ANALYSIS

Preservation: Constitutional Issues, Is an Entity a Professional for Malpractice Purposes

Henry v. New Jersey Transit, with a profound dissent by Chief Judge Rowan Wilson, brings the issue of preservation of constitutional issues on appeal to the Court of Appeals to the forefront.

May 25, 2023 at 12:18 PM

By Elliott Scheinberg | May 25, 2023 at 12:18 PM

I respectfully begin this column by congratulating Judge Rowan Wilson on his confirmation as chief judge of the Court of Appeals and Judge Caitlin Halligan on her confirmation as associate judge following Wilson's investiture as chief judge.

Henry v. New Jersey Transit, 2023 NY Slip Op 01466 [2023], with a profound dissent by Wilson, brings the issue of preservation of constitutional issues on appeal to the Court of Appeals to the forefront.

Preservation, Generally

Briefly, preservation lies at the epicenter of appellate practice. It is not a mere formality, *People v. Casanova*, 62 A.D.3d 88, 91 [1st Dept 2009], nor is it "simply a meaningless technical barrier to review," *Wilson v. Galicia Contruction & Restoration,* 10 N.Y.3d 827, 829 [2008]. "The very theory and constitution of a court of appellate jurisdiction only is the correction of errors that a court below may have committed. A court below cannot be said to have committed an error when their judgment was never called into exercise, and the points of law were never taken into consideration, but was abandoned by the acquiescence or default of the party who raised it." *Flake v. Van Wagenen*, 54 N.Y. 25, 27 [1873]. "A party [must] have the opportunity to address [an] argument and Supreme Court [must] have the opportunity to consider it, *Robles v. Brooklyn Queens Nursing Home,* 131 A.D.3d 1032, 1033 [2d Dept 2015]. "It is settled that a ruling on an application must be reviewed in respect of the arguments made before the motion court and not on the basis of some novel contention." *Wald v. Marine Midland Business Loans*, 270 A.D.2d 73, 75 [1st Dept 2000].

It thus goes against the inherent grain of the doctrine of preservation that there are categories of issues may be raised first time on appeal. Such categories include but are not limited to: statutory construction and statutory interpretation, *Richardson v. Fiedler Roofing,* 67 N.Y.2d 246 [1986]; legislative intent, *American Sugar Refining Co. of New York v.*

Waterfront Commission of New York Harbor, 55 N.Y.2d 11 [1982]; subject matter jurisdiction, *Seneca v. Seneca,* 293 A.D.2d 56, 60 [4th Dept 2002]; judicial notice, *Cohen v. State*, 94 N.Y.2d 1, 7, 7 [1999]; *Caffrey v. North Arrow Abstract & Settlement Services,* 160 A.D.3d 121 [2d Dept 2018].

Preservation and Questions of Law

Another exception to the preservation rule is a question of law. "It should also be noted that the general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: 'if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.' … Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time. There are some exceptions to this liberalizing rule …" *Telaro* [at 438-39]; see *Sagres 9 v. State*, 164 A.D.3d 903 [2d Dep 2018], questions of law which could not have been avoided if brought to the Supreme Court's attention at the proper juncture; *Glasheen v. Valera,* 116 A.D.3d 505 [1st Dept 2014] (timeliness of the commencement of an action against the Metropolitan Transportation Authority), *Deutsche Bank National Trust v. Lubonty,* 208 AD3d 142, 145-46 [2d Dept 2022] (whether the automatic bankruptcy stay terminated on a certain date); *Kramarenko v. New York Community Hospital,* 195 A.D.3d 608 [2d Dept 2021] (whether a J.H.O. or a referee has the authority to issue an order), essentially … no new facts, countersteps … (See, E. Scheinberg, The New York Civil Appellate Citator, § 30, Preservation of Issues and Arguments; Issues Raised First Time on Appeal (NYSBA, 2d ed., 2022.)

That said, logic dictates that there can be no weightier issue of law than a constitutional question, which should, therefore, be reviewable first time on appeal. However, such is not the case. The reasoning is captured in *People v. Baumann & Sons Buses,* 6 N.Y.3d 404, 408 [2006]: A challenge to the constitutionality of a statute must be preserved … This requirement is no mere formalism, but ensures that the drastic step of striking duly enacted legislation will be taken not in a vacuum but only after the lower courts have had an opportunity to address the issue and the unconstitutionality of the challenged provision has been established beyond a reasonable doubt.

For this court to consider a constitutional claim in the guise of an argument that the accusatory instrument is facially insufficient would permit an end run around the parties' obligation to preserve constitutional claims before the trial court.

Henry concerned "the jurisdictional nature of interstate sovereign immunity … whether defendants' sovereign immunity defense is exempt from our general preservation rules."

The majority opinion, penned by Judge Madeline Singas, with a thought provoking dissent by Wilson, held:

"We conclude that a state must preserve its interstate sovereign immunity defense by raising it before the trial court, and no exception to the general preservation rule applies. Because defendants asserted their sovereign immunity defense for the first time on appeal after the U.S. Supreme Court decided *Franchise Tax Board of California v. Hyatt* (587 US –, 139 S Ct 1485 [2019] [hereinafter *Hyatt III*]), the argument is unpreserved in this case and there is no directly involved constitutional question supporting this appeal as of right. The appeal should therefore be dismissed … For a constitutional question to be directly involved it must, among other things, be preserved as a question of law," citing *Schulz v. State of New York*, 81 NY2d 336, 344 [1993]."

