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Construction of the Notice of Appeal: Jurisdiction, Discretion, Inextricably Intertwined Relief

'Cline v. Code' is a lesson in precise "you-can't-be-too-careful-enough" drafting.

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CPLR 5515(1) sets forth the elements of the notice of appeal: "a notice shall designate

the party taking the appeal, the judgment or order or specific part of the judgment or order appealed." The statute is jurisdictional. *Levitt v. Levitt*, 97 A.D.3d 543 (2d Dep't 2012). Although the three ingredients appear innocuously simple, great precision must be applied towards rigidly honed drafting of the notice because phrasing, miswording or an omission, however seemingly benign, can be fatal to the appellant. Nevertheless, decisional authority has carved out rarely granted lifelines that should never be expected. *Cline v. Code*, 2019 NY Slip Op 06251 (4th Dep't 2019), the subject of this article, is such a lifeline.

An appeal from part of a judgment or order waives the right to appeal from the remainder thereof; omission in the brief. "By taking an appeal from only a part of a judgment or order, a party waives its right to appeal from the remainder thereof." *Hatem v. Hatem*, 83 A.D.3d 663, 664 (2d Dep't 2011). Although a notice of appeal indicates that the appeal is from the entire judgment, the omission of an issue in the brief renders the argument abandoned. *Casey v. State*, 148 A.D.3d 1370 (3d Dep't 2017). This rule also applies when a party seeks leave to appeal. *Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.*, 32 N.Y.3d 645, 650-51 (2019):

> Ordinarily when the court grants a motion for leave to appeal all issues of which the court may take cognizance may be addressed by the parties" ... However, where "the party seeking leave specifically limits the issues to be raised [in its notice of motion], it is bound thereby and may not thereafter raise other questions" because "[t]o permit otherwise necessarily disadvantages the opposing parties, who might have joined issue or even cross-moved for leave to appeal as to additional issues had adequate notice been given.

The Appellate Division has discretion to construe a notice of appeal liberally and "reach beyond the issues" therein; prejudice. In *McSparron v. McSparron*, 87 N.Y.2d 275, 282 (1995), the Court of Appeals stated that appellate courts have discretion to "liberally" construe a notice of appeal "or even to reach beyond the issues it cited":

> [T]he scope of the Appellate Division's review power was not limited by the recitations in defendant's notice of appeal. Notably, there is no indication on this record that plaintiff was prejudiced by any ambiguity or omission in the notice.

> Accordingly, there is no basis for this Court to interfere with the Appellate Division's discretionary choice to construe defendant's notice of appeal liberally or even to reach beyond the issues it cited.

The Fourth Department developed a body of law, grounded in *McSparron*, wherein it has alternately applied and denied such discretion: *Canandaigua Emergency Squad v. Rochester Area Health Maintenance Org.*, 130 A.D.3d 1530 (4th Dep't 2015); *In re Manufacturers & Traders Tr. Co.*, 42 A.D.3d 936 (4th Dep't 2007); *Mowers v. Isaacs*, 258 A.D.2d 934 (4th Dep't 1999); *Michael M. v. Tanya E.*, 256 A.D.2d 1137 (4th Dep't 1998); *Camperlino v. Town of Manlius Mun. Corp.*, 78 A.D.3d 1674 (4th Dep't 2010); and *Haas v. Haas*, 265 A.D.2d 887 (4th Dep't 1999).

When the unappealed portion of an order is "inextricably intertwined" with the appealed portion. The order appealed from, in *City of Mount Vernon v. Mount Vernon Hous. Auth.*, 235 A.D.2d 516 (2d Dep't 1997), denied the motion of the plaintiff, City of Mount Vernon, for leave to serve an amended complaint, and granted the cross motion of the defendant, Commissioner of the New York State Division of Housing and Community Renewal, to, inter alia, dismiss the complaint insofar as asserted against it:

> The City filed a [] notice of appeal which expressly stated that it was appealing "from that part of the order * * * that denied the motion * * * for leave to serve an amended complaint and substitute a party defendant". The City now moves for leave to serve and file an amended notice of appeal to provide that the appeal is from the whole, not just a part, of the order in question.

These facts, held the Second Department, constituted a "rare occasion" where relief could be granted (at 517):

> [T]here are rare occasions on which an appellate court may review and alter provisions of an order or judgment which were not described in a limited notice of appeal. That may occur when matters which are the subject of the limited appeal are 'inextricably intertwined' with those that are not, so that to give appropriate relief requires the court, by necessity, to disturb a provision of the order or judgment which would otherwise not be before it ... In light of this rule, our denial of the cross motion to amend the notice of appeal in this case does not foreclose

> the power of this court to review and, if required, alter any portion of the order appealed from necessary to afford the appellant appropriate relief with respect to its limited appeal.

See also *Citnalta Const. v. Caristo Assoc. Elec. Contractors*, 244 A.D.2d 252, n.1, 254 (1st Dep't 1997) ("Where disposition of the portion of an order or judgment appealed from is so inextricably intertwined with the portion of the order not appealed from, that it would be unjust to vacate the one without the other, the court has power on vacatur of the portion appealed from to vacate the remaining portion."); *Castellon v. Reinsberg*, 82 A.D.3d 635, 636 (1st Dep't 2011) ("Even though SMI's notice of appeal was limited to the granting of plaintiffs' motion for partial summary judgment, we may review unappealed portions of the order that are 'inextricably intertwined' with the appealed from portion.")

