rules of the Court § 500.10 (Court may sua sponte determine whether it has subject matter jurisdiction and authority to review).

While it is within the power of the Appellate Division to reverse in the interests of justice in the absence of an objection or protest in the trial court, the Court of Appeals has no such "interests of justice" jurisdiction. *Brown v. City of New York,* 60 N.Y.2d 893 (1983); Martin v. City of Cohoes, 37 N.Y.2d 162, 165 (1975).

The Rules of the Court emphasize that preservation of error is central to Court of Appeals review. For example, all applications pursuant to CPL § 460.20 for leave to appeal to the Court in criminal cases must identify and reproduce "the particular portions of the record where the questions sought to be reviewed are raised and preserved." Rules of the Court § 500.20(a)(4).

There are four instances in which the Court of Appeals can go beyond questions of law and engage in *de novo* review of the facts. Three instances are based on the state constitution, and one on the Court's reading of a United States Supreme Court ruling:

(1) in death penalty cases: N.Y. Consti. Art. 6, § 3(a); CPL § 470.30

(2) when the Appellate Division on reversing or modifying a final or interlocutory judgment or order, "finds new facts and a final judgment or a final order pursuant thereto is entered." N.Y. Consti. Art. 6, § 3(a); CPLR § 5501(b). On the other hand, when the Appellate Division affirms the facts found in the trial court, that determination is beyond review; Court of Appeals review is limited in such cases to determining only whether there are facts in the record to support the Appellate Division's determination. *L. Smirlock Realty Corp. v. Title Guarantee Co.,* 63 N.Y.2d 955, 957-958 (1984).

(3) in reviewing determinations of the Commission on Judicial Conduct. N.Y. Consti. Art. 6, § 22(d)

(4) in defamation cases affecting a public figure, the Court can review the facts with respect to a finding below of malice. *Prozeralik v. Capital Cities Communications, Inc.,* 82 N.Y.2d 466, 474-475 (1993).

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I. Both plaintiff and defendant have a role at each stage of the proceedings in raising issues and protecting the record,

A. Both parties must object in order to preserve the issue for appellate review

B. Both parties must make a record which will demonstrate to an appellate court that the objection was either improperly sustained or properly overruled

C. In many instances the key to protecting the record is to anticipate the issues and prepare for them

1. *e.g.,* the plaintiff should always anticipate an attack on the pleadings and therefore spend the time preparing a complaint which will withstand judicial scrutiny because it adequately pleads all the requirements of a valid cause of action (i.e. notice, demand, etc.)

2. *e.g.,* the defendant should anticipate critical evidentiary rulings at the trial and be prepared to specifically and in a timely manner object (i.e, CPLR requirements for admission of business records as an exception to the rule against hearsay)

D. Plaintiff and defendant must both proceed on the same basic assumption: if you do not protect the record in the lower court you will get no help from an appeals court

II. ***The Notice of Appeal:*** if you do not file a proper and timely notice of appeal nothing is preserved for review

A. There are three ingredients of a proper notice of appeal: contents, timing, and service

1. ***Contents*****:** under CPLR 5515 subd. 1 a proper notice of appeal has three basic components

a. **the name or the party taking the appeal:** If there are multiple parties name each one; avoid using terms like "et al." or "etc." in the caption or the body of the notice

[Federal court: specify the party taking the appeal by naming each appellant in the caption or the body of the notice; while one attorney representing several parties can use "et al.", this should be avoided; FRAP 3(c)3

b. **designation of the judgment or order or specific part of the Judgment or order appealed from**

CPLR § 5501: an appeal from a final judgment automatically brings up for review any subsidiary rulings; *therefore do not limit scope of the appeal in the notice of appeal unless that is precisely what you want to do*

• an appeal from only part of an order is a waiver of the right to appeal from other parts of the order not specified in the notice of appeal; use language that the appeal is "from each and every part thereof"

*Watergate II Apartments v. Buffalo Sewer Authority,* 46 N.Y. 2d 52, 57 n.l (1978): certain errors in the notice such as saying it is an appeal from a "decision" instead of a judgment or order will be disregarded as a "mere misdescription"

*Mascitti v. Greene,* 250 A.D.2d 821, 822-823 (2nd Dept. 1998) (appellant held to issues in order on appeal as limited by the notice of appeal); *Hemnings v. St. Mark's Housing Asso.*, 272 A.D.2d 442, 444 (2nd Dept. 2000).

