

Expert Opinion

CPLR 5511: The Varied Implications of Aggrievement, Part I

This article examines varied implications of CPLR 5511. Part I addresses: the two-tier test for aggrievement; consent orders, failure to oppose; the court's reasoning or adverse language in a decision is not appealable; accepting the benefits of a judgment; appeals by technical nonparties, relief to nonappealing parties, unity in interest; relief to intertwined nonappealing parties; intertwined orders or judgments; and intervenors, failure to intervene.

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Elliott Scheinberg. Courtesy photo

An appellant must satisfy four jurisdictional predicates before the merits may be reviewed: Aggrievement [CPLR 5511]; Appealable Paper [CPLR 5512] and Timeliness [CPLR 5513].

CPLR 5515(1) requires that a notice of appeal designate the judgment or order, or specific part of the judgment or order, from which the appeal is taken. This requirement is jurisdictional. *Levitt v. Levitt*, 97 A.D.3d 543 [2d Dept 2012]. CPLR 5520(c) can on occasion be helpful with CPLR 5512 and 5515(1) but that is beyond the cope of this article.

CPLR 5511 states: “An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent.” The statute casts a wide net with broad consequences.

The root of appellate jurisdiction is by way of an aggrieved person. See *Burmester v O'Brien*, 166 AD 932 [2d Dept 1915]. Aggrievement is jurisdictional and subject to the court's threshold review, sua sponte first time on appeal. See *Klinge v. Ithaca College*, 235 A.D.2d 724 [3rd Dept 1997]; *Glickman v. Sami*, 146 A.D.2d 671 [2nd Dept 1989].

This article examines varied implications of CPLR 5511. Part I addresses: (i) the two-tier test for aggrievement; (ii) consent orders, failure to oppose; (iii) the court’s reasoning or adverse language in a decision is not appealable; (iv) accepting the benefits of a judgment; (v) appeals by technical nonparties, relief to nonappealing parties, unity in interest; (vi) relief to intertwined nonappealing parties; (vii) intertwined orders or judgments; and (viii) intervenors, failure to intervene.

Aggrievement, Two-Tier Test

Aggrievement occurs when requested relief is denied in whole or in part or when someone demands relief against another, who opposed the application, and the relief is granted in whole or in part. See *Mixon v. TBV*, 76 A.D.3d 144 [2nd Dept 2010]. A party is not aggrieved by an order which does not grant relief the party did not request. See *Spielman v Mehraban*, 105 AD3d 943 [2d Dept 2013].

A party is aggrieved when he or she has a direct interest in the controversy which is affected by the result and when ‘the adjudication has a binding force against the rights, person or property of the party. See *Rare instan v. Chautauqua County Board of Elections*, 69 A.D.3d 1298, 1304 [4th Dept 2010], aff’d, 14 N.Y.3d 139 [2010]; *DiMare v. O'Rourke*, 35 A.D.3d 346 [2nd Dept 2006]; *Application of Richmond County Society for Prevention of Cruelty to Children*, 11 AD2d 236, 239 [2d Dept 1960], affd, 9 NY2d 913 [1961], amended, 10 NY2d 746 [1961]. It must be an existing right. *In re Landis*, 114 A.D.3d 458 [1st Dept 2014]; *Application of DeLong*, 89 AD2d 368 [4th Dept 1982]. That the judgment may affect remote or contingent interests of a party does not give that party a right to appeal. *Olney v. Town of Barrington*, 162 AD3d 1610, 1611 [4th Dept 2018]; *In re Landis*, 114 AD3d 458, 459 [1st Dept 2014]. Disappointment or even having been deprived of a

financial benefit does not, without more, make that party aggrieved. *Thymann v. AFG Management*, 112 AD3d 455 [1st Dept 2013].

Incomplete relief to the successful party may include a specific finding at trial that might prejudice the party in a future proceeding by way of collateral estoppel. *Feldman v. Planning Board of Town of Rochester*, 99 A.D.3d 1161 [3rd Dept 2012]. *Lincoln v. Austic*, 60 A.D.2d 487, 401 N.Y.S.2d 1020 [3d Dept 1978] is one such instance:

“Generally, a party who has been successful may not appeal a judgment in his favor. This rule is not inflexible, however, and an appeal may be taken when the judgment does not grant complete relief to the successful party, when, for example, a specific finding at trial might prejudice a party in a future proceeding by way of collateral estoppel. It seems clear that a substantial and important right has been adversely affected and that the interests of justice require that [Robert] be permitted to appeal the adverse finding.

