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

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CASE LAW DEVELOPMENTS

Majority of Court of Appeals Finds Life Insurance Policy Unambiguous, Resulting in Lapse of Policy Before Insured's Death

To the Contrary, Says the Dissent, and Any Ambiguity Must be Resolved Against the Insurer

Two fairly well-known principles associated with contract interpretation are that extrinsic or parole evidence cannot be resorted to unless the pertinent contract language is ambiguous. Further, when an ambiguity is found, the doctrine of *contra proferentem* generally applies to construe the ambiguity against the party that provided the language. For those who have done research within this area, another maxim might be applicable: ambiguity is in the eyes of the beholder (or here, the policyholder).

In *Bonem v. William Penn Life Ins. Co. of N.Y.*, 2022 N.Y. Slip Op. 00908 (February 10, 2022), the issue was whether a life insurance policy had lapsed before the insured's (plaintiff's husband's) death. The policy, purchased in 2002, provided that the due date for the first premium was the "Date of Issue," identified as January 14, 2002, although the insured did not actually receive a physical copy of the policy until January 31, 2002. Subsequent premiums were due on "the day after the end of the period for which the previous premium was paid." The policy had a 31-day grace period, after which the policy coverage lapsed. It also provided that the premiums were payable as shown in a policy schedule. That schedule identified the "premium due date" as January 14.

For 15 years, premiums were paid by the premium due date. However, in 2018, notwithstanding a notice advising the decedent that the premium was due on January 14, the premium was not paid by that date or during the ensuing 31-day grace period. The decedent then died on February 26. The insurer denied plaintiff's claim on the ground that the policy had lapsed.

A majority of the Court of Appeals found that the insurance policy unambiguously tied "the due date of the annual premium to the date of issue, January 14, 2002, and expressly state[d] that January 14 is the premium due date." The Court was not troubled by the policy's use of the term "annual," even though the premium payment period, which ran from January 14, may not cover a full year. The majority felt that this did not create an ambiguity

> in light of the clear policy language identifying January 14th as the "premium due date." Furthermore, any claimed ambiguity in the definition of "policy date" is irrelevant inasmuch as the policy does not tie the premium due date to the "policy date" but, rather, the date of issue, which is January 14th. Because the insured failed to pay the 2018 premium by January 14, 2018 or within the 31-day grace period, the policy lapsed prior to the insured's death (citation omitted).

Id. at *2.

In contrast, the dissent focused on the perceived ambiguity in competing (reasonable) interpretations of the policy language by the insured and the insurer. It stressed that the decedent actually made his first premium payment when the policy was executed, January 31, 2002, and the policy provided that it did "not take effect until it has been delivered and the first premium has been paid." The insurer argued that the premium was due on January 14 of each year based on the defined "premium due date" with a grace period running through February 14. However, the plaintiff maintained that once her husband signed the policy on January 31, 2002, and paid the premium

> he purchased a year of coverage, ending January 30, 2003. By the terms of the policy, his next payment, and all subsequent payments, were due on "the day after the end of the period for which the previous premium was paid"—that is, January 31. Tacking on the 31-day grace period, the policy had not expired on the date Mr. Dzialo passed away. The insurer does not dispute

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that, if Ms. Bonem's interpretation is correct, she is entitled to recover under the policy.

Id. at *7.

The dissent found both interpretations to be "plausible" (although it thought the plaintiff's interpretation to be the better one). And that is where the doctrine of *contra proferentem* came into play. Once the parties each offered reasonable alternate interpretations of the policy, it must be resolved against the insurer:

> Although the "policy date" shown in the Schedule is January 14—which favors the insurer's interpretation, the "date on which the contract goes into effect" is January 31—which favors Ms. Bonem. Clearly, the "Policy Date" cannot be two different dates; that ambiguity—entirely the creation of the insurer—must be resolved against the insurer, such that "contract years and anniversaries" would run from January 31, not January 14.

Id. at *8.

The dissent stressed the underpinnings of the doctrine of *contra preferentem*, that "[t]he party drafting a contract knows that ambiguities will be resolved against it, giving it an incentive to write as clear a contract as possible." *Id*. at *9–10.

Majority of Court of Appeals Holds There to Be No Implied Private Right of Action Under Labor Law § 198-b.