*Royal v, Brooklyn Union Gas,* 122 A.D.2d 132 (2nd Dept. 1986): if the notice of appeal specifies the appeal is limited to part of an order, there is a waiver of the right to appeal from other parts of the order. *See also, City of Mount Vernon v. Mount Vernon Housing Auth.,* 235 A.D.2d 516 (2nd Dept. 1997); after time to file notice of appeal has expired, it is too late to seek to amend a prior notice of appeal to include other portions of the judgment or order riot specified in the prior notice.

*Boyle v. Taylor,* 255 A.D.2d 411 (2nd Dept. 1998): wife waived right to appeal failure to award maintenance where notice of appeal limited the appeal to that part of the judgment regarding equitable distribution of marital assets; *see also, O'Donnell v. O'Donnell,* 41 A.D.3d 447 (2nd Dept. 2007)

*Kitchen v. Port Authority of New York and New Jersey,* 221 A.D.2d 195 (1st Dept. 1995) (if a "resettled order" has no effect on the appealable issues, the appeal must be from the original order)

*Vias v. Rohan,* 119 A.D.2d 672 (2nd Dept. 1986): plaintiff's appeal "on the amount of the damages" does not bring up for review the theory of liability and therefore court cannot consider claim that damages should not have been limited to one cause of action

*Battlpaglia v. Barlow,* 107 A.D.2d 1001, 1003 (3rd Dept. 1985): where order resolved a series of motions and cross motions for summary judgment, appeals court will consider only those portions of the order which the appellant has designated in its notice of appeal

*Mtr. of Smith,* 91 A.D.2d 789, 790 (3rd Dept. 1982); issues raised in Notice of Appeal but not in brief filed with Appellate Division will be deemed abandoned

c. **designation of the court appealed to**

2. ***Time***

a. CPLR 5513(a): take appeal within 30 days of service by a party of order or judgment appealed with notice of entry

Jurisdictional

"Very rigid" rule

Add five days if service by mail: CPLR 2103(b)(2)

Add one day if service by overnight delivery:

CPLR § 2103(b)(6)

E-service - CPLR § 2103(b)(7)

*Reynolds v. Dustman,* 1 N.Y.3d 559 (2003): if a notice of entry does not contain a reference to "entry" it is not a proper and effective notice of entry; see also, *Norstar Bank of Upstate New York v. Office Control Systems, Inc.,* 78 N.Y.2d 1110 (1991)

*Mileski v. MSC Industrial Direct Inc.,* 138 A.D.3d 797 (2nd Dept. 2016)

b. CPL § 460.10: 30 days to file and serve notice of appeal

[Federal court: not a notice of entry jurisdiction; time begins to run from the entry of the judgment regardless of counsel's knowledge of the entry. In a civil case the appeal must be taken within 30 days of entry of the judgment, FRAP 4 (a)(1), but in a criminal case it is within only 10 days. FRAP 4(b).

[While the clerk is expected to serve notice of entry, the failure to do so does not enlarge the time to file a notice of appeal. F.R.Civ.P. 77(d); to reopen the time to file a notice of appeal when the clerk did not send out notice of entry, *see,* FRAP 4(a)(6)]

[Federal caution: if there is an amended judgment be certain the notice of appeal is addressed to the correct

judgment. *See e.g., Rezzonico v. H & R Block, Inc.,* 182 F.3d 144 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1189 (2000). The safest course is to file a notice of appeal each time the judgment is amended.]

3. ***Service***

a. CPLR §5515 subd. 1: serve adverse party and file with court where judgment or order entered

CPLR §5520(a): if do one but not the other within the allotted time, court can grant extension to cure omission

b. CPL §460.10(d): appeal is deemed "taken" upon filing and service of the notice of appeal

*DeLeonardis v. Gaston Paving Co., Inc.,* 271 A.D.2d 839 3rd Dept. 2000) (the affidavit of service creates a presumption of proper service which can be rebutted by credible evidence that the notice of entry was not received)

III. **Leave to Appeal:** if you do not file a proper and timely motion or application for permission to appeal from an intermediate appellate court nothing is preserved for review

