



NOT FOR REPRINT  
LETTER TO THE EDITOR

## Amendment to Recent Appellate Practice Column

Elliott Scheinberg makes an amendment to his recent Appellate Practice column, "Weight of Evidence, Preservation, Third Department Joins Second, Fourth (and First)," which the New York Law Journal published on May 1, 2024.

May 07, 2024 at 12:55 PM

Civil Procedure

By Elliott Scheinberg | May 07, 2024 at 12:55 PM



*[Editor's Note: This letter was submitted in response to the column "Weight of Evidence, Preservation, Third Department Joins Second, Fourth (and First)," which the New York Law Journal published on May 1, 2024].*

In my Appellate Practice column dated May 1, 2024, "Weight of Evidence, Preservation, Third Department Joins Second, Fourth (and First)," I noted that, in *Fitzpatrick v. Tvetenstrand*, 2024 NY Slip Op 01956, 1 [3d Dept 2024], the Third Department joined the Second and Fourth Departments in ruling that weight-of-the-evidence arguments may be raised first time on appeal. *Fitzpatrick* cited *Sims v. Comprehensive Community Development*, 40 AD3d 256, 258 [1st Dept 2007] suggesting that this rule is now congruent in all four appellate courts, that weight of the evidence may now be securely raised first time on appeal everywhere.

Significantly, while *Sims* never expressly articulated such a rule, it does, nevertheless, permit the inference that such may, in fact, be the rule in the First Department, "Burnside [defendants-appellants (collectively, Burnside)] may not avoid the consequence of its failure to preserve the inconsistency argument by characterizing it as an argument addressed to the weight of the evidence." The implication is clear that, had the defendants successfully been able to convert their argument from inconsistency of the evidence to weight of the evidence they could have salvaged their preservation issue. The reason I captioned the article to conclude with "(and First)" was precisely because it was unclear whether the Third Department's broader reading of *Sims* was accurate.

I gratefully acknowledge Hon. Mark C. Dillon, Associate Justice of the Appellate Division, Second Department, whose Practice Commentaries offer exceptional in-depth analyses of procedural issues, for calling *Moctezuma v. New York City Transit Authority*, 222 AD3d 489 [1st Dept 2023], a five-month-old decision, to my attention. *Monteczuma* is the First Department's direct pronouncement on this issue. Its wording seems absolute that weight arguments may not be raised first time on appeal: "We do not reach the issue of whether the jury's determination to allocate zero fault to plaintiff is against the weight of the evidence, as defendant did not challenge that finding when moving to set aside the liability verdict and the issue is not preserved for our review" [at 490].

---

I have thus amended myself.

**Elliott Scheinberg** is a member of NYSBA Committee on Courts of Appellate Jurisdiction. He is the author of *The New York Civil Appellate Citator* (NYSBA, 3d ed., 3 vols., TBA 2024) 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.

