

THE PRESERVATION RULE IN THE NEW YORK COURT OF
APPEALS: HOW RECENT DECISIONS AND
CHARACTERIZATIONS OF THE RULE INFORM ADVOCACY

Richard J. Montes & David A. Beatty***

I. INTRODUCTION

The Court of Appeals has engaged in sharp and divisive debates on the preservation rule over the past few years. These debates are important in light of how fundamental the preservation rule and its exceptions are to appellate practice.¹ The rule itself can be stated simply: if a party did not raise an issue below, it cannot raise the issue on appeal.² In practice, failing to preserve an error is one of the most frustrating ways to lose an appeal—before it begins.³ Thus, a proper objection, in its simplicity, is of unmatched importance to the appellate process.⁴

* Richard J. Montes is a partner of Mauro Lilling Naparty LLP, the largest law firm in New York that exclusively dedicates its practice to appeals and litigation strategy.

** David A. Beatty is an associate with Mauro Lilling Naparty LLP.

¹ See Catherine Stone, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence Forward*, 30 ST. MARY'S L.J. 993, 994 (1999) (referring to preservation of error as “the most fundamental step in the appellate process”); see also Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2020–21 (2012) (reflecting on the preservation rule as “firmly established”). It is often among the first topics in appellate texts. The aptly named federal appellate practice guide, *Federal Appellate Practice*, by Mayer Brown LLP, begins the first text page with the frustrating experience where a litigator is told, “an effective argument is foreclosed on appeal because it was not preserved adequately in the court below.” MAYER BROWN LLP, FEDERAL APPELLATE PRACTICE 2 (Philip Allen Lacovara ed., 2008). Similarly, the treatise *New York Appellate Practice*, originally curated by Thomas R. Newman, begins Chapter 1 with organization of the courts and proceeds in Chapter 2 to Preservation of Error for Review. 1 A. VINCENT BUZARD & THOMAS R. NEWMAN, NEW YORK APPELLATE PRACTICE §§ 1.01–2.09 (2014).

² Dobbins, *supra* note 1, at 2016–17. As explained below, this could be viewed as errors the Court of Appeals can or cannot address, or errors it will and will not address, depending on the extent to which judges believe they have flexibility over preservation. See discussion *infra* Part II.B–D.

³ MAYER BROWN LLP, *supra* note 1, at 2 (explaining that “[t]here are few experiences more frustrating to a litigator than” losing an effective argument due to preservation issues).

⁴ *E.g.*, Alan D. Marrus, *The Most Powerful Word in the Law: “Objection!”*, N.Y. ST. B.J., July–Aug. 2000, at 42, 42 (“If you had to select a single word with the greatest impact on the evolution of law and justice, what would it be? My nomination goes to ‘Objection!’ The invocation of this word can change the direction of a trial and the outcome of an appeal. . . .

As will be shown, recent debates over the preservation doctrine have been nuanced and contentious.⁵ In one case, the rule led a judge to call some of her fellow judges' reasoning "downright bizarre."⁶ In another case, a second judge referred sarcastically to the majority's reasoning as "an exercise akin to deciding whether [he] would be a bicycle if [he] had wheels."⁷ In a third, a party failed to preserve an objection at the trial court and ultimately prevailed at the Court of Appeals because of that failure.⁸

This article explores these disagreements on preservation, revealing a complex push and pull among adherence to doctrine; limits on authority; and principles of justice, equity, and pragmatism.⁹ Part II of this article provides a historical framework of the preservation rule and appellate review. Part III reviews several recent decisions implicating the preservation doctrine, largely focused on its appearance in civil litigation.¹⁰ The article

This one word is so mighty that it can actually get a trial lawyer to stop speaking in the middle of a sentence. There simply is no other word in the legal lexicon with such power.").

⁵ Sofie M. F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated . . .*, 50 AM. J. COMP. L. 201, 226 (2002) (referring to the requirement to raise an issue at the trial level); Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 180–81 (2012) (beginning discussion on the rule requiring issues to be raised at trial or be lost on appeal).

⁶ *People v. Finch*, 23 N.Y.3d 408, 437, 15 N.E.3d 307, 328, 991 N.Y.S.2d 552, 573 (2014) (Read, J., dissenting).

⁷ *Misicki v. Caradonna*, 12 N.Y.3d 511, 524, 909 N.E.2d 1213, 1222, 882 N.Y.S.2d 375, 385 (2009) (Smith, J., dissenting).

⁸ *Hecker v. State*, 20 N.Y.3d 1087, 1089, 987 N.E.2d 636, 637, 965 N.Y.S.2d 75, 76–77 (2013) (Smith, J., concurring) ("And now in this Court, claimant loses the case . . . because of *defendant's* neglect. This result is so counterintuitive—and the cases that we find to compel that result so little known—that the parties not only failed to anticipate it, but assumed the rule to be the opposite.").

⁹ One prominent scholar on the point wrote that unpreserved issues on appeal suffer from the failure or inability of appellate courts to articulate any principled basis for determining when and under what circumstances a new issue will be considered. As a result, it is almost impossible to predict in a particular case whether or not the appellate court will consider a new issue raised by the appellant.

Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1025 (1987); *see also* Singleton v. Wulff, 428 U.S. 106, 121 (1976) (noting there can be no "general rule" about potential exceptions to the preservation rule and such exceptions are a matter "left primarily to the discretion of the courts of appeals"); *York Ctr. Park Dist. v. Krilich*, 40 F.3d 205, 209 (7th Cir. 1994) ("Discretion there may be, but methodized by analogy, disciplined by system. Discretion without a criterion for its exercise is authorization of arbitrariness." (citations omitted) (quoting *Brown v. Allen*, 344 U.S. 443, 496 (1953)) (internal quotation marks omitted)); *see also* Weigand, *supra* note 5, at 181 (2012) ("[M]any appellate court decisions provide no or little explanation of why exception to forfeiture is being exercised . . .").

¹⁰ Commentators have recently written on a large and equally interesting area of preservation jurisprudence within the New York criminal appeal sphere. *See generally* Larry

concludes with a discussion of the future of the preservation rule and what the current debate means for practitioners today.

II. ROOTS OF THE PRESERVATION DOCTRINE

A. *Mechanisms Developed for Appellate Review in Anglo-American Courts*

The current debate over the preservation doctrine is part of a centuries-long evolutionary process of superior courts reviewing the conduct of inferior courts.¹¹ In modern times, the rule incorporates policy choices and a division of responsibility among attorneys, trial courts and appellate courts, as well as competing incentives for efficient case administration.¹² The issue even goes to the source of an appellate court's authority to decide new issues on appeal.¹³ This article, therefore, begins with the historical divide between strict error-correction schemes and more liberal justice-seeking schemes. That historical divide of processes for appellate review informs, at a broader level, the limitations on reviewing verdicts and judgments today.

Appellate review in the English legal system is understood to

Cunningham, *Appellate Review of Unpreserved Questions in Criminal Cases: An Attempt to Define the "Interest of Justice,"* 11 J. APP. PRAC. & PROCESS 285 (2010); Gary Muldoon, *Understanding New York's "Mode of Proceedings" Muddle,* 59 BUFF. L. REV. 1169 (2011).

¹¹ See Peter D. Marshall, *A Comparative Analysis of the Right to Appeal,* 22 DUKE J. COMP. & INT'L L. 1, 4–8 (2011) (describing origins and development, particularly of the criminal appeal in the common law world).

¹² *People v. Hawkins*, 11 N.Y.3d 484, 492–93, 900 N.E.2d 946, 950–51, 872 N.Y.S.2d 395, 399–400 (2008) (referring to sound reasons that underlie the preservation requirement, both when viewed in the context of an individual trial and systematically); see also *People v. Gray*, 86 N.Y.2d 10, 20–21, 652 N.E.2d 919, 922, 629 N.Y.S.2d 173, 176 (1995) (discussing some purposes for requiring timely objections); Cunningham, *supra* note 10, at 286 (noting that preservation encourages, among other things, “efficient resolution” and “conservation of appellate resources” but also observing, “preservation is not without its costs”); ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* § 17:3, at 597 (3d ed., rev. 2005); Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice,* 55 DRAKE L. REV. 39, 42 (2006) (describing incentives to keep the preservation rule).

¹³ See *Oldfield v. New York & Harlem R.R. Co.*, 14 N.Y. 310, 321 (1856) (“Where a trial and general verdict have been had, we can deal only with questions of law upon exceptions duly taken, and we cannot correct the errors of the jury.”). Compare *Misicki v. Caradonna*, 12 N.Y.3d 511, 524, 909 N.E.2d 1213, 1222, 882 N.Y.S.2d 375, 384 (2009) (Grafteo, J., dissenting) (“I view the preservation requirement as a constitutional limitation on this Court’s jurisdiction.” (citation omitted)), with *id.* at 525, 909 N.E.2d at 1223, 882 N.Y.S.2d at 385 (Smith, J., dissenting) (“[W]e have occasionally referred to it as a matter of ‘jurisdiction.’ But it is not truly jurisdictional, in the sense of being a limitation on our power.” (citations omitted)).

have developed from a party's accusations that a jury gave a "false verdict" or a judge rendered a "false judgment."¹⁴ Such charges meant, in essence, a party accused a judge or jury of *lying*. Said differently, the charges would not focus on whether a judge or jury made a mistake. One can imagine how successful a litigant would be in calling a judge a liar.¹⁵ This system proved inefficient, and the powers to review inferior courts evolved into a new system of writs, including the writ of error.¹⁶

The writ of error allowed a superior court to remedy legal mistakes in lower law-court judgments.¹⁷ It was designed to fix errors of law, not facts, appearing from the proceedings below or as preserved in a document known as a bill of exceptions.¹⁸ This writ was not designed to find justice in the law courts.¹⁹

Finding justice was more appropriately addressed by equity courts.²⁰ In fact, the word "appeal" surprisingly had a different meaning in the past than its meaning today. It referred then to the equity court practice of essentially retrying a case anew.²¹ Today, New York appellate courts do not retry cases anew. Thus, what we

¹⁴ See Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 926 (1997); Martineau, *supra* note 9, at 1026.

