WARREN COUNTY BAR ASSOCIATION, INC.

SPRING/SUMMER 2026 **TIPSTAFF** Volume VII Issue 2



Hon. Nicole Fish, President

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Dear Colleagues:

Welcome to the Spring/Summer Edition of Tipstaff. As our fiscal year comes to an end, we have a lot to look forward to next fiscal year and much to be proud of from the past few months.

Our *Cabin Fever* event in January brought another great turnout with stories, beverages, and laughs. This event has been a great relief from the cold of the winter months to get us all back out and socializing and is sure to be a continuing annual event.

The Foundation's *March Mixer* event became a *Spring Mixer* in April, which was well attended by over 60 attendees, and netted over 17,000. This benefit is hosted to provide community grants, to assist local students studying law, and to support educational programs selected by the Foundation. Thanks to the Foundation and their team. A special thank you to Judge Teresi and Matthew J. McAuliffe, Esq. for doing the MC work and the auction.

Our Law Day ceremony was held at the Glens Falls Country Club. Dr. Richard Leach received the Liberty Bell award. The contributions that Dr. Leach has made to our community and his accomplishments were worthy of this honor. Thank you to the Law Day committee for another great year for all the planning and preparation.

Congratulations to the Glens Falls High School Mock Trial Team on their win this year! Another special thank you to Hon. Glen T. Bruening for once again chairing this committee and to all judges, attorneys, coaches, court personnel, and everyone who volunteered their time throughout the tournament. This is my personal favorite, as I love watching the student growth and achievement week by week.

The annual dinner was held on May 18th at the Lake George Club and was very well attended. Thank you to all our officers and directors for your service now and moving forward.

I would like to welcome our newest members: Anna Bowden, Esq., Jordyn Conway, Esq., Kristin Kurish, Esq., and John Mc Carron, Esq. Best wishes to Vanessa Hutton, Esq., the new President of the Association. Vanessa has an amazing vision for moving the Bar Association forward and will be a terrific President. Thanks again to all who contribute articles and case decisions to the *Tipstaff*. Keep those articles coming.

Finally, I want to express my sincere gratitude to our Executive Director, Kate Fowler. Kate has made my job as President a smooth transition with her knowledge, planning, and attention to detail. I could not have done it without you!

I hope that everyone has an amazing summer and enjoys some time away. I look forward to seeing everyone at the Fall "Welcome Back Mixer."

Best wishes, Nicole

CABIN FEVER 2026!











45 hearty souls gathered at 21 Ridge to celebrate the "new year" on January 22, 2026. Pizza and beverages were welcome distractions from what proved to be a very long, cold winter!

by James Cooper, Esq.



James Cooper is a frequent contributor to the *Tipstaff*.

Star Chamber

I attended a CLE lecture sponsored by the Schenectady County Bar Association as it does each Spring about real property practice. The featured speaker then was attorney Peter Coffey of Schenectady, a dynamic public speaker who was also regarded as a spectacular performer in our appellate courts. Mr. Coffey asserted that all freedoms we enjoy originated from our predecessors' rights in land. The macro level of land rights arising in the late Middle Ages supports such a conclusion.

Under feudal law, all the land was owned by the King. He derived his wealth and power by granting estates to his vassal lords who held their lands *per baroniam.* Such grants vested the right of possession in exchange for pledges of loyalty, (fealty) to the King, a pledge to provide military service, revenues and other services to the King. The rights were inheritable and virtually permanent. Treason resulted in reversion of the rights of occupation to the King. Lands burdened by the obligation to furnish military service were derived from the Latin, *feodum,*. (fee, fealty, fief and fiefdom). That the concept of rights originate from legal possession of land requires understanding that the modern concept of rights had no applicability to commoners in the late Middle Ages, but to the baronial class, was real and entrenched. The lived expectations of generations of barons made them think that King John had ignored their rights justifying their rebellion, resulting in *Magna Carta*.

Vassals' legal status under feudal law come from the Latin, *tenare* - (to hold), from which English nouns 'tenant' and 'tenure' evolved. The lords holding lands directly from the King came to be called barons or tenants-in-chief. The estates possessed by a lord were called a manor. The lands he occupied with family and retainers were his *demesne*, (domain), a law French word to describe those belonging to a lord. Barons could and did subdivide portions of their grants to their vassals with reciprocal pledges of fealty and military service, called subinfeudation. Tenants by subinfeudation were knights, who held some classes of peasants in permanent bondage to the manor to produce the means for the vassal to meet his obligations to his overlord and to marshal generational wealth. Another class of peasants, 'freeholders', possessed lands free of feudal obligations, more like our concept of fee-simple-absolute rights. That term continued in various usages and forms as the law evolved and was frequently used in America's colonial period to describe those with the right to vote and the right to be a juror.

Rudimentary systems of justice evolved in England by Celts even before the influence of the Roman conquest and later by Germanic settlement of southern England. Saxon immigration ended about 600 AD. The name, 'Sussex' evolved from 'south Saxon'. Saxon immigrants may have brought their cultural institutions including something like a justice system from Westphalia, Saxony. There is some confused evidence that the Vehmic Courts, *Vehmgerichte,* in Westphalia were composed and conducted in secret by secret societies organized as vigilantes. Four passwords were employed in the trial proceedings conducted to correct serious societal offenses. Death sentences could be imposed, not only for the accused, but for any unfortunate who witnessed the proceedings and didn't know the passwords.

Under Anglo-Saxon law, resolution of rights was before the lord or his agent in court. Originally there were no juries, no evidence in the sense we understand the term and a two stage process like a civil grand jury before the court hearing the case which determined if there was a sufficient basis to continue to a second stage trial before its decision. Early records indicate that most trials arose from rights claimed involving occupation of land. The evolution of criminal justice or resolution by trial by witnesses, oath, ordeal and battle is beyond the scope of this article.

The English had centuries to develop a judicial system after the Saxons settled in Sussex and Wessex. After the passage of almost a thousand years, they came to believe that their common law courts and the equity courts were inadequate. Henry VII in 1487 created a royal court to remedy these beliefs which came to be known as the Star Chamber. Parliament[1] had a limited role by authorizing its creation but no role in its procedures. It was composed at the King's pleasure by his Privy Councillors, some common law judges and high officers of state. It met at the royal palace of Westminster in a room with a blue ceiling decorated with gold stars. Originally the Star Chamber acted as an appellate court created to remedy injustices occurring because of influence in outcomes brought about by the upper classes' privileges and connections to the subject matter of the cases heard in courts that they controlled within their manors. It had no jury. Due process as we know it was practiced in a limited sense as the rights to counsel and to call witnesses originated there. The court could hear matters without petition on its own initiative and if it found a petition meritorious, proceed without the procedural protections which had evolved in the common law courts. There was

[1] Parliament- from the French, '*parley*'.

no right to appeal. The sentences imposed could not include death, but could include maiming by facial branding, ear lopping, fines, imprisonment, whipping and the pillory. There is academic disagreement whether torture was authorized to exact confessions. An accused was placed in an untenable situation, being forced to testify under oath regarding the accusation, then to be charged with perjury if the answers were deemed untruthful or to be prosecuted for his silence as contempt of court. Its informality allowed equitable dispositions to punish for wrongdoing and offenses perceived to be morally reprehensible, even if authorized by law. It was a court applying criminal equity. Equity then meant that guilt and punishment were liberally applied.

