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NEWS

Court of Appeals and Appellate Division As Courts of First Instance

The author writes "Preservation in the court below is the nucleus of appellate practice. But what does the “the court below” mean? Is it limited to Supreme Court, Surrogate’s Court, etc., or can the Appellate Division be the court of first instance for the purposes of preservation? If “the court below” is limited in meaning to Supreme Court, etc., must preservation be complied with even if just as a “technical,” “hollow formality,” “a useless exercise,” where the court is without authority to adjudicate the issue or rather should “the court below,” of necessity, refer to the court that is first capable of rendering a determination of consequence on the issue? Sabine v State, 2024 NY Slip Op 06288 [2024] (Dec. 17, 2024), a matter of first impression, strikes a blow at the historical development of preservation."

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Preservation in the court below is the nucleus of appellate practice. But what does the “the court below” mean? Is it limited to Supreme Court, Surrogate’s Court, etc., or can the Appellate Division be the court of first instance for the purposes of preservation? If “the court below” is limited in meaning to Supreme Court, etc., must preservation be complied with even if just as a “technical,” “hollow formality,” “a useless exercise,” where the court is without authority to adjudicate the issue or rather should “the court below,” of necessity, refer to the court that is first capable of rendering a determination of consequence on the issue? *Sabine v State*, 2024 NY Slip Op 06288 [2024] (Dec. 17, 2024), a matter of first impression, strikes a blow at the historical development of preservation.

Preservation, background

The Court of Appeals has instructed that preservation 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*

Construction & 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]. Also, *Robles v. Brooklyn Queens Nursing Home*, 131 A.D.3d 1032, 1033 [2d Dept 2015] (“A party [must] have the opportunity to address [an] argument and Supreme Court [must] have the opportunity to consider it.”); *Wald v. Marine Midland Business Loans*, 270 A.D.2d 73, 75 [1st Dept 2000] (“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.”)

It thus goes against the inherent grain of the doctrine of preservation that there are categories of issues that may be raised for the first time on appeal, which 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 the 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]; *Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355, 359 [2003] (citing *Telaro*: "A new issue—even a pure law issue—may be reached on appeal only if it could not have been avoided by factual showings or legal countersteps had it been raised below.").

This rule has been repeated in many appellate decision, by way of brief example, *Matter of Sagres 9, LLC, 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, Chapter 29, Preservation of Issues and Arguments; Issues Raised First Time on Appeal (NYSBA, 3d ed., 2025.)

Sabine v. State

Sabine involved two statutes, CPLR 5002, statutory interest, and Insurance Law §5102(d), No Fault Law determinations regarding serious injury. Following a bench trial, the Court of Claims found that the claimant established a serious injury within the meaning of 5102(d) and awarded him $550,000 in damages on Oct. 27, 2021, with prejudgment interest from that date rather than from the date that liability had been

determined against the defendant, three years earlier. The claimant appealed. This issue was certified to the Court of Appealed.
The Court of Appeals wrestled with the question whether an argument raised first time on appeal in the Appellate Division because it could not have been meaningfully raised in Supreme Court due to binding adverse appellate precedence in that Department could be heard by the Court of Appeals.

The masterful dissent by Associate Judge Jenny Rivera, joined by Chief Judge Rowan D. Wilson, fueled by the unarticulated doctrine of stare decisis, compels a reexamination of what "the first time that a litigant had an opportunity to raise an issue of law below" means. Does it mean that the argument must always have been raised in the "lowest" court even if as a "hollow formality," "a futile exercise," needlessly going through motions, where the "lowest" court could not possibly have ruled in favor of the proponent because of appellate precedent in that department, or, can "the first opportunity to raise an argument" mean, or, ought it to include the Appellate Division as the court of first instance where the argument can first receive meaningful treatment? [Although Judge Shirley Troutman dissented, she did not join Judges Rivera and Wilson on the issue of preservation.]

The majority rejected the claim on procedural grounds as the claimant had only first raised the issue on appeal to the Appellate Division without having raised it in the Court of Claims, that the claimant could have moved the Court of Claims postjudgment pursuant to CPLR 5015 and 5019 to correct the award.

Judge Rivera summarized the majority opinion of the Appellate Division on the issue of preservation:

"The Appellate Division unanimously affirmed the judgment insofar as appealed from, but divided on preservation, with two Justices concluding the issue was unpreserved (214 A.D.3d 1414, 1416–1417 [4th Dept. 2023]). Three Justices disagreed on that score, explaining that 'assuming,

arguendo, that claimant failed to preserve his contention an exception to preservation applied because claimant raised ‘a purely legal issue that could not have been obviated or cured by factual showings or legal countersteps in the trial court [ ], related to the law in this department with respect to the calculation of prejudgment interest in automobile accident cases’ (id. at 1415. On the merits, these Justices held that under its existing case law, the Court of Claims was bound [by Fourth Department precedent] to calculate the interest from the date of the serious injury determination (cites omitted). The Appellate Division granted claimant leave to appeal.”