“From oral argument it is apparent that a second action arising is pending against Robert wherein he may well be collaterally estopped from challenging the specific factual finding of the jury, that Victor operated the automobile with his consent. The prejudice to Robert from the estoppel is obvious, and, therefore, fairness compels that he be permitted to bring this appeal.”

The doctrine serves essential fairness by preventing collateral estoppel prejudice in subsequent litigation where parties cannot relitigate fully contested issues. Justice should protect parties who prevailed overall but face binding adverse findings on discrete issues.

Consent Orders, Failure to Oppose

A person who consents or fails to oppose relief requested by another has acquiesced in that relief and is not aggrieved. *Mixon v. TBV*, 76 AD3d 144, n., 2, [2d Dept 2010]. A stipulation reducing a damages award does not render the party aggrieved. See *Zhagnay v. Royal Realty*, 87 NY2d 954 [1996]; *Nunez v. City of New York*, 85 AD3d 885 [2d Dept 2011]. An appeal from a judgment entered on consent lies to the extent that it differs from the consent. *Hatsis v. Hatsis*, 122 A.D.2d 111 [2nd Dept 1986].

In *Matter of Dah'Marii G.*, 156 AD3d 1479 [4th Dept 2017] the mother never moved to vacate the finding of neglect or to withdraw her consent to the order, her contention that her consent was not knowing, intelligent, and voluntary could not be appealed.

The Court's Reasoning or Adverse Language in a Decision Is Not Appealable

An appellant who received all the relief it requested is not aggrieved, even though the court may have made some finding of fact or ruling of law with which the appellant is dissatisfied. *Benedetti*

v. Erie County Medical Center, 126 AD3d 1322 [4th Dept 2015]. Aggrievement does not hinge upon a court's reasons underpinning why relief was granted or denied. *Dolomite Products Co. v. Town of Ballston*, 151 AD3d 1328 [3d Dept 2017]; *Brown v. Condzal*, 137 AD3d 667 [1st Dept 2016]. "A party is not aggrieved merely because it 'disagrees with the particular findings, rationale or the opinion supporting' a judgment or order." *Avigdor v. Avigdor*, 2026 NY Slip Op 00892 [2d Dept 2026]. Not the words selected by the writing judge, but the action taken by the court, is what is operative and significant. *Switzer v. Merchants Mutual Casualty*, 2 NY2d 575 [1957]; *Wells Fargo Bank, NA v Ostiguy*, 119 AD3d 1266 [3d Dept 2014].

Where multiple grounds for relief are asserted, receipt of a favorable judgment or order does not render the prevailing party aggrieved as to the other grounds. *Held v. New York State Workers' Compensation Board*, 58 AD3d 971 [3d Dept 2009].

Accepting the Benefits of a Judgment

Generally, a party accepting the benefits of a judgment waives the right to appeal that judgment. An exception occurs where the appeal seeks to increase the amount of the judgment. *Estate of Fleischer*, 126 AD2d 805 [3d Dept 1987].

In *Kriesel v. May Dept. Stores*, 261 AD2d 837 [4th Dept 1999], plaintiff executed a satisfaction of judgment for damages for past and future lost wages and past and future medical expenses. Plaintiff could appeal the verdict's failure to include damages for pain and suffering:

"The outcome of the appeal could have no effect on the appellant's right to the benefit he or she accepted, its acceptance should not preclude the appeal. 'There is nothing inconsistent in a party's accepting the benefit of a judgment * * * and appealing in an attempt to increase the award' ... 'This exception appears to be limited to those instances where the appellant's right to the amount awarded by the original judgment is absolute, making it possible to obtain a more favorable judgment without the risk of a less favorable result upon retrial.'"

Also, *Webber v. Webber*, 145 AD3d 1499 [4th Dept 2016]; *Cornell v T.V. Dev. Corp.*, 17 NY2d 69 [1966].

