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in a nonjury trial the Appellate Division "independently reviews the probative weight of the evidence together with the reasonable inferences that may be drawn therefrom and gives due deference to the court's factual findings and credibility determinations," "taking into account that, in a close case, the trial judge had the advantage of seeing and hearing the witnesses";

on appellate review from a nonjury trial the findings of fact should be reviewed in the light most favorable to sustain the judgment;

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The Appellate Division may not disregard a jury verdict as against the weight of the evidence unless "the evidence so preponderated in favor of the [moving party] that [it] could not

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Defaults and subject of contest 8-190

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9. CPLR 5512: Appealable Paper

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– No appeal lies from a memorandum decision 9-5

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An order without an underlying action does not constitute an appealable paper 9-8

No appeal lies from a decision directing "submit order," "settle order"; decisions and orders which direct the prevailing party to "submit order" are decisions from which no appeal lies 9-9

No appeal lies from findings of fact and conclusions of law..... 9-10

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No appeal lies from a court's rejection of a motion pursuant to Family Court Act § 1035(f) to intervene in proceedings for the purpose of seeking custody of a child 9-30

A bill of costs is not an appealable paper 9-31

An appeal from an order rather than from a judgment is treated as an appeal from a judgment where the order does not differ materially from the judgment 9-32

An appeal from a decision rather than from an order is treated as an appeal from the order where the decision does not differ materially from the order 9-33

No appeal lies from an order that has been superseded by a later order 9-34

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[b] Resettlement of Orders; Court's Continuing Jurisdiction to Reconsider Its Prior Interlocutory Orders During the Pendency of the Action; the Trial Court Has Discretion to Correct an Order or Judgment Containing a Mistake, Defect, or Irregularity Not Affecting a Substantial Right; a Trial Court Has No Revisory or Appellate Jurisdiction to Sua Sponte Vacate Its Own Order or Judgment 9-39

Resettlement of orders and judgments 9-39

Definition of resettlement 9-40

Regardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action; a court has the inherent power, even sua sponte, to reconsider and vacate its prior interlocutory order and issue a new order 9-43

– Once an order finally determines an action the matter is no longer pending and a court lacks the authority to consider an untimely request for reargument 9-46

– "The pendency of an appeal from an order continues to be a time period available for a motion to reargue, which is indeed the preferable construction" of CPLR 2221(d)(3) 9-48

– In a case of default Supreme Court has the inherent authority to vacate a judgment in the interest of justice even after the statutory one-year period has lapsed 9-50

The "pendency of the appeal is no bar to a motion in the court below for a new trial" 9-52

"A court of original jurisdiction may entertain a motion to renew or vacate a prior order or judgment even after an appellate court has rendered a decision on that order or judgment";

"on a post-appeal motion for leave to renew or to vacate, the movant bears a heavy burden of showing due diligence in presenting the new evidence to the court of original jurisdiction";

a court may not however grant leave to reargue 9-53

A trial court has no revisory or appellate jurisdiction to sua sponte vacate its own final judgment or order 9-55

– A trial court has no revisory or appellate jurisdiction to sua sponte vacate its own final order or judgment 9-59

Substantive changes to an order or judgment are pursued by direct appeal or by motion to vacate under CPLR 5015(a); CPLR 5019(a) is only intended for clerical errors 9-61

– Courts possess inherent power to correct their records relating to clerical mistakes or errors, the clarification of orders, or to conform the record to the truth;

– A trial court may unilaterally and affirmatively correct minor mistakes, defects, or irregularities in its orders or judgments, after the fact, so long as the correction does "'not affect[ ] a substantial right of a party 9-65

– A "written order or judgment must conform strictly to the court's decision"; "in the event of an inconsistency between a judgment and a decision or order upon which it is based, the decision or order controls" 9-66

– CPLR 5019 "cannot be used to sua sponte correct errors that involve new exercises of discretion or fact-finding, vacating prior orders or judgments . . . reconsidering the merits of summary judgment . . . or adding the words that a judgment is 'with prejudice' " 9-67

A clerk's mistake in assessing interest may be corrected by the court of original jurisdiction even after the appellate process is over where the interest rate was not disputed 9-69

No appeal lies from an order denying a motion to resettle or to clarify a substantive portion of an order or the decretal paragraphs of a judgment 9-71

A later order issued in response to a request for clarification of an earlier order is akin to a resettlement of the earlier order 9-73

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"The granting of a motion to resettle an order has no affect on the original appeal yet the change can be substantial" 9-75

The timeliness of an appeal of resettled orders or judgments..... 9-76

A defect or irregularity in a judgment or order that affects no substantial right of a party may also be corrected at the appellate level 9-78

The preferred remedy when a judgment does not accurately incorporate the terms of a stipulation or where the judgment contains an inaccurate insertion is by motion in the trial court for resettlement or vacatur of the judgment rather than by appeal..... 9-79

The decision controls when the judgment and the underlying decision differ 9-81

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[c] Amended Orders and Judgments 9-85

No appeal lies from an order or judgment that has been amended, first judgment is superseded by the amended order or judgment 9-85

Where an order on appeal was superseded by an amended order the appeal need not be dismissed where the amendment is immaterial to the appeal 9-87

While an appeal is pending only from the original judgment an amended order or judgment that only clarifies the decision does not require a new notice of appeal 9-88

The Supreme Court retains "inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice" 9-89

– The Appellate Division may deny relief on statutory grounds but nevertheless grant it on its inherent authority.. 9-89

– "Although the Supreme Court retains 'inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice,' " once the appellate process has been concluded errors of law which could have been reviewed may not be addressed except as to the grounds for relief in CPLR 5015 or if there has been some other compelling circumstance 9-91

– "A motion to vacate is not another means by which to raise an issue of law that could have been raised had the party timely perfected [a direct] appeal" 9-98

10. CPLR 5513, Timeliness of an Appeal, Notice of Appeal, Notice of Entry, Cross-Appeal, Motion for Leave to Appeal

Statutes that regulate the right to appeal are to be strictly construed especially when a party is seeking to limit the time of another to take an appeal 10-3

– Timeliness of notice of appeal, time does not commence when the order was transmitted and entered into NYSCEF (22 NYCRR 202.5-b(h)(2)) 10-4

– Generally appeals from orders that have not been entered are subject to dismissal 10-4

When there are multiple parties, whose service of the order or judgment with notice of entry starts the 30-day limitation period?; *W. Rogowski Farm, LLC v. County of Orange*, 171 A.D.3d 79, 96 N.Y.S.3d 88 (2d Dep't 2019) held that service by any party starts the 30-day clock

CPLR 5513(a) was amended in 1996, (L.1996, c. 214, § 1), effective January 1, 1997, to provide, in pertinent part: "An appeal as of right must be taken within thirty days after service *by a party* upon the appellant of a copy of the judgment or order appealed from and written notice of its entry . . ."

Pre 1997 amendment language provided: "CPLR 5513(a) limits the time to appeal by requiring that an appeal as of right 'be taken within thirty days *after service upon the appellant* of a copy of the judgment or order appealed from and written notice of its entry.' "

Pre 1977 amendment case law noted that then CPLR 5513 did not explicitly designate the person or the entity who must serve the order or judgment being appealed from for purposes of commencing the 30–day limitation period clock..... 10-6

Pre-amendment caselaw involving multiple parties 10-8

The Memorandum of the Bill Sponsor, Bill Number: A10407, Sponsor: Rules (Sidikman) 10-12

W. Rogowski Farm, LLC v. County of Orange holds that the 1997 Amendment means service by "any party to an action" 10-15

The power of an appellate court to review a judgment is subject to a timely appeal; the CPLR 5513 time for filing is jurisdictional and nonwaivable an appellant is held to strict compliance even for pro se litigants; even one day late is fatal to the appeal 10-17

Where the untimeliness was occasioned by an act of the other party the untimeliness will not be charged against the appellant ... 10-20

The presumption that an affidavit of service creates a presumption that proper service was completed upon mailing may be rebutted 10-22

Courts do not possess a general power to revise judgments to revive an expired right of appeal 10-24

No extensions may be made nor may a notice of appeal be amended once the time to file the notice of appeal has expired 10-25

Notice of appeal may not be amended to add parties after the time to serve and file the notice has elapsed..... 10-26

Notice of filing with the clerk is not a notice of entry; entry does not occur until the clerk files the judgment after signing it... 10-27