Dissent Finds There to Be an Express Right and, Even if Not, There Was an Implied One

In the December 2021 edition of the *Law Digest*, we discussed the Court of Appeals' decision in *Ortiz v. Ciox Health, LLC*, 37 N.Y.3d 353 (2021), holding there to be no implied private right of action for damages for violation of Public Health Law § 18(2)(e). That section limits the reasonable charge for paper copies of medical records to a maximum of $0.75 per page.

Where a provision does not provide for an express private right of action, an implied one can be found where each of these three factors are satisfied: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." *Id*. at 360.

More recently, the Court dealt with Labor Law § 198-b, prohibiting wage kickbacks "by making it unlawful for any person to 'request, demand, or receive' part of an employee's wages or salary on the condition that 'failure to comply with such request or demand will prevent such employee from procuring or retaining employment.'" *Konkur v. Utica Academy of Science Charter Sch.*, 2022 N.Y. Slip Op. 00911 (February 10, 2022) at *2. Violation of the statute is a misdemeanor. In *Konkur*, a majority of the Court held there to be no private right of action to recover under that statute. Since the majority found that the provision did not provide an express right, the Court needed to analyze the three factors noted above. While finding that the plaintiff had satisfied the first two factors, it ruled that the third factor, the "most important" one relating to whether a private right was consistent with the legislative scheme, was not.

The majority focused on the statute's express "robust" enforcement mechanisms. The Attorney General can prosecute a Labor Law violation upon referral from the Labor Department after an investigation. In addition, the Labor Department can seek civil penalties, in addition to restitution, liquidated damages, interest, reinstatement of the employee's former position and back pay. Thus, the majority refused "to find another enforcement mechanism beyond the statute's already 'comprehensive scheme.'" *Id.* at *7–8 (citation omitted).

The majority also pointed to the fact that the legislature chose to provide for an express private right of action in *other* provisions "in the statutory scheme," but not with respect to a § 198-b violation:

> Contrary to the dissent's characterization, we do not hold that "the nonexistence of an express right" standing alone is "determinative." In interpreting whether the legislature intended such a right despite that silence, the relevant point is that the legislature chose to provide for it in other provisions in this statutory scheme, but not for this one. Rather than support an implied right of action here, analysis of the remedies provided for in section 198 further supports the conclusion that a plenary private right of action for violations of section 198-b would be inconsistent with the comprehensive statutory enforcement scheme (citations omitted).

Id. at *9–10.

The dissent looked at the same statutory scheme and concluded that resort to an implied private right of action was unnecessary "[g]iven the simple fact that an employee has a Labor Law claim for unlawfully withheld or seized wages, including the particular brand of wage theft known as a kickback. . . ." *Id*. at *18. In addition, even if there was no express right, an implied right exists. The dissent criticized the majority for its "undue emphasis" on the fact that other Labor Law provisions provide an express right of action. In fact, the express affirmative enforcement mechanisms noted by the majority did not

> mean that the legislature foreclosed a private right of action in 198-b (2) or that recognizing such a right would be at odds with the statutory scheme. As the majority notes, broader law enforcement further discourages kickbacks (majority op at 4), and a private right of action in no way undermines state efforts to punish bad actors. On the contrary, the private right of action is intended to work with law enforcement by state actors to impose a heavy deterrent on extortive conduct in the workplace—which is, fundamentally, the purpose of the legislative scheme established in article 6 . . .

Id. at *21.

The dissent also asserted that the majority's view leads to absurd results:

> If the majority is correct, then an employee coerced into paying a kickback out of their wages would have no recourse but to hope that the Attorney General or the Commissioner of Labor will choose to pursue the individual employee's case. One would have to hope, too, that such state officials would act expeditiously, since most employees depend on timely payment of

> every cent of their wages. The legislature could not have intended such a paternalistic application of the Labor Law, a law intended to empower employees and level the uneven employment relationship that renders employees vulnerable to exploitative tactics like kickback demands (citations omitted).

Id. at *23.

Second Department Reconciles CPLR 4106 with Constitutional and Statutory Requirements

Once Alternate Juror Is Substituted, Jury Deliberations Must Restart and the Court Must Provide an Appropriate Instruction

CPLR 4106 was amended in 2013 to provide that a trial court could discharge and replace a regular juror with an alternate, *even after deliberations had begun*, if the regular juror "is unable to perform the duties of a juror." In *Caldwell v. New York City Transit Auth.*, 2021 N.Y. Slip Op. 07537 (2d Dep't 2021), the Second Department was concerned with reconciling this provision "with the constitutional right to a trial by a six-member jury wherein each juror deliberates on all issues."