Appeals by Technical Nonparties, Relief to Nonappealing Parties, Unity in Interest

A "technical nonparty" refers to an individual or entity that is not formally named as a party to litigation but has sufficient interest in the outcome to be considered an "aggrieved party" under CPLR 5511 for purposes of appellate standing. Technical nonparties have the right to appeal when they can demonstrate they are aggrieved by a court order or judgment that directly affects their legal rights or interests, even though they were not formal parties to the underlying litigation. Dating back to at least 1881, the Court of Appeals has held that "It is a mistake to suppose that no

one can appeal from an order made in an action unless he be a party to the action. Everyone who can properly be called a party to the order, and who is aggrieved thereby, may appeal." *Hobart v. Hobart*, 86 N.Y. 636, 637 [1881].

A technical nonparty may have standing to prosecute an appeal, even absent a motion for leave to intervene, a notice of appearance, answer, or motion extending the time to answer (CPLR 320, 1003, 1012, 1013) where it is "expressly bound" by the order under review. *Stewart v. Stewart*, 118 AD2d 455 [1st Dept 1986]; *Buller v. Giorno*, 40 AD3d 316 [1st Dept 2007]; *Brady v. Ottaway Newspapers*, 97 AD2d 451 [2d Dept 1983], *affd*, 63 NY2d 1031 [1984]; *Petroski v. Petroski*, 6 AD3d 1194 [4th Dept 2004].

In *Hecht v. City of New York*, 60 NY2d 57, 63 [1983], the Court of Appeals held:

"Neither CPLR 5522 nor any other statutory or constitutional authority permits an appellate court to exercise any general discretionary power to grant relief to a nonappealing party.

"n. To be distinguished is CPLR 5501(subd. [a], par. 5), applicable when a trial court has granted additur or remittitur relief with respect to an excessive or insufficient verdict. When the beneficiary of that order appeals, the appellate court may, under this provision, grant affirmative relief to the nonappealing party by reinstating the verdict."

Hecht noted, however, that it would not delve into identifying "the specific circumstances when a such a judgment or order might be appropriate" [at 62]:

"It is, of course, axiomatic that, once an appeal is properly before it, a court may fashion complete relief to the appealing party. On rare occasions, the grant of full relief to the appealing party may necessarily entail granting relief to the nonappealing party. At this time, there is no need to detail or enumerate the specific circumstances when such a judgment or order might be appropriate."

In *Cover v. Cohen*, 61 N.Y.2d 261, 277-78 [1984], the Court of Appeals, quoting the preceding passage in *Hecht*, held:

"This is such an occasion, for here, if the judgment against Kinney stands, General Motors will be required by the indemnity judgment against it to pay plaintiffs on the basis of a defective product manufactured by General Motors notwithstanding that on retrial the product may be found not to have been defective."

Mixon v. TBV, 76 A.D.3d 144, n.2 [2d Dept 2010], citing *Tymon v. Linoki*, 23 A.D.2d 663 [2d Dept 1965], *mod. on other grounds* 16 N.Y.2d 293 [1965], similarly noted: "In rare instances, a person against whom no relief was sought may be aggrieved by the granting of relief to an adversary against a party with whom he or she is united in interest." In *Tymon*, a vendee sued for specific

performance of a contract for the sale of real property. The defendant-Linoki (the vendor) and defendant-Hayes (a subsequent vendee) appealed from a judgment, which directed Linoki to specifically perform the contract and to deliver to the plaintiff a Full Covenant and Warranty Deed.

While Hayes had not sought affirmative relief and the judgment contained no provision directed against him, his right to appeal was upheld because his claim as the proper vendee with the only subsisting enforceable contract for the land purchase was adversely affected thus rendering him aggrieved. Absent the judgment, Hayes would have been entitled to the conveyance.

