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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

Court of Appeals Decision Brings No Clarity to Conflict

Brevity Is Not Always a Virtue

It is said that brevity is a virtue. But when extreme brevity leads to confusion, less is not always more. Unfortunately, I fear the recent New York State Court of Appeals decision in *Brito v. Gomez*, 2019 N.Y. Slip Op. 06452 (September 10, 2019), suffers from this deficit.

We first need to go back to the First Department's decision in *Brito*, 168 A.D.3d 1 (1st Dep't 2018), to understand context. There, the court noted a clear conflict between the First and Second Departments as to whether a party in a personal injury action who asserts a claim for lost earnings and loss of enjoyment of life waives the doctor-patient privilege in connection with prior injuries not raised in the action. In *Brito*, a split court reaffirmed its position that the privilege is waived only for injuries that were affirmatively placed in controversy. Conversely, the Second Department has held that a party places his or her entire medical condition in controversy through "broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries." *See, e.g., Greco v. Wellington Leasing L.P.*, 144 A.D.3d 981, 982 (2d Dep't 2019). *See* discussion in Weinstein, Korn & Miller ¶ 3121.01 and ¶ 4504.15 (David L. Ferstendig, LexisNexis Matthew Bender 2d Ed.).

In *Brito*, the plaintiff claimed she sustained personal injuries in a 2014 motor vehicle accident. Her bill of particulars alleged injuries to her cervical spine, lumbar spine, and left shoulder. At her deposition, plaintiff testified that in 2009 she had surgery on her left knee and began to use a cane; after a 2012 accident, she had surgery to her right knee; and the knee surgeries "may have affected her ability to wear heels." Plaintiff also asserted that her back and neck injuries prevented her from wearing heels and made it more difficult for her to walk.

The defendants sought authorizations "for all facilities where plaintiff received medical treatment for her knees, including, but not limited to, the hospital where her knee surgeries were performed." The plaintiff objected to the demand as seeking information for unrelated medical treatment. The defendants responded by letter advising that the plaintiff had made "multiple claims relating to loss of enjoyment of life in the bill of particulars, including, but not limited to, 'impairments and negative effects upon plaintiff's pre-accident enjoyment of life, day-to-day existence, activities, functions, employment and involvements; limitation, diminution and/or effect of functions, activities, vocation, avocation and all other activities in which the plaintiff engaged prior to the underlying accident.'" 168 A.D.3d at 3.

The trial court denied defendants' request for authorizations relating to plaintiff's medical treatment for her knees. A majority of the First Department affirmed, noting that discovery of the mental or physical condition of a party is subject to the doctor-patient privilege; a party can waive the privilege by *affirmatively* placing his or her physical or mental condition in controversy; neither the bill of particulars nor plaintiff's deposition testimony placed her prior knee injuries in controversy; and relevant First Department case law has only permitted the disclosure of medical records where the plaintiff claims an exacerbation or aggravation of prior injuries.

The Appellate Division majority found that the plaintiff had *not* made a claim here that her prior injuries were aggravated or exacerbated by the 2014 accident. In addition, the court held that plaintiff did not affirmatively place the physical condition of her knees in controversy by claiming a loss of enjoyment of life and such a claim "is not a separate item of recoverable damages, but a factor in assessing pain and suffering." *Id*. at 6. The majority specifically rejected the Second Department precedent discussed above.

The dissent in the First Department gave its own take on the issue:

> To be sure, as previously noted, our more recent decisions have clarified that, unlike the Second Department, we do not regard generalized allegations of loss of enjoyment of life or of the ability to work as opening the door to a plaintiff's entire medical history. We have never held, however, that a defendant is not entitled

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> to disclosure of medical records pertaining to a pre-existing condition that may have caused, independent of the injuries attributed to the defendant, the particular functional deficits or pain for which recovery is sought. I see no reason to depart from our earlier cases holding that such disclosure is appropriate.

Id. at 19.

According to the majority, although the dissent conceded that the plaintiff had made no claim that she injured her knees in the accident, it concluded that she nevertheless placed the condition of her knees in controversy because "the condition of the knees is essential to the actions of walking and standing." At her deposition, the plaintiff testified about her difficulties in walking, her use of a cane to ambulate, and that she could not wear heels. Thus, as the defendants had argued, the medical records from her knee surgeries were "material and necessary" to their defense.

