JUSTIFICATION FOR PROPOSED AMENDMENT TO CPLR 3025(b) REMOVING REQUIREMENT OF AFFIDAVIT OF MERIT IN ALL CIRCUMSTANCES

David L. Ferstendig, *Confusion and Uncertainty Continue With Respect to the Standard to Apply on Motion to Amend Under CPLR 3025(b)*, 725 N.Y.S.L.D. 4 (2021)

Confusion and Uncertainty Continue With Respect to the Standard to Apply on Motion to Amend Under CPLR 3025(b)

Is an Affidavit of Merit Still Required When Seeking to Add a Wrongful Death Cause of Action (in Some Courts in New York)?

So, I have a confession to make. Readers of the *Law Digest* know my discomfort with the numerous conflicts among the Appellate Division Departments on basic procedural issues. But with respect to the "conflict" I discuss below, I honestly thought there was none anymore.

You can't really blame me. In the 2017 case, *NYAHSA Servs., Inc., Self-Insurance Trust v. People Care Inc*., 156 A.D.3d 99 (3d Dep't 2017), the Third Department stated that it was moving away from its precedent of requiring the proponent of a motion for leave to amend a pleading to make a "sufficient evidentiary showing to support the proposed claim." Instead, it was "persuaded to depart from that line of authority and follow the lead of the other three Departments, and we now hold that '[n]o evidentiary showing of merit is required under CPLR 3025 (b).'" So there it was. All Departments were in agreement. In the absence of prejudice or surprise resulting directly from the delay in seeking leave, a motion for leave to amend is to be granted unless the proposed amendment is palpably insufficient or patently devoid of merit. No evidentiary showing of merit is required.

But wait, not so fast. In a series of decisions coming out of the First Department, the affidavit of merit appears to be alive and well, at least where the amendment seeks to add a cause of action for wrongful death. *See Kamara v. 767 Fifth Partners, LLC*, 188 A.D.3d 602 (1st Dep't 2020) ("To support the amendment sought here, plaintiff was required to submit competent medical proof of a causal connection between decedent's 2015 work-related injury and his death, which plaintiff claims was due to complications stemming from a 2018 epidural injection (citations omitted)"); *Frangiadakis v. 51 W. 81st St. Corp*., 161 A.D.3d 478 (1st Dep't 2018) ("[A]s we have stated, to support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit 'competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff (citation omitted). The affirmation of plaintiffs' expert, which stated that to a reasonable degree of medical certainty the decedent's injury led to his death, was sufficient, for the purposes of CPLR 3025(b), to establish a causal connection between the decedent's death and the originally alleged negligence by defendants (citations omitted)").

However, the First Department continues to *not* require an affidavit of merit in other CPLR 3025(b) circumstances. Recently, in *Sorge v. Gona Realty, LLC*, 188 A.D.3d 474 (1st Dep't 2020), it reiterated that "on a motion for leave to amend, plaintiff does not need to establish the merit of

his proposed new allegations, but show that the proffered amendment is not 'palpably insufficient or clearly devoid of merit,' which plaintiff has done here (citation omitted)." *Id*. at 475. That certainly sounds like an unequivocal statement. No exceptions provided for seeking to add a wrongful death claim. Even more perplexing is that the *Sorge* case cites to *MBIA Ins. Corp. v Greystone & Co., Inc*., 74 A.D.3d 499 (1st Dep't 2010), for authority for its proposition. And you know upon which case *MBIA Ins*. relies for the proposition that an affidavit of merit is unnecessary? *Lucido v. Mancuso*, 49 A.D.3d 220 (2d Dep't 2008)! Yes, *Lucido,* the seminal case in which the Second Department rejected prior precedent and held that "causes of action alleging *wrongful death* should not be treated differently (emphasis added)," dispensing with the need for an affidavit of merit. *Id*. at 22.

Lack of certainty in the law is bad. Confusion is worse. It would be wonderful if the Court of Appeals could finally clear this up. Otherwise, a legislative fix may be necessary.

On the merits, why should a party seeking to amend under CPLR 3025(b), which states that leave should be freely given, have to provide an affidavit of merit not required when filing the original complaint (other than in those actions in which a certificate of merit is required). The current standard accepted in most courts today properly guards against improper amendments. To repeat, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, the motion is to be granted unless the proposed amendment is palpably insufficient or patently devoid of merit. No surprise, no prejudice and no amendment patently insufficient or devoid of merit. Who could ask for anything more?

PROPOSED AMENDMENT TO CPLR 3025 (b)

b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. **No evidentiary showing of merit is required and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such a motion is to be granted unless the proposed amendment is palpably insufficient or patently devoid of merit.** Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.