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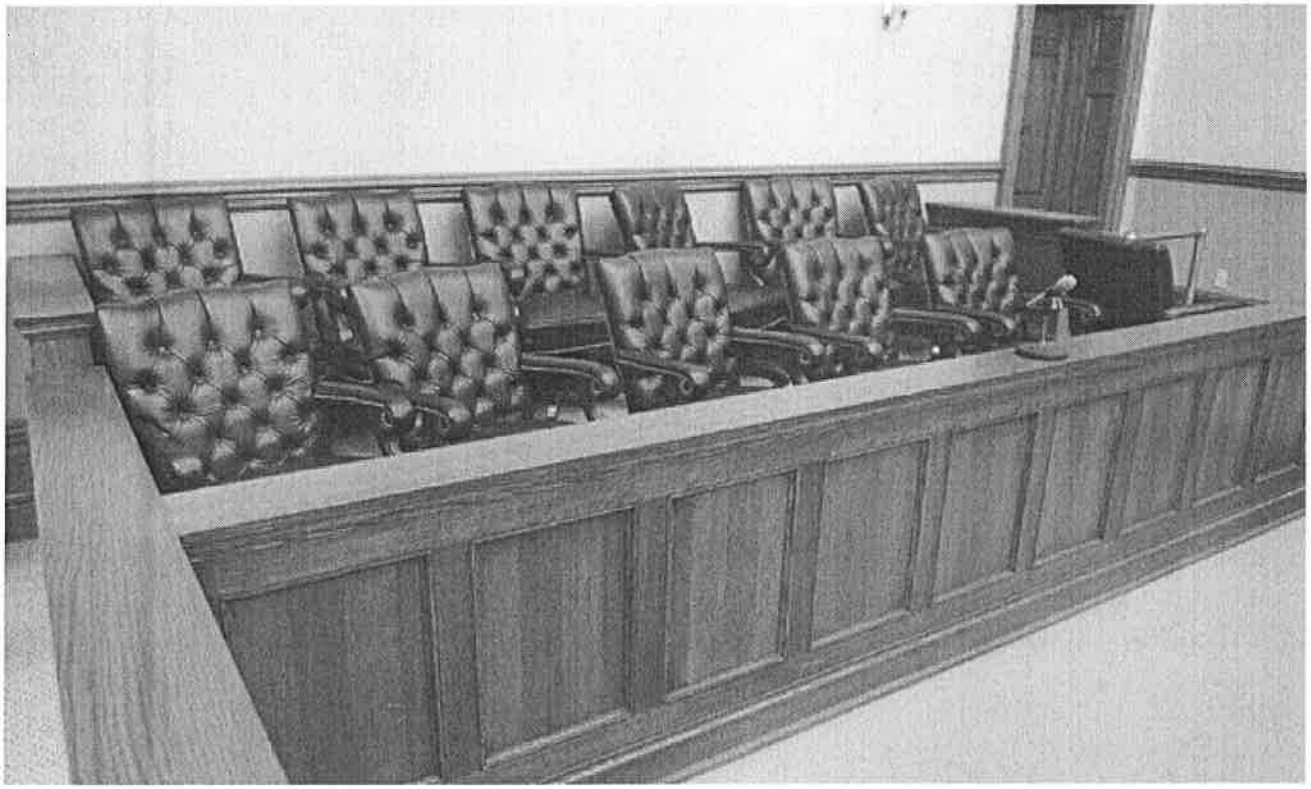
Fourth Department, Preserving Weight of Evidence Contentions; Judicial Notice

On, Aug. 20, 2020, the Fourth Department issued two decisions, 'Defisher v. PPZ Supermarkets,' and 'Alexandra R. v. Krone,' which the author describes as "momentous strides in the seeming evolution toward the death knell of CPLR 4404 as applied to the method of preservation of the contention that a verdict was against the weight of the evidence."