Which brings us back to the recent Court of Appeals decision. Faced with a clear conflict between the First and Second Departments on a key issue, a conflict that the First Department set out in stark terms, we hoped that the Court would resolve that conflict. Instead, while reversing the First Department, the Court "simply" ruled that:

> Plaintiff affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages. Under the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of plaintiff's knees is "material and necessary" to defendants' defense of the action. Accordingly, Supreme Court erred in denying defendants' motion to compel plaintiff to provide discovery related to the prior treatment of her knees (citations omitted).

2019 N.Y. Slip Op. 06452 at *1.

It is not clear from the opinion where the Court of Appeals falls on the conflict, or whether it may have leaned towards the First Department dissent's analysis. Thus, we await further instruction.

Plaintiff's Deposition Testimony Partially Contradicts Expert Witnesses's Factual Conclusions

Nevertheless, Majority of Court Holds that Expert Opinions Created Material Issues of Fact Precluding Summary Judgment

In *Salinas v. World Houseware Producing Co.*, 2019 N.Y. Slip Op. 06537 (September 12, 2019), the Court of Appeals again issued a pithy narrow 4-3 decision on a significant issue impacting summary judgment motion practice.

The underlying fact pattern is unremarkable. The plaintiff was seeking damages for personal injuries she allegedly sustained while using a potholder. The plaintiff had placed a biscuit sandwich in a pan on the top rack of her electric oven, in which the heating element was suspended from the top of the oven. The plaintiff folded the potholder in half in her right hand and then reached into the oven to pull out the rack. When she was removing the pan, she noticed that the potholder was on fire. She then tossed the potholder into the sink only to then realize that her gown had caught fire, which resulted in her sustaining serious personal injuries.

The defendants (the manufacturer, distributer, and seller of the potholder) moved for summary judgment, arguing that the potholder did not cause plaintiff's injuries. Significantly, under the plaintiff's version of the facts, the potholder she was holding *did not* touch the heating element. In fact, she stuck to that story upon repeated questioning at her deposition. The defense expert opined that based on that testimony, the potholder would not ignite at a distance of one inch from the element. In opposition, plaintiff's experts conceded that a potholder would not have ignited if it did not contact the heating element. However, they concluded that, notwithstanding plaintiff's testimony, the potholder *did* touch the heating element.

The trial court found that plaintiff's concession at her deposition that she did not touch the heating element was fatal to her claim. It held that because the plaintiff's expert opinions were "completely inconsistent with the plaintiff's deposition testimony . . . this constitutes a feigned issue of fact and will not prevent a motion for summary judgment." 2017 N.Y. Misc. LEXIS 1091 (Sup. Ct. N.Y. Co. March 27, 2017) at *8.

The First Department affirmed in a brief opinion, holding that "[w]here the conclusion of an expert relies upon facts contrary to the plaintiff's testimony, the affirmation will fail to raise an issue of fact sufficient to defeat summary judgment. Here, the validity of plaintiff's experts' opinions rely upon the assumption that the subject potholder caught fire after contacting the heating element of plaintiff's oven, a fact plaintiff specifically denied several times during her deposition." 166 A.D.3d 493, 493–94.

In an equally brief memorandum opinion, a narrow majority of the Court of Appeals *reversed*, holding that "[a]lthough the plaintiff's deposition testimony partially contradicted the factual conclusions reached by her expert witnesses, the expert opinions were based upon other record evidence and were neither speculative nor conclusory. Insofar as plaintiff raised genuine issues of fact on the element of causation, summary judgment should not have been granted on that ground (citations omitted)." 2019 N.Y. Slip Op. 06537 at *1. The Court remitted the case to the trial court "to consider the alternative grounds for summary judgment defendants raised in their motions and neither Supreme Court nor the Appellate Division reached." *Id.* at *1–2. The three dissenting judges instead voted to affirm for the "reasons stated" in the Appellate Division decision.

Especially in view of the Court of Appeals' reversal of both the trial court and the Appellate Division decisions, we would have been more comfortable if the majority opinion had been more specific about the "other record evidence" upon which the experts relied.