The judgment served upon the other party must be a true copy of the original judgment; statutes which regulate the right to appeal are to be strictly construed 10-28

Where there is no written notice of entry the 30-day period under CPLR 5513(a) does not begin to run; proper notice of entry 10-29

Motion papers accompanied by a proper copy of the order triggers the 30 time clock 10-31

Where service of a conformed copy of an order omitted the word "interest," but service of a later copy included "interest," the omission was held inconsequential; service of the first copy satisfied the CPLR 5513 time requirements 10-33

A cover letter can function as a notice of entry only when it includes the requisite information alerting the respondent that the enclosure is an appealable paper..... 10-34

An appeal from a short form order with notice of entry rather than from the so-ordered transcript with notice of entry starts the 30-day jurisdictional clock 10-36

Failure to file a preargument statement is not jurisdictional 10-37

An order which does not contain a recital of the papers used is an appealable order; no new right of appeal is created by a resettled order correcting such omission 10-37

A court's failure to recite the papers that were submitted in support of a motion may be remedied by way of resettlement even after appeal;

the time to appeal from an order that fails to recite the papers relied upon may not be circumvented by a motion to resettle and appealing from the resettled order as resettlement correcting such omission makes no material change in the original order 10-39

Amended notice of appeal that clarifies a timely filed notice of appeal; prejudice is a factor 10-41

CPLR 2001: clerical, typographical errors and the notice of appeal 10-43

Notice of appeal amended pursuant to CPLR 2001 to add or name a proper party 10-46

Where counsel for a party erroneously signs the notice of appeal as the appellant the CPLR authorizes the Appellate Division to disregard the error 10-50

11. CPLR 5515, CPLR 2220, Taking an Appeal, the Notice of Appeal

The Appellate Division has discretion to construe a notice of appeal liberally subject to the prejudice of the other party 11-3

The Appellate Division may exercise its discretion "to reach beyond" the scope of a party's notice of appeal; prejudice to another party is a factor 11-4

– The Appellate Division declines review in the interest of justice 11-5

CPLR 5515(1), taking an appeal, notice of appeal involves a two-step process, compliance with only one step; CPLR 5515 is jurisdictional 11-6

– The distinction between service by mail and filing: service by mail is complete upon mailing, filing occurs when the clerk's office receives the notice of appeal 11-8

An instance of the latitude given to correct an omission

Petitioner served a notice of appeal on respondent's law guardian pursuant to statute; petitioner failed to serve respondent herself as of the time of oral argument; petitioner granted leave to correct the omission 11-9

The notice of appeal must designate the judgment or order, or specific part of the judgment or order, from which the appeal is taken, this requirement is jurisdictional;

where an appeal is taken from only part of a judgment or order the right to appeal from the remainder thereof is deemed waived and abandoned 11-10

– Failure to appeal from a sub silentio denial of a motion precludes the Appellate Division from granting the relief sought..... 11-12

The Appellate Division "may treat a notice of appeal which contains an inaccurate description of the judgment or order appealed from as valid, it may not amend a notice of appeal to insert therein an order from which no appeal has in fact ever been taken" 11-13

Where a portion of an order appealed from is "inextricably intertwined" with the balance of the unappealed order an appellate court may neither be circumscribed nor precluded from passing upon so much of the order as is necessarily affected by the portion from which an appeal has been taken 11-14

Limiting language..... 11-16

– Parties may ask the Appellate Division to limit the issues addressed 11-16

– Whether the notice of appeal contains limiting language is not always clear to the Appellate Division..... 11-16

It is "a perfectly legitimate tactic" even at the appellate level for a corporation to assign its interests to an individual in order to circumvent the prohibition against corporate self-representation in CPLR 321 11-19

12. CPLR 5520: Omissions, Appeal by Improper Method

– Mistakes as to Form and Content of the Notice May Well Be Excused..... 12-2

– CPLR 5520 and CPLR 5512(a) 12-2

– CPLR 5520(b) overlaps CPLR 5014(a)..... 12-2

A "notice of poor person requesting permission to proceed" cannot be treated as a notice of appeal when nothing in it suggests that it was intended to be one; although a "mistake, omission, defect or irregularity" in a notice of appeal may be disregarded (CPLR 2001), and a notice of appeal may be deemed valid where it "is premature or contains an inaccurate description of the judgment or order appealed from" (CPLR 5520(c)), a document may not be treated as a notice of appeal when nothing in it suggests that it was intended to be one 12-3

Where an order is subsumed within a judgment the appeal is from the judgment not the order; the Appellate Division may treat the notice of appeal as one taken from the judgment 12-5

Notice of appeal treated as a premature notice of appeal from the judgment 12-8

While an appeal should be taken from an amended order the notice of appeal may be treated as being from the amended order 12-11

The notice of appeal from a ruling from a motion for discovery only referenced the amended order which deferred determination of defendants' entitlement to the records. The final determination was issued in a letter order, entered the same day as the amended order; defendants challenged the scope of the ordered disclosure. On those facts, and the absence of any prejudice, the Appellate Division discretionarily overlooked the inaccurate description in the notice of appeal and treated the appeal as having been taken from both orders 12-12

– Where the record does not indicate that a notice of appeal was timely filed in the absence of prejudice for the other party 12-13

– Once a final judgment is entered, an intermediate order is reviewable only in the appeal from that judgment; the failure to appeal from the judgment may be excused where it resulted from an office failure provided it was not prejudicial to the other party 12-13

– Omission of a docket number 12-14

– Inaccurate description of an order 12-14

– General inaccuracies 12-15

– Mere inaccuracies and inconsequential errors in the notice of appeal which violate no rules of practice, such as the failure to include an address, and are in themselves immaterial 12-18

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Defective mailings of notice of appeal and leave for proper service granted 12-27

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Inconsistent applications of *Park East Corp. v. Whalen* 13-7

When an incorrect method is used, the court can deny or fix the time within which to properly file 13-9

– CPLR 5514(b) does not apply to voluntary discharge of counsel 13-10

CPLR 5514(b): "otherwise becomes disabled" "connotes a force majeure" 13-12

CPLR 5514(c), CPLR 1022: Substitution of Parties 13-14

If an appeal is taken to the wrong court, the wrong court may sua sponte transfer the appeal to the proper court 13-15

14. CPLR 5513, CPLR 5015 and Finality of Judgments

A final judgment or order represents a conclusive adjudication of the parties' substantive rights, unless it is overturned on appeal; absent the sort of circumstances in CPLR 5015 a judgment becomes final when a timely appeal has not been taken; CPLR 5015 is discretionary and applies to judgments that are still in the appellate process and to those in which appellate review has been exhausted 14-2

– When the law remains what it was when the original order was issued, the predicate for a motion to renew is lacking, and the motion is one to reargue;

an intervening ruling that merely clarifies existing law does not afford a basis for renewal attributed to a change in the law pursuant to CPLR 2221 14-8

– *Fuentes v. Kwik Realty* illustrates the appellate remedy of a renewal motion based on a change in the law 14-9

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– A motion "for reconsideration" is a motion for reargument which is not appealable 14-12

– A motion for reconsideration based upon additional facts which petitioner could not have discovered until after the prior application is a motion for renewal..... 14-12

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15. CPLR 5501(a), Finality, "Necessarily Affects the Final Judgment," Implied Severance, Doctrine of "Implied Finality"

[a] In General..... 15-2

Finality..... 15-2

"Reviewability is governed by CPLR 5501, entitled scope of review, which enumerates the issues of law, fact, or discretion, that are subject to appellate review once the aggrievement and appealability requirements have been satisfied"..... 15-2

Finality is based on the perception that litigants are best served by a system that prohibits piecemeal appellate review 15-4

"The concept of finality is complex and cannot be exhaustively defined in a single phrase, sentence or writing" 15-5

The Court of Appeals has rarely discussed the meaning of the expression "necessarily affects"; the Court of Appeals has declined to give "a generally applicable definition"..... 15-6

[b] The Issue of Whether a Nonfinal Order Affects the Judgment 15-8

"Inevitable and mechanical reversal or modification of the final determination"; a final order or judgment disposes of all of the causes of action between the parties and leaves nothing for further judicial determination 15-8

Read with caution 15-12

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CPLR 5501(a)(1) brings up a prior unappealed default order for review 15-18

An order granting or denying a motion to compel arbitration is a final order 15-19