¹⁵ Similar to a false judgment, the false verdict was targeted at a jury, but was a quasi-criminal allegation that the jury had "willfully falsified." James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 357, 364-65 (1892). As recognition that this procedure, like a false judgment, was not an effective means of correcting injurious verdicts, courts developed the ability to set aside verdicts and grant new trials. *Id.* at 366; see *Smith v. Times Publ'g Co.*, 36 A. 296, 309 (Pa. 1897); Bilder, *supra* note 14, at 926-27.

¹⁶ See Bilder, *supra* note 14, at 926-27; Martineau, *supra* note 9, at 1026; Thayer, *supra* note 15, at 366 (discussing how false verdicts and false judgments were not an effective means of correcting injurious verdicts, which led to courts developing the ability to set aside verdicts and grant new trials); see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1447-48 (2000) (referring to the development of the Kings Bench and comments on the importance of writs, including the writ of error, as a means of correcting inferior courts); cf. William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664-1776*, 38 HOFSTRA L. REV. 69, 135-36 (2009) (describing pre-constitutional English-colonial New York practices where writs existed for transferring cases from a lower to higher court, including the writ of error).

¹⁷ Contrasted with equity courts. See Martineau, *supra* note 9, at 1027-28.

¹⁸ See Pfander, *supra* note 16, at 1460-61 (distinguishing a writ of error and an appeal).

¹⁹ See Martineau, *supra* note 9, at 1028; Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 9-12, 27 (2002) (describing a formalistic writ system and the development of negligence).

²⁰ See Geeroms, *supra* note 5, at 220 (contrasting law and equity and noting the purpose of equity is justice).

²¹ See Bilder, *supra* note 14, at 915, 924-28; Martineau, *supra* note 9, at 1027; see also 3 WILLIAM BLACKSTONE, COMMENTARIES *56-57 (referring to the courts of equity with their appeals and the courts of law with their writs of error and noting some differences between them).

term an appeal today resembles much more a writ of error than the word's original meaning.²²

Divergent historical approaches for review are attributable, in part, to the parallel system of courts of law and courts of equity that was prevalent as recently as the early- to mid-nineteenth century.²³ In the mid-nineteenth century, there was a trend toward single appellate courts where “both equity and common law matters were heard by a single appellate court.”²⁴

In New York, the merging of law and equity was a product of nineteenth century law reforms known today as the Field Code.²⁵ This revolutionary codification of civil procedure coincided with the creation of the New York Court of Appeals in an amendment to the New York State Constitution in 1846.²⁶ Commentators note that the American and territorial experience postunification of law and equity was, broadly speaking, to follow more closely the writ of error process than the equity appeal process:

American appellate courts adopted the writ of error procedure as the default procedure. Following this choice, emphasis was placed on reviewing procedural technicalities rather than rehearing the equity appeal as was the case in England. More importantly, the American appellate courts only reviewed questions of law in common law and equity matters. . . . Such a situation proved to be too cumbersome to maintain and reform was inevitable.²⁷

²² See Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339, 342 (1996) (referencing the early New York Appellate system and development of unified law and equity courts along with the Court of Appeals); Bilder, *supra* note 14, at 942; Geeroms, *supra* note 5, at 222 (“Accordingly, the Court of Appeal [sic] now functions more to correct errors in the trial court than to provide a second stage in the trial of a case.”); Pfander, *supra* note 16, at 1449–51 (distinguishing the writ of error and the appeal, including the writ of error securing review of errors of law appearing on the face of the record or bill of exceptions).

²³ Geeroms, *supra* note 5, at 224–25 (describing the evolution of the American appellate system through the nineteenth century).

²⁴ *Id.* at 224.

²⁵ See N.Y. C.P.L.R. 103(a) (McKinney 2014); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 464–67 (2003) (describing reform efforts to simplify legal procedure, including development and adoption of the Field Code).

²⁶ Gary D. Spivey, *Two Centuries of Law Reporting*, HIST. SOC'Y CTS. ST. N.Y., Spring–Summer 2004, at 7, 8 (referring to the expansion of law reporting in the post-1846 era after the creation of a state reporter and the New York Court of Appeals).

²⁷ Geeroms, *supra* note 5, at 224–25 (describing writ of error procedure as the methodology of review post-integration of law and equity in nineteenth century); see also Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 50–51 (2010) (exploring the error-correction function in civil appeals); cf. Howard Thayer Kingsbury, *Writs of Error and Appeals from the*

B. Historical Appellate Review at the New York Court of Appeals

*“The restrictions on the scope of review available in the Court of Appeals on an appeal properly before it also represent a compromise between the diverse views as to whether that Court should serve the role of oracle for the law or that of dispenser of justice.”*²⁸

Early on, preservation was described as an issue of the court’s jurisdiction and power.²⁹ In *Duryea v. Vosburgh*,³⁰ an 1890 opinion, the Court of Appeals discussed preservation as the preservation of power:

The denial of a motion for a new trial, made on the ground stated, is not the subject of an exception, and if it be competent for this court to review the decision of that question by the General Term, it follows, of course, that it reviews a question of law without any exception having been taken, which is contrary to its uniform practice, and the power to do which has been denied.³¹

By modern parlance, the court was powerless to review the denial of a motion for a new trial because it was not the subject of an exception.

In terms of process, the system was formal and involved taking objections, exceptions, and filing bills of exceptions after cases.³² In an 1899 Court of Appeals opinion, *Hecla Powder Co. v. Sigua Iron Co.*,³³ the multi-part preservation process was captured quite succinctly:

In a civil action we can only reverse upon exceptions, and are

New Territorial Courts, 16 YALE L.J. 417, 418–20 (1907) (referring to appellate systems in territorial holdings of the United States, including writ of error usage).

²⁸ KARGER, *supra* note 12, § 1:3, at 8; *cf.* Oldfather, *supra* note 27, at 63–64 (referring to two functions of appellate courts involved in most discussions: “error correction” and “law declaration”).

²⁹ See generally Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 KAN. L. REV. 947, 949 (1998) (referring to the “earlier times” where preserved objections involved more lengthy process of detailing claimed errors).

³⁰ *Duryea v. Vosburgh*, 121 N.Y. 57, 24 N.E. 308 (1890).

³¹ *Id.* at 62, 24 N.E. at 309.

³² See *Onondaga Cnty. Mut. Ins. Co. v. Minard*, 2 N.Y. 98, 99–100 (1848) (describing the bill of exceptions, the practice of the court, and an argument presented to the court that it should amend a bill of exceptions).

³³ *Hecla Powder Co. v. Sigua Iron Co.*, 157 N.Y. 437, 52 N.E. 650 (1899).

compelled to disregard all errors committed by the trial court, unless they were pointed out by an objection and saved by an exception, no matter how serious those errors may be.³⁴

Thus, long ago, a timely, specific objection was insufficient to preserve a matter for appellate review. The trial attorney was required to object, then take an exception to the unfavorable ruling, and finally compile and submit a bill of exceptions at trial's end.³⁵ A failure to submit an error with the bill of exceptions meant a timely, specific, and objected-to ruling would be lost.³⁶ *Hecla Powder Co.* is of particular note because the opinion begins by highlighting “[s]everal interesting questions, ably argued by the learned counsel for the appellant,” before crushing that counsel's hopes.³⁷ Those “[s]everal interesting questions,” the judge concluded, “are not before us”³⁸

This overly formalistic system subsequently developed into a more pragmatic one.³⁹ Statutes and court rules eliminated exceptions and bills of exceptions. There were many reasons for eliminating these formalisms, but two should be noted. First, the objection itself did all the work necessary to put the trial court on notice.⁴⁰ Second, the objection and record alone enabled an

³⁴ *Id.* at 441, 52 N.E. at 651 (citing *Wicks v. Thompson*, 129 N.Y. 634, 634, 29 N.E. 301, 301 (1891)).

³⁵ *Pangburn v. Buick Motor Co.*, 211 N.Y. 228, 235, 105 N.E. 423, 425 (1914) (noting generally that only questions of law presented by exceptions are reviewable on appeal); *see also* *Berliner v. Pequa Club Ass'n*, 73 A.D. 622, 76 N.Y.S. 671 (App. Div. 1st Dep't 1902) (*per curiam*) (referencing plaintiff's motion for leave to file an amended bill of exception with a new exception, *nunc pro tunc*). *See generally* David William Navarro, Comment, *Jury Interrogatories and the Preservation of Error in Federal Civil Cases: Should the Plain-Error Doctrine Apply?*, 30 ST. MARY'S L.J. 1163, 1170–72 (1999) (describing the preservation of error requirement, including the bill of exception).

³⁶ *Butler v. Miller*, 1 N.Y. 496, 504 (1848) (“But no such question is presented by the bill of exceptions, or was before the circuit judge, and cannot be raised and passed upon in this court.”); *see Pangburn*, 211 N.Y. at 235, 105 N.E. at 425.

³⁷ *Hecla Powder Co.*, 157 N.Y. at 441, 52 N.E. at 651.

³⁸ *Id.* Note the similarity between the “several interesting questions” language in 1899 and Chief Judge Lippman's 2013 dissent in *Matter of Bezio v. Dorsey*:

The Court today offers its views on a range of interesting, important and to some extent novel questions having to do with the respective prerogatives of prison inmates and correctional authorities in the context of inmate hunger strikes. None of these issues, however, is properly before the Court.

Matter of Bezio v. Dorsey, 21 N.Y.3d 93, 108, 989 N.E.2d 942, 953, 967 N.Y.S.2d 660, 671 (2013) (Lippman, C.J., dissenting).

³⁹ *See Geeroms*, *supra* note 5, at 225 (referring to starts of major reforms to appellate procedure in the beginning of the twentieth century and the effective implementation of these rules in the 1960s).

⁴⁰ *See* David D. Siegel, *Practice Commentaries*, C4017, in N.Y. C.P.L.R. 4017 (McKinney

appellate court to review the matter fully.⁴¹ Beyond reforms of error preservation, the courts themselves underwent reforms of their jurisdictional scope and purpose.⁴²

Today, the need for an exception has been eliminated and appellate jurisdiction has gone through reforms; the need for a sufficiently specific and properly raised objection, however, remains.⁴³ Notwithstanding these reforms, attorneys still can be heard to ask for an exception, and judges can be heard to respond, “you have your exception.”⁴⁴

C. *Reforming Appellate Review and Changing Views on Preservation*

Along with the more pragmatic procedural approach came a softening of language on the preservation rule in the mid-twentieth century.⁴⁵ In 1969, the Court of Appeals commented: “[T]he 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.”⁴⁶ The court then quoted the leading treatise on the Court of Appeals: “[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

2014).