Notwithstanding the severity described above, the court was very well regarded in the century of the 1500s. Its speed and flexibility were used effectively to root out perjury, slander, and violation of the peace in various aspects. It originated the crimes of attempt and conspiracy. The famous lawyer and Member of Parliament, Sir Edward Coke, said that it was the most honorable court in the Christian world. But then, its original purposes to redress the excesses of the nobility changed. The informality and equitable discretion of the institution consistently became a vehicle for abuse of political enemies under the reign of Henry VIII. Toward the end of the reign of James I, the informality of proceedings allowed the utilization of the court for political purposes and to oppress Puritans, some of whom were of the baronial class. Their baronial status would have protected them from such punishments in the common law courts.

King Charles I creatively used the Star Chamber in abusive and unjust ways to punish enemies. An example is that juries in the common law courts who had ruled adversely on matters affecting government minions were summoned to the Star Chamber to be fined or imprisoned. Charles I used the court as a mechanism to harshly implement his perception of Divine rights. He circumvented Parliament's financial control with excessive Star Chamber fines to the royal treasury. Resort to the court by the King and his government to exercise reactionary powers from the Plantagenet era became a primary reason why Parliament put an end to the Star Chamber by the Habeas Corpus Act of 1640. Even then, the King had no veto power over Parliament's statutes, only the exclusive right to call Parliament to assemble. Other reforms were passed by Parliament and forced on the King as Parliament reasserted control of governmental purse strings. These disputes foreshadowed a civil war. Charles I and his royalist supporters were defeated. Charles I was beheaded for treason, but the underlying cause was his dictatorial use of the law. After Oliver Cromwell died, Charles II assumed the throne continuing the Stuart dynasty. He resumed some of Charles' abuses. His brother, James II, succeeded him. Parliament, remembering Stuart abuses, enacted the English Bill of Rights and the Declaration

of Rights in 1688:

> **"That excessive Baile ought not to be required**
> **nor excessive Fines imposed nor cruell**
> **and unusual Punishments inflicted."**

James II fled to France in the Glorious Revolution in which William of Orange and James II's daughter, Mary, were enthroned, but their powers further limited by Parliament. The Devine rights of Kings was effectively eliminated and Parliament's assembly fixed on a regular schedule as the monarch could no longer delay its convening.

It is appropriate to note in this year of celebration of 250 years of America's existence, that we inherited a thousand years of British experience and law. We are gifted with their wisdom and folly. Part of that was what was learnt concerning the abuses of the Star Chamber which inspired some of our most cherished constitutional rights: protection against self incrimination compelled testimony under the Fifth Amendment; protection from excessive bail and cruel and unusual punishments in our Eighth Amendment. Probably the greatest lesson or gift to us from the legacy of the Star Chamber is knowing that if a judicial system is flexible enough to punish based on some arbitrary and capricious consensus of judges, without due process, forms, definitions, precedents, and rules that make the law just, it is doomed to devolve into cruelty and abuse. While it is universally human to crave a legal system that summarily punishes bad people, George Santayana, the philosophy professor at Harvard who was Judge Learned Hand's mentor, noted that those who neglect the lessons of history are condemned to relive them.

Jim Cooper
April 2026

I was unable to find a book about the Star Chamber. This article will not pass muster for a serious historian, but should suffice for your general knowledge.

Crane Brinton, John Christopher and Robert Lee Wolff, A History of Civilization, 2d ed. Volume One,, Prentice-Hall Inc. 1960;
Star Chamber, Adam Augustyn, Encyclopaedia Britannica, October 2025;
Star Chamber Court, Google Search; search date March 2026
Star Chamber, Wikipedia, search date March 2026
Star Chamber Court, YouTube, search date April 2026
Timothy Whipple, 'Anglo Saxon Trials', "The Knights Templar" winter 2025
Laughing Lion pubs, Littleton, CO.

THANK YOU TO CHICAGO TITLE/FIDELITY NATIONAL TITLE!
Breakfast CLE ~ February 10, 2026













Real Property Update: Plotting Courses for Legal Descriptions; 1031 Exchange Practices & Updates; and the Latest Global MLS Contract

Many thanks to Donna Seymour, Assistant Vice President ~ Chicago Title, and presenters: Marie C. Flavin, Esq., Kenneth M. Schwartz, Esq., George R. Slingerland, Esq. and Ryan Vassar, Esq.

THANK YOU TO PROF. MICHAEL L. FOX, J.D. ~ MOUNT ST. MARY COLLEGE
Luncheon CLE ~ April 9, 2026 at The Tavern







Prof. Michael L. Fox, J.D. enlightened us with a great deal of important information at this CLE entitled: *Cybersecurity Ethics Update for 2026 - Being Aware, Being Prepared.*





From The Judge's Chambers

Martin D. Auffredou, JSC
Warren County Supreme Court
Warren County Municipal Center
1340 State Route 9, Lake George, NY 12845

DECISION AND ORDER
Index No.: EF202 I-69058
RJI No.: 56-l-2021-0368

STATE OF NEW YORK SUPREME COURT
COUNTY OF WARREN

LYNNE A. ENGLERT,

Plaintiff,

-against-

JOSEPH RUSSELL; BOLTON CARMELA, LLC; and ALEX MAXAM, Individually and Doing Business as MAXAM'S LANDSCAPING,

Defendants.

DECISION AND ORDER

Index No.: EF2021-69058
RJI No.: 56-1-2021-0368

Appearances:

The Towne Law Firm, P.C., Albany (*Douglas J. Goglia* of counsel), for plaintiff.

Hacker Murphy, LLP, Troy (*John F. Harwick* of counsel), for defendants.

AUFFREDOU, J.

Motion by defendants for (1) partial summary judgment on the issue of damages, and (2) to preclude the testimony of plaintiff's expert at trial on the issue of replacement cost damages; and cross-motion by plaintiff for leave to amend the complaint. Upon the papers in support of the motion (NYSCEF Doc. Nos. 246-267), the papers in opposition to the motion and in support of the cross-motion (NYSEF Doc. Nos. 271-272), the papers in opposition to the cross-motion and further support of the motion (NYSCEF Doc. No. 273) and the papers in reply on the cross-motion (NYSCEF Doc. No. 278), decision is rendered as follows.