When an appeal from a nonfinal order is perfected together with an appeal from a final judgment, the appeal from the nonfinal order is dismissed and errors in the nonfinal order affecting the final judgment are reviewed upon the appeal from the final judgment 15-20

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Finality and ministerial acts 15-22

An appeal from an order does not bring up for review a prior order 15-24

An appeal from a nonfinal order or an intermediate order does not bring up for review prior nonfinal orders 15-26

The corollary of CPLR 5501(a)(1) is that a final order may not be reviewed on appeal from a later order or judgment 15-28

An order from a contempt proceeding in a pending action does not finally determine the causes of action 15-29

An appeal from a jurisdictionally valid contempt order does not bring up for review the prior order 15-30

A decision or verdict upon which no formal judgment has been entered has no conclusive character 15-31

The scope of the words “final judgment” should not be confined to a final judgment in an action; the essential element of a conclusive adjudication is finality of the proceedings; a judicial decision may be a conclusive adjudication of fact or law 15-32

The conclusive effect of a final disposition of a case is not to be disturbed by a subsequent change in decisional law; retroactivity analysis does not permit application of new law to cases already resolved; a change in law generally will be applied to all cases still in the normal litigation process 15-34

– A party may not reopen a voluntary settlement agreement to take advantage of a subsequent change in the law 15-35

Generally, the right of a direct appeal from an intermediate order terminates with the entry of judgment in the action (*Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285 (1976)) 15-37

– In 2020, in *Knapp v. Finger Lakes NY, Inc*., the Fourth Department reversed its precedent authority to hold that "an order otherwise appealable as of right (CPLR 5701(a)) entered after the entry of a final judgment is not subsumed in the judgment but is independently appealable" 15-41

Where the order appealed from is a final order, the right of direct appeal does not terminate upon entry of the judgment..... 15-43

A posttrial order is subsumed in the judgment 15-44

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Implied severance, doctrine of "implied finality" 15-50

– Party finality doctrine 15-53

The intent of the amendment to CPLR 5501(c)..... 15-54

16. CPLR 603, CPLR 1010, Severance and Separate Trials

[a] In General 16-2

A severed cause of action does not impair the finality of the remaining judgment, it becomes a separate action which may be terminated in a separate judgment; review of the prior order may only be had by direct appeal therefrom or by appeal from a judgment entered thereon 16-2

Consolidation or joint trial hinges upon a finding of common issues of law or fact; severance generally depends upon an absence of such commonality 16-4

17. Provisional Remedies

[a] Provisional Remedies to Preserve the Status Quo, Injunctions and Finality 17-2

"Absent unusual or compelling circumstances, appellate courts are reluctant to disturb preliminary injunctions" 17-4

A preliminary injunction even when issued after an evidentiary hearing depends upon probabilities which may be disproven at trial 17-6

When reviewing an order that denied a preliminary injunction the Appellate Division should review only whether the court abused its discretion 17-7

Injunctions, provisional remedies to preserve status quo do not necessarily affect the final judgment and are not subject to review 17-8

On an appeal from a preliminary injunction an issuing court retains the power to decide motions on an order that has been appealed even where the outcome may impact the pending appeal 17-9

[b] Stays, Preliminary Injunctions, CPLR 5518, CPLR 5519(a)(1) 17-10

Stays, Preliminary Injunctions, CPLR 5518, CPLR 5519(a)(1) 17-10

A stay merely suspends further proceedings; it does not vitiate the effect of the order or judgment stayed; "filing a notice of appeal does not suspend the operation of the judgment as an estoppel" 17-11

– The Appellate Division possesses the inherent power to stay a trial..... 17-13

CPLR 5519(a)

"CPLR 5519(a) only provides a stay of proceedings to enforce the executory components of the judgment or order appealed from; it has the effect of temporarily depriving the prevailing party of the ability to use the methods specified by law – a motion decided by an order does not become undecided and the declaratory provisions of a judgment are not undeclared when a governmental party serves a notice of appeal therefrom";

"the automatic stay of CPLR 5519(a) is restricted to the executory directions of the judgment or order appealed from which command a person to do an act";

"the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief";

"where an order merely denies a motion for summary judgment or to strike the case from the calendar, an appeal from that order will not stay a trial which is a consequence of the order but is not directed by it" 17-14

"A notice of appeal of an order denying a motion to dismiss does not trigger the automatic stay in CPLR 5519(a) with respect to affirmative directives in the CPLR regarding litigation obligations such as the obligation to answer and comply with discovery requests" 17-19

– An automatic stay pursuant to CPLR 5519(a)(1) is not available by appealing as of right or by seeking permission to appeal from an order or judgment which prohibits certain conduct because it does not direct an executory act;

prohibitory injunctions are self-executing and need no enforcement procedure to compel inaction on the part of the person or entity restrained 17-21

– Order discharging patient "forthwith" from state psychiatric center does not trigger automatic stay pursuant to CPLR 5519(a) because it is self-executing rather than executory... 17-23

A "stay pursuant to CPLR 5519(a)(1) stays only proceedings to enforce an order, a trial is not a proceeding to enforce an order"... 17-25

The interaction between CPLR 5519(c) and CPLR Article 65 (Notice of Pendency): the pendency of an appeal notwithstanding, the rights from a final judgment "are fully enforceable in the absence of a judicially issued stay pending disposition of the appeal" 17-28

Motion for a stay pursuant to CPLR 5519(c) is unnecessary where the automatic stay provisions of CPLR 5519(a)(1) are available 17-31

Stays and Mootness in Construction Cases 17-32

"Chief among the factors bearing on mootness has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation";

other factors include "whether work was undertaken without authority or in bad faith, and whether substantially completed work is "readily undone, without undue hardship"; relief is "theoretically available" in that a structure or project "can be destroyed";

The Appellate Division "may retain jurisdiction despite mootness if recurring novel or substantial issues are sufficiently evanescent to evade review otherwise"..... 17-32

Appeals dismissed as moot or academic due to appellant's failure to "seek injunctive relief or to make any other attempts to preserve the status quo during the pendency of [its] appeal"; absence of bad faith 17-39

– Has petitioner moved for a preliminary injunction, or otherwise sought to preserve the status quo; construction not performed in bad faith or without authority 17-43

– A petitioner seeking to halt a construction project must "move for injunctive relief at each stage of the proceeding" 17-46

No mootness where construction had not proceeded beyond the point where it could not be "readily undone, without undue hardship"; petitioners sought an expedited hearing of the appeal and had moved expeditiously to perfect it 17-50

Petitioner never moved for a preliminary injunction, or otherwise sought to preserve the status quo;

construction was not performed in bad faith or without authority;

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– Failure to seek injunctive relief pursuant to CPLR 5518 due to financial constraints is unavailing 17-51

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[c] Appeals from Pendente Lite Orders in Matrimonial Cases 17-54

Appeals from pendente lite support awards in matrimonial cases are disfavored during the pendency of the action except where the award renders the payor-spouse unable to meet his or her reasonable needs 17-54

Pendente lite orders in matrimonial cases cease to exist after the final judgment has been entered and are not reviewable on appeal because even if modified they would not affect the final judgment 17-55

Prof. Siegel equates a pendente lite order of support to a provisional remedy like a temporary injunction during the pendency of an action intended to preserve the status quo..... 17-58

When a temporary order of visitation functions like a permanent order the word temporary does not control and the order is appealable 17-60

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18. CPLR 5701: Appeals as of Right, Orders Not Appealable as of Right, Appeals by Permission

[a] In General..... 18-2

CPLR 5701

Appeals to the Appellate Division from Supreme and County Courts..... 18-2

Trial courts should be cognizant of the consequences that may ensue from piecemeal interlocutory orders; "from an appellate perspective, it is highly undesirable to review separate decisions on the basis of separate records"..... 18-5

CPLR 5701(a)(1): an appeal lies as of right from any final or interlocutory judgment except one entered subsequent to an order of the Appellate Division which disposes of all the issues in the action..... 18-6

An order refusing to strike scandalous or prejudicial matter from a pleading is not appealable as of right, leave to appeal must be sought; the Appellate Division may consider a belated motion 18-11

Instances of nonappealable interlocutory orders 18-12

– Motion to accelerate the return date of a motion 18-12

– Denial of a motion to designate a date for trial..... 18-12

CPLR 5701(b) subsequent order held appealable as an amendment to a prior order because the later order contained the same motion sequence number as the prior order; also the "[motion] denied" box was checked in the later order indicating reference back to the earlier order 18-13