⁴¹ *Id.*

⁴² See Geeroms, *supra* note 5, at 225 (referring to changes impacting judicial economy and stability and the expansion of appellate review and standards of review); KARGER, *supra* note 12, § 17:1, at 591–92.

⁴³ N.Y. C.P.L.R. 4017 (McKinney 2014) (deeming objections to include exceptions); KARGER, *supra* note 12, § 14:1, at 495; e.g., Suria v. Shiffman, 67 N.Y.2d 87, 96 n.2, 490 N.E.2d 832, 836 n.2, 499 N.Y.S.2d 913, 917 n.2 (1986) (referencing no need to take an exception); cf. FED. R. CIV. P. 46 (stating that, while “[a] formal exception to a ruling or order is unnecessary,” a party must still state its objection); FED. R. EVID. 103(a) (noting that a claim of error is only preserved if a party timely objects).

⁴⁴ See *People v. Resek*, 3 N.Y.3d 385, 388, 821 N.E.2d 108, 109, 787 N.Y.S.2d 683, 684 (2004) (quoting trial judge as, “[w]ell, counsel you have your exception” (internal quotation marks omitted)); *People v. De Jesus*, 42 N.Y.2d 519, 522, 369 N.E.2d 752, 754, 399 N.Y.S.2d 196, 198 (1977) (noting that defense counsel asked for exceptions and that the trial judge stated, “[y]ou have your exception” (internal quotation marks omitted)); cf. CAL. CIV. PROC. CODE § 646 (West 2014) (“An exception is an objection upon a matter of law to a decision made.”).

⁴⁵ See Geeroms, *supra* note 5, at 225 (referring to evolution of reforms in 1960s); see also Weigand, *supra* note 5, at 194–95 (describing evolution of plain error doctrine between 1930s and 1980s).

⁴⁶ *Telaro v. Telaro*, 25 N.Y.2d 433, 439, 255 N.E.2d 158, 160, 306 N.Y.S.2d 920, 924 (1969) (expanding on Cohen & Karger’s *Powers of the New York Court of Appeals* language).

unimpeachable showing that he had no case in the trial court.”⁴⁷

In 2003, the court stated that only “with rare exception” will it review a question “raised for the first time on appeal.”⁴⁸ It noted a rule for new issues: “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.”⁴⁹

In 2009, Judge Smith dissented in a case while noting:

Our preservation rule is an important one—so important that we have occasionally referred to it as a matter of “jurisdiction.” But it is not truly jurisdictional, in the sense of being a limitation on our power. We review unpreserved questions when common sense and practical necessity dictate that we should.⁵⁰

Dissenting separately, however, Judge Graffeo commented that she “view[s] the preservation requirement as a constitutional limitation on this Court’s jurisdiction.”⁵¹ This type of judicial cross-talk on the preservation rule serves as a valuable teaching moment.

At other times, however, the court has not described its powers so broadly. In contrast to its “far less restrictive” language above, the court has referred to the preservation rule as akin to a “jurisdictional” issue. For example, in *People v. Turriago*,⁵² the Court of Appeals stated that an unpreserved argument “is beyond the jurisdiction of this Court.”⁵³ As the foremost treatise on the Court of Appeals’ jurisdiction recounts: “The primary function of the Court of Appeals, like that of the United States Supreme Court in the Federal sphere, is conceived to be that of declaring and developing an authoritative body of decisional law for the guidance of the lower courts, the bar and the public.”⁵⁴ The court reflected on

⁴⁷ *Id.* (quoting HENRY COHEN & ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* 627–28 (1952)) (internal quotation marks omitted).

⁴⁸ *Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359, 786 N.E.2d 28, 30, 756 N.Y.S.2d 129, 131 (2003). Compare this with the various articulations of appellate courts choosing to review issues not sufficiently preserved, including doing so “when necessary,” as it has the “opportunity,” or when there was an issue that was “squarely presented” by the record or of “significant public interest.” See Weigand, *supra* note 5, at 247–48 (internal quotation marks omitted).

⁴⁹ *Bingham*, 99 N.Y.2d at 359, 786 N.E.2d at 30, 756 N.Y.S.2d at 131 (citations omitted).

⁵⁰ *Misicki v. Caradonna*, 12 N.Y.3d 511, 525, 909 N.E.2d 1213, 1223, 882 N.Y.S.2d 375, 385 (2009) (Smith, J., dissenting) (citations omitted).

⁵¹ *Id.* at 524, 909 N.E.2d at 1222, 882 N.Y.S.2d at 384 (Graffeo, J., dissenting).

⁵² *People v. Turriago*, 90 N.Y.2d 77, 681 N.E.2d 350, 659 N.Y.S.2d 183 (1997).

⁵³ *Id.* at 80, 681 N.E.2d at 351, 659 N.Y.S.2d at 184.

⁵⁴ KARGER, *supra* note 12, § 1:1, at 3–4.

how this role is best accomplished in *People v. Hawkins*: “[S]econd level of review—to authoritatively declare and settle the law uniformly throughout the state—is best accomplished when the Court determines legal issues of statewide significance that have first been considered by both the trial and intermediate appellate court.”⁵⁵

These differing views in modern times highlight that the very nature of error and its preservation involves someone educated and presumed to know the law who did something inadvertent or incompetent.⁵⁶ This leaves at least some credible justification for reviewing certain errors of pure law.⁵⁷ On one hand, there are issues that are not expected to be preserved or are addressed when unpreserved, like criminal trial claims of ineffective assistance of counsel or “mode of proceedings” errors.⁵⁸ On the other hand, even some constitutional claims can be waived.⁵⁹ Modern jurisprudence, therefore, reflects the historical tensions between jurisprudential concerns and more equity-pragmatic concerns, which sometimes result in exceptions to the preservation rule.⁶⁰ Specific examples of this jurisprudence are found in Part III.

D. Primer on Preservation Today

“The essential function of an [objection] is to direct the mind of the trial justice to the point in which it is supposed that he has erred in law so that he may reconsider it and change his ruling if

⁵⁵ *People v. Hawkins*, 11 N.Y.3d 484, 493, 900 N.E.2d 946, 951, 872 N.Y.S.2d 395, 400 (2008) (quoting *Reed v. McCord*, 160 N.Y. 330, 335, 54 N.E. 737, 738 (1899)).

⁵⁶ *See Wainwright v. Sykes*, 433 U.S. 72, 104 (1977) (Brennan, J., dissenting) (referring to ordinary procedural defaults as often the product of “inadvertence, negligence, inexperience, or incompetence of trial counsel”); KARGER, *supra* note 12, § 17:1, at 591.

⁵⁷ *Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359, 786 N.E.2d 28, 30, 756 N.Y.S.2d 129, 130 (2003) (“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.”); *cf.* Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 996–99 (1989) (describing federal courts’ pure question of law exception). *But see* Weigand, *supra* note 5, at 265–68 (discounting or suggesting some skepticism at pure legal question review).

⁵⁸ *Misicki v. Caradonna*, 12 N.Y.3d 511, 525, 909 N.E.2d 1213, 1223, 882 N.Y.S.2d 375, 385 (2009) (Smith, J., dissenting) (describing various forms of exceptions or different unpreserved arguments addressed by the court); Muldoon, *supra* note 10, at 1172–78.

⁵⁹ *See People v. Angelo*, 88 N.Y.2d 217, 222, 666 N.E.2d 1333, 1334, 644 N.Y.S.2d 460, 461 (1996) (“Because defendant failed to present these constitutional claims to County Court, however, they are unpreserved for this Court’s review.”).

⁶⁰ *See generally* Carter, *supra* note 29, at 955–74 (1998); Dennerline, *supra* note 57, at 996–1003.

convinced of error.”⁶¹ While objections are directed to the trial court, preservation is often written about in terms of what an attorney needs to do to preserve an issue for appellate review.⁶² The answer to that question is typically to make an objection (1) timely and (2) clearly, and (3) receive an unfavorable ruling.⁶³

The court and commentators note a timely objection is one that allows a trial court to correct the claimed error.⁶⁴ Similarly, they note a clear objection is one that is sufficiently specific to clue the trial court in to the error to be corrected.⁶⁵ Finally, they posit that a ruling that is ambiguous or not unfavorable is inadequate to preserve issues.⁶⁶

The CPLR describes both preservation and the scope of appellate review in New York. Specifically, CPLR section 4017 provides that:

Formal exceptions to rulings of the court are unnecessary.

⁶¹ *Gangi v. Fradus*, 227 N.Y. 452, 458–59, 125 N.E. 677, 679–80 (1920) (referring to how an exception enables an appellate court to review a jury charge).

⁶² An explication on the ins and outs of preserving error is beyond the scope of this article. But many resources are available across multiple states on the issues beyond the above primer. See generally, Polly Jessica Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 ST. MARY'S L.J. 997 (1999); Mayes & Vaitheswaran, *supra* note 12; Sean M. Reagan, *Recurring Themes in Preserving Error in Civil Cases*, 22 APP. ADVOC. 392 (2010); 4 N.Y. JUR. 2D *Appellate Review* § 137 (2014) (detailing the manner of preserving error).

⁶³ See FED. R. EVID. 103(a)(1); N.Y. C.P.L.R. 4017 (McKinney 2014). See generally 1 MCCORMICK ON EVIDENCE § 52, at 349, 356–357 (Kenneth S. Broun ed., 7th ed. 2013); Deborah McCoppin & Mikal J. Condon, *Twenty-Ninth Annual Review of Criminal Procedure: Appeals*, 88 GEO. L.J. 1601, 1614–21 (2000) (citing to voluminous case law about how one makes timely objections); L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After Ohler v. United States*, 34 U.C. DAVIS L. REV. 615, 629–30 (2001) (referencing the basic needs for preservation); Reagan, *supra* note 62, at 392, 396–97 (opining on requirement of specific and timely objections with adverse rulings within the context of Texas trial practice).