The facts of this case are set forth in this court's decisions and orders entered September 30, 2024 and May 2, 2025. In brief, plaintiff and defendant Bolton Carmela, LLC (hereinafter "BCLLC") are the owners of contiguous, improved parcels in the Town of Bolton, Warren County and, in mid-March 2021, plaintiff found that 34 trees had been felled on her property along its shared boundary with BCLLC's property. Plaintiff then commenced this action, alleging that BCLLC's principal, defendant Joseph Russell, had hired defendant Alex Maxam,

Individually and Doing Business as Maxam's Landscaping, to fell the trees, asserting causes of action in trespass and negligence, and seeking damages as allowed under RPAPL 861 (1), to wit, $250 per tree, treble the stumpage value of each tree and the value of "permanent and substantial damage caused to the land" by the trees' removal. Among the damages sought in the "permanent and substantial damage caused to the land" category, plaintiff seeks damages for the costs to remediate drainage and erosion issues that she alleges were "a result of [the alleged] violation," and the replacement value of the trees (RPAPL 861 [1]). Plaintiff has submitted a "tree replacement appraisal report" purportedly prepared by a Richard St. Armand of Saratoga Land Management Corporation on May 8, 2024 that concludes, based on the "trunk formula method," that the replacement value of the trees is a staggering $465,000.[1] Defendants now seek partial summary judgment declaring that the cost to replace the trees is not among the damages allowed under RPAPL 861 (1) and precluding St. Armand from testifying to his conclusions on that issue.

Plaintiff's motion asks this court to "revisit its earlier Decisions and Orders denying [her] motion to amend" the complaint to include a claim for punitive damages. In essence, plaintiff seeks reargument of the court's May 2, 2025 decision and order. Insofar as a jury trial in this action has long been scheduled to commence on February 2, 2026 and the motion and cross-motion were interposed on December 5 and 16, 2025, respectively, the parties agreed that the court should address the motion and cross-motion in the manner of motions in limine.

[1] St. Armand's identity and the fact that he is a forester are gleaned from plaintiff's supplemental bill of particulars (NYSCEF Doc. No. 261). The report itself (NYSCEF Doc. No. 262) does not mention his name. Nor does it describe what "Saratoga Land Management Corporation" is or what it does. St. Armand's qualifications to render the conclusions reflected in the report are not in the report and are not otherwise found in the record. Nor are there averments in the report that the conclusions reached therein are accurate to a reasonable degree of professional or scientific certainty.

Defendants' claims present a question of statutory construction, which is a question of law for resolution by the courts and is thus an issue appropriate for summary judgment (*see Mills v Chauvin*, 103 AD3d 1041, 1045 [3d Dept 2013]; *People v Spencer*, 89 AD3d 1156, 1158 [3d Dept 2011], citing *Bush v Delaware, Lackawanna & W. R.R. Co.*, 166 NY 210, 226 [1901]). This court finds defendants' position that tree replacement costs are not recoverable under the statute to be compelling and in line with common principles of statutory construction. However, in *Fair Chase Holdings II, LLC v County of Dutchess* (165 AD3d 1237 [2d Dept 2018]), the Appellate Division, Second Department, held to the contrary, at least implicitly. There being no precedent on the question from the Third Department, this court believes itself bound by the Second Department's determination (*see Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664-665 [2d Dept 1984]). That said, the costs recoverable in *Fair Chase* were far more limited than those sought here under the "trunk formula method," which purports to capture the value of the tree for such things as aesthetics, visual/privacy buffers, erosion control, snow deposition control, wind breakage and dust reduction, whereas the Court in *Fair Chase* sanctioned recovery of only "the retail price of replacement trees . . . , delivery, soil amendment, planting and mulching" (*Fair Chase Holdings II, LLC v County of Dutchess*, 50 Misc 3d 371, 379 [Sup Ct, Dutchess County 2015] [replacement costs included in stumpage value, not permanent and substantial damage to land], *revd* 102 AD2d at 664-665, *supra* [plaintiff not required to seek replacement costs as part of stumpage value]). The court finds that an award of damages upon these other bases of recovery is not compelled by *Fair Chase* and not intended to be included in "permanent and substantial damage caused to the land" (RPAPL 861 [1]). Thus, the court concludes, the trunk formula method is not a permissible means of determining the cost to replace removed trees under the statute. Moreover, the court finds that the figure arrived at

under the trunk formula method—being the lion's share of the value of plaintiff's entire property—is unreasonable.[2] A discussion of these holdings follows.

RPAPL 861 (1) provides:

> "If any person, without the consent of the owner thereof, cuts, removes, injures or destroys, or causes to be cut, removed, injured or destroyed, any underwood, tree or timber on the land of another or on the common or other land of a city, village, town or county, or damages the land in the course thereof, an action may be maintained against such person for treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation. Such reparations shall be of such kind, nature and extent as will reasonably restore the lands affected by the violation to their condition immediately before the violation and may be made by physical restoration of such lands and/or by the assessment of monetary payment to make such restoration."

RPAPL 861 (3) provides, in turn:

> "For the purposes of this section "stumpage value" shall mean the current fair market value of a tree as it stands prior to the time of sale, cutting, or removal. Stumpage value shall be determined by one or more of the following methods: the sale price of the tree in an arm's-length sale, a review of solicited bids, the stumpage price report prepared by the department of environmental conservation, comparison with like sales on trees on state or private lands, or other appropriate means to assure that a fair market value is established within an acceptable range based on the appropriate geographic area."[3]

Defendants argue that replacement costs are not recoverable under the statute because they are not an appropriate measure of stumpage value and the statute does not otherwise provide for recovery of replacement costs. Indeed, controlling precedent from the Third Department holds that stumpage value does not include replacement costs (*see Tverskoy v Ramaswami*, 83 AD3d 1195, 1197-1198 [3d Dept 2011]). However, plaintiff's claim is, as noted, that replacement costs are recoverable as a component of permanent and substantial damage to the

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[2] Defendants submitted a retrospective appraisal report valuing plaintiff's property at $520,000 as of January 17, 2021, the first date on which plaintiff can say that her trees were missing. Plaintiff has not had the property appraised.

[3] RPAPL 861 (2) provides a defense to the imposition of treble damages that is not at issue or otherwise implicated on the motion or cross-motion.

land.[4] Defendants counter that the statute, as it is to be read under common principles of statutory construction, does not admit of an award of costs to replace the trees, and the court is inclined to agree.