[b] CPLR 5701(a)(2), Motions Made on Notice are Appealable as of Right; the Intersection between CPLR 5701(a)(2) and CPLR 2215(a); Relief Allowed although No Formal Cross Motion Was Served When the Merits of the Application Were Briefed and Argued 18-15

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The intersection between CPLR 5701(a)(2) and CPLR 2215(a) (Cross Motions): instances where relief has been allowed and considered on appeal even though no formal cross motion had been served because the merits of the application were briefed and argued..... 18-16

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– The Appellate Division may sua sponte conform pleadings to the proof, which although not formally pled, were raised and addressed before the motion court 18-25

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[f] Failure to Rule on a Motion or on a Branch Thereof; an Order Holding a Decision in Abeyance or Deferring the Motion to Trial 18-38

A court's failure to decide or rule on a motion or on a branch thereof is deemed a denial of that aspect of the motion and is appealable 18-38

An order that does not decide a branch of a motion is not appealable where the issue remains pending 18-40

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An order referring a motion to the trial court may constitute a denial rendering the order appealable as of right 18-44

An order directing a trial in response to a motion for summary judgment is appealable because it constitutes a denial of the motion 18-45

An order that adjourns or reserves a decision is not appealable 18-46

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Summary judgment presumes a litigated motion; ex parte submission of a motion for summary judgment precludes meaningful appellate review of Supreme Court's disposition; the absence of any opposition to a motion for summary judgment means there is no theory of recovery for review 18-47

Although the Court of Appeals may not grant summary judgment to a nonappealing party the Appellate Division may independently search the record to grant complete relief to the appealing party ... 18-49

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The Court of Appeals slams "the sloppy practice" of a midtrial motion for summary judgment in contravention of CPLR 3212(a) 18-53

Repetitive motions for summary judgment are disfavored but courts are permitted to consider such motions; the court should examine whether the motion "furthers the ends of justice and eliminate[s] an unnecessary burden on the resources of the courts" 18-55

[h] CPLR 5701(b) 18-56

Scandalous matter in a pleading, the standard of review for the appellate court is whether the trial court's order to strike matter, or not strike matter, was an improvident exercise of its discretion ... 18-56

[i] CPLR 5701(c), Appeals by Permission, Appeals from Sua Sponte Orders 18-57

CPLR 5701(a)(3): Sua sponte orders 18-57

Distinction between sua sponte relief not requested by any party and sua sponte reasoning 18-59

No appeal lies as of right from a sua sponte order as it is not "on notice" and is only appealable by permission; a sua sponte order must be vacated by motion on notice to nisi prius a direct appeal may then be taken from a denial of that motion 18-60

– Remedy for unrequested sua sponte relief granted in a motion 18-60

An order that is based on a letter to the court is treated like a sua sponte order, an appeal therefrom must comply with CPLR 5701(a)(3) 18-62

A sua sponte order is appealable if leave to appeal is granted 18-64

Where sua sponte relief is extraordinary the Appellate Division may deem a notice of appeal as a motion for leave to appeal 18-65

The power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist 18-67

A sua sponte order in the final judgment is appealable as of right 18-68

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CPLR 5701(c): Novel and significant issues 18-78

– The Appellate Division may grant a motion for leave to appeal in order to address a new area of law 18-79

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A denial of an application for leave to appeal is not equivalent to an affirmance and has no precedential value 18-81

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– Discovery, an order granting a protective order and precluding discovery of numerous documents affects a substantial right..... 19-2

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– Denial of a motion to bar a party from calling his counsel as a witness is reviewable..... 19-3

– An order denying a motion "without prejudice to renew" is appealable as of right 19-3

20. Instances of Issues Not Appealable as of Right

Where a motion is denied with leave to renew upon proper papers the appropriate remedy is not to appeal but rather to remove at nisi prius supported by the proper papers 20-2

An order deferring determination of a motion to compel discovery until the production of other documents or after an in camera inspection of certain materials is not an appealable paper 20-3

– The denial of an application to quash a subpoena is a final and appealable order..... 20-4

No appeal lies as of right from a qualified domestic relations order (QDRO)..... 20-6

A justice's recusal from a case is not an appealable order 20-8

21. The Appealability of a "Decision and Order" Following a Trial Is Uniquely Treated in the Second Department

The Second Department does not permit a direct appeal from a "decision and order" following a trial 21-2

The Court of Appeals and the Third Department permit a direct appeal from a "decision and order" 21-3

22. Appeals From Orders of Reference Directing a Hearing

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Appeals from orders of reference directing a hearing; the appellate courts are not quite unanimous 22-2

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– Third Department: one decision holds it is not appealable, another decision holds it is not 22-2

– Fourth Department: not appealable as of right 22-2

First Department: orders of reference are appealable 22-3

Second Department: an order directing a reference or a conference is not appealable as of right 22-4

– An appeal from an order granting a motion to dismiss based upon lack of personal jurisdiction—issued after a hearing—also brings up for review the issue of whether a hearing was necessary to determine the motion;

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Exception in the Second Department, similar to First Department 22-8

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An order appointing a JHO to hear and report is not appealable as of right 22-11

An order transferring an action to another judge is not appealable where the order was not made upon notice 22-12

A party who did not object to a reference may not challenge the reference on appeal as illegal following an adverse ruling..... 22-13

No direct appeal lies as of right from orders of attorney-referee in disclosure matters 22-14

[b] CPLR 5703, Appeals to the Appellate Division from Appellate Courts 22-16

No appeal lies as of right from an order of a county court which determines an appeal from an order of a lower court nor may such leave be granted 22-17

[c] CPLR 5704 22-20

CPLR 5704. Review of ex parte orders 22-20

While no appeal lies as of right from an ex parte order, the Appellate Division may treat the appeal as anda application for review pursuant to CPLR 5704(a) 22-21

Objections to an ex parte order will not be heard after the merits of the claim have been litigated 22-25

By declining to sign an order to show cause, a court refuses to permit a party to bring on a motion; no order on the merits can result therefrom because there was no pending motion, relief is only available by way of CPLR 5704(a);

where the supporting papers are the same, one Supreme Court Justice should not sign an order to show cause refused by a colleague, however, if signed by a different judge, the motion should proceed on the merits;

a court which declines to sign an order to show cause should not proceed to act as if the motion had in fact been made..... 22-26

A purported order that refuses to sign an order to show cause is not an appealable paper; review of such refusal is available pursuant to CPLR 5704; the court may write its reasons for declining to sign..... 22-27

– The signing of an order to show cause does not connote approval of the substance of the motion 22-29

– Direct appeal allowed from court's refusal to sign an order to show cause 22-30

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A court's refusal to sign an order to show cause has no res judicata or collateral estoppel value..... 22-35

A prior justice's refusal to sign an order to show cause is not a court order and does not create law of the case 22-37

The Appellate Division may review an order pursuant to CPLR 5704(a) when there is no adverse party such as in appeals where a petition for a name change has been denied and in applications for tax comprises..... 22-38

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An appeal does not lie as of right or by permission from evidentiary rulings, such rulings are appealable from the final judgment 23-4

– CPLR 5701(c), "Appeals by Permission," were not intended to permit intermediate appeals from evidentiary rulings during trial 23-5

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24. Appeals from Motions in Limine

An order from a motion in limine which limits the admissibility of evidence is at best an advisory opinion which is neither appealable as of right nor by permission; an evidentiary ruling made before trial is generally reviewable only in the context of an appeal from the judgment rendered after trial except, for instance when the order also limits the issues to be tried 24-2

Appealable and nonappealable orders from in-limine motions 24-4

– An evidentiary ruling made before trial is ordinarily reviewable only on appeal from the posttrial judgment, except when the order also limits the issues to be tried 24-4

– An in-limine order is appealable where it dismisses a claim 24-4

– An in-limine ruling is appealable as of right if it affects the merits of the case 24-5

– An order from an in-limine motion that limits the legal theories of liability to be tried or the scope of the issues at trial is appealable 24-6

– An in-limine order that is the functional equivalent of a motion for partial summary judgment is appealable 24-9

– An in-limine order that limits the scope of the issues or legal theories is the functional equivalent of summary judgment is appealable 24-9