In *Caldwell,* the plaintiff was a passenger in a vehicle that collided with a New York City Transit Authority (NYCTA) bus, resulting in a personal injury action against the NYCTA and the bus driver. After the initial liability phase of the bifurcated trial, the jury was polled, finding that 100% of the fault was attributed to the defendants. During the damages phase, and after deliberations had begun, an alternate juror was seated when one of the regular jurors became unavailable. The resulting verdict and polling of the jurors reflected that the "verdict included the votes of the discharged juror as to questions one through four, and that the substituted juror only voted on questions five and six. As to questions one through four, the substituted juror was 'not there.'" *Id*. at *6.

The court found that the "defendants were deprived of their constitutional and statutory rights to a civil jury trial of six persons who deliberate on all matters" and to poll all jurors whose votes were counted; that they had preserved their contentions; and that even if the defendants did not preserve their objections, "given the fundamental errors committed by the Supreme Court, we would reach the defendants' contentions in the interest of justice." *Id*. at *8–9.

The 2013 amendment to CPLR 4106, permitting the replacement of a regular juror with an alternate after deliberations have started, was meant to reduce the possibility of a mistrial where a regular juror becomes incapacitated during jury deliberations. The Bill Jacket for the legislation, however, did not reference case law which held that substituting an alternate juror after deliberations have begun without consent "violates the *constitutiona*l right to a civil trial by jury, and invalidates any resulting verdict." The Appellate Court in *Caldwell* stated it was obliged to "avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional (citations omitted)." *Id*. at *12.

It ruled that restarting the jury deliberations from the beginning was required once the alternate juror was chosen. Ironically, the trial court had rejected the plaintiff's argument to the contrary but never gave an appropriate jury instruction. The Appellate Court concluded that such an instruction was critical:

> Thus, we hold that to reconcile CPLR 4106 with the constitutional right to a civil jury trial, a trial court permitting, upon adequate inquiry, a substitution of a regular juror with an alternate juror once deliberations have begun, must instruct the jury: (1) that one of its members has been discharged and replaced with an alternate juror as provided by law; (2) that the parties are entitled to a verdict reached only after full participation of the six jurors who will ultimately return the verdict; and (3) in order to assure the parties of that right, the jury must start their deliberations on each issue from the beginning, and must set aside and disregard all past deliberations. Further, where the trial court has provided the jury with a verdict sheet, the court should substitute it with a clean verdict sheet in order to ensure that past deliberations do not infect the new deliberation process (citations omitted).

Id. at *13–14.

In this case, the failure to give that instruction to restart deliberations anew

> resulted in an invalid verdict that included the votes of the discharged juror, and did not include votes of the juror who replaced him. Further, the verdict sheet evinces that on questions two through four, the discharged juror voted with the majority, and there were three different dissenting jurors on those questions. Discounting the votes of the discharged juror on those questions, there were only four votes in favor of the plaintiff. A verdict may not be reached by less than five-sixths of the jurors constituting a jury, and a jury's vote containing less than five votes in favor of a party is tantamount to no verdict (citations omitted).

Id. at *14.

Second Department Discusses Interplay of CPLR 3024(b) and 3013 in the Context of a Sex-Abuse Case

Court Endeavors to Provide "Bright Line" Rules

CPLR 3024(b) provides for the striking of scandalous or prejudicial matter "unnecessarily inserted" in a pleading, and CPLR 3013 refers to general pleading requirements. In *Pisula v. Roman Catholic Archdiocese of N.Y.,* 201 A.D.3d 88 (2d Dep't 2021), the Second Department discusses the interplay of these provisions in the context of sex-abuse claims under CPLR 214-g, recently enacted as part of the more comprehensive Child Victims Act (CVA).

Plaintiff brought this action under the CVA against a gym teacher/coach, the school that employed the teacher, and the Roman Catholic Archdiocese of New York, alleging that he was sexually abused from 1965 through 1967, when he was 12 to 14 years old. Plaintiff claimed that the school and the Archdiocese knew, or should have known, of the teacher's behavior and breached their duty by failing to protect him as a minor.

The complaint included various admissions by the defendant teacher (some in the form of documents included with the complaint), as well as allegations that the teacher molested the plaintiff and other youngsters. The Archdio-

cese moved pursuant to CPLR 3024(b) to strike the paragraphs from the complaint referring to the molestation of other boys as "scandalous or prejudicial." It maintained that those paragraphs had no bearing upon the liability issues raised in the action and were intended to inflame the jury and deprive defendants of a fair trial. Plaintiff argued that all of the allegations were relevant to the issues of notice (actual and constructive); the teacher's intent, motive, identity, modus operandi, and lack of mistake; the Archdiocese's actions moving offenders from institution to institution; and his request for punitive damages.

