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CPLR 4404(a), Interest of Justice; Multiple Preservation

In discussing the topic of relief grounded in the interest of justice, author Elliot Scheinberg concludes: "The lesson is to err on the side of over caution: re-dot the i's and re-cross the t's below. It seems that one cannot over preserve but only under preserve."

By **Elliott Scheinberg** | July 30, 2020

CPLR 4404(a) presents several outcomes from a post-trial motion where a jury trial was required:

> After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

This month's column addresses relief grounded in the interest of justice.

First, a 4404(a) movant must be mindful of CPLR 4406, styled the "single post-trial motion":

> In addition to motions made orally immediately after decision, verdict or discharge of the jury, there shall be only one motion under this article with respect to any decision by a court, or to a verdict on issues triable of right by a jury; and each party shall raise by the motion or by demand under rule 2215 *every ground for post-trial relief then available to him*.

"Successive motions are not permitted under CPLR 4406." Hon. Mark C. Dillon, Practice Commentaries. "'The post-trial motion' is usually made on papers *that reiterate every significant error that occurred during the trial* that affected or caused the jury verdict or decision by the court." New York Appellate Practice, A. Vincent Buzard, Esq. — Thomas R. Newman, Esq., Original Author – LexisNexis.

Professors David D. Siegel and Patrick Connors state in their Practice Commentaries:

> There are several grounds listed under CPLR 4404 for a post-trial motion, but only one such motion is allowed. Hence a party bent on any motion under CPLR 4404 should see to it that *all possible grounds are joined*. The loser on the verdict, for example, may move for judgment n.o.v., or, in the alternative if judgment n.o.v. is denied, for a new trial on the ground that the verdict is contrary to the weight of the evidence.
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> If a party opposing a CPLR 4404 motion "would also raise a CPLR 4404 ground, that party must do so by the expedient of a cross-motion []. This is designed to assure that the court will have to consider only one CPLR 4404 motion, and that *all possible grounds* urged by all interested parties will be there together." Siegel and Connors.

The requirement that "each party shall raise by the motion or by demand *every ground for post-trial relief then available to him,*" as amplified by the leading commentators, seems to imply that the 4406-motion is, in essence, the appellate brief and that an argument omitted from the motion is barred on appeal. Enter *Powell* v. *City of New York*,

146 AD3d 701 [1st Dept. 2017], alternative grounds for affirmance and the unarticulated rule therein; when moving to set aside a verdict, raise every possible ground or be found to have waived them on a future appeal.

'Powell v. City of New York'

In *Powell,* the First Department produced a hard outcome for an unfortunate appellant caught in a procedural quagmire. While this column previously discussed this case, *Powell v. City of New York*: CPLR 4404(a), Preservation of Issues, E. Scheinberg, NYLJ, May 17, 2017, it merits another read.

Powell involved a personal injury action. The trial court issued an order granting plaintiff's posttrial 4404(a)-motion to set aside the jury's verdict that the defendant (the city) was negligent but that its negligence was not the proximate cause of the plaintiff's injuries. Plaintiff's sole basis for the motion was that the jury's finding of no proximate cause was inconsistent with its finding of negligence on the part of the city. The city's appeal therefrom reversed the order, reinstated the defense verdict and directed the Clerk of Supreme Court to enter judgment dismissing the complaint. Plaintiff appealed from the judgment that dismissed her complaint. The Appellate Division dismissed her appeal because the new judgment was statutorily not appealable as of right:

> An appeal may be taken to the appellate division as of right in an action, originating in the supreme court...(1) from any final...judgment *except one entered subsequent to an order of the appellate division which disposes of all the issues in the action*" (CPLR 5701[a][1]).

The Appellate Division explained:

> The judgment [on appeal] entered at our direction in connection with this Court's decision of a prior appeal [] *disposed of all the issues in the action*. Therefore, under CPLR 5701(a)(1), plaintiff has no right to appeal [that] judgment. Were we to consider this appeal on its merits, this Court would be in the untenable position of reviewing its own order from the prior appeal.
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> Although an appeal from a final order or judgment of Supreme Court brings up for review, inter alia, certain evidentiary rulings made at trial (CPLR 5501[a][3]...once this Court decides the issues raised on appeal and directs the Clerk of the court from which the appeal originated to enter judgment, such judgment finally disposes of all the issues in the action (CPLR 5701[a][1]; *Rose v. Bristol*, 222 N.Y. 11, 12 [1917])... The judgment that the Clerk was entered [] pursuant to an order of this Court which "dispose[d] of all the issues in the action" (CPLR 5701[a][1]). Stated differently, the [] judgment [wa]s not a judgment of the trial court bringing up interlocutory issues for review (compare CPLR 5701 [a][1] with 5501[a]).

