DEPENDENT UPON THE KINDNESS OF STRANGERS: THE CIRCUMSTANCES IN WHICH A NON-APPELLANT MAY BE AWARDED AFFIRMATIVE RELIEF IN THE NEW YORK COURTS

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It is a strange and perplexing phenomenon.

In New York, it is exceedingly simple for a party to take an appeal. Although all of New York's appellate courts have various forms required for the would-be appellant to complete and file, all a party need do to jurisdictionally take an appeal is: (a) prepare a notice of appeal (which need not be a work of art, and typically says nothing more than that the party appeals from all parts of an identified order or judgment);[1] (b) serve the notice of appeal on the other parties within thirty days of service of the judgment or order (with notice of entry) that is being appealed; and (c) file the notice of appeal, within the same time frame, in the court from which the appeal is taken.[2]

Not easy enough to take an appeal? Well, Civil Practice Law and Rules ("CPLR") 5520(a) makes it even more difficult to go wrong. As the Court of Appeals recently had occasion to demonstrate,[3] if the would-be appellant gets *either* the service part right *or* the filing part right, the court from or to which the appeal is taken can, in its

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[1] There is, it should be noted, a danger in not appealing from all parts of the order or judgment. The appellate court may well rule that it is thereby barred from considering those portions of the order or judgment that were not appealed. Southwell v. Middleton, 67 A.D.3d 666, 670, 890 N.Y.S.2d 57, 60 (App. Div. 2d Dep't 2009); Marciano v. Ran Oil Co. East, 63 A.D.3d 1118, 1119–1120, 882 N.Y.S.2d 452, 452–453 (App. Div. 2d Dep't 2009); Violet Realty, Inc. v. City of Buffalo Planning Bd., 20 A.D.3d 901, 904, 798 N.Y.S.2d 283, 285 (App. Div. 2d Dep't 2005).

[2] N.Y. C.P.L.R. 5513(a) (McKinney 2010); 5515(1) (McKinney 2009).

[3] M Entertainment, Inc. v. Leydier, 13 N.Y.3d 827, 919 N.E.2d 177, 891 N.Y.S.2d 6 (2009).

beneficence, excuse the irregularity in the part that did not go so well.

Is thirty days not enough time to prepare, file, and/or serve a document that is likely no more than a page long? The statutes enacted by legislators who often empathize with lawyers (since the legislators often *are* lawyers) again intervene to protect lawyers from their own follies. If the order or judgment that is being appealed was served by overnight mail, another day is added, as would apply to service of virtually any document by overnight mail.[4] If the order or judgment was instead served by ordinary mail, five days are added.[5] In fact, as a result of a 1999 amendment, the would-be appellant gets an extra five days for ordinary mailing even if it was the would-be appellant who served the order or judgment by mail,[6] a provision that some might deem generous inasmuch as the would-be appellant need not, one would think, actually wait for the mail to arrive at its destination before reading the document that he or she is mailing.

But what about those instances in which the party may have a valid complaint with some aspect of the judgment but would just as soon let the matter rest and allow the case to conclude so long as the other parties are also willing to do so? And what about the party who believes that an interlocutory order was wrongly decided but is content to wait until final judgment is entered to get the matter sorted out on appeal?[7] For these litigants who would prefer to appeal if and only if the adversary does so, New York law provides the useful mechanism of the cross-appeal. The recalcitrant appellant can wait and see if any of the parties are going to appeal, and, if one of the other adversarial parties in fact does so, has ten days from service of the notice of appeal or the remainder of the thirty-day period—whichever is longer—to file a cross-appeal.[8] The same provision also provides a second chance for the would-be appellant who actually *meant* to appeal but just neglected to do so.

In this context, the strange and perplexing phenomenon is that, even with statutes that virtually defy the would-be appellant to "blow" the notice of appeal requirement, so many would-be

[4] N.Y. C.P.L.R. 2103(b)(6) (McKinney 2010).

[5] N.Y. C.P.L.R. 2103(b)(2).

[6] N.Y. C.P.L.R. 5513(d). For a further discussion of this issue, see David D. Siegel, *Amendment Gives Loser, Too, Extra Time to Appeal when Loser, Instead of Winner, Serves the Notice of Entry by Mail, etc.*, 86 SIEGEL'S PRAC. REV. 3 (Aug. 1999).

[7] N.Y. C.P.L.R. 5501(a)(1) ("An appeal from a final judgment brings up for review . . . any non-final judgment or order which necessarily affects the final judgment . . . .").

[8] N.Y. C.P.L.R. 5513(c).

appellants nonetheless do so. More to the point, so many would-be appellants *with valid claims for appellate relief* somehow manage *not* to timely and properly appeal in cases in which one or more of the other parties does appeal the order or judgment in issue.

This article examines the circumstances in which affirmative relief may be granted to that unfortunate breed: the *non*-appealing party who, on the merits, actually deserves affirmative relief. The article also examines whether, or to what extent, the non-appellant's rights may have been broadened by the Second Department's 2008 ruling in *Koscinski v. St. Joseph's Medical Center*.[9]

I. THE GENERAL RULE

All non-appellants who seek relief from one of New York's appellate courts are, in a sense, dependent upon the kindness of strangers. The non-appellant must hope that some other party in the case—a stranger, perhaps—actually did appeal. If there is no appeal before the appellate court, there is no possibility of granting the non-appellant relief, no matter how worthy his or her arguments may be.[10] Yet there are, as we shall soon see, circumstances in which, with the aid of "strangers," the non-appellant can obtain relief.

The general rule is that appellate courts can grant affirmative relief only to those parties who sought such relief as appellants or cross-appellants.[11] Courts have, on occasion, even referred to that prerequisite as constituting a jurisdictional limitation upon the granting of affirmative relief.[12]

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[9] *Koscinski II*, 47 A.D.3d 685, 850 N.Y.S.2d 162 (App. Div. 2d Dep't 2008). For a further explanation of *Koscinski*, including how this article cites to the case, see infra note 55 and Parts V–VI.

[10] Ocean Accident & Guar. Corp. v. Otis Elevator Co., 291 N.Y. 254, 255, 52 N.E.2d 421, 421 (1943) ("[T]he court is without power to entertain an appeal when it appears that an appellant has failed to comply with the limitations of time imposed by section 592, subdivision 3, of the Civil Practice Act. This court possesses only those powers which are conferred by the Constitution as limited by statute in accordance with the Constitution. Such powers thus limited may not be enlarged by consent of the parties.").

[11] Hecht v. City of New York, 60 N.Y.2d 57, 61–62, 454 N.E.2d 527, 529, 467 N.Y.S.2d 187, 189 (1983).