Auerbach v. Bennett, 64 A.D.2d 98, 104 [2d Dept 1978], *affd* in relevant part, *mod* on other grounds 47 N.Y.2d 619 [1979], concerned a stockholder derivative action for recovery of payments abroad and in the United States constituting bribes and kickbacks; the Supreme Court granted summary judgment in favor of the defendants. Stanley Wallenstein was a stockholder in the corporation for whose benefit the action was brought but was not a named party at the inception of the action or at the time of the order of Special Term: "The first and fundamental question raises the standing of the appellant, Stanley Wallenstein, to take the appeal in an action in which he is not a party, although he is a stockholder in the corporation for whose benefit the action was brought by the plaintiff, Auerbach, who is also a stockholder and did not take an appeal." The Second Department set "appearances aside" declining to apply a "narrowly construed" "cramped construction" on the "language" in CPLR 5511 rather emphasizing that "the true question is whether the nonparty may be bound by the judgment if he does not take affirmative action in the litigation to protect his rights" [at 104]. In *Mutual Benefits Offshore Fund, Limited v. Zeltser*, 172 AD3d 648, 649 [1st Dept 2019], the First Department, quoting *Auerbach v. Bennet*, allowed a nonparty to appeal.

Relief to Intertwined Nonappealing Parties

Hecht v. City of New York, 60 N.Y.2d 57, 63 [1983], addressed the limits of an appellate court's scope of review of a judgment rendered against multiple parties but appealed by only one. It noted that appellate scope of review is "generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party"; "no statutory nor constitutional authority permits an appellate court to exercise any general discretionary power to grant relief to a nonappealing party." Nevertheless, "on rare occasions," *Hecht* held, "the grant of full relief to the appealing party may necessarily entail granting relief to a nonappealing party" such as when there are "multiple tort-feasors for damages" where "the parties have a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties." [Also, *Cover v. Cohen*, 61 NY2d 261 [1984]; *Mixon*, n.2.].

Intertwined Orders or Judgments

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 one without the other, the court may vacate the nonappealed portion via its vacatur of the appealed portion. *Citnalta Construction v. Caristo Associates Electrical Contractors*, 244 AD2d 252, n. 1 [1st Dept 1997] (“the failure to factor the payments to the original subcontractor into the damages award was inextricably intertwined with the failure to factor the cost of the change orders into that award, the correction of the former error required correction of the latter”); *Offset Paperback Manufacturers v. Banner Press*, 71 AD2d 593, 594 [1st Dept 1979].

In *City of Mount Vernon v. Mount Vernon Housing Authority*, 235 AD2d 516 [2d Dept 1997], plaintiff-appellant cross-moved to amend the notice of appeal. The Appellate Division found that this case was a rare occasion “where an appellate court may review and alter provisions of an order or judgment which were not described in a limited notice of appeal because 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.” (Remember, the jurisdictional requirement in CPLR 5515(1) that a notice of appeal must designate the judgment or order, or specific part of the judgment or order, from which the appeal is taken. *Levitt v. Levitt*, 97 A.D.3d 543 [2d Dept 2012].) Although the Appellate Division denied the cross-motion to amend the notice of appeal, it did “not foreclose the power 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.”

Intervenors, Failure to Intervene

An intervenor becomes a party to the underlying proceeding for all purposes, including aggrievement. *Dolomite Products Co. v. Town of Ballston*, 151 AD3d 1328 [3d Dept 2017]. *Cadlerock Joint Venture, L.P. v. John H. Fisher, P.C.*, 178 A.D.3d 1160 [3d Dept 2019] concerned a judgment-creditor’s efforts to recover money in the judgment-debtor’s possession where the judgment-debtor did not attempt to intervene in the proceeding. The petitioner in *Cadlerock* was the assignee of a 2007 money judgment against Peter Kuber.

In 2016, Kathleen Kuber and her husband, Peter, settled a personal injury claim, arising out of an auto accident, for a net unallocated recovery of \$119,503.84. Cadlerock served a restraining notice on the respondent, who was the Kubers’ attorney in the personal injury action and the holder of the settlement proceeds. It simultaneously commenced a turnover proceeding to recover the money pursuant to CPLR 5225, 5227, which statutes address the recovery by a judgment creditor of money or other personal property in the debtor’s possession or custody or owed to its judgment debtor.