The First Department noted that "the plaintiff responded to the city's appeal [but] did not cross-appeal." The plaintiff argued that she could not have then cross-appealed because she had prevailed in setting aside the defendant's verdict and was therefore not

aggrieved; that she only became aggrieved after the Appellate Division reinstated the defense verdict thereby first allowing her to challenge evidentiary and other rulings subsumed in the now adverse judgment.

On appeal, the *Powell*-court rejected her argument observing that, "Plaintiff did not move to set aside the verdict based upon erroneous evidentiary rulings...she had the opportunity to raise those evidentiary rulings in her motion to set aside the jury's verdict. *These issues could have also been raised to support her position in the prior appeal* [as alternative grounds for affirmance, e.g., *Fernandez v. Stepping Stone Day School, Inc.*, 291 A.D.2d 530, 531 (2d Dept. 2002)]." Also see *Ambrose v. Brown*, 170 AD3d 1562 [4th Dept. 2019]; *Community Related Services, Inc. (CRS) v. New York State Dept. of Health*, 151 AD3d 429 [1st Dept. 2017], lv to appeal dismissed, 30 NY3d 1038 [2017]; *Trimarco v. Data Treasury Corp.*, 146 AD3d 1008, 1009 [2d Dept. 2017] (nonjury trials).

What a Motion for a New Trial in the Interest of Justice Examines

An interest of justice motion is directed to the components of the trial, such as the testimony, charge and conduct of the participants. *In re De Lano's Estate*, 34 AD2d 1031, 1032 [3d Dept. 1970], affd, 28 NY2d 587 [1971] ("Order affirmed on the opinion at the Appellate Division"); *Rudle v. Shifrin*, 182 AD3d 617 [2d Dept. 2020]. Such a motion "encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct by attorneys or jurors (*Gomez v. Park Donuts, Inc.*, 249 AD2d 266 [2d Dept. 1998]; *Rodriguez v. City of New York*, 67 AD3d 884 [2d Dept. 2009] ("inflammatory and unduly prejudicial comments" by court and counsel), improper references by an attorney and a party (*Peters v. Wallis*, 135 A.D.3d 922 [2d Dept. 2016]), improper testimony (*Grogan v. Nizam*, 66 AD3d 734, 736 [2d Dept. 2009], newly discovered evidence, and surprise" (*Russo v. Levat*, 143 AD3d 966 [2d Dept. 2016]); *Ioffe v. Seruya*, 134 A.D.3d 993 [2d Dept. 2015] ("[L]itigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court." "The cumulative effect of the court's comments deprived the plaintiffs of a fair trial on the issue of damages.")

Additional grounds may include trial court's error in permitting a party to impeach the credibility of a witness called by the party with evidence of the witness' criminal history and prior bad acts "because it is well established that an adverse party or a hostile witness may not be impeached on direct examination by evidence of his or her criminal conviction[s]." (*Morency v. Horizon Transportation Services, Inc.*, 139 A.D.3d 1021 [2d Dept. 2016]).

In *Morency,* the plaintiff's sister was also the plaintiff's guardian ad litem (GAL). The sister had not only commenced and maintained the action in her capacity as GAL but she was also a fact witness because the plaintiff was a nonverbal individual with mental and physical disabilities:

> The repeated and extensive questioning of the injured plaintiff's sister by defense counsel as to her past convictions and as to the underlying factual details of those crimes was an error grave enough in scope to have potentially affected the verdict.

> Given the nature and quantity of such questioning, it was plainly prejudicial and designed to deprive the plaintiffs of their right to a fair trial. Accordingly, the Supreme Court should have granted that branch of the plaintiffs' motion which was to set aside the verdict in the interest of justice and for a new trial.