– "Where a party misuses a motion in limine as the procedural equivalent of a motion for partial summary judgment resulting in an order that limits the issues to be tried, that order is appealable" as it "clearly involves the merits (CPLR 5701(a)(2)(iv)), affects a substantial right (CPLR 5701(a)(2)(v))" 24-11

– Where a motion is erroneously titled a motion in limine when it was the functional equivalent of a summary judgment motion; an order deciding the merits of such a motion is appealable because it limits the scope of the issues at trial 24-14

– A motion for summary judgment that in actuality seeks an evidentiary ruling 24-15

– No appeal lies from an order regarding a motion to permit or to preclude expert testimony; such an order is appealable when it limits the scope of the issues or the legal theories of liability 24-16

– Orders denying an in-limine motion to preclude expert testimony based on insufficient disclosure 24-18

– Where expert testimony sought to be precluded created an issue of fact that served as the basis of the court's ruling on a motion for summary judgment..... 24-23

– An order denying a motion for a *Frye* hearing or denying a motion to direct an expert witness to submit to a *Frye* hearing is not appealable as of right 24-25

– Orders to preclude expert testimony or denying a *Frye* hearing are appealable where they limit the scope of the issues, involve the merits *and* affect a substantial right 24-26

Where a court declines to rule on contentions in an in-limine motion the contentions are not preserved for appeal 24-30

Generally no appeal lies from an order denying a motion to preclude proposed expert testimony 24-31

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25. Appeals from Questions Related to Depositions

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No direct appeal or by permission from rulings made during depositions even if reduced to an order unless such order seeks leave upon a complete record to compel answers or to obtain a protective order 25-5

– Appellate Division treated the notice of appeal as an application for leave to appeal 25-7

– Appellate Division declined to treat the notice of appeal as an application for leave to appeal 25-8

No appeal lies as of right from an order directing a party to answer questions propounded at a deposition 25-9

– No direct appeal lies from an order directing a party to answer questions propounded at a deposition *except* where the order involves the merits affecting a substantial right or the novelty or significance of an issue 25-10

Denial of a protective order preventing further examination of a witness is not appealable as of right as it is in the nature of an order on an application to review objections raised at an examination before trial 25-11

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Rulings affecting the scope of pretrial examinations are not appealable as of right even if reduced to an order 25-14

26. Appeals from Motions to Reargue

Generally, no appeal lies as of right from the denial of a motion to reargue 26-2

No appeal lies from an order made upon reargument that adheres to its prior decision 26-3

Two exceptions to the rule that the denial of a motion to reargue is not appealable 26-4

1. Where partial relief is granted: 26-4

2. Although an order states that it denied reargument, if it reviewed the merits and adhered to its determination the denial of reargument is appealable: 26-4

– Where the original order was not appealed but where reargument is granted and the court changed its disposition review is limited to whether discretion was providently exercised in granting the motion for leave to reargue and upon reargument making the appropriate disposition 26-5

Where a party's "motion cannot be said to fall precisely within the category of either renewal or reargument, the court's disposition was well within the exercise of its discretion" 26-7

Designation by an attorney of a motion as combined for leave to renew and leave to reargue does not govern, renewal and reargument are distinct and each item of relief is to be identified and supported separately 26-8

[a] Appeals from Orders Directing a Party Not to Consult with Counsel 26-11

Court orders that direct a party not to consult with counsel; the duration of the order is central to its validity

Generally 26-11

27. A Court May Not Deprive a Party of the Right to Either Make a Written Motion or Make a Record

CPLR 2219: "Upon the request of any party, an order or ruling made by a judge, whether upon written or oral application or sua sponte, shall be reduced to writing or otherwise recorded" 27-2

The Appellate Division cautioned "courts to ensure that the fundamental rights to which a litigant is entitled are not ignored, "no matter how pressing the need for the expedition of cases";

a court may not deprive a party of the right to either make a written motion or make a record;

conditioning the making of motions on prior judicial approval is generally inappropriate; "a judge shall accord to every person who is legally interested in a matter, or his or her lawyer, full right to be heard according to law" 27-7

An oral order is not appealable unless the transcript is so-ordered 27-10

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28. Abandonment of an Appeal

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– Issues not addressed in the main brief on appeal are deemed abandoned; a cross appeal must be dismissed as abandoned where the brief does not seek reversal or modification of any portion of the judgment 28-11

– Argument raised first time in reply considered where it is determinative, does not allege new facts, and is a legal argument on the face of the record that would not have been avoidable if raised in defendants' moving brief below, and because the record is sufficient to resolve the issue 28-14

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VOLUME II

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– Taxation of costs is a ministerial act solely within the province of the clerk 32-40

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– Statute of frauds defense precluded first time on appeal 32-49

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Arguments first raised in reply papers not considered on appeal 32-67

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Surreplies containing new arguments "generally should not be considered"; courts, however, have discretion to authorize surreplies when there is either no prejudice or there are safeguards to protect the other party 32-72

"Ordinarily, courts do not consider issues first mentioned in reply in support of a motion for summary judgment";

a party "cannot [in a motion for summary judgment] meet its prima facie burden by submitting evidence for the first time in reply or [in] surreply [papers]"

prejudice;

"unusual circumstances, such as a recent change in decisional law, may arise which justify further submissions on a motion for summary judgment, with leave of court" 32-75

– Reply affirmation held appropriate in support of summary judgment dismissal since "defendants' arguments could not have been submitted at an earlier juncture because of the indefiniteness of plaintiff's initial pleading" 32-76

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– The contention that a document was void as against public policy pursuant to the General Business Law and the Uniform Commercial Code could not be presented first time on appeal 33-8

The prohibition against the indefinite suspension of the alienation of real property is a matter of state public policy which may be raised first time on appeal 33-10

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Cases precluding public policy contentions from being raised first time on appeal 33-12

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The contention that a reduction of a parent's child support obligation will render the other parent and the child public charges may not be raised first time on appeal 34-3

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– Although the defendant failed to preserve the issue restricting his right to speak to counsel overnight for appellate review, the Appellate Division reached the issue in the exercise of the interest of justice jurisdiction 34-13

35. Article 78 First Time on Appeal

An Article 78 proceeding is not an appropriate vehicle for asking review of an issue that is reviewable on direct appeal..... 35-2

Summary punishment not appealable by direct appeal but by Article 78 35-4

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Governmental immunity may not be raised for the first time on appeal 36-3

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Generally 37-2

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The relation back doctrine may not be asserted in reply brief 37-4

Issues regarding attorney's fees may not be asserted in the reply brief 37-5

Judicial estoppel may not be asserted in the reply brief 37-6

Presumption of payment may not be asserted in the reply brief 37-7

That a party is conclusively presumed to know the contents of an insurance policy may not be asserted in the reply brief 37-8

Unconscionability may not be asserted in the reply brief 37-9

Excessive interest rate may not be asserted in reply brief 37-10

That a party is not a natural person may not be raised for the first time on appeal 37-11

Fifth amendment privilege against future prosecution may not be raised for the first time on appeal in the reply brief..... 37-12

That a proceeding be converted into an Article 78 proceeding may not be raised for the first time in a reply brief 37-13

Quasi judicial immunity may not first be made in a reply brief.... 37-14

Recusal may not be raised in a reply brief first time on appeal..... 37-15

To the extent that a party seeks to challenge the denial of part of a motion may not first be made in a reply brief on appeal..... 37-16

A contention as to standard of proof may not first be made in a reply brief on appeal 37-17

Effective assistance of counsel may not first be made in a reply brief on appeal 37-18

The presence of a justiciable controversy may not first be made in a reply brief on appeal 37-19

The contention that the court improperly restricted the cross-examination of a witness may not first be raised in a reply brief... 37-20

[a] Court's Excessive Examination and Acting as an Advocate; Court May Not Interject Its Opinion as to Plausibility of Testimony in the Jury's Presence; A Court May Not Create an Impression of Incredulity; These Issue Must Be Preserved 37-21

Claim that a party was denied a fair hearing due to the court's excessive examination and acting as an advocate must be preserved; "it is incumbent upon counsel at least to attempt to register some protest to preserve the matter for appellate review"..... 37-21

Although unpreserved for appellate review, the Appellate Division remanded a matter for a new trial where the trial court overstepped its role in clarifying confusing testimony by excessive questioning of the plaintiff's treating neurologist in a manner designed to cast doubt on the foundation of his opinions..... 37-25