By **Elliott Scheinberg** | October 28, 2020



Jury box

On, Aug. 20, 2020, the Fourth Department issued two decisions, *Defisher v. PPZ Supermarkets, Inc.*, 2020 NY Slip Op 04665 [4th Dept. 2020] and *Alexandra R. v. Krone*, 2020 NY Slip Op 04631 [4th Dept. 2020], both of which repudiated the court's precedent authority and adopted the recent shift in law by the Second Department, in *Evans v. New York City Tr. Auth.*, 179 A.D.3d 105 [2d Dept. 2019], which held that "an appellant need not preserve the contention that a jury verdict was contrary to the weight of the evidence by making a post verdict motion for a new trial." *Defisher* and *Alexandra R.* are momentous strides in the seeming evolution toward the death knell of CPLR 4404 as applied to the method of preservation of the contention that a verdict was against the weight of the evidence.

CPLR 4404

CPLR 4404, post-trial motion for judgment and new trial, provides:

> (a) 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.
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> (b) After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.

'Powell '

CPLR 4406, styled the "single post-trial motion," cautions the 4404(a) movant:

> 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. Also, Professors David D. Siegel and Patrick Connors state in their Practice Commentaries, CPLR 4406: "[A] party bent on any motion under CPLR 4404 should see to it that *all possible grounds are joined*." A party opposing a 4404-

motion must file a cross-motion to assure that the court consider only one motion, and that *all possible grounds* urged by all parties will be simultaneously reviewed. Siegel and Connors.

'Evans'

In 'Preservation, Post Jury Trial Challenges to Weight of the Evidence,' E. Scheinberg, NYLJ, Jan. 6, 2020, this column reviewed *Evans v. New York City Tr. Auth.*, 113 N.Y.S.3d 127 [2d Dept. 2019], a strong decision penned by Justice Francesca E. Connolly, where the Second Department, following a scrutinized examination of statue and precedent authority in its own court, as well as in its sister courts, abandoned its prior rulings, holding that "an appellant need not preserve the contention that a jury verdict was contrary to the weight of the evidence by making a post verdict motion for a new trial." A review of *Evans* will facilitate comprehension of the significance of *Defisher* and *Alexandra R.*

Evans began with *Schwinger v. Raymond*, 105 NY 648 [1887],where the Court of Appeals held that the Appellate Division has the power to review and set aside a verdict as against the weight of the evidence, without any requirement that the issue be preserved. Notably, in *Middleton v. Whitridge*, 213 NY 499 [1915], the Court of Appeals held that "it is 'incumbent on the Appellate Divisions to review the findings of fact in all cases.' "

Evans also examined "prior appellate jurisprudence that a weight of the evidence argument need not be preserved by a motion for a new trial":

> *Bintz v. Hornell*, 268 App Div 742, 747 [4th Dept. 1945] ["We may reverse or modify a judgment although no motion for a new trial was made"], affd 295 NY 628; *Miller v. Brooklyn Hgts. R.R. Co.*, 173 App Div 910, 910-911 [2d Dept. 1916] ["Although the defendant has appealed merely from the judgment, without any motion for a new trial, this court since the 1914 amendment of Code of Civil Procedure, section 1346, has power to review the facts"]; also *Mosler Safe Co. v. Brenner*, 100 Misc 107, 111 [App Term, 1st Dept. 1917] ["That the General Term and the Appellate Division have always had the power to reverse a judgment of the Supreme Court as being contrary to the evidence regardless of whether or not a motion was made to nonsuit the plaintiff, we think there can be no doubt"].

The Second Department concluded: "*Condor* [*v. City of New York*, 292 A.D.2d 332 (2d Dept. 2002)], and *Bendersky v. M & O Enters. Corp.*, 299 A.D.2d 434 (2d Dept. 2002)], cannot be reconciled with the extensive authority, discussed above, that recognizes the Appellate Division's power to consider a weight of the evidence argument without any need for preservation." Moreover, *Evans* emphasized that neither *Condor* nor *Bendersky* "ha[s] ever been cited by the Second Department for the proposition that a weight of the evidence argument must be preserved: both cases "are aberrations in this Court's jurisprudence and [] should no longer be followed for the proposition that a weight of the evidence argument must be preserved."