When construing a statute, the courts are concerned with effectuating the intent of the Legislature, the best indicator of which is the statute's plain language (*see Avella v City of N.Y.*, 29 NY3d 982, 434 [2017]). "'[A] statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other'" (*id.*, quoting *Matter of New York County Lawyers' Assn. v. Bloomberg*, 19 NY3d 712, 721 [2012]). "Where 'the Legislature uses different terms in various parts of a statute, courts may reasonably infer that different concepts are intended'" (*Level 3 Communications v Clinton County*, 114 AD3d 115, 119 [3d Dept 2016], *lv denied* 29 NY3d 918 [2017], quoting *Rangolan v County of Nassau*, 96 NY2d 42, 47 [2001]). "'[W]here the Legislature enacts a specific provision directed at a particular class, and a more general provision in the same statute which might appear to encompass that class, the specific provision will be applied'" (*Level 3 Communications*, 144 AD3d at 120, quoting *Matter of Robert Bruce McLane Assoc. v Urbach*, 232 AD2d 826, 828 [3d Dept 1996] [internal quotation marks and citation omitted]; *see* McKinney's Cons. Laws of NY, Book 1, Statutes § 238). "[A] court cannot by implication supply in a statute a provision that it is reasonable to

[4] The court does not read *Tverskoy* to go so far as to affirmatively hold that replacement costs are recoverable as a component of permanent and substantial damage to the land. Nor does it clearly state whether replacement cost damages may appropriately be determined via the trunk formula method. Its utility in the resolution of this issue is thus limited. *Western N.Y. Land Conservancy, Inc. v Cullen* (66 AD3d 1461 [4th Dept 2009]) is similarly unhelpful. Though the Court in *Cullen* sanctioned recovery of "restoration costs" awarded after a trial—which apparently followed plaintiff's election of that remedy in lieu of treble stumpage value (*see also Tverskoy*, 83 AD3d at 1196-1197; *Fair Chase*, 165 AD3d at 1238-1239; *Fair Chase*, 50 Misc 3d at 376)—there is no evidence that the Court was confronted with the question that is before this court. And in any event, it cannot be gleaned from the *Cullen* decision whether the "restoration costs" awarded by the jury included the replacement of trees, since the damage to the land involved there included defendant's laying down stone to make a road and excavating around pond to expand it; or, if the "restoration costs" did include tree replacement, how much of the figure awarded was specifically for tree replacement and what considerations may have gone into that award. Notably, the trunk formula method was not mentioned in the decision.

suppose the Legislature intended to omit" (*Matzell v Annucci*, 183 AD3d 1, 6 [3d Dept 2020]; *see* McKinney's Cons. Laws of NY, Book 1, Statutes §74; *Pajak v Pajak*, 56 NY2d 394, 396-397 [1982]; *Danskammer Energy, LLC v New York State Dept. of Envtl. Conservation*, 76 Misc 3d 196, 249 [Sup Ct, Orange County 2022]).

While it is true that "land" may generally be considered to include that which grows on it (*see* Black's Law Dictionary [12th ed 2024], land; Merriam-Webster.com Dictionary, land [https://www.merriam-webster.com/dictionary/land]), here, the Legislature has specifically provided that one's entitlement to recovery when one's tree is unlawfully felled is treble stumpage value and/or $250 per tree (*see* RPAPL 861 [1]). It then devotes an entire subdivision to the various ways in which stumpage value might be established (*see* RPAPL 861 [3]; *Tverskoy*, 83 AD3d at 1197-1198). Separate and apart from these measures of damages, the statute permits recovery for permanent and substantial damage to the land that occurs in the course of cutting down or removing the tree (*see* RPAPL 861 [1]). Nowhere in the statute is the cost to replace the unlawfully felled tree mentioned, and the plain language of the statute distinguishes the cutting, removal, injury or destruction of a tree from the damage that may be caused to the land thereby (*see* RPAPL 861 [1]). The structure of this statute and the Legislature's choice to specifically address damages for the loss of a tree without including replacement costs compels the conclusion that the Legislature intended to exclude that measure of damages as pertains to the loss of a tree and militates against the inclusion of other damages related specifically to the loss of a tree amidst those recoverable for the more general injury of damage to land (*see* McKinney's Cons. Laws of NY, Book 1, Statutes §§ 74, 238; *Matzell v Annucci*, 183 AD3d at 6; *Level 3 Communications*, 114 AD3d at 119-120).[5]

[5] To the extent that the court's observations about the statute that underpin this conclusion may be viewed as inconclusive of the issue, they at least render the meaning of "land" as used in RPAPL 861 (1) ambiguous under the

While the court is bound to permit plaintiff to seek replacement costs as a component of permanent and substantial damage to the land under *Fair Chase*, all that was allowed in that case was "the retail price of replacement trees . . . , delivery, soil amendment, planting and mulching," the court is bound by that case to permit no more than that, and the above principles of statutory construction compel the conclusion that the Legislature did not intend to allow recovery for such ethereal matters as aesthetics, visual/privacy buffers, erosion control, snow deposition control, wind breakage and dust reduction (*Fair Chase*, 50 Misc 3d at 379; *see* McKinney's Cons. Laws of NY, Book 1, Statutes §§ 74, 238; *Matzell v Annucci*, 183 AD3d at 6; *Level 3 Communications*, 114 AD3d at 119-120; *Fair Chase*, 102 AD2d at 664-665).[6] To the extent that a replacement cost appraisal using the trunk formula method accounts for the supposed values of these things, it is not to be permitted.

Other grounds to disfavor the trunk formula method as a means of establishing damages under RPAPL 861 (1) exist. First, the statute allows for only those reparations that would "reasonably restore the lands affected by the violation" (RPAPL 861 [1]). The court finds that plaintiff's employing a valuation method for the loss of 34 trees on a forested portion of plaintiff's property that results in a damages figure nearly equal to the full market value of the entire property is not reasonable, particularly where there is nothing in the record to show that plaintiff's property was devalued to that extent by the removal of the trees.

Moreover, the court is bound to avoid construing a statute in such a way as would yield objectionable, unreasonable, absurd or unjust results (*see* McKinney's Cons. Laws of NY, Book

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circumstances, making resort to legislative history appropriate, and the court notes that the Senate introducer's memorandum refers to treble stumpage value and $250 per tree as "[t]he maximum civil penalty" for the unlawful taking of timber (Senate Introducer's Mem in Support of 2023 Senate Bill S1783A, enacted as L 2003, ch 602 [bill jacket at 7]).

[6] The court notes that plaintiff's tree replacement appraisal report does not make clear how any of these things were measured or quantified.

1, Statutes §§ 141, 143, 145, 146; *DeTroia v Schweitzer*, 87 NY2d 338, 342 [1996]). Construing RPAPL 861 (1) so as to permit recovery for lost aesthetics, visual/privacy buffers, erosion control, snow deposition control, wind breakage, dust reduction and the like, and thereby inflate the value of lost trees to so great an extent is absurd, unjust, unreasonable for the reasons stated above and, therefore, objectionable. Defendants are thus granted partial summary judgment to the extent stated herein, and plaintiff is precluded from calling St. Armand at trial to testify about his trunk formula method appraisal of the cost to replace plaintiff's trees, except to the extent that such testimony would address the retail price of replacement trees, the costs to deliver, plant and mulch them, and the cost of any soil amendment necessary to these tasks.