Although unpreserved for appellate review verdict was set aside and the matter remitted for a new trial in the interest of justice where improper comments by the Supreme Court and opposing counsel deprived a party of a fair trial and may have unduly influenced the jury; curative instruction may be insufficient 37-25

– Court may not interject its opinion as to plausibility of testimony in the jury's presence 37-27

– A court may not create an impression of incredulity..... 37-27

– Although counsel did not object, new trial ordered before a different judge in the interests of justice because the court conducted excessive and prejudicial questioning of trial witnesses acting as an advocate 37-29

38. Issues Relating to Children

[a] Issues Relating to Children That May Not Be Raised First Time on Appeal 38-2

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The contention that a court improvidently exercised its discretion in failing to appoint an attorney for the children at the hearing must be preserved for appellate review 38-4

Challenges to an attorney for the child, including but not limited to conflicts of interest, may not be raised first time on appeal; a motion must be made during trial to remove the attorney..... 38-5

– The contention that children should not have been jointly represented by the same attorney because they had conflicting interests must be preserved 38-5

Constructive abandonment by a child may not be raised for the first time on appeal 38-7

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[b] Issues Related to Custody and Visitation Precluded First Time on Appeal 38-9

Issues related to custody and visitation may not be raised for the first time on appeal; a request for a psychological evaluation or drug testing may not be raised first time on appeal as it is discretionary with the court 38-9

Relief relating to parental visitation at correctional facilities may not be raised first time on appeal; the proper remedy is to present such relief in a new petition 38-12

The Indian Child Welfare Act of 1978 38-13

[c] Issues Related to Custody and Visitation Considered First Time on Appeal 38-14

Issues related to custody and visitation considered first time on appeal 38-14

39. Standing, Subject Matter Jurisdiction, Waiver, Justiciability

CPLR 3211. Motion to dismiss 39-2

"A court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected" 39-3

Standing to sue is a threshold issue: if standing is denied, the pathway to the courthouse is blocked 39-4

The difference between standing and capacity to sue 39-5

The First Department notes that it uses the terms standing and capacity to sue interchangeably 39-7

The Court of Appeals has held that standing may be waived, making it unlike subject matter jurisdiction, which may never be waived 39-8

– Capacity is a waivable objection that does not implicate subject matter jurisdiction to entertain an appeal 39-9

– The defenses of standing and capacity to sue are both subject to the same waiver rule under CPLR 3211(e) 39-9

First Department

The First Department has held that standing does and does not go to subject matter jurisdiction and standing may be raised by the court sua sponte 39-11

– Citing the US Supreme Court: "Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute" and may not be waived 39-11

– First Department decisions that standing is a question of law that may be raised first time on appeal 39-12

Subsequent decisions from the First Department hold that standing does not go to subject matter jurisdiction and may be waived and may not be raised first time on appeal 39-13

The Second Department

– The Second Department's analysis of the "unsettled question" concludes that standing is not jurisdictional and may thus be waived and not timely raised first time on appeal 39-15

– Within one week the Second Department issued inconsistent decisions regarding standing first time on appeal 39-19

The Third Department

Third Department decisions hold that standing may and may not be waived and may and may not be raised for the first time on appeal 39-20

– Recent decisions hold that standing may be waived and does not go to subject matter jurisdiction 39-20

– Prior Third Department cases cite the U.S. Supreme Court that standing is jurisdictional and may thus be raised first time on appeal 39-21

The Fourth Department 39-23

Standing is an element of the larger question of justiciability which implicates subject matter jurisdiction; whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation 39-25

Justiciability and ripeness implicate subject matter jurisdiction ... 39-29

40. CPLR 4401, 4404: Preservation and Motions for a Directed Verdict

Preservation and motions for a directed verdict 40-2

A directed verdict grants judgment as a matter of law; a court may not weigh the evidence but must determine "that by no rational process could the trier of the facts base a finding in favor of the [nonmoving party] upon the evidence presented" 40-4

An order denying a motion for a directed verdict embodies determinations in the nature of midtrial rulings and is not appealable either as of right or by permission 40-7

No appeal lies from an order denying a motion for judgment notwithstanding the verdict, CPLR 4401 40-8

Whether the Supreme Court improperly entertained a motion for summary judgment midtrial must be preserved 40-9

The grant of a CPLR 4401 motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable 40-10

41. CPLR 4404, Post-trial Motion for Judgment and New Trial in Jury Trials and in Nonjury Trials

Setting aside a jury verdict or the judgment entered thereon 41-2

– CPLR 4404 motions are reserved for those parties who took part in the trial 41-2

– CPLR 2221 is not an appropriate vehicle to "challenge a judgment entered after trial" 41-3

Appellate review is frustrated when "trial courts choose not to issue formal decisions" 41-8

A challenger to the sufficiency of pleadings must have first moved for a directed verdict under CPLR 4401 41-10

Objecting only that a verdict was contrary to the weight of the evidence without claiming that the evidence of damages was legally insufficient disqualifies the sufficiency contention from appellate review 41-12

The failure to move for judgment as a matter of law at the close of evidence implicitly concedes that the issue is for the trier of fact to determine and is not preserved for appellate review 41-13

Objections to a verdict on the ground of inconsistency must be raised before the jury is discharged or it is not preserved for review 41-15

– The argument that the jury verdict was inconsistent, while not raised before the jury was discharged, was deemed preserved and considered within the context of the posttrial motion to set aside the verdict 41-17

– Notwithstanding the failure to assert that the verdict was inconsistent before the jury was discharged and thus unpreserved, the argument was considered because it was raised in a posttrial motion *without objection* 41-18

– Plaintiff's failure to object to the jury's award of $0 for both past and future pain and suffering as inconsistent with the jury's awards for past and future lost earnings and future medical expenses did not preclude the court from deciding whether " 'the jury's failure to award damages for pain and suffering [wa]s contrary to a fair interpretation of the evidence and constitute[d] a material deviation from what would be reasonable compensation' " 41-18

A party may not avoid the consequence of its failure to preserve the inconsistency argument by characterizing it as an argument addressed to the weight of the evidence 41-20

While the contention that a jury verdict was inconsistent was not preserved the contention that the verdict was against the weight of the evidence may nevertheless be heard if it was preserved 41-21

Although a party did not preserve the contention that the verdict was inconsistent by raising it before the jury was discharged when Supreme Court could have taken corrective action the Appellate Division addressed it in the context of the challenge to the weight of the evidence which was preserved in a motion to set aside the verdict on that ground 41-22

That the number of jurors who agreed to the verdict as reported on the verdict sheet was inconsistent with the number of jurors who agreed to the verdict when polled must be preserved 41-23

Consent that alternate jurors deliberate with the regular jurors fails to preserve the argument that the court committed reversible error in submitting the case to a jury of eight persons rather than six 41-24

That a verdict was rendered by less than five-sixths of the jurors must be preserved 41-25

A party's submission of posttrial affidavits on appeal from jurors to explore its deliberative process and impeach its verdict is patently improper 41-26

[a] CPLR 4404(a), the Interest of Justice 41-27

A motion for a new trial under CPLR 4404(a), on the ground of the interest of justice, encompasses errors in rulings on admissibility of evidence, mistakes in the charge, misconduct of judges, misconduct of attorneys or jurors, deprivation of a fair trial, newly discovered evidence and surprise; it is directed to the components of the trial, such as the testimony, charge and conduct of the participants;

the trial judge is in the best position to evaluate errors therein and must look to his or her own common sense, experience and sense of fairness rather than to precedents in arriving at a decision; the trial judge must decide whether substantial justice has been done, i.e., whether it is likely that the verdict has been affected..... 41-27

– Common courtesy requires that an attorney allow opposing counsel the opportunity to argue his or her case to the jury without undue or repetitive interruptions; nevertheless, where counsel, in summing up, exceeds the bounds of legal propriety, it is the duty of the opposing counsel to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any improper remarks, and to admonish counsel from repetition of improper remarks;

although no objection is interposed to pervasive prejudicial or inflammatory comments to deprive a party of a fair trial, the Appellate Division may nevertheless order a new trial in the interest of justice pursuant to CPLR 4404 where it would cause gross injustice to uphold the verdict 41-30

– The contention that opposing counsel put forth a theory on summation that was unsupported by the record must be preserved..... 41-36

– A party's failure to seek curative instructions or failure to immediately move for a mistrial for improper comments during opening statements and summations leaves the challenge unpreserved for appellate review 41-36