CPLR 5501(c)

The Second Department noted CPLR 5501(c)'s consonance with "§1346 of the [prior] Code of Civil Procedure, that the Appellate Division has the power to exercise its factual review power on an appeal from a judgment where no motion for a new trial was made":

> That statute [] provided that on an appeal to the Appellate Division from a final judgment, "[w]hen the judgment was rendered upon the verdict of a jury, the appeal may be taken upon questions of law, or *upon the facts*, or upon both" (internal emphasis).
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> Likewise, CPLR 5501, the current statute governing this Court's scope of review on an appeal from a final judgment, imbues this court with the same broad authority to review the facts: "The appellate division shall review questions of law and questions of fact on an appeal from a judgment" (CPLR 5501[c]).

'Northern Westchester'

The Second Department also focused on the language in CPLR 4404(a), which allows a court, "on its own initiative," to "order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence." The Second Department read the term "own initiative" in CPLR 4404(a) in conjunction with *Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 NY2d 492, 499 [1983], where the Court of Appeals, stated "the power of the Appellate Division...is as broad as that of the trial court...this Court [the Appellate Division] also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court."

Fourth Dept. Precedent

Prior to Aug. 20, 2020, case law from the Fourth Department held that weight-of-the-evidence contentions must be preserved only by way of a timely motion to set aside the verdict on that ground: *Almuganahi v. Gonzalez*, 174 AD3d 1492 [4th Dept. 2019] and *Cyrus v. Wal-Mart Stores E., LP*, 160 AD3d 1487 [4th Dept. 2018].

In *Cyrus*, the plaintiff-appellants "concede[d] that they failed to preserve for review their contention that the verdict was against the weight of the evidence" because they failed to make a posttrial motion to set aside the verdict pursuant to CPLR 4404(a). Also, *Likos v. Niagara Frontier Tr. Metro Sys., Inc.*, 149 A.D.3d 1474 [4th Dept. 2017].

'Alexandra R.'

Alexandra R. v. Krone involved an accident on the New York State Thruway (NYST), when a minivan drifted from the left travel lane to the shoulder and collided with the back of a dump truck operated by Krone, a NYST employee, who had parked the truck on the shoulder during a cleanup operation. Three of the occupants died and the remaining occupants, as well as defendant, sustained injuries.

Plaintiffs commenced actions alleging, inter alia, that the collision was caused by the defendant's recklessness. Defendant appealed from judgments entered upon a nonjury verdict finding him partially liable on the ground that he acted with reckless disregard for the safety of others on the ground that Supreme Court's finding was against the weight of the evidence. Citing *Northern Westchester*, relied upon by *Evans*, a sharply divided court reversed, in a 3-2 opinion:

> [D]efendant was not required to preserve his contention that the nonjury verdict is contrary to the weight of the evidence by making a postverdict motion. Such a requirement is inconsistent with the principle that, "[f]ollowing a nonjury trial, the Appellate Division has authority...as broad as that of the trial court...and...may render the judgment it finds warranted by the facts' "...(...*Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 NY2d 492, 499 [1983]...). To the extent that any of our prior decisions suggest otherwise, they should no longer be followed (e.g. *Gaiter v. City of Buffalo Bd. of Educ.*, 125 AD3d 1388, 1389 [4th Dept. 2015], lv dismissed 25 NY3d 1036 [2015]).

Notably, the dissenting justices, Patrick H. Nemoyer and John M. Curran, citing *Evans,* "agree[d] with the majority that defendant-appellant was not required to preserve his challenge to the weight of the evidence underlying Supreme Court's nonjury verdict.

'Defisher'

In *Defisher v. PPZ Supermarkets, Inc.*, Kristen Defisher sustained injuries when she slipped and fell in the defendants' supermarket. Plaintiffs appealed from a judgment in favor of the supermarket, challenging the verdict, inter alia, on the ground that it was against the weight of the evidence. The Fourth Department, citing the authority relied upon in *Evans,* affirmed the jury verdict and, consistent with *Alexandra R.,* held that any prior decisions to the contrary are no longer to be followed:

[P]laintiffs were not required to preserve their contention that the jury verdict was contrary to the weight of the evidence by making a postverdict motion for a new trial... Inasmuch as the trial court is authorized to order a new trial 'on its own initiative' when the verdict is contrary to the weight of the evidence (CPLR 4404[a]) and 'the power of the Appellate Division...is as broad as that of the trial court...(*Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 NY2d 492, 499 [1983]), 'this Court also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court" (Evans, 179 AD3d at 110...also CPLR 5501[c]; *Cohen v. Hallmark Cards, Inc.*, 45 NY2d 493, 500 [1978]).