Second Department Stresses That Bifurcation of Personal Injury Cases Is Not Absolutely Required

Dispelling Perception That Second Department Is Strictly and Inflexibly in Favor of Bifurcation

22 N.Y.C.R.R. § 202.42(a) of the Uniform Rules for the Trial Courts provides that "[j]udges are encouraged to order

a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action." Prior to the adoption of this rule, the Second Department had its own rule (formerly 22 N.Y.C.R.R. § 699.14(a)), which required a bifurcated trial *unless* there was a showing of "exceptional circumstances" and "good cause" for resorting to a unified trial on liability and damages.

Recently, in *Castro v. Malia Realty, LLC*, 2019 N.Y. Slip Op. 06466 (2d Dep't September 11, 2019), the Second Department took issue with what it characterized as the continuing perception that the "Second Department precedent is strictly and inflexibly in favor of bifurcation." In doing so, and in reversing the trial court's decision to bifurcate and ordering a new, unified trial, the Appellate Division stressed that "bifurcation of the trial of personal injury cases is not absolutely required in the Second Department, and trial courts should use their discretion in determining, in accordance with the statewide rule, whether bifurcation will assist in clarifying or simplifying the issues and in achieving a fair and more expeditious resolution of the action (*see* 22 N.Y.C.R.R. § 202.42[a])." *Id.* at *3.

In the underlying action, plaintiff Manuel Castro was allegedly injured in a construction site incident "when the scaffold upon which he was working 'collapsed, slipped or otherwise failed to support [him].'" Labor Law § 240(1) imposes "on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks." The plaintiffs sought a unified trial on liability and damages. They argued that evidence with respect to Castro's head and brain injuries were necessary to dispute the contentions (made in opposition to plaintiff's prior summary judgment motion on liability) of the defendant, owner of the construction site, and the third-party defendant, Castro's employer, that Castro's injuries to his back and neck were caused by lifting wooden planks and that he did not sustain head injuries as a result of a fall from a scaffold. Plaintiffs' counsel pointed to medical records submitted in opposition to their summary judgment motion, stating that the accident occurred when Castro lifted wooden planks. In addition, the third-party defendant advised that it intended to submit during the liability trial the treating doctors' testimony who took Castro's medical history "of injuring himself by lifting a plank or moving a scaffold."

The trial court denied the plaintiffs' motion, ruling that a bifurcated trial was "required" under Second Department rules. Ultimately, the jury found that Castro did not fall from a scaffold.

The Appellate Division noted the advantages and disadvantages of bifurcation. For example, if liability is found in the defendant's favor, a damages hearing becomes unnecessary. Moreover, the gravity of injuries could engender sympathy for the plaintiff on liability in a unified trial. Conversely, if the same experts need to testify on both liability and damages, bifurcation results in additional expenses, and if jurors know that a verdict in the defendant's favor on liability will end the case, this might incentivize jurors to rule against the plaintiff.

The court stated that although 22 N.Y.C.R.R. § 202.42(a) encourages bifurcation, it does not contain a strong presumption in favor of it. However, while acknowledging the discretion of the trial court, the Second Department has continued to use language in its decisions suggesting that there are limited circumstances where a unified trial is permitted (such as where the nature of the injuries has an important bearing on liability issues). Thus, the court noted that while the First and Third Departments have "relaxed" their standard and seem more willing to permit unified trials,

> [t]here is little doubt but that the Bench and the Bar in the Second Department perceive that our precedent is, in contrast to the approach of the other departments, inflexibly, or nearly inflexibly, in favor of bifurcation. We stress today that the trial courts in the Second Department have the discretion to determine whether a personal injury trial should be unified or bifurcated in accordance with the standard set forth in the statewide rule.

Id. at *11–12.

In the instant action, the Appellate Division found that the trial court erred when it did not exercise its available discretion, since

> by any standard, a unified trial was warranted. . . . Malia and Target disputed the plaintiffs' claim that Castro fell from a scaffold and contended that the accident resulted not from an elevation-related risk, but from Castro's action in lifting wooden planks. Evidence relating to Castro's brain injuries, which would not have occurred from lifting wooden planks, was probative in determining how the incident occurred. Thus, the nature of the injuries had an important bearing on the issue of liability (citations omitted).

Id. at *12.