A. ***Time***

1. CPLR § 5513(b): time to move for permission to appeal

2. CPLR § 5516: return date for motion seeking permission to appeal

B. **Appeal to the Court of Appeals**

1. CPLR § 5602: motions made in the Appellate Division and the Court of Appeals

C. ***Appeal to the Appellate Division***

1. CPLR § 5703: appeals to the Appellate Division from the Appellate Term (civil cases)

D. ***Criminal cases***: except in a case in which the death penalty has been imposed, there is no right to appeal to the Court of Appeals; all appeals are by permission

1. See, CPL §§ 450.90, 460.20

*Quain v. Buzzeta Construction Corp.,* 69 N.Y,2d 376 (1987): while a grant of a motion for leave to appeal to the Court of Appeals ordinarily brings up for review all issues preserved for review, if the moving party specifically limits the issues it seeks to have reviewed, it is bound by that limitation

*Telaro v. Telaro,* 25 N.Y.2d 433, 438 (1969); issues raised in the trial court but not in the Appellate Division can be raised in the Court of Appeals

IV. **The basic rule:** issues not raised in, facts not established in, and objections not made in the lower court will not be considered by an appellate court.

V. **The appropriate steps at each stage of a case**

A. ***Pleadings, defenses, and the theory of the case***

1. <u>The plaintiff</u>: for an unsuccessful plaintiff to assert on appeal a basis or theory of recovery, that basis or theory must be pleaded in the complaint or otherwise raised at the trial.

*Cummins v. County or Onondaga,* 84 N.Y.2d 322 (1994): in wrongful death action appellate court will not consider novel basis for recovery for pain and suffering not raised below; *see also, Cooper v. City of New York,* 81 N.Y.2d 584, 588 (1993).

*Synder v. Wetzler*, 84 N.Y.2d 941 (1994): Court of Appeals will not consider constitutional theory of recovery not pleaded by the plaintiff

*Davis v. St. Joseph's Children Services*, 64 N.Y.2d 794 (1985): argument that the statute of limitations was tolled under the continuous treatment doctrine is waived on appeal because not argued below by the plaintiff

*Pipe Welding Supply Co., Inc. v. Haskell Conner & Frost*, 61 N.Y.2d 884 (1984): unsuccessful plaintiff cannot raise on appeal theory of recovery not pleaded or tried and submitted to the jury

*319 Smile Corp. v. Formon Fifth, LLC*, 37 A.D.3d 245 (1st Dept. 2007): plaintiff's claim that action is timely under CPLR § 205 not preserved for appellate review

*1550 Fifth Avenue Bay Shore, LLC v. 1550 Fifth Ave.*, LLC., 297 A.D.2d 781 (2nd Dept. 2002)

*Dufficy v. Wharf Bar & Grill, Inc.*, 217 A.D.2d 646 (2nd Dept. 1995): plaintiff must raise specific provision of New York City Administrative Code allegedly violated by the defendant for appellate court to consider the provision

*Picquazzi v. State of New York*, 95 A.D.2d 958 (3rd Dept. 1983); *res ipsa loquitor* cannot be raised for first time on appeal by injured plaintiff motorist

2. The defendant: in order for an appellate court to consider a defense, the defense must be pleaded or raised at the trial

*Diamond Asphalt Corps v. Sander*, 92 N.Y.2d 244 (1998): meaning of statutory term "public work" preserved by answer and by fact that lower courts "plainly ruled on it, and everyone was manifestly aware of its practical significance."

*Szigyarto v. Szigyarto*, 64 N.Y.2d 275 (1985): failure to raise laches or estoppel before trial precludes raising these defenses to defeat claim on appeal

*Sean H. v. City of New York,* 20 A.D.3d 146 (1st Dept. 2005): defendant cannot raise as grounds for dismissal theory not argued in the lower court

*Ouyang v. Jeng*, 260 A.D.2d 618 (2nd Dept. 1999); failure to plead or to move to dismiss on grounds of *res judicata* or collateral estoppel waives these defenses

*Lister Electric, Inc. v. Incorporated Village of Cedarhurst,* 108 A.D.2d 730 (2nd Dept. 1985): in contract action, failure of the defendant to plead or otherwise raise claim that contract is unconscionable waives issue for appeal