[12] Omansky v. 64 N. Moore Assocs., 269 A.D.2d 336, 337, 703 N.Y.S.2d 471, 472–473 (App. Div. 1st Dep't 2000) ("Although the brief for the partnership and the condominium requests that we modify the order on appeal so as to grant their cross motion to the extent it sought summary judgment dismissing plaintiffs' third and fourth causes of action, we have no jurisdiction to review the order insofar as it denied such cross motion in the present circumstances in which none of the defendants has filed any notice of appeal or cross appeal."); Schulz v. Dep't of Envtl. Conservation, 186 A.D.2d 941, 942 n.1, 589 N.Y.S.2d 370,

Parenthetically, it was not always this way. Once upon a time, the rule was that "[t]he judgment is entire as to all of the defendants, and must either be reversed or affirmed *in toto*."[13] That ultimately gave way to the rule followed today, that a judgment can be sustained as to one defendant and yet overturned as to another who was not unified in interest with the first.[14] That change led to another, at least as a general matter: a party now has to appeal in order to reap the benefits of the appeal, and cannot generally obtain relief on another's appeal.[15]

Interestingly, although most states hold that the general rule precludes an award of affirmative relief to non-appellants,[16] it is not universally so. In some jurisdictions, the rule that a party must appeal to obtain affirmative relief is an absolute rule that brooks no exceptions.[17] In others, the rule seems even more flexible than in New York, amounting to more of a "practice" than a "rule."[18]

371 n.1 (App. Div. 3d Dep't 1992) ("It is well settled that a party's failure to timely file a notice of appeal effectively deprives this Court of jurisdiction to entertain his or her appeal.").

[13] Sheldon v. Quinlen, 5 Hill 441, 441 (N.Y. Sup. Ct. 1843); Harman & Harman v. Brotherson, 1 Denio 537, 540 (N.Y. Sup. Ct. 1845) ("As the judgment is entire against both of the defendants, and is clearly erroneous as to one of them, it must be reversed *in toto*.").

[14] U.S. Printing & Lithograph v. Powers, 233 N.Y. 143, 154, 135 N.E. 225, 227 (1922) ("If the subject or issue as to which a new trial is granted is so far separate and distinct from the other issues in the case, is one in which the party in whose favor it is granted is alone interested so that any judgment that may be rendered upon it can in no way affect the other parties who are joined with him, then, doubtless, the court would be authorized to grant a new trial as to one and affirm as to the others."); St. John v. Andrews Inst. for Girls, 192 N.Y. 382, 386, 85 N.E. 143, 144 (1908).

[15] *Hecht*, 60 N.Y.2d at 61–62, 454 N.E.2d at 529, 467 N.Y.S.2d at 187.

[16] 5 C.J.S. *Appeal and Error* § 867 (2007) ("An appellee or defendant in error who has not appealed or brought error cannot obtain affirmative relief by way of a modification or an amendment of the judgment under review. Such is the case even though the relief sought extends only to the adjustment of the costs . . . ." (citations omitted)); § 1015 ("Although exceptions to the rule may be made in the interests of justice, generally, a reviewing court will not adjudicate or dispose of matters involving persons not parties to the appellate proceedings, or grant relief to one who fails to appeal or bring error. . . . It is a general rule that an appellate court will not grant relief to a party who has not appealed or complained of the judgment or decree in the mode provided by law. More specifically, it is not appropriate to grant relief on appeal which exclusively benefits a non-appealing party.").

[17] Hoang v. Hewitt Avenue Assocs., 177 Md. App. 562, 613 n.10, 936 A.2d 915, 945 n.10 (Ct. Spec. App. 2007) ("[In some jurisdictions] the grant of full relief to the appealing party may necessarily entail granting relief to a nonappealing party. Maryland appellate courts never have adopted that principle, or considered it." (citing *Hecht*, 60 N.Y.2d at 61–62, 454 N.E.2d at 529, 467 N.Y.S.2d at 187)); F. Enter., Inc. v. Ky. Fried Chicken Corp., 47 Ohio St. 2d 154, 163, 351 N.E.2d 121, 127 (1976) ("Even though we might be so inclined, such grant of affirmative relief is foreclosed by the reason that appellees have not cross-appealed from the judgment of the Court of Appeals by the filing of a notice of appeal. Because they have not, we are without authority to grant affirmative relief by modifying the judgment of the Court of Appeals in appellees' favor.").

[18] McLaughlin v. Amirsaleh, 65 Mass. App. Ct. 873, 885 n.18, 844 N.E.2d 1105, 1114–15 n.18 (2006) ("The general rule that an appellee may not secure favorable modification of a

In New York, there are at least three, and now possibly four, circumstances in which a non-appellant can reap the benefits of someone else's appeal. It is the fourth circumstance, examined last, that is most problematic; for, as we shall see, it constitutes an exception which, if ultimately approved by the Court of Appeals, threatens to swallow the rule, at least as to interlocutory appeals. I below urge that the new exception is, however, untenable under the terms of the plainly applicable (but heretofore overlooked) provision of the Civil Practice Law and Rules.

II. THE *HECHT* RULE: ALLOWING THE GRANT OF RELIEF TO A NON-APPELLANT WHEN SUCH IS NECESSARY TO AFFORD MEANINGFUL OR FULL RELIEF TO A DESERVING APPELLANT

One instance in which New York law permits—indeed, requires—the grant of affirmative relief to a non-appellant, deserving relief on the merits, is when such is necessary in order to grant meaningful or full relief to an appellant, also deserving relief on the merits. The case in which the Court of Appeals announced the rule, *Hecht v. City of New York*,[19] also set forth the boundaries of the doctrine.

In *Hecht*, the personal injury plaintiff tripped over a sidewalk defect.[20] The supreme court held the defendants City of New York ("City") and Square Depew Garage Corporation ("Square Depew") liable to the plaintiff for negligent maintenance of the sidewalk.[21] The City appealed from the judgment, contending that the defect was, as a matter of law, too "trivial" to trigger liability.[22] Square Depew did not appeal.[23] Notwithstanding this failure to appeal, when the appellate division held that the defect was indeed too "trivial" for liability to be imposed, the court dismissed the complaint against *both* defendants, the appellant City and non-appellant Square Depew.[24]

On the plaintiff's appeal to the Court of Appeals, Square Depew argued that the appellate division had exercised its discretionary

judgment unless he has filed a cross appeal, if applicable in the present case, is one of practice rather than jurisdiction. An appellate court may take appropriate action where circumstances compel it." (citation omitted)).

[19] 60 N.Y.2d at 61–64, 454 N.E.2d at 529–531, 467 N.Y.S.2d at 189–191.

[20] *Id.* at 60, 454 N.E.2d at 59, 467 N.Y.S.2d at 189.

[21] *Id.* at 60–61, 454 N.E.2d at 59, 467 N.Y.S.2d at 189.

[22] *Id.* at 61, 454 N.E.2d at 529, 467 N.Y.S.2d at 189.

[23] *Id.*

[24] *Id.*

authority, either of itself or pursuant to CPLR 5522, to grant relief to non-appellants "in the interest of justice."[25] In considering that claim, the Court of Appeals clearly stated, as follows, that relief could "[o]n rare occasions"[26] be granted to non-appellants when such was necessary to fashion full or meaningful relief for an appellant:

> 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 a 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.[27]

Yet, in stating that relief could be granted to a non-appellant where necessary to fashion relief for an appellant, the *Hecht* court ruled that: (1) appellate courts otherwise lacked authority to grant relief to non-appellants, and had no "interests of justice" authority to do so; and (2) the instant case was not one that fit within the exception inasmuch as full relief could be granted to the appellant City without also granting relief to the non-appealing defendant:

> The power of an appellate court to review a judgment is subject to an appeal being timely taken. . . . And an appellate court's scope of review with respect to an appellant, once an appeal has been timely taken, is generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party. . . . The corollary to this rule is that an appellate court's reversal or modification of a judgment as to an appealing party will not inure to the benefit of a nonappealing coparty . . . unless the judgment was rendered against parties having a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties.
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> . . . As full relief to the city can be achieved without granting relief to Square Depew, it was error to dismiss the complaint as to Square Depew unless the city's interest could be said to be inseparable from that of Square Depew.
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> Square Depew argues that the Appellate Division is

[25] *Id.* at 63, 454 N.E.2d at 530, 467 N.Y.S.2d at 190.
[26] *Id.* at 62, 454 N.E.2d at 530, 467 N.Y.S.2d at 190.
[27] *Id.* (citation omitted).