An Incomplete Record Is Fatal

The *Defisher*-plaintiffs "contended that Supreme Court improperly reversed a purported factual finding in its earlier spoliation order by ruling, on the eve of trial, that defendants would be permitted to contest whether video footage that had not been retained would

have captured the area where plaintiff fell. Plaintiffs failed to include the spoliation order in the record on appeal," making this contention nonreviewable. See CPLR 5526.

For the second time in two months, an appellant in the Fourth Department missed an opportunity to have a potentially prevailing argument heard on appeal due to an incomplete record. See *Knapp v. Finger Lakes NY, Inc.,* 184 AD3d 335 [4th Dept. 2020]. The Defishers were told they "must suffer the consequences."

However, appellate courts, including the Court of Appeals, may take judicial notice at any stage of the litigation, including appeals. *Cohen v. State*, 94 N.Y.2d 1, 7 [1999] ("At this appeal stage of the controversy, we take judicial notice that the 1999–2000 budget negotiations concluded in early August 1999 with Legislative concordance and Gubernatorial acquiescence..."). In *Caffrey v. N. Arrow Abstract & Settlement Services, Inc.*, 160 A.D.3d 121, 126–27 [2d Dept. 2018], the Second Department held:

> [T]he factual review power of the Appellate Divisions is confined to the content of the record compiled before the court of original instance and does not include matter dehors the record (CPLR 5526...) However, the general rule is not inviolate, as courts may take judicial notice of a record in the same court of either the pending matter or of some other action...Judicial notice may be taken by a court at any stage of the litigation, even on appeal.
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> * * *
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> Nevertheless, a court should not take judicial notice of any court-generated document without affording the parties an opportunity to be heard on whether notice should be taken, and, if so, the significance of its content (CPLR 4511[a], [b]...).

An appellate court may take judicial notice of orders. *Samuels v. Montefiore Medical Center*, 49 A.D.3d 268 [1st Dept. 2008] ("Even though the order is dehors the record on appeal, it is included in the motion court's files, and we take judicial notice of it."); *People v. Davis*, 161 A.D.2d 787 [2d Dept. 1990] ("Although the order of the Trial Judge...is dehors the record...we have taken judicial notice of these court documents."); *Kevin McKay v. Elizabeth A.E.*, 111 A.D.3d 124 [1st Dept. 2013] ("We take judicial notice of certain court orders rendered subsequent to the preparation of the record on this appeal, since the contents of the orders are undisputed."); *Grady v. Utica Mut. Ins. Co.*, 69 A.D.2d 668, n.1 [2d Dept. 1979] ("We have examined the papers in the foreclosure action currently on file in the office of the County Clerk of Queens County [] and take judicial notice of the contents thereof (Richardson, Evidence (Prince, 10th Ed), ss 14, 30)."); *MJD Const., Inc. v. Woodstock Lawn & Home Maintenance*, 293 A.D.2d 516, 517 [2d Dept. 2002] ("The Supreme Court was entitled to take judicial notice of the record and judgment in the related bankruptcy proceeding."); *Sam & Mary Hous. Corp. v. Jo/Sal Mkt. Corp.*, 100 A.D.2d 901, 903 [2d Dept. 1984], affirmed, 64 N.Y.2d 1107 [1985] ("Judicial notice may be taken of all prior proceedings of a case although held in another court of the State.")

In *Santos v. National Retail Transp., Inc.*, 87 A.D.3d 418 [1st Dept. 2011], the Appellate Division even took judicial notice of a copy of a transcript that the husband had failed to submit to the motion court.

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