⁶⁴ See *People v. Patterson*, 39 N.Y.2d 288, 294–95, 347 N.E.2d 898, 902, 383 N.Y.S.2d 573, 577 (1976). The court states that, in a criminal context, “[s]trict adherence to the requirement that complaint be made in time to permit a correction serves a legitimate State purpose.” *Id.* (citing *Henry v. Mississippi*, 379 U.S. 443, 447 (1965)).

⁶⁵ See *People v. Balls*, 69 N.Y.2d 641, 642, 503 N.E.2d 1017, 1018, 511 N.Y.S.2d 586, 587 (1986) (“[T]he unelaborated general objection to ‘speculative facts’ did not alert the court to any of the comments now in issue and therefore was not sufficient to preserve the alleged prejudicial statements for appellate review.” (citations omitted)).

⁶⁶ In *Robillard v. Robbins*, the Court of Appeals found a general objection insufficient to preserve a question of law for the court’s review. *Robillard v. Robbins*, 78 N.Y.2d 1105, 1106, 585 N.E.2d 375, 375, 578 N.Y.S.2d 126, 127 (1991). Similarly, in *People v. Finger*, the Court of Appeals held that moving to dismiss for failure to prove each and every element was too vague to preserve issue for appeal. *People v. Finger*, 95 N.Y.2d 894, 895, 739 N.E.2d 290, 290, 716 N.Y.S.2d 34, 34 (2000). At the same time, specificity can be a downfall, like in *People v. Qualls*, where an objection as to bolstering did not preserve an issue as to a confrontation clause claim. *People v. Qualls*, 55 N.Y.2d 733, 734, 431 N.E.2d 634, 635, 477 N.Y.S.2d 149, 150 (1981).

At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. *Failure to so make known objections*, as prescribed in this section or in section 4110-b, *may restrict review upon appeal* in accordance with paragraphs three and four of subdivision (a) of section 5501.⁶⁷

As referenced in section 4017, CPLR section 5501 defines the scope of appellate review, and several of its subsections describe what can be reviewed on an appeal from a final judgment:

- (3) any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;
- (4) any remark made by the judge to which the appellant objected⁶⁸

III. RECENT DECISIONS EXPRESSING FRUSTRATIONS WITH PRESERVATION

In the past few years, the court has had a number of opportunities to consider its stance on the preservation rule. Its recent decisions reflect the historical tensions between jurisdictional concerns and equity-pragmatic concerns. This Part discusses some of these recent Court of Appeals decisions and how tensions were expressed or resolved.

The first stop on this review is the quote noted at the outset of this article where Judge Read, in dissent, styled the majority's use of the preservation doctrine as "bizarre."⁶⁹ In *People v. Finch*, the defendant was charged with three counts of criminal trespass and one count of resisting arrest relating to visiting his child at a federally subsidized apartment complex.⁷⁰ The complex's property

⁶⁷ N.Y. C.P.L.R. 4017 (McKinney 2014) (emphasis added). CPLR section 4110-b refers to the provisions for challenging a jury instruction or jury charge, and it clarifies that an attorney must object to charges given and those not given "before the jury retires to consider its verdict." *Id.* § 4110-b.

⁶⁸ *Id.* § 5501(a)(3)–(4).

⁶⁹ *People v. Finch*, 23 N.Y.3d 408, 437, 15 N.E.3d 307, 328, 991 N.Y.S.2d 552, 573 (2014) (Read, J., dissenting).

⁷⁰ *Id.* at 410–11, 15 N.E.3d at 308–09, 991 N.Y.S.2d at 553–54 (majority opinion).

manager had originally given the plaintiff “permission” to visit the premises.⁷¹ Later, however, police officers arrested the defendant and others for trespass after finding them in the building lobby with a “marijuana cigarette in the vicinity.”⁷² The property manager then revoked the permission to visit.⁷³ Notwithstanding that revocation, the building tenant that the defendant had been visiting still wanted the defendant to visit.⁷⁴ The defendant continued to visit the premises and was arrested two more times—the final arrest resulting in the resisting arrest charge.⁷⁵

The appeal addressed the defendant’s conviction for resisting arrest. The issue was whether the defendant “preserved for appeal his argument that [a police officer] lacked probable cause to arrest him for trespass [the third time] because [the officer] knew that [the building tenant] had invited defendant to be on the premises.”⁷⁶ Without probable cause, the resisting arrest charge would have to be dismissed.⁷⁷ The defendant did not raise the issue of lack of probable cause with respect to the resisting arrest charge.⁷⁸ Instead, the court referenced an objection after the second arrest.⁷⁹ The majority held that the probable cause issue was preserved at the arraignment on the second trespass charge where a ruling followed “only moments after defense counsel’s request: ‘you should dismiss,’” which meant that the trial court “ruled definitively on the legal argument that defendant makes on this appeal.”⁸⁰

In a dissent, Judge Abdus-Salaam argued that “at the time defendant made the objection cited by the majority, the incident that led to the disputed conviction here had not even occurred yet.”⁸¹ In particular, the objection occurred at an arraignment on the second trespass arrest while the resisting arrest charge arose from the third arrest weeks later.⁸² Judge Abdus-Salaam

⁷¹ *Id.* at 410, 15 N.E.3d at 309, 991 N.Y.S.2d at 554.

⁷² *Id.*

⁷³ *Id.* at 411, 15 N.E.3d at 309, 991 N.Y.S.2d at 554.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 412, 15 N.E.3d at 310, 991 N.Y.S.2d at 555.

⁷⁷ See *People v. Peacock*, 68 N.Y.2d 675, 677, 496 N.E.2d 683, 683–84, 505 N.Y.S.2d 594, 595 (1986) (“There being no probable cause that authorized defendant’s arrest, she cannot be guilty of resisting arrest.”).

⁷⁸ *Finch*, 23 N.Y.3d at 412, 15 N.E.3d at 310, 991 N.Y.S.2d at 555.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 418, 15 N.E.3d at 314, 991 N.Y.S.2d at 559 (Abdus-Salaam, J., dissenting).

⁸² *Id.* at 418, 15 N.E.3d at 314–15, 991 N.Y.S.2d at 559–60.

continued, noting that “the majority seems to believe that defendant specifically argued that his future arrest would be unlawful, and that he would be blameless for resisting it, weeks before it happened.”⁸³ In short, Judge Abdus-Salaam was concerned that the majority’s decision did away with a requirement that a sufficiently specific objection be made at trial and at the close of the People’s case.⁸⁴ Also, she was concerned that “the majority purports to comply with existing preservation precedent” but “closer examination . . . reveals that no legal authority actually supports its finding that defendant’s claim is preserved.”⁸⁵

Regarding the doctrine, Judge Abdus-Salaam argued that its “primary rationales . . . namely the complete development of the defendant’s claim and the swift determination of guilt or non-guilt, would be undermined were appellate review permitted under such circumstances” as in *Finch*.⁸⁶ She concluded that the majority’s preservation conclusion was “flawed.”⁸⁷

Judge Read added a separate, brief, and strong dissent. She was no kinder than Judge Abdus-Salaam about the majority’s use of the preservation rule:

[T]hose who follow our criminal jurisprudence closely will no doubt conclude that the majority was willing to *abandon preservation* to reach the merits. Notably, the Court of Appeals has not traditionally been known for such expediency. I am optimistic that today’s adventure in result-oriented decisionmaking will be looked upon in retrospect as an aberration, not a harbinger.⁸⁸

Judges Abdus-Salaam’s and Read’s characterizations of the majority are a perfect jumping-off point for discussing recent cases for two reasons. First, the dissents specifically target the preservation rule rather than the merits.⁸⁹ Second, the dissents highlight the divergent judicial philosophies about preservation and its importance.⁹⁰ For example, the dissents focus on “expediency”

⁸³ *Id.* at 418, 15 N.E.3d at 315, 991 N.Y.S.2d at 560.

⁸⁴ *Id.* at 423, 15 N.E.3d at 318, 991 N.Y.S.2d at 563.

⁸⁵ *Id.* at 432, 15 N.E.3d at 325, 991 N.Y.S.2d at 570.

⁸⁶ *Id.* at 426, 15 N.E.3d at 320, 991 N.Y.S.2d at 565.

⁸⁷ *Id.* at 429, 15 N.E.3d at 322, 991 N.Y.S.2d at 567.

⁸⁸ *Id.* at 437, 15 N.E.3d at 328, 991 N.Y.S.2d at 573 (Read, J., dissenting) (emphasis added).

⁸⁹ *Id.* at 418, 15 N.E.3d at 314, 991 N.Y.S.2d at 559 (Abdus-Salaam, J., dissenting); *id.* at 437, 15 N.E.3d at 328, 991 N.Y.S.2d at 573 (Read, J., dissenting).

⁹⁰ *Id.* at 425–26, 15 N.E.3d at 320, 991 N.Y.S.2d at 565 (Abdus-Salaam, J., dissenting); *id.*

and “result-oriented decisionmaking,”⁹¹ but they also critique the majority’s cited “policy issues.”⁹² Through these various voices on the issue, the conflict over preservation is laid bare.

A. Acknowledging Problems and Navigating Around Unpreserved Error

The defendants in *Reis v. Volvo Cars of North America*,⁹³ faced a preservation problem: they did not object to an allegedly inconsistent verdict in a case involving products liability claims stemming from an accident involving a motor vehicle.⁹⁴ This meant they would be precluded from arguing on appeal that the inconsistent verdict should have resulted in either further jury deliberations or a new trial.⁹⁵ Factually, the case involved a plaintiff whose leg was injured in a 2002 accident while looking under the hood of a 1987 Volvo station wagon to see the engine.⁹⁶ The plaintiff’s friend started the car and it lurched forward, “pinning [the] plaintiff against a wall.”⁹⁷ The plaintiff argued that the car, which had a manual transmission, should have been designed with a starter interlock device that would prevent starts while in gear.⁹⁸

Coincidentally, the same lead appellate attorney represented the defendants in *Barry v. Manglass*.⁹⁹ In *Barry*, the Court of Appeals, among other things, held for the first time that a defendant’s failure to object to an allegedly inconsistent jury verdict before the jury was discharged meant that the claim was lost and could not be a predicate for reversal.¹⁰⁰ *Barry*, like *Reis*, arose because a plaintiff

at 437, 15 N.E.3d at 328, 991 N.Y.S.2d at 573 (Read, J., dissenting).