> vested with discretionary power to grant relief to a nonappealing party in the interest of justice, and that the Appellate Division has exercised that discretion in this case. In so arguing, Square Depew relies on CPLR 5522, which provides, in pertinent part, that "[a] court to which an appeal is taken may reverse, affirm, or modify, wholly or in part, any judgment or order before it, as to any party." It has been proposed that the clause "as to any party" vests the Appellate Division with discretionary power to grant relief to a nonappealing party who appears before the court as a respondent. The Appellate Division in the past has claimed this power and applied it on a number of occasions. . . . This court now holds that 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.[28]

When, if not in *Hecht* itself, would it be necessary to grant relief to a non-appellant in order to provide full relief to a deserving appellant? The Court of Appeals identified one such case the very next year in *Cover v. Cohen*.[29]

In *Cover*, the plaintiff alleged that his 1973 Chevrolet Malibu had a defective accelerator system and that the defect was the proximate cause of an accident that purportedly occurred when the car "shot backward at high speed."[30] The plaintiff sued the manufacturer of the car, General Motors, and the dealer from whom he purchased the car, Kinney Motors ("Kinney"). The plaintiff did not allege that Kinney was itself negligent. Rather, he proceeded solely on the doctrine of strict products liability, the substantive point being that all parties in the chain of distribution stand liable if a product defect proximately caused someone's injury.[31] Significantly, settled law provided that a seller or distributor not personally negligent, but liable by virtue of a product defect, was entitled to be indemnified by the manufacturer.[32]

A jury found in favor of the plaintiff and against both defendants. General Motors appealed the resulting judgment "but not from the

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[28] *Id.* at 61–63, 454 N.E.2d at 529–530, 467 N.Y.S.2d at 189–190 (citations omitted).

[29] 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984).

[30] *Id.* at 267, 461 N.E.2d at 866, 473 N.Y.S.2d at 380.

[31] Speller v. Sears, Roebuck & Co., 100 N.Y.2d 38, 41, 790 N.E.2d 252, 254, 760 N.Y.S.2d 79, 81 (2003); Harrigan v. Super Prods. Corp., 237 A.D.2d 882, 883, 654 N.Y.S.2d 503, 504 (App. Div. 4th Dep't 1997).

[32] Brumbaugh v. CEJJ, Inc., 152 A.D.2d 69, 71, 547 N.Y.S.2d 699, 701 (App. Div. 3d Dep't 1989).

judgment over in Kinney's favor."[33] Kinney also filed a notice of appeal, which it characterized as "protective."[34] On appeal, the appellate division conditionally reduced the plaintiffs' damages, but otherwise rejected the defendants' arguments for dismissal or a new trial of the liability issue. Only General Motors appealed to the Court of Appeals.[35] The question, after the Court of Appeals held that evidentiary errors entitled General Motors to a new trial, was whether non-appellant Kinney should be awarded the same relief.

The *Cover* court acknowledged that *Hecht* (decided only five months earlier) was good law, but held, in contrast to *Hecht*, that it was *necessary* to grant relief to the non-appellant Kinney in order to provide full relief to the appellant General Motors. Indeed, if the court did not do so, GM's victory would have been entirely pyrrhic. Even if General Motors prevailed at the new trial Kinney would still be liable to the plaintiff, and would therefore have a right to be fully indemnified by General Motors.[36] So, at least on this view of the case, the relief granted to appellant General Motors would have been rendered meaningless unless Kinney was granted the same relief, thus justifying relief to Kinney.[37]

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[33] *Cover*, 61 N.Y.2d at 268, 461 N.E.2d at 867, 473 N.Y.S.2d at 381.

[34] *Id.*

[35] *Id.* at 268–69, 461 N.E.2d at 867, 473 N.Y.S.2d at 381.

[36] *Id.* at 277–78, 461 N.E.2d at 872–73, 473 N.Y.S.2d at 386–87.

[37] I say "on this view of the case" because there was another possibility that the *Cover* court ostensibly did not consider.

There are instances in which a party who would be entitled to indemnification if he or she were held liable in the first instance is denied indemnification because the party should not have been held liable in the first instance. This may occur where a party who would not have been held liable to the plaintiff nonetheless settled with the plaintiff. If the party who settled with the plaintiff thereafter seeks indemnification from a third person, the party may find disappointment. The rule in such instance is that the party seeking indemnification must prove that the settlement was warranted and reasonable or else lose the right to obtain indemnification. Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 218, 67 N.E. 439, 440 (1903) ("[S]uch loss or damage may be voluntarily paid by the innocent party who is legally liable without waiting for judgment . . . but, in that event, he undoubtedly assumes the risk of being able to prove the actionable facts upon which his liability depends as well as the reasonableness of the amount which he pays." (citations omitted)); Schirmer v. Athena-Liberty Lofts, LP, 48 A.D.3d 223, 224, 851 N.Y.S.2d 168, 169 (App. Div. 1st Dep't 2008); Jemal v. Lucky Ins. Co., 260 A.D.2d 352, 353, 687 N.Y.S.2d 717, 717–718 (App. Div. 2d Dep't 1999). So, if the party seeking indemnification made a gratuitous payment that he or she was not bound to make, that party cannot obtain indemnification.

Thus, the alternative in *Cover* was for the court to rule that, like a defendant who settles when it should not have done so and is thereby barred from seeking indemnification, Kinney was barred from seeking indemnification by virtue of its own failure to properly defend the case. Of course, had that been the ruling, the second trial would likely never occur (since the plaintiff would likely not have cared if General Motors was deemed liable) and appellant General Motors would have then had even better protection than that arising from the relief given Kinney (since General Motors would now not be liable, this as opposed to *perhaps* evading liability at the second trial).

In the wake of *Hecht* and *Cover*, the Court of Appeals granted affirmative relief to non-appellants in two other cases in which such was plainly necessary to the grant of full relief to an appellant.[38] More recently, the Court of Appeals reiterated that the "exception exists only for cases where granting relief to a nonappealing party is necessary to give meaningful relief to the appealing party."[39]

The appellate divisions have also frequently said that relief can be granted to a non-appellant only when necessary to provide relief to an appellant.[40] The rare instances in which the appellate

Whether the *Cover* court ever seriously considered this alternative cannot be said. In any event, this was a path not chosen.

[38] One such case, Sharrow v. Dick Corp., 86 N.Y.2d 54, 62, 653 N.E.2d 1150, 1153–1154, 629 N.Y.S.2d 980, 983–984 (1995), involved virtually the same situation as *Cover*. Although the defendant that stood liable to plaintiff had not appealed, failure to grant it a new trial would render the appellant-third-party-defendant's new trial meaningless since the defendant's liability was "entirely derivative" of that of the appellant. *Id.* at 62, 653 N.E.2d at 1153, 629 N.Y.S.2d at 983.