Plaintiff's cross-motion for reargument of her prior motion for leave to amend her complaint is denied as untimely (*see* CPLR 2221 [d] [3]). Arguments not specifically addressed have been examined and determined to be without merit. Based upon the foregoing it is hereby

ORDERED that defendants' motion for partial summary judgment is granted in part; plaintiff may pursue replacement cost damages only to the extent that they are comprised of only the retail price of replacement trees, the costs to deliver, plant and mulch them, and the cost of any soil amendment necessary to these tasks; and the motion is otherwise denied; and it is further

ORDERED that defendants' motion for preclusion of the testimony of Richard St. Armand at trial is granted to the extent stated herein and otherwise denied; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that defendants' letter application, dated January 12, 2026, for adjournment of the trial and a conference to select a new trial date is denied; to the extent that plaintiff's letter to the court seeks bifurcation of the trial and a conference with the court, it is denied; and the jury trial shall go forward on all issues as scheduled on February 2, 2026 at 9:30 a.m.

The within constitutes the decision and order of this court.

Signed this 16th day of January 2026, at Lake George, New York.

ENTER:



HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to NYSCEF. Such uploading does not constitute service with notice of entry (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [2]).

Distribution:
Douglas J. Goglia, Esq.
John F. Harwick, Esq.

Englert v Russell
Warren County
Index No. EF2025-69058

DECISION & ORDER
Index No-EF2025 -73683
RJI No. 56-1-2025-0218

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

HUNTER CROFT and CHRISTINA CROFT,
Plaintiffs,

-against-

PREMIER ROOF SOLUTIONS, JAKE HELM and PINNACLE PROPERTIES, INC.,
Defendants.

DECISION AND ORDER

Index No. EF2025-73683
RJI No. 56-1-2025-0218

Appearances:

Marc E. Elliot, P.C., New York City (*Marc E. Elliot* of counsel), for plaintiffs.

Harris Beach Murtha Cullina PLLC, Albany (*Daniel R. LeCours* of counsel), for defendants.

AUFFREDOU, J.

Motion, in lieu of an answer, to dismiss the fourth, sixth and seventh causes of action in plaintiffs' third amended complaint, for failure to state a cause of action (*see* CPLR 3211 [a] [7]).[1] Upon the papers in support of the motion (NYSCEF Doc. Nos. 51-54), the papers in opposition (NYSCEF Doc. Nos. 55-63) and the reply (NYSCEF Doc. No. 64), the motion is granted.

The facts of this case are set forth in a prior decision and order of this court, entered July 15, 2025. In brief, plaintiff-homeowners engaged defendant Premier Roof Solutions (PRS), a Vermont corporation, to perform exterior renovations and repairs on their home in the Town of

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[1] Plaintiffs improperly designated the pleading at issue (NYSCEF Doc. No. 44) a "second amended complaint." The original complaint was filed on February 28, 2025. It was amended in short order, apparently by right, on March 3, 2025, by the filing of a pleading entitled "amended complaint" (NYSCEF Doc. No. 2) (*see* CPLR 3025 [a]). Thereafter, the parties stipulated to, among other things, plaintiffs' filing a second amended complaint (NYSCEF Doc. No. 4). The pleading filed pursuant to that stipulation on April 14, 2025, was, however, not denominated a "second amended complaint" but reused the moniker "amended complaint" (NYSCEF Doc. 5). That error appears to have been perpetuated in later filings—including the parties' later stipulation to plaintiff's filing another amended pleading, the pleading itself, and the papers on the motion hereinafter recited—since they all identified the subject pleading as a "second amended complaint" (NYSCEF Doc. Nos. 43, 44). The pleading at issue is the fourth complaint that plaintiffs have filed and is therefore their "third amended complaint."

Hague, Warren County. PRS subcontracted with defendant Pinnacle Properties, Inc. (PPI) to perform portions of the work, specifically replacing exterior decks, which was to be performed by nonparty Brett Kent, a carpenter. Both entities are solely owned by defendant Jake Helm. Plaintiffs' third amended complaint asserts various causes of action to recover monies paid for work that plaintiffs allege was inadequate and incomplete, including, as relevant here, claims for fraud and fraudulent inducement (fourth cause of action), for deceptive business practices (sixth cause of action) and to pierce the corporate veil (seventh cause of action).

> "'On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, [this court] must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory'" (*Hilgreen v Pollard Excavating, Inc.*, 193 AD3d 1134, 1136 [3d Dept 2021], quoting *Graven v Children's Home R.T.F., Inc.*, 152 AD3d 1152, 1153 [3d Dept 2017] [internal quotation marks and citations omitted]).

"'At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017], quoting *Simkin v Blank*, 19 NY3d 46, 52 [2012] [internal quotation marks omitted]). "Dismissal . . . is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton*, 29 NY3d at 142).

Plaintiffs' fourth cause of action alleges fraud and fraudulent inducement against PRS only.[2] The fraud alleged is that PRS represented to plaintiffs that it would perform its work in a workmanlike manner, would supervise the performance of the work, the work would comply with all legal requirements and would be completed in a timely and efficient manner; and that it

[2] To the extent that the fourth cause of action may be read to assert those claims against Helm, it is dismissed for the same reasons that it is dismissed as against PRS. The same is true for PPI, which is not alleged to have made any fraudulent representations to plaintiffs.

made these statements knowing that they were false in order to induce plaintiffs to engage it for the project. They also claim that, although Helm introduced them to Kent and informed them that he would do portions of the work, he inaccurately referred to him as his "partner," whereas Kent was in fact, apparently, a subcontractor independent of PRS and PPI. This cause of action is insufficiently pleaded in the complaint, which fails to identify the time, place and specific words used to manifest the alleged misrepresentations (*see* CPLR 3016 [b]; *Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1st Dept 1994]). To the extent that the affirmation of Hunter Croft (NYSCEF Doc. No. 56) cures the deficiencies as to time and place by alleging that Helm told him he could do the work at a conversation held at their home in July 2023, it remains deficient as to the substance of the statements alleged to have been fraudulent in the complaint (*see Eastman Kodak*, 202 AD2d at 222). In any event, the alleged "misrepresentations consist of [no] more than mere promissory statements about what is to be done in the future" (*id.*). Finally, the court finds that any misrepresentation or concealment of the specific business relationship between Helm, PRS, PPI and Kent to be immaterial (*see id.*). The use of subcontractors is well-known to be ubiquitous in the construction industry and plaintiffs knew that Kent was to perform the deck work.