Addressing concern over subject matter jurisdiction, the majority turned to *Franchise Tax Board of California v. Hyatt,* 203 L Ed 2d 768, 139 S Ct 1485, 1491 [2019], referred to in *Henry* as *Hyatt III,* the majority noted:

"*Hyatt III* accepted that interstate sovereign immunity is waivable based on litigation conduct (*Hyatt III,* 587 US at –, 139 S Ct at 1491 n 1; cf. *Aboujdid v. Singapore Airlines,* 67 NY2d 450, 454, 459 [1986])2. Arguments or defenses that are waivable are generally subject to our preservation rule. The Supreme Court's determination that interstate sovereign

immunity is waivable fatally undermines NJT's argument that interstate sovereign immunity is rooted in subject matter jurisdiction because subject matter jurisdiction, as a rule, "cannot be dispensed with by litigants" (*Shea*, 253 NY at 21) and "can never be forfeited or waived" (*Union Pacific Railroad,* 558 US at 81 [internal quotation marks omitted]).

"Interstate sovereign immunity's waivability vitiates any legal justification for applying a broad exception to the general preservation requirement to such sovereign immunity claims. The history and nature of interstate sovereign immunity guide us to the conclusion that the doctrine more closely aligns with jurisdiction over a party, rather than over all subject matter concerning that party. In particular, interstate sovereign immunity is rooted and analyzed in terms of concepts such as a court's power over a party, a state's amenability to suit, its consent to be sued, and haling a party into court—all of which align closely with treatment of personal jurisdiction issues, not subject matter jurisdiction ones (see Hyatt III, 587 US at –, 139 S Ct at 1493, citing James E. Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal L Rev 555, 581-588 [1994] and Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv L Rev 1559, 1574-1579 [2002]). As such, interstate sovereign immunity defenses do not fall within the subject-matter-jurisdiction exception to the general preservation requirement discussed above."

An issue may be argued first time on appeal to the Court of Appeals, even if not raised to the Appellate Division, provided it was preserved in nisi prius.

The Court of Appeals has repeatedly held that an issue may be argued first time on appeal to the high court provided it was preserved below, even if not raised to the Appellate Division on its way up the appellate ladder:

Telaro v. Telaro, 25 N.Y.2d 433, 438 [1969]: "Apart 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. …

But we know of no rule which prevents counsel from urging, in an appellate court, a point distinctly made and preserved at the trial court, because it has not been made to an intermediate appellate court. If the exception presents clear error, and one of materiality, which may have influenced the fate of the trial, an appellant may be indulged in bringing it to notice on his final appeal."

People v. Colon, 71 N.Y.2d 410, 413, n.1 [1988]: Although abandoned on defendant's direct appeal to the Appellate Division, we may reach the issue as it was preserved at trial (CPL 470.35(1)).

Preservation and Arguments First Raised in Reply Papers

Preservation has a unique application with respect to issues first raised in reply papers: "the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion," *Kennelly v. Mobius Realty Holdings,* 33 AD3d 380 [1st Dept 2006]; *Yee v. Panousopoulos,* 176 A.D.3d 1142 [2d Dept 2019], where "an adversary can no longer respond." *O'Sullivan v. O'Sullivan*, 206 A.D.2d 960 [4th Dept 1994]. An exception to this rule, however, exists where opposing counsel has been given the opportunity to submit a surreply. *Guryev v. Tomchinsky*, 114 A.D.3d 723, 724 [2d Dept 2014]; *Kennelly v. Mobius Realty Holdings,* 33 A.D.3d 380 [1st Dept 2006].

A Question of Law First Raised in Reply Papers, Whether an Entity Is a 'Professional' for Malpractice Purposes

In *Bellevue Towers and Gardens v. Atlantis National Services,* 208 AD3d 1300 [2d Dept 2022], the plaintiffs commenced an action against, among others, Atlantis National Services, Inc., an alleged title insurance/settlement/real estate services corporation, to recover damages for negligence and professional malpractice based on allegations, inter alia,

that Atlantis had breached certain voluntarily assumed duties of care owed to the plaintiffs with regard to the handling of certain real estate transactions. Atlantis moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against it. The Supreme Court denied the motion. Atlantis appealed.

The Appellate Division held that the Supreme Court should have granted that branch of Atlantis' motion to dismiss the cause of action alleging professional malpractice, since Atlantis was not a professional for purposes of a malpractice claim *(Chase Scientific Research v. NIA Group,* 96 N.Y.2d 20, 28–30 [2001] (the Court of Appeals discusses what constitutes a "professional"). Although *Atlantis* improperly raised this contention for the first time in its reply papers, the Second Department considered it on appeal because it presented an issue of law that appeared on the face of the record and that could not have been avoided if brought to the court's attention at the proper juncture.

Elliott Scheinberg *is a member of the New York State Bar Association committee on courts of appellate jurisdiction. He is the author of The New York Civil Appellate Citator [NYSBA, 2d ed., 2 vols 2022] and Contract Doctrine and Marital Agreements in New York [NYSBA, 5th ed., 2 vols 2023]. He is also a Fellow of the American Academy of Matrimonial Lawyers and the International Family Law Association.*