In the other case, Miller v. DeBuono, 90 N.Y.2d 783, 788 & n.*, 689 N.E.2d 518, 519 & n.*, 666 N.Y.S.2d 548, 549 & n.* (1997), the appellate division had affirmed the lower court's finding that the petitioner-nurse was guilty of patient abuse because it was supported by substantial evidence. The appellate division further held, however, that such a finding could not justify the petitioner's termination on the ground of patient abuse because the regulation providing for that penalty had been enacted after the event itself. The Court of Appeals disagreed that the penalty could not be applied retroactively, but held that it would entail a new determination premised upon the constitutionally required preponderance of the evidence standard. Although the result of a new hearing might be to exonerate the non-appellant nurse of the charge of patient abuse, such was an unavoidable feature of the new determination sought by the appellant.

[39] 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 151 n.3, 773 N.E.2d 496, 499 n.3, 746 N.Y.S.2d 131, 134 n.3 (2002) (citations omitted).

[40] *See, e.g.*, *In re* Cali L., 61 A.D.3d 1131, 1133, 876 N.Y.S.2d 557, 559 (App. Div. 3d Dep't 2009) ("[S]ince respondent did not appeal Family Court's order remanding her to the custody of the Columbia County Sheriff prior to the neglect hearing pursuant to Family Ct[.] Act §§ 153 and 155-a, this issue is not properly before us."); Campbell v. County of Suffolk, 57 A.D.3d 821, 822, 871 N.Y.S.2d 222, 224 (App. Div. 2d Dep't 2008) ("We have not considered the claim raised by the plaintiff in her respondent's brief that the Supreme Court should have also granted that branch of her motion which was for summary judgment on the issue of serious injury because the plaintiff did not cross-appeal from the order."); Chunnulal v. Rosen, 56 A.D.3d 409, 409, 865 N.Y.S.2d 916, 917 (App. Div. 2d Dep't 2008) ("We have not considered the plaintiffs' contention that the Supreme Court erred in dismissing the cause of action grounded on vicarious liability, as the plaintiffs failed to cross-appeal from the Supreme Court's order."); Sanders v. Slater, 53 A.D.3d 716, 717 n.1, 861 N.Y.S.2d 461, 462 n.1 (App. Div. 3d Dep't 2008) ("The grandmother's contention that she should have been granted joint custody with the mother is not properly before this Court inasmuch as she has not appealed from Family Court's order."); Brenner v. Brenner, 52 A.D.3d 322, 323, 860 N.Y.S.2d 58, 59 (App. Div. 1st Dep't 2008) ("Since plaintiff did not cross appeal, she may not ask us to overturn the portion of the court's order that denied her request for interim counsel fees."); Benedictine Hosp. v. Glessing, 47 A.D.3d 1184, 1188, 850 N.Y.S.2d 291, 295 (App. Div. 3d Dep't 2008) ("Notably, petitioner—which also questions the propriety of the 30-day grace period—has not appealed and, thus, is not entitled to affirmative relief."); G.K. Alan Assoc. v. Lazzari, 44 A.D.3d 95, 105, 840 N.Y.S.2d 378, 387 (App. Div. 2d Dep't 2007) ("Finally, Lazzari's argument that the Supreme Court erred in failing to award him summary judgment

divisions have granted relief to non-appellants seem to fall within the *Hecht* rationale.[41]

III. THE SUMMARY JUDGMENT SCENARIO: WHERE RELIEF CAN BE GRANTED TO A NON-APPELLANT BASED UPON A SEARCH OF THE RECORD

A second and far more common instance in which an appellate court can grant affirmative relief to a non-appellant is when an appeal is taken from an order granting or denying a motion for summary judgment or from a judgment that was predicated on the grant of summary judgment.

The statutory underpinnings of the rule can be found in CPLR 3212(b). That provision literally says only that "[i]f it shall appear that any party *other than the moving party* is entitled to a summary

on the counterclaims is not properly before us. Lazzari did not seek such relief in his motion for summary judgment, presumably because the counterclaims had not yet been interposed at the time that motion was made. Even if he had done so, however, Lazzari did not file a notice of appeal or cross appeal and it is not necessary, in order to give meaningful relief to Alan and Katzenberg, to grant relief to Lazzari."), *aff'd*, 10 N.Y.3d 941, 893 N.E.2d 133, 862 N.Y.S.2d 855 (2008); Perkins v. 686 Halsey Food Corp., 36 A.D.3d 881, 881–882, 829 N.Y.S.2d 185, 187 (App. Div. 2d Dep't 2007) ("We have not considered the plaintiff's contention that the court improvidently exercised its discretion in vacating the appellant's default because the plaintiff did not cross-appeal from the order."); Millard v. Alliance Laundry Sys., LLC, 28 A.D.3d 1145, 1148, 814 N.Y.S.2d 433, 435–436 (App. Div. 4th Dep't 2006) ("The failure of Alliance to cross-appeal from that part of the order denying its cross motion seeking sanctions against Tramz precludes Alliance from obtaining the affirmative relief it seeks.").

[41] Hofmann v. Town of Ashford, 60 A.D.3d 1498, 1499, 876 N.Y.S.2d 588, 589 (App. Div. 4th Dep't 2009). There, an insured and his wife commenced an action against the defendant Town of Ashford for injuries arising out of a snowplow accident. State Farm was the insured's subrogee, and when the insured appealed from an order that, inter alia, had incorrectly denied State Farm's cross-motion for summary judgment, the court noted that, "although State Farm did not cross-appeal from that part of the order denying its cross motion and, instead, only Hofmann cross-appealed therefrom, 'this is one of those cases where relief to a nonappealing party is appropriate.'" *Id.* at 1499; 876 N.Y.S.2d at 589 (citations omitted). It may be that the same result would have followed from the "search the record" rule that is discussed below; *see also* Bank One Nat'l Ass'n v. Osorio, 26 A.D.3d 452, 453, 811 N.Y.S.2d 416, 417 (App. Div. 2d Dep't 2006) ("We note that in order to grant full relief to the appellant we must grant relief to nonappealing parties by setting aside the foreclosure sale of the subject property."); N.Y. Cent. Mut. Fire Ins. Co. v. Smith, 16 A.D.3d 1028, 791 N.Y.S.2d 788 (App. Div. 4th Dep't 2005). There, an insurer commenced a declaratory judgment action to establish that it owed no duty to the insured, a landowner, to defend him with respect to potential personal injury claims. The defendants moved for dismissal on the ground that the personal injury action had not yet been commenced and that the instant action was therefore premature. The supreme court incorrectly denied the motion to dismiss. The appellate division ruled that the reversal necessitated by the defendants' appeal from the order should also extend to the non-appellant insured, the apparent assumption being that otherwise the appellant-victims would be left with an uninsured landowner to sue. *C.f.* Lakewood Constr. Co., Inc. v. Brody, 1 A.D.3d 1007, 1009, 769 N.Y.S.2d 664, 666 (App. Div. 4th Dep't 2003) ("[W]e deem it appropriate to grant relief to Lakewood, which did not appeal from that order, as a means of effectuating our grant of relief to Brody in his appeal . . . .").

judgment, the court may grant such judgment without the necessity of a cross-motion."[42] If one were disposed to construe that language narrowly and literally, one could conclude that summary judgment could be granted to an appellant who did not ask for such relief in a lower court (as could occur if, for example, a defendant who was entitled to summary judgment but did not seek it below appealed from an order that had granted summary judgment to the plaintiff) but not to a non-appellant (say, the situation in which plaintiff was entitled to summary judgment but only the defendant appealed from an order that denied all motions and cross-motions for summary judgment).