Plaintiffs' sixth cause of action alleges deceptive business practices under General Business Law § 349 against all defendants. This claim fails because the complaint is devoid of factual allegations that would establish that any defendant engaged in consumer-oriented conduct that had "'a broad impact on consumers at large'" (*Kovalenko v Bhatti Gen. Contr. & Dev., LLC*, 241 AD3d 1540, 1543-1544 [2d Dept 2025], quoting *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *see* CPLR). "Rather, even liberally construing the complaint, the plaintiff merely alleged a 'single-shot transaction outside the scope of' General Business Law §

349" (*Kovalenko*, 241 AD3d at 1544, quoting *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 148 [2d Dept 1995], *lv dismissed and denied* 87 NY2d 937 [1996]). The conduct in which the complaint alleges defendants engaged was entirely addressed to plaintiffs' private, individual needs (*see Kovalenko*, 241 AD3d at 1544).

Plaintiffs' seventh cause of action seeks to have this court ignore Helm's corporate alter egos, i.e., PRS and PPI, and hold him individually responsible for the damages alleged in the complaint, otherwise known as piercing the corporate veil. Vermont law governs the substance of this claim, as there has been no showing that PRS's or PPI's contacts with that state were minimal or controlled by Helm from New York (*see Highland Crusader Offshore Partners, L.P. v Celtic Pharma Phinco B.V.*, 205 AD3d 520, 521-522 [1st Dept 2022]; *cf. Serio v Ardra Ins. Co., Ltd.*, 304 AD2d 362, 362 [1st Dept 2003], *lv denied* 100 NY2d 516 [2003]).[3] In Vermont, courts will pierce the corporate veil only "'where the corporate form has been used to perpetrate a fraud, [or] where the needs of justice dictate'" (*Doherty v Town of Woodstock*, 310 A3d 916, 919 [2023], quoting *Agway, Inc. v Brooks*, 790 A2d 438, 441 [2001]). This court held herein that there was no actionable fraud alleged in this case. "'In cases not involving fraudulent activity, the court will look to the facts and circumstances of each case to determine whether the corporate veil should be pierced in the interests of fairness, equity, and the public need'" (*Doherty*, 310 AD3d at 919, quoting *Agway*, 790 A2d at 441). Plaintiffs have made no showing that fairness, equity or public need requires the court to disregard Helm's corporate entities. Rather, they offer only legal conclusions with no underlying factual substance. There are no factual allegations in the complaint or the affirmations submitted in opposition to this motion from which the court could conclude that Helm is using the "'corporate shell . . . merely as a sham'" to deprive plaintiff

[3] That said, all parties have recognized on this motion that the New York and Vermont standards are essentially the same.

of a remedy (*Doherty*, 310 A3d at 919, quoting *Winey v Cutler*, 678 A2d 1261, 1263 [1996]). Plaintiffs' bald allegations that PRS or PPI is "undercapitalized" does not establish that either entity would be unable to pay any judgment that may ensue in this action and nothing in the complaint permits the conclusion that Helm otherwise abused the corporate forms to work an injustice upon plaintiffs (*see Doherty*, 310 A3d at 919-920). The mere fact that Helm is the sole owner of both companies that do business together is not sufficient (*see id.* at 920).

Arguments not expressly addressed have been examined and determined to be without merit or academic in light of the holdings herein. Accordingly, it is hereby

ORDERED that the motion is granted; the fourth, sixth and seventh causes of action in the third amended complaint are dismissed; and defendants Jake Helm and Pinnacle Properties, Inc. are released from this action; and it is further

ORDERED that this action shall hereafter be captioned:

SUPREME COURT STATE OF NEW YORK
COUNTY OF WARREN

HUNTER CROFT and CHRISTINA CROFT,
Plaintiffs,

-against-

PREMIER ROOF SOLUTIONS,
Defendant.

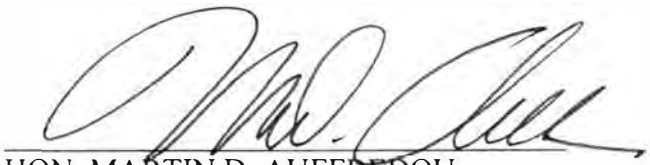
Defendant Premier Roof Solutions shall serve a copy of this decision and order upon plaintiffs, with notice of entry, forthwith and in no event later than Wednesday, January 28, 2026. In accordance with CPLR 3211 (f), said defendant shall file its answer to the third amended complaint within 10 days of such service.

The court shall convene a conference in this action, to be held virtually via Microsoft Teams, on Monday, March 16, 2026 at 9:15 a.m.

The foregoing constitutes the decision and order of this court.

Signed this 23rd day of January 2026, at Lake George, New York.

ENTER:



HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to NYSCEF. Such uploading does not constitute service with notice of entry (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [2]).

Distribution:
Marc E. Elliot, Esq.
Daniel R. LeCours, Esq.

Croft v Premier Roof Solutions
Warren County
Index No. EF2025-73683

DECISION & ORDER
Index No. EF2026-75496
RJI No. 56-1-2026-0155

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

DESCENDANT'S SEPARATE TRUST U/A V OF THE RUECKER FAMILY IRREVOCABLE TRUST U/A DATED AUGUST 29, 2014 F/B/O TYSON E. RUECKER FAMILY,

Plaintiff,

-against-

DESCENDANT'S SEPARATE TRUST U/A V OF THE RUECKER FAMILY IRREVOCABLE TRUST U/A DATED AUGUST 29, 2014 F/B/O GARRETT J. RUECKER FAMILY,

Defendant.

DECISION & ORDER

Index No. EF2026-75496
RJI No. 56-1-2026-0155

Appearances:

Toporowski Law, PLLC, Albany (*Brett T. Williams* of counsel), for plaintiff.

Maynard, O'Connor, Smith & Catalinotto, LLP, Albany (*Justin W. Gray* of counsel), for defendants.

AUFFREDOU, J.

This action for the partition of real property comes before the court by defendant's request for judicial intervention (RJI) seeking a partition settlement conference. At issue is the threshold determination that is required in all partition actions of whether the subject real property is "heirs property" within the meaning of RPAPL 993, also known as the Uniform Partition of Heirs Property Act (*see* RPAPL 993 [1], [2] [e], [3] [b]).[1]

Plaintiff brought the action by the filing of its summons and complaint seeking to partition the real property by sale pursuant to RPAPL 901 and an equitable adjustment of the sale proceeds to account for monies expended by the parties to carry the property. Defendant

[1] At issue are three parcels in the Town of Queensbury, commonly known as 11, 13 and 14 Gunn Lane. These multiple parcels will be discussed collectively herein, and referred to in the singular, to wit, "the property" or "the subject property."

answered, asserting in various affirmative defenses and counterclaims that the property is heirs property subject to disposition under RPAPL 993. Upon receipt of the RJI, the court solicited plaintiff's position on the heirs property question, as to which the parties must be given "notice and the right to be heard" before the court makes the required threshold determination (RPAPL 993 [3] [b]). Plaintiff thereafter supplied the court with a letter in which it takes the position that the property is not heirs property. It has since filed a reply to the counterclaims in which it reiterates that position.