⁹¹ *Id.* at 437, 15 N.E.3d at 328, 991 N.Y.S.2d at 573 (Read, J., dissenting).

⁹² *Id.* at 434, 15 N.E.3d at 327, 991 N.Y.S.2d at 572 (Abdus-Salaam, J., dissenting).

⁹³ *Reis v. Volvo Cars of N. Am.*, 24 N.Y.3d 35, 18 N.E.3d 383, 993 N.Y.S.2d 672 (2014).

⁹⁴ *Id.* at 44, 46, 18 N.E.3d 383, 389–90, 993 N.Y.S.2d 672, 678–79 (2014) (Grafteo, J., dissenting) (noting that Volvo failed to preserve a challenge to consistency of two verdicts).

⁹⁵ See *Barry v. Manglass*, 55 N.Y.2d 803, 806, 432 N.E.2d 125, 127, 447 N.Y.S.2d 423, 425 (1981) (holding that a challenge to inconsistent verdict must be raised before the jury is discharged).

⁹⁶ *Reis*, 24 N.Y.3d 35, 39, 18 N.E.3d 383, 385, 993 N.Y.S.2d 672, 674.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Barry*, 55 N.Y.2d at 803, 432 N.E.2d at 125, 447 N.Y.S.2d at 423.

¹⁰⁰ *Id.* at 806, 432 N.E.2d at 127, 447 N.Y.S.2d at 425; see also *Bradley v. Earl B. Feiden, Inc.*, 8 N.Y.3d 265, 272 n.2, 864 N.E.2d 600, 604 n.2, 832 N.Y.S.2d 470, 474 n.2 (2007) (mentioning casually that a party’s arguments about an alleged inconsistent jury verdict were unpreserved).

was injured due to alleged products liability and negligence arising from a motor vehicle accident.¹⁰¹

Judge Fuchsberg dissented alone in *Barry*. He argued that the majority's use of the preservation doctrine to eliminate consideration of an alleged jury inconsistency was "unreal" and "patently unreasonable."¹⁰² He added that the majority imposed a specificity requirement, such that a generic claim of some inconsistency is insufficient.¹⁰³ Judge Fuchsberg also laid out the daunting task for a litigator in *Barry*'s aftermath.¹⁰⁴ He noted, with disbelief, that the decision compels counsel to "have explored all facets of the inconsistency in the immediacy of the reporting of the verdict . . ."¹⁰⁵ The dissent even calculated that there were "65,536 (2 to the 16th power)" possible verdict combinations to explore.¹⁰⁶ He, therefore, argued it would be difficult to internalize such complexity.¹⁰⁷

To prove the point that a specific objection would have been fruitless, Judge Fuchsberg added that neither the trial court nor the appellate division had even discerned the existence of the inconsistency upon reviewing the motion papers and briefs.¹⁰⁸ Instead, it was only in the "relatively unhastened and contemplative collegial setting of a court of highest jurisdiction, having afforded the inconsistency some judicial perception for the first time" that a court acknowledged such an inconsistency argued by counsel.¹⁰⁹ He thus concluded: "If all this is not a denial of fundamental fairness, it certainly smacks of it."¹¹⁰

Recognizing that under *Barry*, the issue of an inconsistent verdict would be deemed unpreserved, counsel pursued a different approach in *Reis*. Instead of challenging the verdict as inconsistent, the defendants would challenge the jury charge. Thus, they framed the issue as whether a jury charge confused the jury on the proper

¹⁰¹ *Barry*, 55 N.Y.2d at 805, 432 N.E.2d at 126, 447 N.Y.S.2d at 424.

¹⁰² *Id.* at 812–813, 432 N.E.2d at 131, 447 N.Y.S.2d at 429 (Fuchsberg, J., dissenting).

¹⁰³ *Id.* at 813, 432 N.E.2d at 131, 447 N.Y.S.2d at 429 ("That counsel did not immediately seize upon the exact analysis is no more than practicably could have been anticipated. That he perceived an inconsistency and promptly articulated it as best he could at the moment is to his credit.")

¹⁰⁴ *Id.* at 812–13, 432 N.E.2d at 131, 447 N.Y.S.2d at 429.

¹⁰⁵ *Id.* at 812, 432 N.E.2d at 131, 447 N.Y.S.2d at 429.

¹⁰⁶ *Id.* at 814, 432 N.E.2d at 131, 447 N.Y.S.2d at 429.

¹⁰⁷ *See id.* at 812–13, 432 N.E.2d at 131, 447 N.Y.S.2d at 429.

¹⁰⁸ *Id.* at 814, 432 N.E.2d at 131, 447 N.Y.S.2d at 429.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 814, 432 N.E.2d at 132, 447 N.Y.S.2d at 430.

standard to be applied.¹¹¹ An objection to the jury charge, however, was similarly problematic for the defense.¹¹² The initial conference to determine jury charges was held off the record and no specific objections were registered, but when they resumed on the record, the defense attorney noted that he had not had the opportunity to tell the judge everything he wanted to about the charges at issue.¹¹³ The judge, however, waived the defense counsel off, stating further objection was not necessary.¹¹⁴ At oral argument before the Court of Appeals, a judge asked if the issue was sufficiently preserved; defense counsel answered that if it was not, then he would “eat [his] hat.”¹¹⁵

Ultimately, the majority of the court was comfortable with the jury charge argument as a clever means of sidestepping the unpreserved verdict inconsistency argument.¹¹⁶ Judge Graffeo in dissent, however, voiced her belief that “the majority’s holding allows Volvo to evade the well-settled preservation requirement and benefit from its failure to provide the trial court with the opportunity to cure any inconsistency before discharging the jury.”¹¹⁷ What was Judge Graffeo’s qualm? It was that the majority reversed because of a confusing jury instruction, but the evidence in support was the unpreserved alleged inconsistent verdict.¹¹⁸ In short, the majority analyzed the unpreserved verdict issue to have evidentiary support for jury confusion. The majority opined on whether an alleged mistake in the jury charge affected the jury verdict.¹¹⁹ Its proof was that the “verdict was, as we have said, inconsistent”¹²⁰

The single dissenter’s overriding point, however, was that “ample evidence supported the jury’s negligent design verdict” and the differences between what should have been charged to the jury and what actually was charged did not call for reversal.¹²¹ Judge Graffeo would have upheld the verdict, while the majority granted a

¹¹¹ Transcript of Oral Argument at 4–6, *Reis v. Volvo Cars of N. Am.*, 24 N.Y.3d 35, 18 N.E.3d 383, 993 N.Y.S.2d 672 (2014) (No. 138).

¹¹² *Id.* at 8.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Reis*, 24 N.Y.3d at 43, 18 N.E.3d at 388, 993 N.Y.S.2d at 677.

¹¹⁷ *Id.* at 46–47, 18 N.E.3d at 390–91, 993 N.Y.S.2d at 679–80 (Graffeo, J., dissenting).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 43, 18 N.E.3d at 388, 993 N.Y.S.2d at 677 (majority opinion).

¹²⁰ *Id.*

¹²¹ *Id.* at 47, 18 N.E.3d at 391, 993 N.Y.S.2d at 680 (Graffeo, J., dissenting).

new trial where the same verdict may result.¹²²

Through a jurisprudential lens, *Reis* offers some intriguing contrasts to *Barry*. The *Reis* dissent conceded that the jury charge at issue “should ordinarily not be charged in relation to negligent design claims,”¹²³ but contended the subtle difference between various standards should not result in a new trial. By contrast, the majority stated that there was actual proof that the subtle difference likely affected the jury because of the unpreserved inconsistency. The procedural result for either type of error, however, would be identical: a vacated judgment and a new trial.

B. When Preservation Is Used to Interpret Prior Case Law

In *Manhattan Telecommunications Corp. v. H & A Locksmith, Inc.*,¹²⁴ the court used preservation as a means of interpreting its prior case law. The question on appeal was whether a failure to comply with a provision of the CPLR that related to default judgments constituted a jurisdictional defect that rendered the judgment a nullity.¹²⁵ The issue specifically was whether noncompliance with CPLR 3215(f)¹²⁶ could nullify a default judgment.¹²⁷ The Court of Appeals concluded that the defect was not jurisdictional.¹²⁸ The manner in which it did so, however, is the interesting element. The court stated that its result

follows from our decision in *Wilson v. Galicia Contr. & Restoration Corp.*, where we refused to set aside a default judgment despite the defaulting party’s contention “that CPLR 3215(f) renders the judgment a nullity.” We relied in *Wilson* on the party’s failure to preserve its argument. But if the defect were truly jurisdictional—if the court that entered it was powerless to do so—a lack of preservation would not matter. *Wilson* thus implies that a defect of this kind is non-

¹²² Compare *id.*, with *id.* at 44, 18 N.E.3d at 389, 993 N.Y.S.2d at 678 (majority opinion).

¹²³ *Id.* at 45, 18 N.E.3d at 390, 993 N.Y.S.2d at 679 (Grafteo, J., dissenting).

¹²⁴ *Manhattan Telecomm. Corp. v. H & A Locksmith, Inc.*, 21 N.Y.3d 200, 991 N.E.2d 198, 969 N.Y.S.2d 424 (2013).

¹²⁵ *Id.* at 202–03, 991 N.E.2d at 199, 969 N.Y.S.2d at 425 (referencing the appellate division’s opinion and the question certified to the Court of Appeals).

¹²⁶ C.P.L.R. 3215(f) provides, in relevant part: “On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim . . .” N.Y. C.P.L.R. 3215(f) (McKinney 2014) (emphasis added).

¹²⁷ *Manhattan Telecomm. Corp.*, 21 N.Y.3d at 203, 991 N.E.2d at 199, 969 N.Y.S.2d at 425.