This would not make a great deal of sense from any policy perspective, however, and it is not how the provision has been construed. The case law uniformly holds that the provision excuses both sins: the sin of not moving for summary judgment and the sin of not appealing. Not only can the reviewing court grant summary judgment to a non-movant, it can also search the record and grant summary judgment to a non-appellant.[43]

The Court of Appeals plainly set forth the boundaries of the rule in *Dunham v. Hilco Construction Company, Inc.*[44] Although an appellate court can grant summary judgment to a party who did not seek it, the court may only do so with respect to a cause of action or issue that was a "subject of the motions before the [lower] court."[45] Such limitation was warranted as a matter of fairness, and the contrary rule "would be tantamount to shifting the well-accepted burden of proof on summary judgment motions."[46]

The tactical implications of the "searches the record" rule are enormous. Absent the rule, a party who was denied summary

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[42] N.Y. C.P.L.R. 3212(b) (McKinney 2004) (emphasis added).

[43] Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 110–111, 460 N.E.2d 1077, 1080, 472 N.Y.S.2d 592, 595 (1984) ("This court has consistently upheld the Appellate Division's authority to grant such relief pursuant to CPLR 3212 (subd. [b]), even in the absence of an appeal by the nonmoving party."); Kaplan v. Great Neck Donuts, Inc., No. 68 A.D.3d 931, 892 N.Y.S.2d 425 (App. Div. 2d Dep't 2009) ("Wat separately moved, on the same ground as the appellant, for summary judgment dismissing the complaint insofar as asserted against her. Although Wat's separate motion was denied, she, unlike the appellant, did not appeal from so much of the order as was adverse to her. Nonetheless, this Court has the authority to search the record and award summary judgment to a nonappealing party with respect to an issue that was the subject of the motion before the Supreme Court."); *see also* Rivera v. Bushwick Ridgewood Props., Inc., 63 A.D.3d 712, 714, 880 N.Y.S.2d 149, 151–152 (App. Div. 2d Dep't 2009); Marrache v. Akron Taxi Corp., 50 A.D.3d 973, 975, 856 N.Y.S.2d 239, 241 (App. Div. 2d Dep't 2008).

[44] 89 N.Y.2d 425, 676 N.E.2d 1178, 654 N.Y.S.2d 335 (1996).

[45] *Id.* at 430, 676 N.E.2d at 1180, 654 N.Y.S.2d at 337.

[46] *Id.* at 430, 676 N.E.2d at 1180, 654 N.Y.S.2d at 337.

judgment in the lower court might reasonably conclude that "there is no harm in asking," that the worst outcome of an appeal from the order would be an affirmance with continuation of the status quo, and that there was no "downside" to perfecting an appeal apart, perhaps, for the attendant cost and delay. But that is not the worst case scenario, for the appellate court might—on review of an order that merely denied appellant's motion for summary judgment—affirmatively grant summary judgment to the respondent.

IV. THE STATUTORY ANOMALY: WHERE A PARTY WHO NOT ONLY FAILED TO APPEAL BUT WAS NOT PERMITTED TO APPEAL CAN OBTAIN PARTIAL OR FULL REINSTATEMENT OF THE JURY'S DAMAGES ASSESSMENTS DURING THE *ADVERSARY'S* APPEAL

There is one other, extremely well-settled exception to the general rule that affirmative relief can be granted only to appellants and cross-appellants. In contrast to the above-noted exceptions, this rather arcane exception applies in a situation in which the party seeking affirmative relief not only *did not* appeal, but *could not* have appealed.

Where the trial court conditionally modifies a jury verdict as legally excessive or legally inadequate, and where the party who is adversely affected by the modification of the verdict stipulates to accept the modification in lieu of risking a new trial of the damages issue, that party, having stipulated to accept the modification, *cannot* appeal the trial court's ruling.[47] If, however, any adversary appeals from the resultant judgment, the stipulating party is entitled to challenge the wisdom of the post-verdict ruling on the adversary's appeal.[48]

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[47] Donohoe v. Goldner, 168 A.D.2d 412, 413, 562 N.Y.S.2d 538, 540 (App. Div. 2d Dep't 1990) ("The defendants . . . appeal from the judgment, and the plaintiff cross-appeals from the judgment on the ground of inadequacy. Since the plaintiff stipulated to entry of a judgment in the principal sum of $625,798, the cross appeal must be dismissed."); Rumph v. Gotham Ford, Inc., 44 A.D.2d 792, 792, 355 N.Y.S.2d 114, 116 (App. Div. 1st Dep't 1974) ("The cross appeal by the plaintiffs from that part of the judgment which set aside the verdict unless the plaintiffs stipulate to reduce the awards, as aforesaid, which stipulation the plaintiffs filed, is dismissed on the ground that they cannot appeal because they are not parties aggrieved.").

[48] Hecht v. City of New York, 60 N.Y.2d 57, 63 n.*, 454 N.E.2d 527, 530 n.*, 467 N.Y.S.2d 187, 190 n.* (1983) ("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." (citation omitted)); Geraci v. Probst, 61 A.D.3d 717, 719, 877 N.Y.S.2d 386, 389 (App. Div. 2d Dep't 2009) ("A party who consents to a trial court's reduction of a damages award is not aggrieved by the resulting judgment, and therefore is not entitled to appeal from that

The respondent's right to challenge such a modification on the appellant's appeal is statutory, and is currently set forth in CPLR 5501(a)(5).[49] But the rule long predates the enactment of the Civil Practice Laws and Rules.[50] It goes back to at least 1926, when a one-sided version of the rule—only the *plaintiffs* could challenge such modifications on a *defendant's* appeal—was enacted as section

judgment. Accordingly, the plaintiff's cross appeal must be dismissed. However, the plaintiff may be afforded relief pursuant to CPLR 5501 (a) (5)." (citations omitted)), *motion for leave to appeal granted*, 13 N.Y.3d 709 (2009); Perez v. Farrell Lines Inc., 223 A.D.2d 388, 389, 637 N.Y.S.2d 360, 361 (App. Div. 1st Dep't 1996) ("Although plaintiff stipulated to the reduction, because defendant then brought this unsuccessful appeal, we are authorized to increase the amount of the judgment up to the amount of the verdict. . . . Based on our review of the record, we agree with plaintiff that the trial court improperly exercised its discretion in reducing certain portions of the award to the extent that it did." (citations omitted)); Roundtree v. City of New York, 208 A.D.2d 407, 408, 617 N.Y.S.2d 170, 171 (App. Div. 1st Dep't 1994); Desa v. City of New York, 188 A.D.2d 313, 314, 590 N.Y.S.2d 483, 484 (App. Div. 1st Dep't 1992); Chazon v. Parkway Med. Group, 168 A.D.2d 660, 662–63, 563 N.Y.S.2d 488, 491 (App. Div. 2d Dep't 1990) ("CPLR 5501 (a) (5) vests this court with authority to review the amount of and increase or reduce a 'final judgment [which] was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate.' In the matter at bar, the appellants failed to rebut the calculation of the plaintiff's economist that, had Adam graduated from high school and lived a normal life, he would have earned a total of $1,210,090. The record therefore supports the jury's determination that Adam's earning ability had been impaired to the extent of $1,174,000, and the trial court's determination that that portion of the verdict was excessive was erroneous." (citations omitted)); Pozzanghera v. Anderson, 136 A.D.2d 912, 913, 525 N.Y.S.2d 87, 87–88 (App. Div. 4th Dep't 1988) ("Inasmuch as plaintiff has stipulated to the reduced amount of damages, he is not an aggrieved party and may not raise this issue by cross appeal. That fact does not preclude our review of this issue, however, in that CPLR 5501 (a) (5) confers jurisdiction upon this court to review the reduced verdicts by reason of the defendant's appeal." (citations omitted)).