*St. John. Associates Engineers v. Chase Architectural Asso.,* 106 A.D.2d 743 (3rd Dept. 1984): maker of note cannot raise lack of consideration for first time on appeal

*Kivort Steel, Inc. v. Liberty Leather Corp.,* 110 A.D.2d 950 (3rd Dept. 1985): defendant who did not plead setoff as an affirmative defense or counterclaim in its answer, waived issue and it cannot be considered on defendant's appeal of motion denying summary judgment

*Fiske v. Fiske*, 95 A.D.2d 929, 931 (3rd Dept. 1983), aff'd, 62 N.Y.2d 828 (1984): failure to plead statute of frauds in answer or as a basis for an objection at trial to testimony of an oral agreement, is waiver of the defense on appeal

*See also*, CPLR 3211(e): waiver of objection to lack personal jurisdiction

B. ***Pretrial motions***: if you want an appellate court to consider any facts or legal theories as the basis for granting or denying a motion, the facts or theories must be alleged in the pleadings or in the papers supporting or opposing the motion

*McLearn v. Cowen & Co.*, 60 N.Y.2d 686 (1983): where the motion under CPLR § 3211 is based on a claim of *res judlcata*, the Appellate Division on appeal cannot grant the motion on the grounds of a failure to state a cause of action

*Spicer v. Spicer,* 162 A.D.3d 886 (2nd Dept. 2018): error for lower court to dismiss petition on ground not raised in dismissal motion

*Bacciocchi v. Ranch Parachute Club, Ltd.,* 273 A.D.2d 173 (1st Dept. 2000)(motion court is restricted to grounds asserted in the moving papers)

*Roland Pietropaoli Trucking v. Nationwide Mutual Ins., Co.,* 100 A.D.2d 680 (3rd Dept, 1984): where notice of motion to dismiss for failure to state a cause of action and supporting affidavits are directed at first cause of action only, objection to the other causes of action is deemed waived and will not be considered on appeal

*Soto v. Frank's Beer & Soda,* 128 A.D.2d 604 (2nd Dept. 1987): plaintiff appealing grant of summary judgment to defendant on complaint alleging violation of the Dram Shop Act waived consideration of negligence claim on appeal where negligence was not pleaded in the complaint and the bill of particulars stated negligence was not the basis for recovery

*Pastors v:. Zlatniskly,* 122 A.D.2d 840 (2nd Dept. 1986): defendant appealing grant of summary judgment to plaintiff on defendant's counterclaim, waives consideration of claim of equitable estoppel because it was not raised in lower court

*Orellano v. Samples Tire Shipment and Supply Corp.,* 110 A.D.2d 757 (2nd Dept. 1985): plaintiff cannot urge on appeal as the basis for *in personam* jurisdiction CPLR section not argued in the lower court

*Lyons v Quandt*, 91 A.D.2d 709 (3rd Dept. 1982): defendant appealing denial of motion to dismiss cannot raise statutory argument for reversal not pleaded or raised in motion papers

*Van Wormer v. Leversee,* 87 A.D.2d 942 (3rd Dept. 1982): on appeal by plaintiff from dismissal of Article 78 proceeding, court will not consider provisions of Real Property Tax Law not raised below by the plaintiff

*But see, Gerdowsky v. Grain's New York Business,* 188 A.D. 2d 93 (1st Dept. 1993): on appeal of a summary judgment motion party can raise new legal arguments which appear on the face of the record and which could not have been negated below if raised at that time

C. ***The trial***

1. Jury selection: objection should be made immediately and prior to seating of jury if issue is to be preserved for preview

CPLR § 4107: judge must be present during voir dire upon request of any party; *Baginski v. New York Telephone Co.*, 130 A.D.2d 362, 365-366 (1st Dept. 1987)(reversible error to deny request); *Guarnier v. American Dredging Co.*, 145 A.D.2d 341 (1st Dept. 1988): statute not satisfied by presence of law assistant during jury selection

*Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991): peremptory challenges based on race are unconstitutional in civil cases; *Superior Sales & Salvage. Inc. v. Time Release Sciences, Inc.*, 224 A.D.2d 922 (4th Dept. 1996).