Supreme Court determined that Cadlerock was only entitled to that portion of the settlement representing Peter Kuber's recovery and, as such, ordered an allocation hearing. Following the hearing, Supreme Court found that 10% of the settlement proceeds were attributable to Peter's derivative claim and directed respondent to release that portion to petitioner. The Kubers appealed and Cadlerock cross-appealed.

The Appellate Division held that, "although the Kubers participated in this matter before Supreme Court, they [we]re not named parties and never sought to intervene (CPLR 5225[a], [b]; 5227, 5239), [t]hey [we]re, nevertheless, aggrieved by [the] order directing the payment of monies to which they assert[ed] a claim and ... [therefore] ha[d] standing to appeal from it (CPLR 5511; *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 393 N.E.2d 994 [1979]; *Triangle Pacific Building Products v. National Bank of North America*, 62 A.D.2d 1017 [1978])."

Triangle held: "Although appellant was not named in this special proceeding, we hold that she was 'aggrieved' by the orders of the trial court and, accordingly, has standing to pursue this appeal ... Appellant's clear interest in the joint account is not disputed on this appeal. She is, minimally, the presumptive owner of one-half of the account proceeds, or 'moiety' (Banking Law, § 675 ...).

Case law has acknowledged that children may be aggrieved from custody determinations: *Angel D. v. Nieza S.*, 131 AD3d 874 [1st Dept 2015] ("Respondent mother has not appealed from the order denying her request to relocate. To the extent the appellant child is aggrieved by the order ... the court's determination that relocation would not be in the child's best interests has a sound and substantial basis in the record."). The children, in *Kessler v. Fancher*, 112 AD3d 1323 [4th Dept 2013], were held not aggrieved by orders that dismissed petitions filed by one parent alleging violations of custody or seeking personal orders of protection against the other parent ("The children, while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned (*Matter of McDermott v. Bale*, 94 A.D.3d 1542, 1543–1544, 943 N.Y.S.2d 708). As we wrote in *McDermott*, 'children in custody cases should [not] be given full party status such that their consent is necessary to effectuate a settlement ... There is a significant difference between allowing children to express their wishes to the court and allowing their wishes' to chart the course of litigation.") In *In re Alexander Z.*, 151 AD3d 421 [1st Dept 2017], the children were similarly held not aggrieved thus barring an appeal from findings of neglect against their mother.

In re Geovany S., 143 AD3d 578 [1st Dept 2016], held that children were not aggrieved by the finding of their derivative neglect by respondent. *Gevonay* and *Alexander Z.* are counterintuitive because the children were, in both cases, the direct victims of the neglect and no one more could have had a greater direct interest or been more aggrieved.

Part II examines: (i) assignment of judgment or rights; (ii) individual and corporate aggrievement; (iii) standing; (iv) third-party standing, organizational standing; (v) nonaggrieved party, CPLR

5501(a), alternative grounds for affirmance; (vi) leave to replead, refile; (vii) “There is nothing particularly novel about repleading a dismissed complaint in Supreme Court to cure a defect discovered on appeal” where the Appellate Division dismissed without prejudice; and (viii) denial of a motion to renew without prejudice is appealable.

Part III reviews: (i) CPLR 5511, default; (ii) default, admissions, burden of proof; (iii) default by disruptive behavior; (iv) CPLR 321, the Second Department, default by not attending the trial, walking out of the courtroom; (v) The First and Third Departments hold that a party’s failure to appear “may not “automatically” or “not necessarily” “result in a default,” where the absence was explained and counsel was authorized to proceed; (vi) The Fourth Department generously holds that there is no default where a party does not appear but counsel appeared and participated in the proceedings, including actions in the Family Court; (vii) 22 NYCRR 202.27; (viii) conditional orders, CPLR §§ 3126, 5015(a)(1); and (ix) subject of contest.

Elliott Scheinberg is the author of *The New York Civil Appellate Citator*, [NYSBA 4th ed., 3 vols, TBA 2026] and of *Contract Doctrine and Marital Agreements in New York*, [NYSBA, 5th ed., 2 vols, 2023]. He is a Fellow of the American Academy of Appellate Lawyers and the American Academy of Matrimonial Lawyers. He is a member of the Committee on Courts of Appellate Jurisdiction (NYSBA) and of NYSBA’s Family Law Executive Committee.

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