[49] N.Y. C.P.L.R. 5501(a)(5) (McKinney 2010) states:

> (a) Generally, from final judgment. An appeal from a final judgment brings up for review:
>
> . . . .
>
> 5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

[50] Gualtieri v. Ferraro, 270 A.D. 1067, 1067, 63 N.Y.S.2d 40, 40–41 (App. Div. 3d Dep't 1946) ("Plaintiffs stipulated to accept the verdicts as reduced but defendants have appealed and the plaintiff wife is now seeking to reinstate the jury's verdict pursuant to the provisions of section 584-a of the Civil Practice Act. . . . The judgment in favor of the plaintiff wife is modified, on the law and the facts, by reinstating the jury's verdict, with costs in this Court."); Miller v. Lucey, 223 A.D. 567, 569, 229 N.Y.S. 425, 427 (App. Div. 3d Dep't 1928) ("Notwithstanding the reduction, the defendant has appealed. The plaintiff has not appealed. On the appeal the plaintiff, however, has asked that the verdict, as reduced by the court, be modified by increasing it to the amount originally found by the jury. Plaintiff bases his right to ask such relief on the terms of section 584-a of the Civil Practice Act, as added by Laws of 1926, c. 385. . . . The law, without any request or motion upon the part of the plaintiff, confers on the Appellate Division the right to modify a verdict 'fixed by the trial court' on a motion to set it aside as excessive.").

584-a of the Civil Practice Act.[51]

The tactical consequences of CPLR 5501(a)(5) are significant. For one thing, any defendant who appeals from a judgment that was entered in the aftermath of a conditional reduction of the damages should realize that an affirmance is not the worst case scenario and that perfection of the appeal could actually result in an increase in the defendant's liability even if the plaintiff did not (and could not) appeal.[52] Worse still for appealing defendants, and to add insult to injury, the defendant-appellant would be solely responsible for the costs of reproducing the record of an appeal in which the plaintiff obtained affirmative relief.[53]

Correspondingly, a plaintiff who stipulates to accept a reduction should realize that such course will not necessarily "cap" liability at the stipulated sum. Rather, there will be two possibilities: (1) the defendants do not appeal, in which event liability is indeed capped at the judgment amount, but with the consolation for the plaintiff that the action terminates and the sum is immediately collected; or (2) the defendants appeal, in which event plaintiff can seek reinstatement of the verdict on the appeal. By stipulating to accept a reduction and thus surrendering the right to appeal, however, the plaintiff forever waives the right to challenge the jury's verdict as legally inadequate,[54] a loss that is likely more theoretical than real because a verdict that was legally inadequate in the first instance is not likely to be further reduced by the trial judge.

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[51] Section 584-a of the Civil Practice Act, as added by the Laws of 1926, chapter 385, stated:

> When the appeal is by the defendant from a judgment entered, after trial by jury, for a less amount than the verdict, such amount having been so fixed by the trial court on defendant's motion to set aside the verdict as excessive, the question as to whether or not the original verdict was excessive shall be deemed to be before the appellate court for review and determination, and the appellate division or appellate term to which the appeal is taken, if it does not reverse the judgment, may modify it by increasing the amount thereof to not exceeding the amount of the verdict.

1926 N.Y. Laws 702–03.

[52] *See, e.g.*, Papa v. City of New York, 194 A.D.2d 527, 531–32, 598 N.Y.S.2d 558, 563 (App. Div. 2d Dep't 1993) (increasing the plaintiff's award for lost future earnings from $1,295,000 to $3,100,500 on the *defendant's* appeal from the judgment; the adjustment was largely offset by appellate reductions of several of the plaintiffs' other awards, however).

[53] Schliessman v. Anderson, 31 A.D.2d 367, 369, 298 N.Y.S.2d 646, 648 (App. Div. 2d Dep't 1969) ("Since the notice of appeal on behalf of Mrs. Schliessman was not only unnecessary but was unauthorized, it is not required that it be printed either by the defendants or by her and she may not be required to pay any part of the cost of printing the defendants' record on appeal. It is her right to argue on the defendants' appeal and record that the reduction of the verdict was improper.").

[54] *Papa*, 194 A.D.2d at 532, 598 N.Y.S.2d at 563; Rumph v. Gotham Ford, Inc., 44 A.D.2d 792, 792, 355 N.Y.S.2d 114, 116 (App. Div. 1st Dep't 1974).

Yet, while the statutory exception created by CPLR 5501(a)(5) is very significant, particularly in personal injury litigation, it is also a narrow and well-defined exception to the rule against granting relief to a non-appellant. Most notably, it applies only to one kind of lower court ruling: post-verdict modification of the damages. If instead of modifying the damages the lower court dismissed, for example, three of the four causes of action on which the plaintiff prevailed with the jury, CPLR 5501(a)(5) would, by its terms, not apply.

V. THE NON-APPELLANT'S AFTER-THE-FACT EXPLOITATION OF AN APPELLATE DETERMINATION: THE *KOSCINSKI* RULING

There is one other manner by which a non-appellant *may* be able to obtain affirmative relief, not in the appeal itself, but by thereafter exploiting an appellate ruling obtained by another party or parties to the action. This "*may*" is because the tactic has been approved only by a recent Second Department ruling that is arguably inconsistent with an older First Department ruling, and that may not be consistent with *Hecht* itself—commentators have differed. That case, *Koscinski v. St. Joseph's Medical Center*,[55] could, if upheld, ultimately marginalize and even trivialize the general rule that non-appellants cannot obtain affirmative relief on appeal.

In *Koscinski*, the plaintiff commenced an action sounding in medical malpractice against two defendants, St. Joseph's Medical Center ("SJMC") and Dr. Richard J. Radha. In the wake of repeated instances in which the plaintiff served bills of particulars which the defendants claimed were inadequate, a compliance conference order "directed the filing of the note of issue by July 30, 2004, 'or action will be dismissed.'"[56] Although that deadline was extended by stipulation to August 18, 2004, the plaintiff failed to meet the extended deadline and the case was automatically dismissed.[57] The plaintiff thereafter moved to restore the case and to compel the defendants' depositions, and both defendants opposed.[58] The supreme court nonetheless granted the motion and

[55] This article will discuss two opinions bearing the same case name *Koscinski*. *Koscinski v. St. Joseph's Med. Ctr.* ("*Koscinski I*"), 24 A.D.3d 421, 805 N.Y.S.2d 123 (App. Div. 2d Dep't 2005), and *Koscinski v. St. Joseph's Medical Ctr.* ("*Koscinski II*"), 47 A.D.3d 685, 850 N.Y.S.2d 162 (App. Div. 2d Dep't 2008).

[56] Brief for Defendant-Respondent at 3–6, *Koscinski II*, 47 A.D.3d 685, 850 N.Y.S.2d 162 (App. Div. 2d Dep't 2008) (No. 2006-11494), 2007 WL 4924464.

[57] *Id.* at 3–6.