*Ancrum v. Eisenberg*, 206 A.D.2d 324 (1st Dept. 1994) (reverse judgment for defendant where plaintiffs are black and defense exercised all three peremptory challenges against blacks; court unconvinced by race-neutral explanation); *see also, Siriano v. Both Israel Hospital Ctr.*, 161 Misc.2d 512 Sup. N.Y. Co. 1994); *O'Neill v. City of New York*, 160 Misc. 2d 1086 (Civ. Ct. N.Y. Co. 1994). *But see, Smith v. United States of America, Inc.*, 276 A.D.2d 620 (2nd Dept. 2000)

Be prepared to make record if peremptory challenges are based on prohibited grounds; for three-step process, *see e.g.*, *People v. Allen*, 86 N.Y.2d 101 (1991). *See also, Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Dretke*, 545 U.S. 231 ( 2005)'

*People v. Colon*, 90 N.Y.2d 824 (1997): consent of counsel and defendant to withdrawal of previously exercised peremptory challenge and the seating of that previously challenged juror waives appellate review of the procedure.

*People v. Vasquez*, 89 N.Y.2d 521 (1997): absence of objection to court's failure to stenographically record the voir dire waives claim that trial was not fully recorded as required by Judiciary Law § 295

*Gallegos v. Elite Model Management Corp.*, 28 A.D.3d 50 (1st Dept. 2005): good discussion of CPLR § 4106 and right to trial by jury in a civil case

2. Presentation of proof: offer of proof or timely objection must be made to testimony or other evidence in order to preserve issue for appellate review

a. Form of objections

CPLR § 4017: formal objections are not required; party must "make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court."

CPL § 470.05(2): a "question of law" is raised when there is a "protest" to a ruling or instruction which is deemed sufficient "if the party made his position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court expressly decided the question raised on appeal."

Be specific: "When a general objection is overruled all grounds of objection which might have been obviated if they had been specifically stated, must be deemed waived." *People v. Ross,* 21 N.Y.2d 258, 262 (1967)

*Kulak v. Nationwide Ins. Co.,* 40 N.Y.2d 140, 145 (1976): a continuing objection to the testimony of a particular witness and other "improper evidence of the same sort" will preserve issue for appellate review

b. Specific instances

*Adams v. Zirlakuts,* 92 N.Y.2d 396 (1998): where party does not object to the qualifications of a witness to testify as an expert, he cannot argue on appeal that the witness' testimony was inadmissible as a matter of law.

*Horton v. Smith*, 51 N.Y.2d 798 (1980); "When a timely objection is not made, the testimony offered is presumed to have been unobjectionable and any alleged error considered waived" (testimony by police officer who was not an eyewitness that point of impact was outside the crosswalk)

*People v. Miller,* 89 N.Y.2d 1077 (1997): absence of objection to subject matter of questions put to alibi witness

during prosecutor's cross examination, is a failure to preserve issue for appellate review

*People v. Waters*, 90 N.Y.2d 826 (1997): where defendant objects to testimony on grounds of hearsay, he does not preserve for Court of Appeals review other theories for barring the testimony which were never presented to the trial judge

*People v. Brown,* 90 N.Y.2d 872 (1997): whether a defendant has implicitly consented to the waiver or relinquishment of procedural rights at trial is a "factual question" the determination of which by the Appellate Division must be upheld by the Court of Appeals if there is any support in the record for that conclusion

*Kaygreen Realty Co. v. IG Second Generation t L.P.,* 68 A.D.3d 933 (2nd Dept. 2009)(objection must be timely)

*Gallegos v. Elite Model Management Corp.*, 28 A.D.3d 50 lst Dept. 2005): while objection could have been "more forceful," it preserved issue for appellate review

Issacson v. Karpe, 84 A.D.2d 868 (3rd Dept. 1981): failure to move to strike otherwise inadmissible evidence is "fatal" on appeal and places such error beyond review on appeal

*In re Will of Cruder*, 89 Misc.2d 477 (Surr. Ct. Nassau Co. 1977): failure to object during trial on grounds of best evidence rule is a waiver of the issue

3. Pre-verdict trial motions

*Miller v. Miller,* 68 N.Y.2d 871 (1986): plaintiff who fails to move for a directed verdict concedes it is an issue for the jury, and findings for the defendant cannot be reversed by the Appellate Division as a matter of law

*Wittorf v. City of New York,* 144 A.D.3d 493 (1st Dept. 2016)