¹²⁸ *Id.* at 203, 991 N.E.2d at 200, 969 N.Y.S.2d at 426.

jurisdictional, as we now hold.¹²⁹

In effect, preservation was used to define its prior jurisprudence. The plaintiffs-respondents in *Wilson* had argued in their opposition brief that the CPLR 3215(f) issue was unpreserved and the Court of Appeals had no jurisdiction to address the question.¹³⁰ It added that the preservation rule was critically important because if the argument were raised below, the “plaintiff would have had the opportunity to make a factual showing or legal argument that would have definitely undermined [the] defendant’s position.”¹³¹ They also added that even if the preservation rule were set aside, the appellant’s argument would require the Court of Appeals to find facts or judge credibility, which it is prohibited from doing by the New York Constitution.¹³²

The Court of Appeals, however, remarked that the “requirement of preservation [was] not simply a meaningless technical barrier to review” and refused to address the issue.¹³³ Yet, Judge Smith who joined the *Wilson* dissent, characterized this issue in a subsequent case as one where the court can “review unpreserved questions when common sense and practical necessity dictate that we should.”¹³⁴ *Manhattan Telecommunications*, therefore, shows us two things: (1) there is tension between strict adherence and justice, and (2) there are exceptions. Thus, one exception to the preservation rule is that if the lower court did not have jurisdiction to perform an act, the Court of Appeals could still reach the issue regardless of preservation.

C. Inartful Objections Are Often Just as Bad as No Objection

If preservation is about directing the trial court to a mistake it should fix, just how precise does one have to be? In the following

¹²⁹ *Manhattan Telecomm. Corp.*, 21 N.Y.3d at 204, 991 N.E.2d at 200, 969 N.Y.S.2d at 426 (quoting *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 829–30, 890 N.E.2d 179, 180, 860 N.Y.S.2d 417, 418 (2008)).

¹³⁰ Brief for Plaintiffs-Respondents at 35, *Wilson*, 10 N.Y.3d 827, 890 N.E.2d 179, 860 N.Y.S.2d 417 (No. 65).

¹³¹ *Id.* at 40.

¹³² *Id.* at 41–42.

¹³³ *Wilson*, 10 N.Y.3d at 829, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

¹³⁴ *Misicki v. Caradonna*, 12 N.Y.3d 511, 525, 909 N.E.2d 1213, 1223, 882 N.Y.S.2d 375, 385 (2009) (Smith, J., dissenting). Judge Smith noted a variety of examples, typically in the criminal arena but also in the civil arena. *Id.* at 525–26, 909 N.E.2d at 1223, 882 N.Y.S.2d at 385–86; *see, e.g.*, *People v. Ahmed*, 66 N.Y.2d 307, 310, 487 N.E.2d 894, 895, 496 N.Y.S.2d 984, 985 (1985); *Rivera v. Smith*, 63 N.Y.2d 501, 516 n.5, 472 N.E.2d 1015, 1023 n.5, 483 N.Y.S.2d 187, 195 n.5 (1984).

three opinions, the court debated the required degree of specificity.

First, in *People v. Chestnut*,¹³⁵ the Court of Appeals addressed a criminal defendant's claim that a joint trial with a co-defendant should have been severed and the issues tried separately.¹³⁶ The two defendants were accused of a gunpoint robbery in Queens.¹³⁷ One of the defendants was later arrested at his mother's home.¹³⁸ Because of the arrest, that defendant faced several drug offenses and a charge of resisting arrest in addition to the robbery charge.¹³⁹ Critically, the second robbery defendant faced no drug charges and had no involvement or relationship to the resisting arrest charge.¹⁴⁰ The People tried both defendants together, including the drug charges and resisting arrest charge against one of the defendants.¹⁴¹

Where two defendants are faced with separate charges, the proper course of action by statute is to try unrelated matters separately.¹⁴² The statute permits joint trials on related matters, but even then, a defendant can move to sever properly joined trials upon good cause shown.¹⁴³ Thus, as relevant here, a defendant's argument for severance can either be because a joint trial (1) is not permitted, or (2) is permitted but should be severed for good cause

¹³⁵ *People v. Chestnut*, 19 N.Y.3d 606, 973 N.E.2d 697, 950 N.Y.S.2d 287 (2012).

¹³⁶ *Id.* at 608, 973 N.E.2d at 698, 950 N.Y.S.2d at 288.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² N.Y. CRIM. PROC. LAW § 200.40 (McKinney 2014). The appellate division and Court of Appeals both identified that the Criminal Procedure Law (CPL) section 200.40(1) *mandated* severance of charges unrelated to the joint robbery charge. The difference was that the appellate division found erroneous failure to sever harmless. See *People v. Chestnut*, 81 A.D.3d 661, 661, 916 N.Y.S.2d 787, 788 (App. Div. 2d Dep't 2011). The dissent's argument at the Court of Appeals appears to be that CPL section 200.40(1) has a two-way operation. It prohibits joint trials under circumstances presented in *Chestnut*, but if joint trials are *permitted*, then the statute allows a defendant to move for "good cause shown" to have the trial severed. *Chestnut*, 19 N.Y.3d at 614, 973 N.E.2d at 702, 950 N.Y.S.2d at 292 (Read, J., dissenting) (quoting *People v. Mahboubian*, 74 N.Y.2d 174, 183, 543 N.E.2d 34, 38, 544 N.Y.S.2d 769, 773 (1989)). Consequently, the dissent appears to argue that defense counsel's objections to prejudice is akin to a concession that a joint trial was permissible under the CPL. *Chestnut*, 19 N.Y.3d at 614–615, 973 N.E.2d at 702, 950 N.Y.S.2d at 292. By extension, it would not put the trial judge on notice that the CPL provision itself was at issue. Indeed, the dissent wrote that "defendant's repeated prejudice-related objections arguably reinforced the incorrect view that joinder was proper . . ." *Id.* at 615, 973 N.E.2d at 703, 950 N.Y.S.2d at 293. It is worth pointing out, however, any argument that one defendant is "not being accused of the same crimes as his co-defendant" should alert a judge to the statutory prohibition on joint trials of unrelated charges.

¹⁴³ *Mahboubian*, 74 N.Y.2d at 183, 543 N.E.2d at 38, 554 N.Y.S.2d at 773.

shown.¹⁴⁴

The defense attorney made several requests for a severance in terms of the “prejudice” to his client, including that his client could not “get a fair hearing” and that even a jury instruction about the unrelated charges would not “cure” the prejudicial effect.¹⁴⁵ All of these things were related to a good cause argument. Counsel did not, however, argue that a joint trial was prohibited as a matter of law. In this instance, it was prohibited as a matter of law.¹⁴⁶ Thus, the key dispute was over proper preservation of the legal argument for the impermissibility of a joint trial.

The four to three majority relegated its feelings on preservation to a footnote, but it rejected the “overly technical” way that the dissent enforced the “specific objection” requirement to the preservation rule.¹⁴⁷ The majority stated that defense counsel “repeatedly appris[ed] the court of the error” and noted, “there is a judge, who is not only presumed to know the law, but has been apprised of and ruled on the specific issue numerous times”¹⁴⁸ Under those circumstances, the majority opined, “the preservation requirement is met.”¹⁴⁹

Two judges joined Judge Read in dissent.¹⁵⁰ Judge Read argued that she “would consider defendant’s objection preserved if he had at least once claimed to the trial judge that severance of the unrelated counts was required as a matter of law rather than as a matter of discretion. But he did not.”¹⁵¹ The dissent opined, “[i]t surely furthers the underlying purposes of preservation for parties to refer to the specific statutory text in a case such as this”¹⁵²

Thus, in *Chestnut*, there were differing views over whether a claim that the *facts* were dispositive rather than that the *law* was dispositive should matter to preservation or if it should be viewed as hyper-technical minutiae. This sort of distinction is directly implicated by the next case.

In *Wild v. Catholic Health System*,¹⁵³ the Court of Appeals was

¹⁴⁴ CRIM. PROC. § 200.40(1).

¹⁴⁵ *Chestnut*, 19 N.Y.3d at 609–10, 973 N.E.2d at 698–99, 950 N.Y.S.2d at 288–89.

¹⁴⁶ *Id.* at 614–15, 973 N.E.2d at 702–03, 950 N.Y.S.2d at 292–93 (Read, J., dissenting).

¹⁴⁷ *Id.* at 611 n.2, 973 N.E.2d at 700 n.2, 950 N.Y.S.2d at 290 n.2 (majority opinion)

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 615, 973 N.E.2d at 703, 950 N.Y.S.2d at 293.

¹⁵¹ *Id.* (Read, J., dissenting).

¹⁵² *Id.*

¹⁵³ *Wild v. Catholic Health Sys.*, 21 N.Y.3d 951, 991 N.E.2d 704, 969 N.Y.S.2d 846 (2013).

faced with a preservation issue similar to the one in *Chestnut*. In *Wild*, the court rejected a challenge over the loss-of-chance doctrine¹⁵⁴ because it was unpreserved.¹⁵⁵ Trial counsel in *Wild* “challenged the jury charge on the ground that the ‘facts of this case’ do not support a loss-of-chance charge, not that such charge is wholly unavailable under New York law.”¹⁵⁶ In other words, trial counsel challenged the factual applicability for charging the jury on loss-of-chance but not whether the doctrine was contrary to New York law.

The *Wild* court unanimously held that the issue was unpreserved and the defendant could not challenge whether the doctrine exists under New York law.¹⁵⁷ Yet, its reasoning was similar to the dissent’s view in *Chestnut*. Namely, that the matter would have been preserved if defense counsel “at least once claimed to the trial judge that” rejecting loss-of-chance instructions “was required as a matter of law rather than as a matter of” factual applicability.¹⁵⁸ The rejoinder to that might be the majority’s view in *Chestnut* that the specific objection rule is being applied in an overly technical way. The question is whether it would be elevating form over substance when defense counsel clearly felt the jury charge was erroneous and should not have been given. If the legal principle is correct, that loss of a chance is unavailable in New York, then it would be equally true that plaintiff “failed to present evidence in

¹⁵⁴ The broader issue of the loss-of-chance doctrine is beyond the scope of this article. In brief, however, the loss-of-chance doctrine or “loss of a chance” concerns an injury to a probability of an outcome. In tort law, particularly medical malpractice, the issue of loss-of-chance generally concerns a negative impact on a patient’s chance of survival. See Margaret T. Mangan, Comment, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279, 283–85 (1997) (defining loss-of-chance). The loss-of-chance doctrine itself is unsettled across the country; some jurisdictions allow it in some form, while some other jurisdictions either remain unsettled or have expressly refused to recognize loss-of-chance as a viable theory of recovery. See Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759, 770–78 (1992) (describing jurisdictions which at the time had accepted, rejected, or left unsettled the issue of loss-of-chance); Tory A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Caution*, 87 MASS. L. REV. 3, 6–7 (2002) (referring to the struggles of various states over adoption or rejection of the theory of recovery). Thus, *Wild* was a missed opportunity, where the Court of Appeals might have settled an unsettled area of law for New York. See Timothy J. O’Shaughnessy, *Loss of a Chance: Finally Back in the Court of Appeals*, N.Y.L.J., July 16, 2012 at 6 (describing opportunity for the Court of Appeals to provide guidance in the *Wild* matter).