[58] *Id.* at 3–6.

denied the defendants' cross-motions for dismissal in an order dated March 21, 2005.[59]

For whatever reason or reasons, only defendant Radha appealed the order. The appellate division ruled, in *Koscinski I*, that the plaintiff had failed to provide a reasonable excuse for his default, and that denial of Radha's cross-motion to dismiss the complaint therefore constituted an abuse of discretion.[60] The result: the complaint was dismissed *as to defendant-appellant Radha.*[61]

After learning about that appellate ruling, defendant SJMC moved by notice of motion dated April 25, 2006 to "renew" its previously unsuccessful cross-motion to dismiss.[62] What was the "new fact" that justified renewal and compelled a different result?[63] The "new fact" was the ruling in *Koscinski I*, in which SJMC did not take part. The strategy worked. The motion to renew, made thirteen months after denial of SJMC's cross-motion for dismissal, was granted, and the plaintiff's complaint was dismissed.[64]

In the appeal from that ruling, *Koscinski II*, the plaintiff argued that the court had in effect granted the non-appellant SJMC the very same relief it would have obtained had it appealed the March 2005 order, and because SJMC had actually failed to appeal, the result ran counter to the logic of *Hecht*.[65] The plaintiff further argued that the Appellate Division for the First Department had, in very similar circumstances presented in *Witz v. Renner Realty Corporation*,[66] ruled that the non-appellant defendants were not entitled to the same non-merits dismissal which was obtained by the co-defendant who had appealed.

The defendant SJMC argued that *Hecht* and its progeny were "readily distinguishable" as decisions that "concern[ed] the power and jurisdiction of appellate courts."[67] That an appellate court could not grant relief to a non-appellant did not, SJMC argued,

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[59] *Id.* at 3–6.

[60] *Koscinski I*, 24 A.D.3d 421, 422, 805 N.Y.S.2d 123, 123–24 (App. Div. 2d Dep't 2005).

[61] Judgment at 1–2, *Koscinski I*, 24 A.D.3d 421, 805 N.Y.S.2d 123 (App. Div. 2d Dep't 2005) (No. 581/01).

[62] Amended Notice for Leave to Renew, *Koscinski I*, 24 A.D.3d 421, 805 N.Y.S.2d 123 (App. Div. 2d Dep't 2005) (No. 581/01).

[63] CPLR 2221(e)(2) requires a showing of "new facts not offered on the prior motion" to justify the granting of a motion to renew. N.Y. C.P.L.R. 2221(e)(2) (McKinney 2010).

[64] Decision and Order, *Koscinski I*, 24 A.D.3d 421, 805 N.Y.S.2d 123 (App. Div. 2d Dep't 2005) (No. 581/01).

[65] Brief for Plaintiff-Appellant at 8, 13, *Koscinski II*, 47 A.D.3d 685, 850 N.Y.S.2d 162 (App. Div. 2d Dep't 2008) (No. 2006-11494), 2007 WL 4924463.

[66] 55 A.D.2d 517, 389 N.Y.S.2d 11 (App. Div. 1st Dep't 1976).

[67] Brief for Defendant-Respondent, *supra* note 56, at 10.

prevent the non-appellant from thereafter claiming the benefit of the ruling by means of a post-appeal motion to renew in the lower court. As for the First Department's ostensibly contrary ruling in *Witz*, SMJC argues that *Witz* turned on the "telling factor" that the non-appellants had accepted the $100 in costs awarded on the prior motion.[68]

The Second Department ruled for SJMC, holding that its failure to appeal the order denying its cross-motion to dismiss did not preclude it from thereafter claiming the benefits of its co-defendant's appeal by means of a motion to renew. The ruling, which did not cite any prior decision that had so stated or held[69] and did not cite or distinguish the First Department's ostensibly contrary ruling in *Witz*,[70] was as follows:

> Contrary to the plaintiff's contention, the Hospital was not precluded from seeking renewal of its cross motion to dismiss the complaint insofar as asserted against it because it did not appeal from the prior order which denied that cross motion. Although, as a general rule, an appellate court will not grant any affirmative relief to a non-appealing party, this principle does not bar a non-appealing defendant from seeking renewal of a cross motion to dismiss the complaint

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[68] SJMC's argument regarding *Witz* was as follows:

> For the first time on this appeal, plaintiff raises a decision with respect to the power to grant renewal after an earlier appeal, which issued in a case that he characterizes as "strikingly similar to the instant action . . ." On the slim basis of that First Department authority, plaintiff asks this Court to reverse the order in SJMC's favor. Although plaintiff quotes extensively from the *Witz* opinion, he omits the telling factor that clearly distinguishes that case from this one: the party seeking renewal in *Witz*, after having failed to participate in the co-defendant's appeal, had accepted the costs awarded on the prior motion. Under the circumstances, having benefited from the prior order, that movant was bound by that order and was denied leave to renew. No such situation is presented here.
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> In marked contrast, this defendant had the right to seek leave to renew and the Supreme Court had the power to reconsider its March 21, 2005 order, denying SJMC's motion to dismiss. It is entirely proper for that Court to have done so in light of the significant change in circumstances arising from the reversal of so much of that order as had denied the co-defendant's motion to dismiss on the same grounds urged by SJMC.

Id. at 13–14.

[69] SJMC's brief also failed to cite any legal precedent in which the Second Department or any other court had either held or said that a non-appellant could claim the fruits of its co-defendant's appeal by moving to renew in the aftermath of the appeal. Rather, the gist of its argument was that the precedents cited by the plaintiff were all inapt.

[70] Although SJMC argued in *Koscinski II* that the non-appellant's acceptance of the $100 in costs in *Witz* was the "telling factor" in that case, the *Witz* court's mention of that fact—especially given the first word in the sentence which discussed that fact—seemed to indicate that it was not considered by the court to be the primary factor: "*Furthermore*, they [the non-appealing defendants] had accepted the $100 costs awarded by Special Term." *Witz*, 55 A.D.2d 517, 517–18, 389 N.Y.S.2d 11, 12 (emphasis added).

> insofar as asserted against it based upon an appellate court's decision to grant dismissal of the complaint as to a codefendant.[71]

In fact, while the *Koscinski* court did not cite any prior ruling of its kind, there had been an analogous, although certainly distinguishable, ruling by the Third Department in *Johnson v. Waugh*.[72] *Johnson* arose from a collision between a truck and a thoroughbred race horse. The defendants' horse escaped from a farm while being unloaded from a trailer, and then ran into a road, where it was involved with a collision with the truck. Although the horse died as a result of the collision, the truck driver sued, seeking compensation for the damage to his truck.

The defendants in *Johnson* were the horse's trainer and several others who, along with the trainer, co-owned the horse as part of a joint venture. At the conclusion of a non-jury trial, the trial court found that the trainer had acted negligently in failing to back the trailer through an opening in a fenced enclosure before unloading the horse. On appeal, however, the Third Department held that the plaintiff's proof did not support a finding of negligence.

Unlike *Koscinski*, *Johnson* was not an instance in which one or more defendant(s) appealed and the other defendant(s) afterwards moved in the lower court to take advantage of the appellate ruling obtained by the defendant-appellant(s). Rather, it was an instance in which the defendants took *separate* appeals from the *same* July 31, 1996 judgment. For whatever reason(s), the appeals were not joined for purposes of review and the Third Department thereupon rendered two different orders, some five months apart, as to the very same substantive issues.

In *Johnson I*,[73] the court dismissed the complaint as against the defendant-appellant trainer Suarez, but granted no relief to the appellant's fellow joint venturers.[74] The *Johnson I* court additionally rejected appellant Suarez's contention that the horse was not jointly[75] owned, although this was *dictum* that did not contribute to the dismissal.