Judge Rivera soundly addressed the opinion of the majority on irrefutable foundations of settled law -- that the argument regarding when interest first applies is a legal argument that the claimant could not have raised any sooner because defeat in the Court of Claims was guaranteed by adverse precedence in its Department – such an argument would have been “a hollow formality”:

“The Court of Claims prejudgment interest determination was based on binding Fourth Department precedent. As the three Justices below stated, ‘[t]he court was bound to apply the law as promulgated by [the Appellate Division]’ and, under that precedent, the Court of Claims ‘properly calculated the award of prejudgment interest from the date of the decision determining, inter alia, that claimant sustained a serious injury’ (214 A.D.3d at 1415). Claimant's first opportunity to present his argument for modification of the judgment was on appeal to the Appellate Division, the court that established the binding precedent. Thus, the question is properly before us on appeal from the Appellate Division's decision to adhere to its long-standing precedent.”

Judge Rivera cited *Maldovan v County of Erie*, 39 NY3d 166, 189 [2022], wherein Judge Wilson, in his dissenting opinion, underscored a fundamental and foundational principle of appellate practice enunciated by the Court of Appeals in 1969 [at n. 9]:

“[I]f 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.” (Cohen & Karger, op cit. supra, pp. 627–628.) 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 (*Telaro v. Telaro*, 25 N.Y.2d 433, 439 [1969]; also *Richardson v. Fiedler Roofing, Inc.*, 67 N.Y.2d 246, 251 [1986]; *Wright v. Wright*, 226 N.Y. 578 [1919]).)

“As we have explained, ‘In our review we are confined to the *questions* [internal emphasis] raised or argued at the trial but not to the arguments there presented. Nor is it material whether the case was well presented to the court below, in the arguments addressed to it. It was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such judgment as they ought to have given’ (*Persky v. Bank of Am. N.A.*, 261 N.Y. 212, 218 [1933] [emphasis in original], quoting *Oneida Bank v. Ontario Bank*, 21 N.Y. 490, 504 [1860]).

We are presented here with a pure question of law – *common law, no less, which is our own special duty to develop* – on a question that matters greatly to highly vulnerable persons. The question turns on no factual showings and cannot have been affected by legal countersteps does Social Services Law §473 establish a statutory special duty? By deferring that question to some unspecified day, we gain nothing, and neither APS nor its clients are benefitted by that prolonged uncertainty.”

Parenthetically, the statement “In our review we are confined to the *questions* [internal emphasis] raised or argued at the trial but not to the arguments there presented” invites reference to *Misicki v. Caradonna*, 12 N.Y.3d 511, 519–20 [2009] and other decisions from the Court of Appeals that stated: “For us now to decide this appeal on a distinct ground that

we winkled out wholly on our own would pose an obvious problem of fair play.
We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made." In *Paramount Pictures Corp. v. Allianz Risk Transfer AG,* 31 N.Y.3d 64, 82 (2018) (Rivera, J., concurring), the Court of Appeals stated: "[T]o reach beyond the arguments squarely before us is inappropriate and unnecessary (cf. *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008) [observing that American courts, "in the first instance and on appeal . . . follow the principle of party presentation [t]hat is, we rely on the parties to frame the issues for decision"].

Rosenblatt v. St. George Health and Racquetball Assoc., LLC, 119 A.D.3d 45, 54 [2d Dept 2014]: "It is significant that, in *Misicki v. Caradonna*, 12 N.Y.3d 511, 519, the Court of Appeals cautioned the judiciary that '[w]e are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made."; *Tabchouri v. Hard Eight Rest. Co., LLC,* 219 A.D.3d 528 [2d Dept 2023]; *Matter of Cassini*, 182 A.D.3d 13, 41-42 [2d Dept 2020].

CPLR 5015, and 5019, the invitation from the judge's law clerk to make a motion

Judge Rivera explained that the majority's point regarding CPLR 5015 and 5019 was in error. Section 5015 could not have remedied the claimant's preservation problem because none of the five grounds set forth in 5015(a), excusable default, newly-discovered evidence, fraud or misrepresentation, lack of jurisdiction, reversal, modification or vacatur of a prior judgment or order upon which it is based, applied. [Notably, the factors in CPLR 5015(a) do not constitute an exhaustive list. *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003].]

CPLR 5019 was similarly inapplicable:

“CPLR 5019 allows an order to be corrected or amended to address (1) any ‘mistake, defect, or irregularity in the papers or procedures in the action not affecting a substantial right of a party’; (2) ‘a subsequent judgment or order affecting judgment or lien’; (3) a change in judgment creditor; or (4) a certificate of change of the docket by the county clerk (CPLR 5019).

Claimant does not allege a mistake, defect or irregularity; he challenges the existing judgment not a subsequent judgment or order; and the argument does not involve a judgment creditor or the county clerk's docket change certificate. I know of no CPLR rule that required claimant to seek reconsideration in that court rather than timely appeal to the Appellate Division on a previously-settled legal question of prejudgment interest.”