*Silipo v. Wiley*, 138 A.D.3d 1178 (3rd Dept. 2016)

*Diteo v. Barreca*, 16 A.D.3d 366 (2nd Dept. 2005)

*Lamana v. Jankowski,* 13 A.D.3d 134 (1st Dept. 2004)

*Segal v. McDaniel, Inc.,* 201 A.D.2d 717 (2nd Dept. 1994): defendant, who fails to move under CPLR § 4401 for judgment at the close of the case, implicitly concedes it is an issue for the trier of fact whether cause of action proven

4. Summations: object and move for a mistrial immediately

*Williams v. Norman*, 34 N.Y.2d 626 (1974): it is error for the trial court to refuse to record the summations upon request by a party.

*Brennan v. City or New York*, 108 A.D.2d 834, 837 (2nd Dept. 1985): error in summation is waived on appeal by failure to make timely objection and not moving for a mistrial prior to the return of the verdict? *Blum v. Bregsoan,* 225 A.D.2d 324 (1st Dept. 1996)

*Moore v. Town or Huntington,* 39 A.D.2d 764 (2nd Dept. 1972); remark in summation is waived unless party moves for a mistrial before the jury verdict is returned; *accord, Dunne v. Lemberg,* 54 A.D.2d 955 (2nd Dept. 1976)

*Bagallik v. Weiss*, 110 A.D.2d 284, 287 (3rd Dept. 1985): if party does not object immediately to remark in summation, issue is still preserved for appellate review if the party moves for a mistrial before the jury is charged because the trial court can still take corrective action.

5. Charge to the Jury; in the absence of a request to charge or an exception to the charge, an error in the charge to the jury is not preserved for review

CPLR § 4110-b: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds for his objection."

*Wild v. Catholic Health System,* 21 N.Y.2d 951 (2013) (cannot raise on appeal objection to instruction not made at trial)

*Harris y. Armstrong*, 64 N.Y.2d 700 (1984)

*IGS Realty Corp. v. Brady,* 149 A.D.3d 524 (1st Dept. 2017)

*34-35 Corp. v. Industry City Associates,* 14 A»D.3d 550 (2nd Dept. 2005)

*People v. Slacks,* 90 N.Y.2d 850 (1997): appellate complaint about charge to the jury is unpreserved for review where defendant did not object in the trial court on the specific ground raised on appeal

*Arbegast v. Board or Education*, 65 N.Y.2d 161, 163 n.l (1985): normally a request at charge conference is sufficient to preserve objection to the charge as long as nothing indicates the request is being abandoned; *see also, Meagher v. Long Island. R.R. Co.,* 27 N.Y.2d 39 (1970)

*Passantino v. P & F Machine Corp.,* 54 N.Y.2d 840 (1981): where there is no objection to the charge, the charge becomes the law of the case and on appeal the verdict will be reviewed according to the charge as given regardless of whether it is legally correct; *Bradley v. Earl B. Feiden, Inc.,* 8 N.Y.3d 265, 272-273 (2007).

*Goldberg v. Wirkosko,* 182 A.D.2d 350 (2nd Dept. 1992): when a party fails to object to supplemental instructions before the jury resumes its deliberations, the issue is not preserved for review.

6. The verdict: enter objections to verdict prior to the discharge of the jury

*Grzesiak v. General Electric Co.,* 68 N.Y.2d 937 (1986): failure to object to the verdict as inconsistent is waived unless made prior to the discharge of the jury; *Bradley v. Earl B. Feiden, Inc.,* 8 N.Y.3d 265, 272 n.2 (2007).

7. Post-verdict motions

*Nelson v. Times Square Stores Corp.,* 110 A.D.2d 691 (2nd Dept. 1985), app. dism., 67 N.Y.2d 645: ground not stated in motion to set aside the verdict cannot first be urged on appeal as a reason why the motion should have been granted

8. Post Judgment motions (criminal): denial of a post judgment motion to vacate a conviction under CPL § 440.10 is beyond Court of Appeals review where there is factual support in the record for the findings of the courts below; Court of Appeals can review only whether as a matter of law the findings are unsupported or are incredible.