The trial court denied the defendant's motion. The Appellate Division granted leave to appeal stating that "[w]e do so because the instant action was brought under the fairly-new CVA, where interpretive case law is at an incipient stage, and because this appeal provides the Appellate Division with a rare opportunity to speak to CPLR 3024(b) pleading issues in such cases, as may be relevant to the bench and bar in future litigations." *Id*. at 98.

The Appellate Division explained that the language in CPLR 3024(b) is in the disjunctive; thus, a matter can be stricken if it is scandalous *or* prejudicial. Moreover, whether such a matter is to be stricken depends on the context, underlying circumstances, and the claims being asserted. CPLR 3013 requires that statements in pleadings must be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Particularity as to certain specific matters is governed by CPLR 3015, in specific actions by CPLR 3016.

Significantly, the court stressed that scandalous or prejudicial matter that is relevant to a cause of action or its material elements will not be stricken. There is a difference between what is relevant to a pleading's factual statements "to give proper notice of transactions and occurrences and to address the material elements of the causes of action" and "what evidence may be relevant and admissible at the time of trial of the action to prove them." *Id*. at 97.

CPLR 3024(b) involves a two-part test: Is the subject allegation "scandalous or prejudicial"? If not, there is no need to strike it. But if it is, the second question is whether the allegation was inserted into the pleading "unnecessarily." This speaks toward the matter's relevance. Thus, where the allegation is both irrelevant and scandalous or prejudicial, it can be stricken. The court emphasized that

> [a]llegations of sexual abuse are, by their nature, definition, and essence, scandalous and prejudicial on some obvious level. At the same time, factual averments about sexual abuse are necessary in any action where those allegations form the predicate for an award of damages, to state a cause of action generally and pursuant to the CVA specifically.

Id. at 99.

In evaluating the allegations in the complaint in this action, the court concluded that, with one exception, all of the allegations were either not scandalous or, if they were, they were not irrelevant, unnecessary, or "unnecessarily inserted into the pleading." The exception was the allegations relating to a 2014 letter sent by the defendant teacher to another survivor who attended the school. The court found that these allegations that another person was sexually abused by the defendant well *after* the occurrences in this case was scandalous, prejudicial, and irrelevant because "[n]one of the asserted causes of action in the amended complaint, nor the prayer for punitive damages, contain elements that render allegations about subsequent sexual abuse survivors necessary or relevant." *Id.* at 109.

The Second Department did not stop there. Instead, recognizing the plethora of cases created by the passage of the CVA, the court endeavored to set firm "bright line" rules to be followed in the future: "Factual allegations about a plaintiff's own alleged sexual abuse will not be stricken from the complaint under CPLR 3024(b) as they are central and necessary to giving notice of the transaction or occurrence or series of transactions and occurrences, and the material elements of the cause(s) of action asserted." Factual allegations about a defendant's (i) prior sexually-abusive conduct or concurrent-in-time sexual abuse of another person will not be stricken "where one or more causes of action includes, as a necessary element, what acts or propensities an institutional defendant knew or should have known by the time of the plaintiff's own abuse"; and (ii) subsequent relevant statements or conduct that specifically relate back to the plaintiff's sexual abuse will not be stricken. However, "[f]actual allegations about a defendant's statements or conduct involving a subsequent sexual abuse survivor, other than the plaintiff," may be stricken "on the ground that they are scandalous or prejudicial and not necessary to the elements of the plaintiff's specific cause(s) of action." *Id*. at 110–111.

Most Interlocutory Orders Are Appealable as of Right to the Appellate Division. But Not All!

Some of you may be perplexed as to why leave to appeal was necessary in *Pisula,* asking: unlike in federal practice, aren't practically all trial court orders appealable as of right to the Appellate Division? The important qualification is "practically all." CPLR 5701(b) lists three exceptions and one is an order granting or denying a motion to strike scandalous or prejudicial matter, which is not appealable as of right. CPLR 5701(b)(3). The others are an order made in an Article 78 proceeding or one that requires or refuses to require a more definite statement in a pleading. In those circumstances leave to appeal will be necessary. Where leave is granted, the standard of review is whether the trial court order was an improvident exercise of discretion. *Id*. at 98.

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