At the beginning of the relevant history of the property, it was owned by Harry Ruecker, who, in 2014, conveyed it to his sons Tyson and Garrett, as cotrustees of the Ruecker Family Irrevocable Trust U/A Dated August 29, 2014 (hereinafter the Ruecker Trust). In 2023, Tyson and Garrett, acting as trustees of the Ruecker Trust, conveyed 50% interests to themselves as tenants in common, as cotrustees of plaintiff and defendant, each of which is a separate trust formed under the authority of the Ruecker Trust, one for the benefit of each of Tyson's and Garrett's families. Thereafter, Garrett resigned as cotrustee of plaintiff and Tyson resigned as cotrustee of defendant, leaving each brother as trustee of the separate trust that existed for the benefit of his family. This is the current status of the property's ownership.

> "Heirs property" means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:
> "(i) there is no agreement in a record binding all of the co-tenants which governs the partition of the property;
> "(ii) any of the co-tenants acquired title from a relative, whether living or deceased;
> "(iii) the property is used for residential or agricultural purposes; and
> "(iv) any of the following applies:
> "(A) twenty percent or more of the interests are held by co-tenants who are relatives;
> "(B) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased;
> "(C) twenty percent or more of the co-tenants are relatives of each other; or

"(D) any co-tenant who acquired title from a relative resides in the property" (RPAPL 993 [2] [e]).

Plaintiff argues that trusts are not natural persons and cannot have relatives, thus neither party can have "acquired title from a relative" (RPAPL 993 [2] [e] [ii]).[2] The court rejects this position and, there appearing no dispute over the other elements of the definition, finds that the subject property is heirs property subject to the procedures prescribed in RPAPL 993.

The "heirs property" definition speaks in terms of title (*see id.*). Trustees hold legal title to the property that forms the corpus of a trust (*see* EPTL 1-2.6 [a], 7-2.1 [a]). The trustees here, being brothers, are unquestionably relatives, and each took legal title from their father, also clearly their relative, when he conveyed the property to them in their capacities as cotrustees of the Ruecker Trust. When each brother conveyed the 50% interests into each of their family trusts, legal title to the property did not change hands. Each brother still held the legal title that he acquired from their father. When each resigned as cotrustee of the other's family trust, he resigned his legal title to the 50% interest held in that trust, leaving the other with sole legal title to the 50% tenancy in common, held in trust for the benefit of his own family (of which he is presumably a part and therefore also holds a beneficial interest in the property).

The court's analysis of the plain language of the relevant statutes leads to this result and is supported by the holdings of other courts of this state of coordinate jurisdiction, which have applied RPAPL 993 in contexts where one or more parties had received their title from a trust or were trusts themselves (*see e.g. Salamone v Salamone*, Sup Ct, Bronx County, May 2, 2024,

[2] A "relative" is defined in the statute to be an "ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or other law of this state" (RPAPL 993 [2] [i]). The terms "ascendant," "descendant" and "collateral" are also defined in statute as being "individuals" who are related in one way or another to other "individuals" (RPAPL 993 [2] [a-c]). Plaintiff's argument proceeds in this parlance, which the court finds is not meaningfully distinct from the term "natural person" in this context, insofar as the relevant relationships addressed in the statutory definitions are those that can only exist between natural persons.

Semaj, J., index No. 813185/2021E, 2024 NY Misc LEXIS 8889; *Fouret v Sagland, LLC*, Sup Ct Suffolk County, June 26, 2024, Hackeling, J., index No. 600983/2022, 2024 NY Misc LEXIS 52761). The court also perceives sound policy reasons for rejecting plaintiff's position; to wit, the remedial purpose of the statute would be thwarted with respect to any family who had resorted to a trust to manage the descent of their property from one generation to the next (*see Gelinas LLC v Hayes*, 85 Misc 3d 1012, 1024-1025 [Sup Ct, Bronx County 2024] [statute's purpose is to protect families from predatory investors who buy minority interests in real estate after descent of partial interests upon death of family member]). While that remedial purpose does not appear to be squarely implicated in this particular case, a holding that deprives family trustees of the protection of the statute could have harmful implications in other cases. Accordingly, it is hereby

ORDERED that the property subject to partition in the within action is "heirs property" within the meaning of RPAPL 993 and subject to the procedures for partition that are prescribed therein.

A notice scheduling the heirs property partition settlement conference, which will also address those findings and admonitions that are required by statute, shall issue commensurately herewith.

The within constitutes the decision and order of this court.

Signed this 15th day of April 2026, at Lake George, New York.

ENTER:



HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* Uniform Rules for Trial Cts [22 NYCRR 202.5-b] § [h] [2]).

Distribution:
Brett T. Williams, Esq.
Justin W. Gray, Esq.

Descendant's Separate Trust U/A V of the Ruecker Family Irrevocable Trust U/A Dated August 29, 2014 F/B/O Tyson E. Ruecker Family v Descendant's Separate Trust U/A V of the Ruecker Family Irrevocable Trust U/A Dated August 29, 2014 F/B/O Garrett J. Ruecker Family
Warren County
Index No. EF2026-75496

2026 Spring Mixer ~ Queensbury Hotel

Guest of Honor Hon. Robert J. Muller (Ret.)









Nearly 70 people gathered at the Queensbury Hotel on April 16th to raise funds for the Warren County Bar Foundation's Scholarship and Community Grants Fund. Many thanks to all the donors and attendees who helped us net over 17,000. this year! Thank you, too, to our Master of Ceremonies, Hon. Gregory Teresi and our auctioneer, Matthew McAuliffe!










THE QUEENSBURY HOTEL


EXIT

The Practice Page



Mark C. Dillon is a Justice at the Appellate Division, 2nd Dept., an adjunct professor of New York Practice at Fordham Law School, and an author of CPLR Practice Commentaries in McKinney's.

THE PRACTICE PAGE

CPLR 4404(a): SUFFICIENCY VERSUS WEIGHT OF THE EVIDENCE

Hon. Mark C. Dillon *

Courts are authorized to set aside jury verdicts for reasons set forth in CPLR 4404(a), either upon motion of a party or at its own initiative. The statute contains three grounds for the setting aside of verdicts. The first is when a different party is entitled to "judgment as a matter of law," which is interpreted as involving the legal sufficiency of the evidence. The second basis to set aside a verdict is the weight of the evidence. The third is in the interests of justice. Sufficiency and weight are the grounds seen most often. They are concepts distinct from one another. CPLR 4404(a) presents a lot to unpack.

