

# PRESERVATION AT TRIAL AND POST-TRIAL MOTIONS

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## Preservation at Trial and Post-Trial Motions: *An Appellate Perspective*



### Introduction

- The Scope of Appellate Review
- The Policy Underlying the Preservation Rule
- Significance of Preservation at Trial and the Trial Transcript

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## Motions in Limine

- Evidentiary rulings on motions in limine are considered “advisory” and not typically reviewable (Chateau Rive Corp. v Enclave Development Associates, 283 AD2d 537, 537 [2d Dept 2001]).
- Merely moving in limine before trial does not necessarily preserve the objection for appeal.
- When the Court reserves decision, ensure that a ruling is ultimately placed on the record.



## Objections

- Must be timely
- Must be specific
- Must result in an unambiguous ruling
- Consider an alternative remedy



## Pre-Verdict Motions

- Mistrial motions or motions for continuance (CPLR 4402)
- Motion for Judgment During Trial (CPLR 4401)



## Jury Charges

- CPLR 4110-b
- Proposed Jury Charges and Charge Conference
- Unpreserved “Fundamental” Errors in a Jury Charge



## Verdict Sheet

- CPLR 4111; CPLR 4111(b) itemized verdicts
- General verdicts should be avoided as they may create preservation problems.



## Summations

- Improper remarks by opposing counsel
- Be prepared to object and/or request a mistrial



## During Deliberations

- Juror Notes Indicating Confusion Or Inability To Agree
- Deadlock
- High-Low Agreements

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## After the Verdict

- Inconsistent Verdict?
- Poll the jury
- Oral Motions And Request A Briefing Schedule

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## Post-Trial Motions – Grounds

- Judgment As A Matter of Law
- New Trial When The Verdict Is Contrary To The Weight Of The Evidence
- New Trial In The Interest Of Justice/ Juror Confusion
- New Trial Unless Adversary Stipulates to Reduction or Increase of Damages
- Collateral Source Hearing

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## Post-Trial Motions- Judgment As A Matter of Law

- “There is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence at trial” (Capwell v Muslim, 80 AD3d 722, 723 [2d Dept 2011])
- A failure to move on this ground may preclude appellate review

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## Post-Trial Motions- Weight Of The Evidence

- “[T]he evidence so preponderate[d] in favor of the [moving party] that [it] could not have been reached on any fair interpretation of the evidence” (Killon v Parrotta, 28 NY3d 101 [2016])
- Must a post-trial motion on this ground be made? The pendulum swings back in the Second Department - (Evans v New York City Tr. Auth , 179 AD3d 105 [2d Dept 2019])

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## Post-Trial Motions- Interest Of Justice

- “A motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court’s rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise” (D’Amato v WDF Development, LLC, 2020 NY Slip Op 02761, 2020 WL 2462442 [2d Dept May 13, 2020])
- A cautionary tale: Kleiber v Fichtel (172 AD3d 1048 [2d Dept 2019])

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## Post-Trial Motions- Excessive or Inadequate Damages

- CPLR 5501(c)- Awards that “deviate materially from what would be reasonable compensation”
- Preservation considerations

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## Post-Trial Motions- Collateral Source Hearing

- CPLR 4545 needs to be pleaded as an affirmative defense
- The request for the hearing may be “timely made any time before the judgment is entered” (Firmes v Chase Manhattan Automotive Finance Corp., 50 AD3d 18, 32 [2d Dept 2008])
- The Defendant Bears The Burden To Prove With “Reasonable Certainty” That Costs Or Expenses Have Been Or Will Be Reimbursed

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## The Notice of Appeal

- This requirement is jurisdictional
- Statutory requirements concerning: (1) the contents; (2) timing; and (3) service.

A background image of a courtroom with wooden paneling, a large chandelier, and rows of empty seats. The text is overlaid in the center.

## Preservation Considerations In A Socially-Distant Jury Trial?



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