"A new trial is also warranted when an error is so significant that the jury was prevented from fairly considering the issues at trial." *DiLallo v. Katsan Limited Partnership*, 134 A.D.3d 885 [2d Dept. 2015]. *DiLallo* reversed the trial court for failing "to charge the jury as to the language of the applicable sections of the Americans with Disabilities Act along with PJI 2:25 and the applicable sections of the Building Code of New York State and the Property Maintenance Code of New York State, in conjunction with PJI 2:29." Also, *Vallone v. Saratoga Hospital*, 141 A.D.3d 886 [3d Dept. 2016] (when an error is fundamental).

The Trial Judge's Common Sense and Experience Are the Best Test regarding Whether Substantial Justice Was Done

CPLR 4404(a) is discretionary and "is predicated on the assumption that the judge who preside[d] at trial is in the best position to evaluate errors therein. The trial judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and 'must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision.' *Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, Inc.*, 39 NY2d 376, 381 [1976]; *D'Amato v. WDF Dev., LLC,* 183 A.D.3d 695 [2d Dept. 2020].

CPLR 4404(a) requires the movant to present evidence that "substantial justice has not been done." *Rodriguez v. City of New York*, 67 AD3d 884, 885-87 [2d Dept. 2009].

New Trials Granted under CPLR 4404(a) without Articulating the Interest of Justice Ground

In *Peters v. Wallis*, 135 AD3d 922 [2d Dept. 2016], the Appellate Division upheld the trial court's granting of a new trial on the issue of liability because the repeated references by the plaintiff and her attorney to the nature of the plaintiff's injuries and her lack of medical insurance at the time of the accident could have influenced the jury to be more sympathetic toward her, resulting in prejudice toward the defendant.

Similarly, in *Grogan v. Nizam*, 66 AD3d 734 [2d Dept. 2009], inadmissible testimony regarding insurance in a medical malpractice action required a new trial because "even if [such testimony was] innocently elicited [and] stricken from the record, it cannot be determined that the offending testimony clearly did not have an influence on the verdict." Proof of prejudice was established by way of the foreperson's questions regarding insurance; the curative instruction proved insufficient.

Must an Objection Be Raised More than Once to Be Preserved?

In *Matter of New York City Asbestos Litig.*, 27 NY3d 1172 [2016] ("NYC Asbestos"), plaintiff's decedent, Dave Konstantin, worked at two construction sites where defendant Tishman Liquidating Corporation (TLC) was the general contractor. Konstantin was exposed to asbestos dust and was subsequently diagnosed with mesothelioma, which required multiple surgeries, radiation, and chemotherapy until his death.

Ten plaintiffs, represented by the same firm, requested a joint trial pursuant to CPLR 602(a). The defendants jointly opposed the motion. Supreme Court ordered that seven of the cases, wherein the plaintiffs had developed mesothelioma, be tried together and the remaining three cases, wherein the plaintiffs had developed lung cancer, be tried together. Konstantin and Dummitt were among the seven cases.

Before trial five of the seven mesothelioma cases settled; Konstantin and Dummitt were tried together. The jury found TLC 76% liable for Konstantin's injuries and awarded damages. TLC contended that conducting the joint trial was an abuse of discretion. The Appellate Division affirmed the judgment.

Two justices dissented in *Dummitt* but concurred in *Konstantin.* Those justices would have declined to address TLC's challenge to the joint trial on an entirely different ground: that TLC had failed to assemble a proper appellate record, meaningful review of the court's order was thus "impossible". The First Department granted TLC's motion for leave to appeal to the Court of Appeals, certifying the question whether its order was properly made.

The Court of Appeals Ruled that TLC Failed to Preserve the Argument, but Did TLC Fail?