Application for mistrial where counsel makes inquiries about insurance..... 41-40

– "No judgment should be permitted to stand where it is made following a trial or hearing where [a party] was subjected to unprofessional and despicable conduct by opposing counsel"..... 41-41

– Comments by adverse counsel during the trial and on summation that diverted the jury's attention from the issues and deprived the moving party of a fair trial failed for nonpreservation 41-45

42. Applications for Mistrials

An untimely motion for a mistrial (before the jury returns its verdict) leaves the error unpreserved and "may limit appellate review"..... 42-2

The contention that a verdict is against the weight of the evidence requires a timely motion to set aside the verdict on that ground 42-4

43. Jurisdiction of the Family Court, Civil Court, and Housing Part of Civil Court

Family Court is a court of limited jurisdiction 43-2

Civil Court is a court of limited jurisdiction..... 43-4

Civil court loses jurisdiction over an action upon its transfer to supreme court; however, any appeal before the appellate term prior to the transfer remains..... 43-5

Civil Court has no power to direct a landlord to legalize an apartment; provisional remedies are statutorily limited 43-6

Civil Court has jurisdiction over any counterclaim that falls within its jurisdiction if sued upon separately; it may not hear a counterclaim for loss of income..... 43-7

The Housing Part of the Civil Court has broad authority to execute its constitutional mandate to enforce housing standards ... 43-8

44. Subject Matter Jurisdiction

Subject matter jurisdiction may be raised at any time by any party or sua sponte by any court at any level; subject matter jurisdiction cannot be born of waiver, consent or estoppel 44-2

The initiation of a removal proceeding to federal court suspends the state court's jurisdiction over all subsequent state court proceedings; a party may not file a notice of appeal or even perfect an appeal in the state system during the removal proceeding..... 44-8

The Appellate Division may decide whether a juvenile delinquency petition is jurisdictionally deficient..... 44-11

The rule that subject matter jurisdiction otherwise nonexistent may not come into being through waiver or estoppel does not apply when the court had jurisdiction of the general subject matter, but a contention is made after judgment that the court did not have power to act in the particular case or as to a particular question in the case 44-12

– A challenge to a court's exceeding its jurisdiction was precluded first time on appeal 44-13

Strict procedure to recover damages for personal injuries caused by the negligence of an officer or employee of the state goes to subject matter jurisdiction..... 44-14

45. Advisory, Hypothetical, Moot, and Remote Opinions or Otherwise Abstract Questions

– "Once the Appellate Division concluded that the challenged regulations were invalid because [the agency] lacked statutory authority to promulgate them, it was unnecessary 'under the circumstances here presented' to prospectively declare the regulations invalid on additional common-law, statutory, and constitutional grounds as that constitutes an inappropriate advisory opinion" 45-3

Advisory opinions, hypothetical questions, remote or abstract questions 45-4

– "Where changed circumstances prevent [the court] from rendering a decision which would effectually determine an actual controversy between the parties involved, [the court] will dismiss the appeal" 45-6

– "Once the Appellate Division concluded that the challenged regulations were invalid because [the agency] lacked statutory authority to promulgate them, it was unnecessary 'under the circumstances here presented' to prospectively declare the regulations invalid on additional common-law, statutory, and constitutional grounds as that constitutes an inappropriate advisory opinion" 45-6

46. Mootness

[a] In General 46-2

Mootness is related to subject matter jurisdiction and thus must be considered by the court sua sponte; the mootness doctrine enjoins appellate review of academic questions;

"it is incumbent upon counsel to inform the court of changed circumstances which render a matter moot" 46-2

The doctrine of mootness is invoked where a change in circumstances or passage of time prevents a court from rendering a decision that would effectively determine an actual controversy 46-4

Instances of mootness 46-7

An appeal is academic where it seeks review of only one of the bases upon which the court granted adverse relief and an independent alternative ground still exists 46-16

– Even though the hearing had concluded, the First Department reversed the order of the Family Court which denied the father's motion for an "expedited hearing" to determine whether the children who were removed through a failed trial discharge should be returned to him 46-17

– An exception to the mootness doctrine where the issue continually occurs in Family Court due to violations of statutory time periods; petitioner held entitled to legal fees from the State pursuant to the "catalyst" theory; this ruling is limited to the First Department 46-21

A subsequent order renders an appeal moot 46-30

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– The record on appeal from an interlocutory judgment or order must include among other things "the transcript, if any"; the court may "disregard defendant's technical failure and take judicial notice of the electronically filed transcript" 50-7

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The doctrine applies only to legal determinations; "a jury verdict is not a judicial determination of law"..... 55-5

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– The doctrine applies only to legal determinations; "a jury verdict is not a judicial determination of law" 55-6

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Under the doctrine of law of the case, the second Justice may not overrule the first Justice notwithstanding that the second Justice has a different view of the merits 55-19

The doctrine of law of the case may be ignored to allow a party the benefit of an intervening change in the law to all cases still in the normal litigation process even though the court has passed on the same issue 55-20

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Doctrine of the law of the case does not apply to ex parte orders such as an order to show cause 55-22

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The Appellate Division is not bound by the doctrine of law of the case and may make its own determinations 55-25

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Law of the case and res judicata do not apply to nonfinal orders 55-28

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The Appellate Division may reverse an order made in violation of the law of the case for that reason alone without regard to the merits 55-32

An appellate court is not bound by a prior unappealed order and may affirm an order which is substantively correct even if the effect of a prior unappealed order will possibly be undermined ... 55-33

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The primary purposes of res judicata are grounded in public policy and are to ensure finality, prevent vexatious litigation and promote judicial economy 55-35

The differences between res judicata and collateral estoppel

"Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues; Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or in privity in the first suit. Only the party against whom the doctrine is invoked must be bound by the prior proceeding"..... 55-36

– "A pragmatic test" as to res judicata..... 55-38

"Under the doctrine of res judicata, a final adjudication of a claim on the merits precludes relitigation of that claim and all claims arising out of the same transaction or series of transactions by a party or those in privity with a party";

"as a general rule, a dismissal for failure to state a cause of action is not on the merits and, thus, will not be given res judicata effect"..... 55-39

"Neither the verdict of a jury nor the findings of a court in a prior action upon the precise point involved in a subsequent action between the same parties constitutes a bar, unless followed by a judgment based thereon";

"entry of a judgment is a prerequisite of res judicata";

"principles of res judicata are inapplicable when the two determinations arise in the same action" and there is no prior judgment 55-40

The meaning of "transaction" or "a series of transactions" for the purposes of res judicata..... 55-41

"A judgment of default which has not been vacated is conclusive for res judicata purposes, and encompasses the issues which were raised or could have been raised in the prior action"..... 55-42

Collateral estoppel 55-44

– "The equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules";

"There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling";

"The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party; The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination"..... 55-44

Collateral estoppel is not an evidentiary matter but rather determines an issue 55-46

"If an issue has not been litigated, there is no identity of issues between the present action and the prior determination. An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation"..... 55-47

– A party seeking to invoke the doctrine of collateral estoppel need not have been a party to the prior action..... 55-47

"Collateral estoppel does not prevent relitigation of a ruling that was an alternative basis for a trial-level decision where an appellate court affirmed the decision without addressing that ruling";

"where an alternate holding by the trial court could support its judgment but such holding is not considered upon appeal there is no collateral estoppel as to the unreviewed ground";

"if an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground"..... 55-48

– Collateral estoppel of interlocutory judgments..... 55-51

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A court's dicta is not subject to the preclusive effect of the doctrines of res judicata, collateral estoppel, or law of the case.... 55-59

56. Mountain View Coach Lines, Inc. v. Storms; Interdepartmental Stare Decisis

Stare Decisis 56-2

– Stare decisis only addresses legal questions not those involving factual issues 56-4

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..... 56-6

Mountain View Coach Lines, Inc. v. Storms, Interdepartmental Stare Decisis 56-7

The law of the originating intermediate appellate court governs when an appeal is transferred from one appellate court to another 56-9

57. Remittitur

[a] In General 57-2

The lower court must strictly conform to the remittitur on remand 57-2

– In a rare body of law, the Appellate Division reassigned no fewer than nine decisions from the same Justice for "continuing to flagrantly ignore this Court's precedent" 57-5

In order to avoid an unjust result upon remittitur a court may in cases of equity mold its procedure and adapt its relief to the exigencies of any new facts or conditions that were not before the appellate court that made and entered the remittitur..... 57-8