The standard applied to determining sufficiency is whether there is a valid line of reasoning and permissible inferences by which a rational trier of fact could find in favor of the party (*Killon v Parrotta*, 28 NY3d 101, 107-08 [2016]; *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978). While this ground is commonly referred to an involving the "sufficiency" of the evidence, the actual task is to determine whether the evidence supporting the verdict is "*in*sufficient," in order for the verdict to be set aside. If the legal standard is met, the court replaces the jury's verdict with a verdict and judgment in favor of another party, and the case concludes on that basis (*Id*.). Sufficiency should be thought of as involving an objective determination of whether there was an absence of evidence establishing a claim or a defense in an action, or at least one element thereof.

Weight is different. The examination of evidentiary weight is less of an objective exercise, and more of a subjective evaluation of the evidence in relation to the jury's verdict. Whereas sufficiency might be loosely thought of as quantitative, weight is more qualitative in nature. The legal standard which must be applied to any motion to set aside a verdict as against the weight of the evidence is whether the evidence so preponderates in favor of a party that a contrary verdict could not have been reached on any fair interpretation of the evidence (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). If a verdict is set aside on this ground, the result is not a judgment in favor of another party, but an entirely new trial (*Killon v Parrotta*, 28 NY3d at 107-08).

Since the result of a sufficiency set-aside is a judgment and the result of a weight set-aside is a new trial, attorneys and courts must differentiate between the two grounds, assess whether an argument for setting aside the verdict is objectively "at law" for sufficiency or factually qualitative for weight, apply the proper legal standard, and proceed accordingly (*Krohn v Schultz Ford Lincoln, Inc*., 58 AD3d 616 [2d Dep't. 2025]).

There is another difference between weight and sufficiency. The sufficiency argument must be preserved at the trial level to be appealed (*Matter of Angel ZZ,* 220 A.D.3d 1097 [3d Dep't. 2023]; *U.S. Bank National Association v Moschetta,* 216 A.D.3d 848, [2d Dep't. 2023]). In contrast, weight need not

be preserved to be appealable (*Evans v New York City Transit Authority*, 179 A.D.3d 105, 113 N.Y.S.3d 127 [2d Dep't. 2016] [opinion by Connolly, J.]; *see also Fitzpatrick v Tvetenstrand*, 228 AD3d 7 [3d Dep't. 2024]; *DeFisher v PPZ Supermarkets, Inc*., 186 AD3d 1062 [4th Dep't. 2020]).

A set-aside motion may be presented orally in the courtroom after the verdict, or in writing with a return date. A written motion must be made within 15 days of the jury's verdict or from the filing of a court's non-jury decision (CPLR 4405; *Balough v H.R.B. Caterers, Inc*., 88 AD2d 136 [2d Dep't. 1982). The deadline can be extended by permission of the court (CPLR 2004), such as if a party needs more time to acquire relevant portions of the trial transcript in support of the motion.

The "third" basis for setting aside a jury's verdict is to do so in the "interests of justice." CPLR 4404(a) does not define the phrase. The interests of justice sounds like a catch-all phrase and perhaps can be thought of that way. Under case law, the court is to decide "whether substantial justice has been done, and must look to common sense, experience, and [the] sense of fairness in arriving at a decision" about whether a new trial should be granted (*Ali v City of New York*, 122 AD3d 888 [2d Dep't. 2014]). The interests of justice includes a wide net of errors that may arise during a trial such erroneous rulings on the admissibility of evidence, jury charges, attorney misconduct, newly-discovered evidence, and prejudicial surprise (*Alonzo v City of New York*, 188 AD3d 1223 [2d Dep't. 2020]). Of course, the trial infirmities which warrant a new trial in the interests of justice must be more than harmless errors (*LaMorte v CFG Profile, Inc*., 154 AD3d 700 [2d Dep't. 2017]). These forms of trial error must typically be preserved to be included in a subsequent appeal (*e.g. Curanovic v New York Cent. Mut. Fire Ins. Co*., 22 AD3d 975, 976 [3d Dep't. 2005]), unless they fall into the small class of most fundamental *mode of proceeding* errors (*State v Todd L.*, 118 AD3d 805 (2d Dep't. 2014]).

CPLR 4404(a) also references hung juries, which necessitate new trials as well. Where there is a hung jury, there is of course no verdict for the court to set aside on any ground. New York courts have borrowed for civil trials the criminal concept of the *Allen* charge (*Allen v United States*, 164 US 492 [1896]) where deadlocked juries are encouraged by the court to continue deliberations, listen to fellow jurors, be open-minded to other opinions, but not surrender conscientiously-held views. The idea is to be constructive but not coercive, in the hope that some gently-encouraged further deliberation may lead to a verdict and avoid the necessity of a new trial.

*Mark C. Dillon is a Justice of the Appellate Division, 2nd Dept., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney's.

WCBA 2026 LAW DAY ~ Glens Falls Country Club























On May 6th, the Warren County Bar Association celebrated Law Day 2026 at the Glens Falls Country Club. We were pleased to honor the Glens Falls High School Mock Trial team, who were recognized for their first-place finish in the Warren-Washington Counties High School Mock Trial Tournament and Richard P. Leach, MD, this year's Liberty Bell recipient!

THE 113th WCBA ANNUAL MEETING
LAKE GEORGE CLUB
MAY 18, 2026









Any time we are able to gather at the Lake George Club is a memorable event, but this year had the added bonus of an evening of spectacular weather! Over 40 WCBA members attended the Annual Dinner Meeting. Many thanks to Chef Desmond Smith and the entire staff of The LGC for a terrific dinner. And thank you to Dennis O'Connor, who was a great photographer that night!













Anna Bowden, Esq., FitzGerald Morris Baker Firth, P.C.

Jordyn M. Conway, Esq., Bartlett, Pontiff, Stewart & Rhodes, P.C.

Kristin Kurish, Esq., FitzGerald Morris Baker Firth, P.C.

John R. McCarron, Jr., Esq., Law Offices of John R. McCarron, Jr.

WARREN COUNTY BAR ASSOCIATION
ADVERTISING OPPORTUNITIES

This publication is the Warren County Bar Association (WCBA) on-line newsletter, the *TIPSTAFF*, which is published several times per year. It is sent to the WCBA membership, as well as other bar associations in our area. In total, the *TIPSTAFF* reaches over 200 people in the legal community, including 150 attorneys. The WCBA is offering an opportunity for local businesses to advertise directly to the lawyers in the community in the *TIPSTAFF*.

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The Bulletin Board

***TIPSTAFF* is a publication of the Warren County Bar Association, Inc. We encourage you to submit articles of interest, classified ads, and announcements to Kate via email at: admin@wcbany.com**

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Nicole Fish, Esq., President WCBA

Kate Fowler, Executive Director WCBA

Deadline for submissions for next edition November 1, 2026



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