*People v. St. John,* 89 N.Y.2d 1018 (1997)
*People v. Grutolla,* 43 N.Y.2d 116 (1977)

VI. **Constitutional Issues:** Court of Appeals will not consider constitutional issues raised for the first time in the Court of Appeals; Appellate Division can reach such issues in the exercise of its discretion

Mohassel v. Fenwick, 5 N.Y.3d 44, 53 (2005): failure to preserve due process challenge to rent stabilization statute

*Mtr. of Barbara C.*, 64 N.Y.2d 866 (1985)
*Cibro Petroleum Products, Inc., v. Chu,* 67 N.Y.2d 806 (1986)

VII. **Exceptions to the Rule**

A. Judicial notice (see below)

B. Interests of Justice: it is within the power of the Appellate Division to reverse in the interests of justice in the absence of an objection, but not the Court of Appeals. *Martin v. City of Cohoes,* 37 N.Y.2d 162, 165 (1975); *Bingham v. New York City Transit Auth.,* 99 N.Y.2d 355, 359-360 (2003)

1. such reversals are rare in civil cases, and usually only where the alleged error is fundamental to a fair trial *Borney v. Tisyi Taxi Corp.,* 93 A.D.2d 291, 294 (1st Dept. 1983:)

a. assertion that damages are excessive is a claim of fundamental error and can be considered on appeal in the absence of an objection below

*Graham v. Murphy,* 135 A.D.2d 326 (3rd Dept. 1988)

C. *New legal argument*

*Sega v. State of New York,* 60 K.Y.2d 183, 190 n.2 (1983): "On appeal, a respondent may proffer in support of affirmance any legal argument that may be resolved on the record, regardless of whether it has been argued previously, if the matter is one which could not have been countered by the appellant had it been raised in the trial court." This means a legal argument which could not have been obviated by evidence at the trial. *But see, Misicki v. Caradonna,* 12 N.Y.3d 511, 519 (2009)(litigant, not the Court, must raise the new legal claim)

*Bingham v. New York City Transit Auth.,* 99 N.Y.2d 355, 359 (2003)

*Post v. 220 East End Ave. Corp.,* 62 N.Y.2d 19, 28-29 (1984): new legal argument based on an amendment to a statute

Standard Funding Corp. v. Lewitt, 225 AtD.2d 608 (2nd Dept. 1996): "we will consider this issue even though it is raised for she first time on appeal, because it concerns an issue of law apparent on the face of the record which could not have been avoided by the opposing party if brought to their attention at proper juncture"; *Williams v. Naylor,* 64 A.D.3d 588 (2nd Dept. 2009)

D. Statutory interpretation by appellant

*Mtr. of Richardson,* 67 N.Y.2d 246, 250 (1986); issue of statutory interpretation can be raised for first time on appeal by appellant seeking reversal. Note: that this is not an issue which can be obviated by proof at the trial.

E. Public Policy

*Mtr. or Niagara Wheatfield Administrators Assn.,* 44 N.Y.2d 68, 72 (1978): claim that contract is void as against, public policy can be raised for the first time in the Appellate Division by a party or by the court sua sponte

F. Subject Matter Jurisdiction: claim that the trial court, the Appellate Division, or an administrative agency does not have subject matter jurisdiction can be raised for the first time on appeal

*Roma v. Ruffo,* 92 N.Y.2d 489, 493 (1998)
*Cappiello v. Cappiello,* 66 N.Y.2d 107, 108-109 (1985)
*Montella v. Bratton,* 93 N.Y.2d 424, 432 (1999)

G. Change in the Law: an appeal is decided based upon the law at the time the appeal is decided, and not in accordance with the law as it was at the time of the original determination which is on appeal. This situation can arise, for example, when the legislature amends the statute while the case is on appeal.

*In re Kahn's Application*, 284 N.Y. 515, 523 (1940)

H. Fundamental defects in the mode of procedure: in a criminal case, there is a "narrowly drawn class of fundamental defects immune from the preservation requirement." *People v. Monroe,* 90 N.Y.2d 982, 984 (1997). For a discussion of this

"narrow, historical exception" which is aimed at modes of trial procedure at basic variance with those mandated by the Constitution and statute, *see,* People v. Patterson, 39 N.Y.2d 288, 296-296 (1976)(burden of proof); *People v. Kisoon,* 8 N.Y.3d 129 (2007)(failure to inform counsel of the contents of a substantive note from a deliberating jury before the judge responds to the note)

VIII. **Judicial Notice:** appellate courts can take judicial notice of law and facts which are not part of the record on appeal

CPLR § 4511: judicial notice taken by "every court"

*James v. Powell,* 19 N.Y.2d 249, 259 (1967): court takes judicial notice of statute of Puerto Rico for first time on appeal

*Hunter v. The New York, Ontario & Western R.R, Co.,* 116 N.Y. 615, 621-622 (1889).