The correspondence between the court’s law clerk and the claimant establishes that the claimant sought to renew the issue postjudgment with the court and thereafter receiving a response from the judge’s law clerk that “that the court considered and rejected claimant's request for reconsideration of the prejudgment interest amount as the court was bound by departmental precedent” *and* “*if the claimant had something to add in support of that request, he could file a motion or otherwise seek relief from the Appellate Division*” (emphasis provided.) It is submitted that this statement by the judge’s law clerk was not remotely necessary to have found that the claimant had preserved his argument.

Judge Rivera deemed the issue preserved citing precedent from the Court of Appeals and the New York State Constitution in support of the rule that “[p]arties may raise claims for the first time on appeal that ‘could not have been obviated or cured by factual showings or legal countersteps’ in the court of original jurisdiction (*Telaro v. Telaro*, 25 N.Y.2d 433 [1969]; also *Richardson v. Fiedler Roofing, Inc.*, 67 N.Y.2d 246, 250 [1986] [“The argument raises solely a question of statutory interpretation … which we may address even though it was not presented

below"]; *People v. Rodriguez y Paz*, 58 N.Y.2d 327, 337 [1983] ["a question of law which could not have been obviated by an evidentiary showing at th(e) hearing ... may be raised for the first time on appeal"]; *American Sugar Ref. Co. of New York v. Waterfront Commn. of New York Harbor*, 55 N.Y.2d 11, 25 [1982] [issue could not have been "obviated or cured by factual showings or legal countersteps, turning as it does on legislative intent"]; *Rivera v. Smith*, 63 N.Y.2d 501, 516 n. 5 [1984]; NY Const, art VI, § 3[a] ["The jurisdiction of the court of appeals shall be limited to the review of questions of law]). Notably, these cases all refer only to either the court of original jurisdiction or the court where the hearing was held. The majority dismissed what it called the "*rarely used* exception to the preservation rule in *Telaro*:

"That exception, which this court has rarely applied in this manner [where an argument is raised first time on appeal because of binding precedent in the Department bars the relief] (and not once in the past four decades), does not apply here. Nor has it ever been applied in the manner that our dissenting colleagues would like to use it—when controlling precedent blocks the protesting party from obtaining relief."

Quoting Judge Wilson's dissent in *Maldovan v County of Erie*, 39 NY3d 166, 189 [2022], Judge Rivera aptly noted that "Our preservation doctrine is not constitutionally compelled; it is of our own making, and we can draw it as narrowly as we wish." *Telaro* rejected what law and logic would consider a necessary level of argument before the argument can be reviewed by the Court of Appeals, i.e., that so long as an argument was raised in the court of original instance even though not raised with the Appellate Division it could still be raised for the first time before the Court of Appeals:

"The rule was best stated in *Cohn v. Goldman*, 76 N.Y. 284, 287: 'It is, indeed, a rule, that questions not raised at the trial court, which might have been obviated by the action of the court then, or by that of the other party, will not be heard on appeal as ground of error. And it is not

uncommon for courts to pass over in silence exceptions not brought to their notice by counsel.
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."

The Court of Appeals as *the* court of first instance

By parity of reason anchored in Court-of-Appeals precedent, the Court of Appeals should also be *the only court of first instance* in proceedings where a party seeks reversal or modification of a prior rule of law of the Court as preservation in any court below is impossible, as a matter of law thus rendering any application to any court below an absolute "hollow formality" and "futile exercise." In *Grady v Chenango Val. Cent. School Dist.*, 40 NY3d 89, 104, n.3 [2023], Judge Rivera, in a cocncurring opinion, noted:

"Lower courts are bound to follow our rulings since, as the high Court of New York State, we are the only tribunal empowered to overrule our precedents (*New York Civ. Liberties Union v. New York City Police Dept.*, 148 A.D.3d 642, 644 [1st Dept. 2017], affd 32 N.Y.3d 556 [2018] ["(W)e cannot overrule ... Court of Appeals decisions ... and are obligated to reverse based on this controlling precedent]). Such a claim is therefore the *ne plus ultra* of "contentions which could not have been so obviated or cured below" and may be raised before us for the first time (*Telaro v. Telaro*, 25 N.Y.2d 433, 439 [1969]).)"

Conclusion

The majority's statement that this issue has not occurred in four decades does not minimize its significance. The common law is a living organism that does not remain stagnant but rather evolves to bring under its

umbrella previously unencountered situations, hence the term “matters of first impression,” rendered all the more significant when a rift among Departments requires stabilized uniformity: “A disagreement among the Judicial Departments on the interpretation of a statute is a matter which is for either the Court of Appeals or the Legislature to resolve.” *Lee v Rogers*, 177 AD3d 965, 967 [2d Dept 2019]; 22 NYCRR § 500.22(b)(4). While the statewide implications of the departmental schism regarding when interest begins presented the perfect facts against which to apply *Telaro, et seq.,* the Court of Appeals declined “our own special duty to develop” preservation---a living fundamental doctrine of appellate practice, “gaining nothing by deferring that question to some unspecified day.” Preservation, under the circumstances of *Sabine,* remains a hollow, futile formality, *People v. Casanova*, 62 A.D.3d 88, 91 [1st Dept 2009], and “simply a meaningless technical barrier to review,” *Wilson v. Galicia Contruction & Restoration*, 10 N.Y.3d 827, 829 [2008].

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