¹⁵⁵ *Wild*, 21 N.Y.3d at 954, 991 N.E.2d at 706, 969 N.Y.S.2d at 848.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *People v. Chestnut*, 19 N.Y.3d 606, 615, 973 N.E.2d 697, 703, 950 N.Y.S.2d 287, 293 (Read, J., dissenting).

support of the charge.”¹⁵⁹ In any event, the trial court apparently disagreed and permitted the loss-of-chance instruction.¹⁶⁰

What the Court of Appeals ultimately reviewed in *Wild* was the objection as stated about an improperly worded jury instruction that allegedly “reduced” or “changed” the burden of proof.¹⁶¹ To this point, the court held that the instructions taken as a whole did not constitute an improper alteration of the causation standard or the plaintiff’s burden of proof.¹⁶² Some might view this as implicit support for the doctrine in a future case. After all, if the charge as worded did not reduce the burden of proof, then perhaps the loss of a chance language as mediated by New York’s substantial factor test would in some way not be offensive to causation law.¹⁶³

If trial counsel in *Wild* failed to preserve his challenge because he was inartful in making the trial objection to the facts rather than the law, what can be made of the preservation finding in *Matter of Bezio v. Dorsey*? In *Bezio*, the Department of Corrections brought a special proceeding seeking an order to force feed a hunger-striking prison inmate.¹⁶⁴ The preservation issue addressed by the Court of Appeals was whether the nasogastric feeding tube violated the inmate’s rights under the common law and state Due Process clause to independently determine or refuse medical treatment.¹⁶⁵

The preservation issue arose at a hastily convened hearing where the inmate was assigned counsel only shortly before the hearing.¹⁶⁶

¹⁵⁹ See *Wild*, 21 N.Y.3d at 954, 991 N.E.2d at 706, 969 N.Y.S.2d at 848.

¹⁶⁰ See *id.* at 953, 991 N.E.2d at 705–06, 969 N.Y.S.2d at 847–48.

¹⁶¹ *Id.* at 954, 991 N.E.2d at 706, 969 N.Y.S.2d at 848.

¹⁶² *Id.* at 955, 991 N.E.2d at 707, 969 N.Y.S.2d at 849.

¹⁶³ One of the prime complaints about loss-of-chance is that the question becomes just how much of a chance does someone need to lose for an actionable tort claim. So, if a person was forty-five percent likely to die with proper medical care, but a doctor’s negligence made the chance of death fifty-five percent, and then death occurred, what is the compensable wrong, what is a sufficient reduction in a chance to be actionable, what proof is required for causation, and what is the measure of damages? This difficult mixture of already probable outcomes and merely a shift in the probability (when in hindsight the actual result is known) leads to apprehension over the scope of the tort law benefit in approving such a theory of recovery. Compare Chris M. Warzecha, Comment, *The Loss of Chance Doctrine in Arkansas and the Door Left Open: Revisiting Holt ex rel. Holt v Wagner*, 63 ARK. L. REV. 785, 799–802 (2010) (describing harms and benefits of the loss-of-chance doctrine), with Weigand, *supra* note 154, at 7–11 (describing states’ rejections of the loss-of-chance doctrine as well as other state approaches).

¹⁶⁴ *Matter of Bezio v. Dorsey*, 21 N.Y.3d 93, 96, 989 N.E.2d 942, 944, 967 N.Y.S.2d 660, 662 (2013).

¹⁶⁵ *Id.* at 95–96, 989 N.E.2d at 943–44, 967 N.Y.S.2d at 661–62 (describing the inmate as a serial hunger striker who would use hunger strikes in an attempt to obtain things from the Department of Corrections).

¹⁶⁶ See *id.* at 99, 989 N.E.2d at 946, 967 N.Y.S.2d at 664.

The state attorney general's brief in *Bezio* notes that the attorney assigned to the inmate raised "free speech" claims.¹⁶⁷ The inmate was using his hunger strike as a way to get into court to air grievances about how he had been treated by guards, as well as state his desire to be transferred to other facilities, among other things.¹⁶⁸ In fact, the inmate opposed the sealing of a doctor's affirmation at the hearing because he "need[ed] that media attention" and was "just trying to get some help from the courts."¹⁶⁹

The Court of Appeals majority held that the *inmate* preserved the issue on appeal by claiming that "putting a tube in my nose, that's cruel and unusual punishment."¹⁷⁰ The inmate was thus complaining that the Department of Corrections sought an order that would violate the Eighth Amendment to the United States Constitution.¹⁷¹ A right to refuse medical treatment is, however, not premised on the Eighth Amendment, but instead on an idea of bodily integrity and a right to be free of the state intervening in a person's choice to avoid medical care.¹⁷² This arises under the state common law and the New York State Constitution's Due Process clause.¹⁷³

The dissent vigorously opposed the majority's reasoning on preservation:

The Court today offers its views on a range of interesting, important and to some extent novel questions having to do with the respective prerogatives of prison inmates and correctional authorities in the context of inmate hunger strikes. *None of these issues, however, is properly before the Court.* As petitioner points out and respondent essentially concedes, *these matters were never raised, much less decided, at nisi prius and, consequently, are not preserved for this*

¹⁶⁷ Brief for Respondent at 20, *Matter of Bezio*, 21 N.Y.3d 93, 989 N.E.2d 942, 967 N.Y.S.2d 660 (A.D. 511234).

¹⁶⁸ *Id.* at 8.

¹⁶⁹ *Id.* (internal quotation marks omitted).

¹⁷⁰ *See Bezio*, 21 N.Y.3d at 98–99, 989 N.E.2d at 946, 967 N.Y.S.2d at 664 (internal quotation marks omitted).

¹⁷¹ *See id.* at 96, 989 N.E.2d at 944, 967 N.Y.S.2d at 662; U.S. CONST. amend. VIII.

¹⁷² *See Fosmire v. Nicoleau*, 75 N.Y.2d 218, 226, 551 N.E.2d 77, 81, 551 N.Y.S.2d 876, 880 (1990) (describing a common law and statutory right to decline blood transfusions based on Jehovah's Witness beliefs concerning medical practice); *River v. Katz*, 67 N.Y.2d 485, 492, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986) (holding that the state constitution's due process clause protects an involuntarily committed mental patient's fundamental right to refuse antipsychotic medication).

¹⁷³ *See* N.Y. CONST. art. I, §6; *Fosmire*, 75 N.Y.2d at 226, 551 N.E.2d at 81, 551 N.Y.S.2d at 880; *River*, 67 N.Y.2d at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

2014/2015]

New York's Preservation Rule

143

*Court's review.*¹⁷⁴

The dissent's view is difficult to oppose on a strict reading of the preservation rule. The inmate objected to cruel and unusual punishment and various "free speech" issues.¹⁷⁵ The objections should have been that the Department of Corrections sought an order that violated his right to bodily integrity under the common law and the New York State Constitution's Due Process Clause. The majority nevertheless held that the bodily integrity issue was properly preserved.¹⁷⁶

The majority appears to reference the inmate's objections rather than his attorney's objections as a rhetorical device. It is far easier to be lax about how an inmate characterized his objection than in how an attorney phrased the grounds of his objection. Had the issue been focused on the attorney's objection, the result might very well be different.¹⁷⁷ Thus, it appears key to the dissent that the inmate's attorney did object on free speech grounds and even the inmate's appellate attorneys noted that the inmate "admittedly did not clearly articulate this legal argument at trial."¹⁷⁸

Notably, by finding the issue preserved in *Bezio*, the Court of Appeals could resoundingly affirm the appellate division's decision in favor of the Department of Corrections. In other words, finding the issue preserved by the losing party aided the winning party's quest for a favorable ruling. The Department of Corrections argued that the inmate's argument was unpreserved, perhaps fearful that the Court of Appeals might change the appellate division's decision.¹⁷⁹ In hindsight, preservation worked in its favor, as the Court of Appeals applied a generous standard when ruling for the Department of Corrections.¹⁸⁰

¹⁷⁴ *Bezio*, 21 N.Y.3d at 108, 989 N.E.2d at 953, 967 N.Y.S.2d at 671 (Lippman, C.J., dissenting) (emphasis added).

¹⁷⁵ *See id.* at 99, 989 N.E.2d at 946, 967 N.Y.S.2d at 664 (majority opinion).

¹⁷⁶ *See id.*

¹⁷⁷ Relying on the inmate's objections and minimizing the attorney who was assigned "only shortly before the hearing" might be viewed as a rhetorical device for easing the preservation rule. *Id.*

¹⁷⁸ Reply Brief for Appellant at 2, *Bezio*, 21 N.Y.3d 93, 989 N.E.2d 942, 967 N.Y.S.2d 660 (AD 511234). The inmate's appellate attorneys claimed his "mere opposition to the State's petition preserved this issue on appeal" because it reflects that the inmate "opposed the State's application to impose unwanted medical treatment upon him." *Id.*

¹⁷⁹ *See Bezio*, 21 N.Y.3d at 98–99, 989 N.E.2d at 946, 967 N.Y.S.2d at 664.

¹⁸⁰ *See id.* at 103, 989 N.E.2d at 949, 967 N.Y.S.2d at 667.