*Mtr. of Wilhelm,* 62 A.D.2d 1155 (4th Dept. 1978)

1. Judicial notice can be used as the basis to affirm or reverse a judgment

*Mtr. of Michael B.*, 80 N.Y.2d 299, 317-318 (1992): in a child custody case, notice of changed circumstances not in the record is appropriate

*Mtr. of Albano v. Kirby,* 36 N.Y.2d 526, 532-533 (1975)
*Zouppas v. Yannikidou*, 16 A.D.2d 52, 54 (1st Dept. 1962)

2. Specific instances

a. incontrovertible documentary evidence dehors the record

*Khatibi v. Weill,* 8 A.D.3d 485 (2nd Dept. 2004) (court records and files)

*Kirp V. Caleb's Path Realty Corp.,* 19 A.D.2d 744 (2nd Dept. 1963); in action to recover broker's commission, court takes judicial notice of plaintiff's real estate broker's license

*State v. Peerless Ins. Co.,* 117 A.D.2d 370 (3rd Dept. 1986): judicial notice of New York State Department of Taxation and Finance Notice of Determination

*Cohan v. Miskhopoulous*, 118 A.D.2d 530, 531 (2nd Dept. 1986): judicial notice of Appellate Term reversal in related case

*Schmidt v. Magnetic Bead Corp.*, 97 A.D.2d 151, 158 n.3 (2nd Dept. 1983): court takes judicial notice of shareholders acquisition agreement because it is contained in the record on appeal in another case pending before the court

b. foreign law

*Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306 (2011)

*Compare*, *Wariri v. Wlldenstein & Co., Inc.*, 297 A.D.2d 214 (1st Dept. 2002)(French Law), *with*, *Harris S.A. De C.V. v. Grupo Sistemas*, 279 A.D.2d 263, 264 (1st Dept. 2001), lv. denied, 96 N.Y.2d 709 (2001) (Mexican law)

c. legislative findings

*Hamilton v. Miller*, 23 N.Y.3d 592 (2014)(cannot take judicial notice of legislative findings; findings are facts, not law)

IX. **Harmless Error**: Litigants are entitled to a fair trial, not a perfect trial. Accordingly, an appeals court will consider an error harmless, and will not reverse a judgment, if the court is satisfied that the result would have been the same even if the error had not been made. See in general, CPLR §§ 2001, 2002

A. Appellant's strategy: must show not only was there an error below, but the error in the context of the trial was not harmless

B. Respondent's strategy: argue there was no error or, in any event, if there was one, it was harmless. A successful plaintiff, for example, would argue that proof of liability was overwhelming and therefore the error did not contribute to the jury's verdict

C. Both parties should not view the error in isolation; rather it must be viewed as the appellate court will view it: in the context of the entire trial.

*Marine Midland. Bank v. John B. Russo Produce Co.,* 50 N.Y 2d 31, 43 (1980)

*People v. Hardy,* 4 N.Y.3d 192, 199 (2005): "prosecutor's own summation illustrates how important [the evidence] was to the People's case"; "heavy reliance" in summation on the evidence

*Badr v. Hogan,* 75 N.Y.2d 629 (1990): in context of this case violation of the collateral evidence rule to impeach witness' credibility was not harmless error because of emphasis placed on the matter during the trial and in summation

*Cotter v. Mercedes Benz Manhattan,* 108 A.D.2d 173, 180 (1st Dept. 1985)(admission or exclusion of trial evidence)

*Walker v. State or New York,* 111 A.D.2d 164, 165-166 (2nd Dept. 1985): court will reverse for improper refusal to admit business record "only if it can be said that such evidence, had it been admitted, probably would have had a substantial influence upon the result of the trial." Court takes same view with respect to an improper charge on *res ipsa loquitor*.

D. Criminal cases: certain constitutional errors can never be deemed harmless, while, in context, some can