[b] Reversal on Appeal Leaves the Parties Wholly Unaffected by any Previous Adjudication Unless the Appellate Court Limits the Scope of the Remand 57-11

Reversal on appeal leaves the parties wholly unaffected by any previous adjudication unless the appellate court limits the scope of the remand 57-11

– "It is fundamental that the reversal of an order upon appellate review restores the party who prevailed on appeal to the position that he or she enjoyed prior to entry of the order appealed from" 57-11

In the absence of an express direction for a limited trial, the granting of a new trial should be construed to require a new trial generally..... 57-13

An order of the Appellate Division that reverses a judgment upon questions of fact and law determines the scope of the new trial it has granted..... 57-15

The term "insofar as appealed from" in a reversal of a judgment is not limiting language as to the issues to be heard on retrial 57-17

Definition of remand: "in accordance *herewith*" 57-18

The appropriate remedy if the remittitur is erroneous or unclear is an application to amend it 57-19

A remittitur to make detailed findings to supplement the trial court's determination does not expand the evidentiary basis to make more detailed findings 57-21

Intelligent appellate review requires a concise, clear explanation from the Supreme Court for its determination; remittitur is necessary where one sentence merely references the factors to be considered without explanation or analysis 57-22

58. CPLR 4017: The Reviewability of General Objections and Specific Objections

[a] In General 58-2

The obligation falls on the objecting party to state the ground for its objection 58-3

Just as failure to timely object or move to strike inadmissible evidence is fatal to and places such error beyond the scope of review on appeal an unchallenged charge becomes the applicable law of the determination of the case; a timely objection is a necessary predicate of preservation 58-6

Where a party has not had an opportunity to object 58-9

The contention that a court deprived a party of a fair hearing by concluding the hearing during a party's cross-examination must be preserved by an objection or an offer of proof at that time and not wait until after an adverse determination is issued 58-10

Evidence though not competent that is received without objection may be relied upon to establish a fact in controversy and may not be challenged on appeal 58-12

– A court is presumed to have considered only competent evidence 58-13

Objection must be clear to apprise the court of the nature of the objection; the requirement of a timely exception is not merely a technicality, its function "is to give the court and the opposing party the opportunity to correct an error in the conduct of the trial" 58-14

An objection is not necessary where the court could not have corrected its error 58-15

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An objection must be specific to preserve a question of law; the word "objection" alone fails to preserve the question for appeal ... 58-19

– Specificity requirement of CPLR 4401 in a motion for a judgment as a matter of law 58-20

Where a party objected to the admissibility of evidence on one ground no new grounds may be considered on appeal 58-22

A general objection is good only if it is sustained; it will be upheld if any ground existed for its exclusion the ruling will be assumed to have been on the proper ground; subject to the exception of inherent incompetency of the proffered evidence, a general objection is to no avail when overruled if not followed by a specific objection directing the court and the adversary to the particular infirmity of the evidence 58-23

If a specific objection is sustained, the ruling must be sustained upon that ground unless the evidence excluded was in no aspect of the case competent, or could not be made so; if the ground at trial was invalid, the objector will lose even if another valid ground existed 58-29

If a specific objection on one ground is overruled and the evidence is admitted other possible grounds cannot be considered 58-30

Once a general objection has been overruled and the evidence is received the objector cannot argue a specific ground on appeal ... 58-32

An objection to the competency of a witness must raise the question in some way which makes the intention clear; the simple objection that the evidence is incompetent is not specific enough 58-37

Continuing Objections 58-38

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Failure to make an offer of proof leaves the issue not preserved for appeal 58-41

An offer of proof must be clear and unambiguous when a court sustains an objection to exclude evidence 58-43

When and how an offer of proof is made 58-45

[d] Objections in Matters Involving Multiple Theories of Liability Submitted to a Jury which Is Instructed to Render a General Verdict Only 58-46

In instances where multiple theories of liability were submitted to the jury which is charged with returning a general verdict only, a judgment entered on a verdict in favor of the plaintiff must be reversed when the proof was insufficient for submission as to one or more of those theories;

concern over the impossibility of determining whether the general verdict was predicated on a finding in plaintiff's favor on one of the claims which lacked supporting proof and should thus not have been submitted to the jury thereby "forcing appellate courts to engage in speculation to determine whether the error affected the jury's verdict";

"one exception upon the same ruling is as good as two" 58-46

– While "reversal generally is required when a general verdict sheet has been used and there is an error affecting only one theory of liability reversal is not required where defendant, as the party asserting an error resulting from the use of the general verdict sheet, failed to request a special verdict sheet or to object to the use of the general verdict sheet" 58-49

59. Decedents: Commencement of Actions and Appellate Review

The dead cannot sue nor be sued, rendering such an action a nullity from its inception, an appellate court has no jurisdiction to entertain an appeal 59-2

Death of a party divests a court of jurisdiction and stays proceedings pending the substitution of a representative for the decedent; any determination prior to substitution is generally a nullity; the decedent's attorney has no standing to bring an appeal 59-3

Death of a party renders academic his or her motion for a preference due to age 59-6

A motion for substitution pursuant to CPLR 1021 is the method by which the court acquires jurisdiction" over the deceased party's personal representative; an order issued before such substitution is a nullity and must be vacated, the Appellate Division has no jurisdiction to hear an appeal from the order..... 59-7

60. An Article 78 Application which Is in the Nature of Prohibition Is Unavailable where an Adequate Remedy Exists by Way of an Appeal

Nature of the Writ of Prohibition..... 60-2

An Article 78 application for relief in the nature of prohibition may not be had where an adequate remedy exists by way of an appeal; writs of mandamus, prohibition, and certiorari do not lie to review an appealable order or to correct an alleged error of law, the proper remedy is to appeal the final order or judgment to the proper appellate court 60-6

61. The Intervenor on Appeal

An intervenor becomes a party to the action even after original appellant has discontinued the appeal but the intervenor acquires no rights greater than a party 61-2

62. Appeals Involving Administrative Agencies

Administrative regulations will be upheld so long as they "have a rational basis and are not unreasonable, arbitrary, capricious or contrary to the statute under which [they were] promulgated"; "where an administrative determination is supported by a rational basis, it must be sustained even if a reviewing court would have reached a different result"..... 62-2

The scope of judicial review of administrative sanctions tests whether the sanction shocks the judicial conscience, if it does it constitutes an "abuse of discretion"; the Appellate Division has no discretionary authority or interest of justice jurisdiction to review a penalty imposed in an Article 78 proceeding 62-5

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Where standing is claimed based upon administrative action a petitioner must show harm greater than that to public at large and that the injury falls within the zone of interest contemplated by the statute..... 62-15

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Definition of amicus curiae; intervenor..... 63-2

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64. Appellate Practice and Family Court

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FCA §§ 1111, 1112

Appeals to the Appellate Division from Family Court Proceedings 64-2

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[b] The Family Court Act § 1113, Time of Appeal; Family Court Act § 1118, Applicability of Civil Practice Law and Rules 64-5

The CPLR does not automatically apply to the Family Court act but rather only in appropriate situations where Family Court Act Article 11 (Appeals) is silent 64-5

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Definition and instances of dispositional orders and nondispositional orders 64-11

A nondispositional order is appealable as of right in abuse or neglect cases 64-16

No appeal lies as of right from fact finding nondispositional orders in permanent neglect proceedings 64-18

– "Family Court Act § 1112(a) creates an exception and allows an appeal as of right 'from an intermediate or final order in a case involving abuse or neglect', which has been interpreted 'to apply to abuse and neglect cases brought pursuant to Family Ct. Act *article 10*, which may involve immediate risk to children [but not] to permanent neglect cases brought pursuant to *article 6*' " 64-19

The Appellate Division may grant permission to appeal sua sponte from a nondispositional order 64-20

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An order staying a petition is not appealable as of right 64-22

A reference to a hearing is not a final order of disposition that is appealable as of right 64-23

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– "Objections from nonfinal orders made by a Support Magistrate are typically not reviewed unless they could lead to irreparable harm" 64-28

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– Family Court's order modifying visitation pending a hearing on all issues before the court is not a final order 64-31

– An order barring a party from filing future petitions without permission regarding custody and visitation is not appealable as of right 64-31

– A finding of contempt scheduled for "continued dispositional hearing" is not appealable as of right 64-32

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