D. When a Party's Failure to Preserve an Issue Causes a Court of Appeals Win Instead of a Loss

The discussion on *Bezio* is a perfect lead-in to the peculiarities of the preservation rule in *Hecker v. State*. The *Hecker* matter is a fascinating case of preservation jurisprudence. The plaintiff in *Hecker* alleged personal injuries when he slipped and fell while shoveling snow on the sidewalk area of a lift bridge.¹⁸¹ The plaintiff was allegedly standing on a metal “pit door” at the time.¹⁸² That pit door would allow access to a “subterranean work site” by ladder.¹⁸³ The plaintiff claimed that the defendants violated section 241(6) of the New York Labor Law¹⁸⁴ and he identified title 12, section 23-1.7(d) of the New York Codes, Rules, and Regulations of the Industrial Code as a predicate for the statutory violation.¹⁸⁵

The Appellate Division, Fourth Department held that the Industrial Code provision did *not* apply to the plaintiff's accident because the area where the plaintiff was allegedly injured was not being used for the purpose defined by the regulation.¹⁸⁶ On this point it appears the issue was not specifically addressed by the parties, but was instead addressed by the Fourth Department, apparently within its interest of justice jurisdiction.¹⁸⁷

One of the issues litigated before the Court of Appeals was whether the Fourth Department correctly determined that the Industrial Code provision was inapplicable.¹⁸⁸ Both parties apparently presumed the issue was preserved and properly before the Court of Appeals. At oral argument, the court raised the issue of preservation.¹⁸⁹ The defendant argued the issue was preserved;

¹⁸¹ See *Hecker v. State*, 92 A.D.3d 1261, 1261, 937 N.Y.S.2d 815, 816 (App. Div. 4th Dep't 2012), *aff'd*, 20 N.Y.3d 1087, 987 N.E.2d 636, 965 N.Y.S.2d 75 (2013).

¹⁸² *Id.* at 1261, 937 N.Y.S.2d at 816–817.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1261–62, 937 N.Y.S.2d at 816. This is a tort statute designed to protect workers involved in construction, demolition or excavation operations and it requires owners or general contractors to provide reasonable and adequate protection for workers. *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 350, 693 N.E.2d 1068, 1071, 670 N.Y.S.2d 816, 819 (1998). A violation of this provision is shown by alleging a violation of a concrete specification of the Industrial Code. *Id.*

¹⁸⁵ *Hecker*, 92 A.D.3d at 1261–62, 937 N.Y.S.2d at 816.

¹⁸⁶ *Id.* at 1262, 937 N.Y.S.2d at 816–17.

¹⁸⁷ See *id.* at 1263, 937 N.Y.S.2d at 817 (Centra and Carni, JJ., dissenting).

¹⁸⁸ See *Hecker v. State*, 20 N.Y.3d 1087, 1087, 987 N.E.2d 636, 636, 965 N.Y.S.2d 75, 75 (2013).

¹⁸⁹ Transcript of Oral Argument at 8, *Hecker*, 20 N.Y.3d 1087, 987 N.E.2d 636, 965 N.Y.S.2d 75 (No. 38).

the plaintiff argued it was not preserved.¹⁹⁰ The court ultimately held that it had “no power to review” the appellate division’s exercise of discretion to reach the issue it decided or to review the issue itself.¹⁹¹ The failure to preserve the issue at the trial court prevented the Court of Appeals from reviewing that as an error, arguably one of law.¹⁹² Curiously, the failure to preserve the issue inured to the benefit of the party who failed to preserve it.¹⁹³

This result was so unusual that the parties themselves did not understand the consequences of the preservation rule on their argument:

[N]ow in this Court, claimant loses the case—whether he is right or wrong on the merits—because of *defendant’s* neglect. This result is so counterintuitive—and the cases that we find to compel that result so little known—that the parties not only failed to anticipate it, but assumed the rule to be the opposite. The preservation question is hardly mentioned in the briefs, but when it was raised in oral argument, defendant asserted that the issue was preserved, and claimant said that it was not—i.e., each party took the position that was to the advantage of the other. Counsel will understandably scratch their heads when they read today’s decision.¹⁹⁴

How strange a rule that the attorneys at oral argument took the position to the other’s advantage. Furthermore, how strange is it that preservation allows the appellate division to be the last word on what is functionally an issue of law,¹⁹⁵ so long as it acts in the

¹⁹⁰ *Id.* at 8, 11.

¹⁹¹ *Hecker*, 20 N.Y.3d at 1087, 987 N.E.2d at 636, 965 N.Y.S.2d at 75.

¹⁹² *See id.* at 1088, 987 N.E.2d at 637, 965 N.Y.S.2d at 76 (Smith, J., concurring).

¹⁹³ *Hecker v State*, 92 A.D.3d 1261, 1262, 937 N.Y.S.2d 815, 816 (App. Div. 4th Dep’t 2012), *aff’d*, 20 N.Y.3d 1087, 987 N.E.2d 636, 965 N.Y.S.2d 75 (2013) (noting that parties do not specifically address the issue, but the court concludes it can “review the applicability of the regulation to the facts herein” and conclude the regulation does not apply); *see also* *Eujoy Realty Corp. v. Van Wagner Commc’ns, LLC*, 22 N.Y.3d 413, 423, 4 N.E.3d 336, 342, 981 N.Y.S.2d 326, 332 (2013) (quoting restatement of preservation rule from *Hecker* when highlighting the consequences of an argument unpreserved yet decided by the appellate division).

¹⁹⁴ *Hecker*, 20 N.Y.3d at 1089, 987 N.E.2d at 637, 965 N.Y.S.2d at 76–77 (Smith, J., concurring).

¹⁹⁵ Judge Smith indicated: “The underlying assumption seems to be that unpreserved questions of law are not questions of law at all, but I have found no civil case in which we have made that assumption explicit.” *Id.* at 1088, 987 N.E.2d at 637, 965 N.Y.S.2d at 76. He noted the Court of Appeals has said as much in criminal cases but he pointed to Judge Pigott’s recent dissent, stating that this is a “misreading.” *Id.* at 1088–89, 987 N.E.2d at 637, 965 N.Y.S.2d at 76 (citing *People v. Riley*, 19 N.Y.3d 944, 947–49, 973 N.E.2d 1280, 1282–83,

exercise of its interests of justice jurisdiction under the circumstances of the case.¹⁹⁶ The Court of Appeals' decision in *Hecker* is a reliable example of not only the continued contention between strict adherence and pragmatism, but also that there is no clear guidance on when and how the preservation rule could be invoked.¹⁹⁷

IV. CONCLUSION

The above cases reveal a long-running historical conflict between doctrinal consistency, formalism, strict adherence, and pragmatism. Some cases show strict adherence and *stare decisis* as being the governing principle. Other cases reveal a stronger desire for justice. It is difficult, due to the changing compositions of the court, to discern any overall trend, but individual judicial philosophies do shine through.

It appears that arguments for strong, traditional preservation rules, relating to jurisdictional authority will tend to resonate with Judges Graffeo, Read, and Abdus-Salaam. Others, like Chief Judge Lippman and Judges Smith and Rivera, appear to be a little less firm on strict adherence to preservation issues; at times, willing to deviate where underlying equitable, justice, or common sense principles are strong.

The impending end of the terms of some judges of the Court of

950 N.Y.S.2d 506, 508–09 (2012)). In any event, Judge Smith's point was that the preservation rule was being treated as a "jurisdictional[] bar[]" but it is ultimately "a fiction that, as I have explained elsewhere, we have occasionally stated but do not adhere to with any consistency." *Hecker*, 20 N.Y.3d at 1088, 987 N.E.2d at 637, 965 N.Y.S.2d at 76 (Smith, J., concurring). Judge Smith concurred "on constraint of . . . precedent" and thereby showed a more abiding faith in *stare decisis* than in the quagmire of preservation doctrine. *Id.* at 1088, 987 N.E.2d at 636, 965 N.Y.S.2d at 76. To borrow Judge Kozinski's phrase from his "reluctant[] dissent[]" in *Sessoms v. Grounds* it might be appropriate to characterize Judge Smith's concurrence as one for a judge "reluctantly" concurring. *Sessoms v. Grounds*, 768 F.3d 882, 896 (9th Cir. 2014).

¹⁹⁶ See *Hecker*, 20 N.Y.3d at 1087, 987 N.E.2d at 636, 965 N.Y.S.2d at 75 ("[The Court of Appeals has] no power to review either the Appellate Division's exercise of its discretion to reach that issue, or the issue itself." (citations omitted)).

¹⁹⁷ See Martineau, *supra* note 9, at 1024 (referring to the inability of courts to reliably articulate a principled basis for varying preservation rules and exceptions). In addition, it should be noted that *stare decisis* has its place for statutes, but common law rules and rules that only the Court of Appeals can adequately explain should perhaps be more susceptible to reasoned and principled change. Cf. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) ("[C]oncerns about maintaining settled law are strong when the question is one of statutory interpretation. *Stare decisis* is not as significant in this case, however, because the issue before us is the scope of [a common law statutory scheme]." (citations omitted)).

2014/2015]

New York's Preservation Rule

147

Appeals limits the ability to predict future trends. While tensions remain, there appears to be an effort to carve out exceptions that maintain the concept of preservation as jurisdictional, but balance it with some clearly defined equitable or pragmatic justifications for deviating from the rule. In this balance, however, the court's language still favors strong preservation and stare decisis principles.

For those who find themselves with a potential winning but unpreserved issue, however, all may not be lost. Thorough legal research should extend beyond the unpreserved issue itself to broader issues, like in the cases above. Consider analogizing your issues to those where the Court of Appeals have avoided or enforced the preservation rule, or have engaged in creative identification of complaints that will stand as a place-holder for an effective objection.

The best advice, however, is to prepare such that a litigator never finds himself/herself in a position involving unpreserved issues. To do so, regularly consult the literature and prepare for litigation with an eye towards an appeal. Timely, specific objections on the record are critical. It remains to be seen in what direction the court may move or how it may attempt to define clearer rules. Until then, litigants will be left to wonder about how the pendulum will swing at the Court of Appeals: will any future evolution of the preservation rule be viewed as "an aberration" or as "a harbinger."¹⁹⁸

¹⁹⁸ See *People v. Finch*, 23 N.Y.3d 408, 437, 15 N.E.3d 307, 328, 991 N.Y.S.2d 552, 573 (2014) (Read, J., dissenting).