CPLR 2001 Does Not Save Service Defect

Delay in Mailing and Filing Affidavit of Service Pursuant to CPLR 308(2) Is Not a Mere Technical Infirmity that Can be Overlooked by the Court

We have touched on CPLR 2001 several times in the *Digest*. It provides that the court may permit the correction of or disregard or excuse procedural mistakes, omissions, defects or irregularities, and "if a substantial right of a party is not prejudiced," the error "shall" be disregarded. *See* Weinstein, Korn & Miller, New York Civil Practice, CPLR ¶ 2001.03 for an exhaustive list of mistakes, omissions, defects, and irregularities that can be corrected, disregarded or excused under CPLR 2001.

However, CPLR 2001 cannot be used to excuse or disregard "jurisdictional" or "substantive" errors. *Estate of Norman Perlman v. Kelley*, 2019 N.Y. Slip Op. 06475 (2d Dep't September 11, 2019), an action to recover legal fees, dealt with a service error. The action was commenced on December 31, 2015; an affidavit of service was filed on January 21, 2016, which stated that service had been effected upon the defendant under CPLR 308(2), leave and mail service. However, it only referenced *delivery* of the summons and complaint at the defendant's office on January 14, 2016; it did not mention the second step necessary to effect proper service: mailing. Approximately two months later, on March 17, 2016, the plaintiff moved for a default judgment, which

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attached an affirmation of service, stating that the plaintiff had mailed a "second copy" of the pleadings to the defendant on February 13, 2016. However, there was no evidence that the plaintiff had filed an affidavit of service with the county clerk evidencing proper mailing. The defendant opposed the motion on prematurity grounds and cross-moved to dismiss for lack of personal jurisdiction. The trial court granted the cross-motion and, upon renewal, adhered to its original determination.

The Appellate Division affirmed. It confirmed that jurisdiction cannot be acquired under CPLR 308(2) unless there has been strict compliance with both acts of delivery and mailing. CPLR 308(2) contains several timing requirements. First, delivery and mailing must be effected within 20 days of each other. Second, proof of service "shall be filed" with the clerk of the court within 20 days of the later of delivery or mailing.

The court noted that the plaintiff failed to comply with those strict requirements. The plaintiff did not mail the pleadings to the defendant within 20 days after delivery and never filed an affidavit of service with the clerk indicating that the mailing has been done. The court concluded that the delay in mailing was not a "technical infirmity" under CPLR 2001, but rather a jurisdictional defect. It focused on the likelihood that the defendant will receive notice.

> A mailing sent within the wrong time frame, like a mailing sent by the wrong method increases the likelihood that a party will not receive proper notice of a legal proceeding. The first 20-day window set forth in CPLR 308(2) serves an important function. If the delivery and mailing required by that statute are not made within a short time of one another, there is a greater likelihood that one or both sets of pleadings will be mislaid, or, at the very least, that confusion will arise as to how much time the defendant has to respond—both of which appear to have occurred here. Further, the requirement that an affidavit of service be filed within 20 days of the delivery or mailing, whichever is effected later, also serves an important function. Timely filing of the affidavit of service is designed to give notice as to the plaintiff's claim of service and permit the defendant to calculate the time to answer. Where the affidavit of service claims that delivery but not mailing occurred within the 20-day period, yet the plaintiff intends to later claim that a timely mailing did occur, additional confusion is created, a defendant may be prejudiced by reliance upon the publicly filed affidavit which only partially disclosed the plaintiff's claim of service, and such prejudice may preclude the prospect that the failure to file the affidavit could be cured (citations omitted).

Id. at *5.

The court referenced the Court of Appeals decision in *Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 583 (2010), specifically where the Court stated that "simply mailing the documents to defendant or e-mailing them to defendant's Web address would present more than a technical infirmity, even if defendant actually receives the documents, inasmuch as these methods in general introduce greater possibility of failed delivery." I have wondered before whether the *Ruffin* Court's reference to "mailing" or "emailing," *non-sanctioned methods of service* to commence an action, involving only one act of service, opened the door to the argument that if a plaintiff met one of the two elements of CPLR 308(2) service and the defendant received actual notice, CPLR 2001 might save such service. While I agree that a default judgment should not have been granted in this case, perhaps the cross-motion to dismiss should have also been denied. Delivery was clearly made, and plaintiff's counsel did aver, albeit in an affirmation of service, that the mailing was also effectuated 30, rather than 20, days after delivery. See *Khan v. Hernandez*, 122 A.D. 3d 802, 803 (3d Dep't 2014) (failure to file proof of service is procedural irregularity that can be cured by motion or sua sponte).

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