The Court of Appeals agreed with the dissenting justices. The court further noted that TLC had failed to preserve its challenge for appellate review: "TLC *did not specifically challenge the joint trial of the Dummitt and Konstantin actions until its posttrial motion,* which is insufficient to preserve its contention for appellate review." [at 1176]. The court rejected TLC's argument that having previously joined all defendants in opposing the plaintiffs' pretrial motion, it was unnecessary for TLC to renew its objection after the five other cases settled:

> In its pretrial order, Supreme Court considered the plaintiffs' motion to try all 10 cases jointly and concluded that seven of those cases, in which the plaintiffs had developed mesothelioma, should be tried together. The court therefore considered whether seven of those cases shared common questions of law or fact (CPLR 602[a]), and whether the defendants would be prejudiced by a joint trial of all seven.
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> If, after five of those seven cases settled, TLC believed that Supreme Court should consider the propriety of a joint trial anew by conducting a particularized assessment of whether *Dummitt* and *Konstantin* shared common issues of law or fact and of whether defendants would be prejudiced by the two-case joint trial, it was incumbent

> upon TLC to object, raise the specific arguments it now asserts with respect to these two cases, and ask the court to conduct that analysis in order to preserve its challenge for appellate review.

Objections in a Pretrial Motion Not Raised During Trial Are Preserved for Appeal

The court's ruling is unclear because, in *People v. Finch*, 23 N.Y.3d 408, 413 [2014], the court held:

> As a general matter, a lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected (People v. Jean-Baptiste, 11 N.Y.3d 539, 544 (2008) [having made a specific motion to dismiss for legal insufficiency, defendant was not required to make the same point as an exception to the charge]; People v. Payne, 3 N.Y.3d 266, 273 (2004) ["We decline to...elevate preservation to a formality that would bar an appeal even though the trial court...had a full opportunity to review the issue in question"]). When a court rules, a litigant is entitled to take the court at its word. ... [A] defendant is not required to repeat an argument whenever there is a new proceeding or a new judge.
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> * * *
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> We hold only that *People v. Hines*, 97 N.Y.2d 56 [2001] does not establish a general rule that every argument once made and rejected must be repeated at every possible opportunity.

In *People v. Wallace*, 147 A.D.3d 1494 [4th Dept. 2017], the Fourth Department held:

> Although defendant's motion for a trial order of dismissal was not specifically directed at the legal sufficiency of the evidence [] inasmuch as he unsuccessfully argued that issue before trial, defendant need not "repeat the argument in a trial motion to dismiss in order to preserve the point for appeal" (quoting People v. Finch, 23 N.Y.3d 408...).

Also: *State v. Nervina*, 120 A.D.3d 941 [4th Dept. 2014], aff'd., 27 N.Y.3d 718 [2016] ("because he objected to hearsay presented at the subsequent SIST violation hearing, he preserved his contention regarding hearsay presented at the previous jury trial.")

Cole v. Cole, 2020 N.Y. Slip Op. 03489 [June 23, 2020], is a difficult decision which further alters the landscape on preservation. The majority, over a cogent dissent by Judge Jenny Rivera which characterized the determination as a "novel and harsh preservation rule," affirmed a custody award, in a one-paragraph decision, attributable to the mother's "fail[ure] to preserve her arguments" of domestic violence [Domestic Relations Law §240(1)(a)] during trial:

> As a result, the parties never litigated, and Supreme Court did not pass upon, or make any findings with respect to, whether a *withdrawn family offense petition constitutes "a sworn petition*" for purposes of this statute or whether defendant

> proved allegations of domestic violence "by a preponderance of the evidence" (DRL § 240[1][a])—issues that are essential to the arguments defendant now raises.

Judge Rivera's elucidation of the trial reveals that although the mother had withdrawn her family offense petition without prejudice in exchange for the father's voluntary departure from the marital residence, she, nevertheless, testified with supporting evidence about the domestic abuse during the divorce trial.

Significantly, "[w]hen the father sought to limit her testimony to the statements in the offense petition, the Attorney-for-the-Child argued to the court that '[w]e all know that domestic violence is an element to be used in the determination of the best interests of the children,' and that 'it would be a travesty' if the evidence was not admitted." Moreover, "the father did not controvert [her allegations] in any way."

Cole and *NYC Asbestos* are far afield from *Finch* and the court's landmark decision, *Telaro v. Telaro*, 25 N.Y.2d 433, 438 [1969], which broadly preserves preserved arguments:

> [A]part from the law of the case, it is well established that questions raised in the trial court *or in the record*, even if not argued in the intermediate appellate court, are nevertheless available in the Court of Appeals.

Conclusion

The lesson is to err on the side of over caution: re-dot the i's and re-cross the t's below. It seems that one cannot over preserve but only under preserve.

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