A parallel may be seen with CPLR 5511, where the Court of Appeals also carved out an exception to an otherwise jurisdictional statute, again based on the exigency of the circumstances: "on *rare* occasions, the grant of full relief to the appealing party may necessarily entail granting relief to the nonappealing party." *Cover v. Cohen*, 61 N.Y.2d 261, 277 (1984); *511 West 232nd Owners v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002); *Hecht v. City of New York*, 60 N.Y.2d 57 (1983).

'Cline v. Code': The Majority. With the foregoing principles in mind, we study *Cline v. Code*. Therein plaintiff commenced an action seeking damages for injuries sustained during an auto accident. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury (Insurance Law § 5102(d)). Plaintiff cross-moved for partial summary judgment on the issue of serious injury. Supreme Court denied plaintiff's cross motion, granted defendant's motion and dismissed plaintiff's complaint.

In a 3-1 decision, the Appellate Division held that plaintiff's notice of appeal did not limit its review regarding that part of the order and judgment that denied her cross motion for partial summary judgment. The notice of appeal stated: Plaintiff "hereby appeals ... from the ... Order and Judgment ... denying Plaintiff's Cross Motion for Summary Judgment. Plaintiff *appeals from each and every part* of said Order denying Plaintiff's Cross Motion" (emphasis added). The majority concluded that the notice

"d[id] not contain language restricting the appeal to only a specific part thereof"; "the appeal [wa]s not limited to review of the denial of plaintiff's cross motion and that the reference thereto simply constitute[d] language describing the order and judgment."

Further supporting the reasoning that the language was descriptive and "not evidence that plaintiff excluded from her appeal that part of the order and judgment granting defendant's motion" was found within plaintiff's cross motion, wherein "[she] expressly sought as part of the requested relief '[a]n Order denying defendant's Motion for Summary Judgment in its entirety.'" Notably, in *Long Is. Pine Barrens Socy. v. Cent. Pine Barrens Joint Planning & Policy Com'n*, 113 A.D.3d 853 (2d Dep't 2014), the Second Department held that the petitioners' notice of appeal which recited that they appealed "from a Judgment ... dismissing [the] Petition due to lack of standing d[id] not limit their appeal solely to the issue of standing" as there was no limiting language, express or implicit, rather the language was construed to "*descri*[*be*] the judgment".

Furthermore, without articulating the term "inextricably intertwined," the majority said:

> [T]he relief sought in the cross motion included the denial of defendant's motion, and that granting the other relief sought by plaintiff in the cross motion and on appeal from the denial thereof, i.e., partial summary judgment on the issue of serious injury, *would necessarily require denial of defendant's motion for summary judgment dismissing the complaint.*

The Dissent. Justice John M. Curran dissented, concluding that the language "unambiguously conveyed that plaintiff limited her appeal to challenging only that part of the order and judgment that denied her cross motion for summary judgment" that "the notice's ["clear" and] express language restrict[ed] [the court's] review to only that part of the order and judgment":

> plaintiff 'hereby appeals [] from the ... Order and Judgment ... denying Plaintiff's Cross Motion for Summary Judgment. Plaintiff appeals from each and every part of said Order *denying Plaintiff's Cross Motion*' [internal emphasis] ... Plaintiff even referenced that portion of the order and judgment, 'Plaintiff's Cross Motion,' twice and made no reference to any other part of the order and judgment. This

> repeated language compels the conclusion that plaintiff did not seek to challenge the court's granting of defendant's motion.

The dissent argued that there is no decisional authority recognizing "a distinction between 'descriptive' and jurisdictional language in a notice of appeal, and, as the majority recognize[d] by using the 'cf.' signal, one of the cases that they cite [*City of Mount Vernon*, above] actually contravenes that view." However, this argument does not address discretion, as authorized by *McSparron* and the body of law from the Fourth Department. Nor is there an explanation as to how the mere use of the "cf." designation, in and of itself, promotes the dissents reasoning. It is unclear to this writer why the majority annexed the "cf." designation to *Mount Vernon* because that decision supports its ruling: "there are *rare occasions* on which an appellate court *may review and alter provisions* of an order or judgment which were not described in a limited notice of appeal."

The dissent found further support in plaintiff's failure to submit a reply brief in opposition to defendant's brief, wherein "defendant argued that the notice of appeal foreclosed plaintiff from challenging the grant of defendant's motion" thereby "only being fair to a party who did not even [] request that we broadly construe the notice":

> This is all the more concerning given that the majority's rationalization of its reading of the notice of appeal is premised, in part, on its conclusion that 'granting the ... relief sought ... would necessarily require denial of defendant's motion for summary judgment.'
>
> [T]he majority essentially looks to the merits of plaintiff's position to justify its exercise of jurisdiction under a broad interpretation of the language of the notice of appeal. Our jurisdiction, of course, is unconnected to our view of the merits, and is in fact the necessary predicate to our review of them.

Significantly, a respondent is not required to file a brief; it is the appellant's burden to sway the appellate court. The majority's analysis did no more than acknowledge the obvious: Plaintiff could not prevail unless defendant lost entirely, that a partial victory for defendant would be ruinous to plaintiff, which is not a determination on the merits.

Conclusion

Cline is a lesson in precise, "you-can't-be-too-careful-enough" drafting. As with all matters jurisdictional, a party should, before proceeding, always remember Clint Eastwood's iconic question: "Do I feel lucky?"

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