Five months later, in *Johnson II*,[76] the other defendants appealed

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[71] *Koscinski II*, 47 A.D.3d 685, 685–86, 850 N.Y.S.2d 162, 162 (App. Div. 2d Dep't 2008) (citations omitted).

[72] *Johnson I*, 244 A.D.2d 594, 663 N.Y.S.2d 928 (App. Div. 3d Dep't 1997); *Johnson II*, 249 A.D.2d 733, 672 N.Y.S.2d 148 (App. Div. 3d Dep't 1998).

[73] 244 A.D.2d 594, 663 N.Y.S.2d 928 (App. Div. 3d Dep't 1997).

[74] *Id.* at 597, 663 N.Y.S.2d at 931.

[75] *Id.* at 595, 663 N.Y.S.2d at 929.

[76] 249 A.D.2d 733, 672 N.Y.S.2d 148 (App. Div. 3d Dep't 1998).

from the same initial judgment that Suarez had appealed, and advanced the same arguments as the defendant Suarez had asserted in *Johnson I*: that the ownership was not a true joint venture and that there was no negligence in the unloading of the horse. The *Johnson II* panel, which included four of the five judges who had sat on *Johnson I*, ruled that the findings in *Johnson I* were "binding on the parties to this appeal inasmuch as they constitute the law of the case."[77] Thus, as in *Koscinski*, some defendants in the case obtained the fruits of an appellate victory won by co-defendant. But, in contrast to *Koscinski*, the "piggybacking" defendants actually did appeal, albeit in a more leisurely fashion. Also, the mechanism by which the "piggybacking" defendants obtained relief was by direct appeal from the allegedly erroneous decision and judgment, not by means of a motion to renew.

As of this writing, the ruling in *Koscinski*, effectively allowing a non-appellant to take "an end run" around *Hecht* by the simple expedient of afterwards moving in the lower court for the same relief that was previously denied, has neither been followed nor criticized in any reported decision. It was followed in highly similar circumstances in the unreported trial-level opinion in *Kenney v. City of New York*,[78] where the court also cited and relied upon *Johnson*, but was evidently unaware of, and did not cite, the in-Department ruling in *Witz*.

While the ruling in *Koscinski* has not yet had a major impact in terms of the case law, it has not gone unnoticed by the commentators. Thomas R. Newman and Steven J. Ahmuty wrote an article about *Koscinski* in their New York Law Journal column on appellate practice.[79] Although Newman and Ahmuty described the ruling in *Koscinski* without approval or disapproval, they concluded by suggesting to their readers "if you wish to set aside some aspect of the judgment or order, or to obtain additional relief, you should file a precautionary notice of cross-appeal."[80]

Professor David D. Siegel also discussed *Koscinski* in one of his Practice Review columns.[81] The good professor there questioned whether *Koscinski* was "in conflict" with *Hecht*:

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[77] *Id.* at 734, 672 N.Y.S.2d at 149.

[78] 22 Misc. 3d 1133(A), 881 N.Y.S.2d 364 (Sup. Ct. 2009).

[79] Thomas R. Newman & Steven J. Ahmuty, Jr., *Relief to Nonappealing Party*, N.Y. L.J., Feb. 6, 2008, at 3.

[80] *Id.*

[81] David D. Siegel, *Taking Advantage of a Co-Party's Appellate Victory: Motion to "Renew" Allows Nonappealing D-2 to Exploit Appellate Victory of D-1*, 195 SIEGEL'S PRAC. REV. 3 (Mar. 2008).

> Under CPLR 2221(e)(2), the "renewal" of a motion requires a showing of "new facts not offered on the prior motion". In *Koscinski*, the new fact was the co-defendant's appellate victory. In that sense, the same equally new "fact" appeared in *Hecht*, too: the co-defendant's appellate victory. Can any kind of "renewal" theory be extruded through the *Hecht* facts to make it parallel with *Koscinski*? Is the distinction between them acceptable? Are the two cases in conflict?[82]

Commentator Paul H. Aloe later dismissed Professor Siegel's concerns in his 2007–2008 survey of civil practice.[83] Mr. Aloe there took the position that "the two cases are not inconsistent at all," that *Hecht* merely concerned "the power of an appellate court to alter a judgment entered against another party that does not appeal from the judgment," and that *Koscinski* merely involved a trial court that "correct[ed] its own mistake based on the appellate ruling."[84]

VI. *KOSCINSKI* MORE CLOSELY EXAMINED

Assuming for sake of argument that *Koscinski* is good law and that a party who fails to appeal can afterwards claim the benefits of the ruling, such "rule" would surely not apply where the non-appellant failed to appeal from a final judgment.

Where a party fails to appeal from a final judgment and there is subsequently a change in the law which would produce a different result if applied to the case retroactively, the longstanding rule is premised upon the rationale that "there must be an end to lawsuits and the time to take an appeal cannot forever be extended."[85] The rule holds that a motion to renew or reargue is not a vehicle that may overturn a final judgment, and the movant must instead move under CPLR 5015(a), a course that would require the movant to show newly discovered evidence, fraud, etc.[86]

Yet, with the significant exception of appeals from a final

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[82] *Id.*

[83] Paul H. Aloe, *Civil Practice*, 59 SYRACUSE L. REV. 567 (2009).

[84] *Id.* at 616–17.

[85] *In re* Irving, 20 N.Y.2d 568, 572, 232 N.E.2d 642, 644, 285 N.Y.S.2d 610, 612 (1967).

[86] Slater v. Am. Mineral Spirits Co., 33 N.Y.2d 443, 447, 310 N.E.2d 300, 302, 354 N.Y.S.2d 620, 623 (1974) ("The conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law."); Dinallo v. DAL Elec., 60 A.D.3d 620, 621, 874 N.Y.S.2d 246, 247 (App. Div. 2d Dep't 2009); Wash. Mut. Bank v. Itzkowitz, 47 A.D.3d 923, 923, 849 N.Y.S.2d 781, 791 (App. Div. 2d Dep't 2008); Daniels v. Millar Elevator Indus., Inc., 44 A.D.3d 895, 895, 845 N.Y.S.2d 785, 786–787 (App. Div. 2d Dep't 2007); Glicksman v. Bd. of Educ., 278 A.D.2d 364, 717 N.Y.S.2d 373 (App. Div. 2d Dep't 2000).

judgment, *Koscinski* would, if good law, marginalize and trivialize *Hecht* in all other instances. Who cares, after all, whether the non-appellant can obtain relief in the appeal itself if the non-appellant can obtain the relief right after the appeal resolves, and without even bearing the costs of the appeals?

But is *Koscinski* good law? For instance, is *Koscinski* in conflict with *Hecht* as Professor Siegel suggested? Or is it sufficient to say that the *Hecht* rule is merely a limitation upon the power of appellate courts and that it does not preclude the non-appellant from thereafter claiming the benefits of any favorable ruling?

Beyond that, was the Second Department's ruling in *Koscinski* inconsistent with the First Department's earlier ruling in *Witz*? Put differently, are the departments in conflict? Or is it premature to make that statement solely on the basis of two rulings, one per department, that each lacked detailed analysis of the issues?

And is *Koscinski* good or bad from a policy perspective? In another factual context, one might have urged that a party who *deserves* to prevail should prevail and that the ruling in *Koscinski* has the virtue of elevating substance over form: the non-appellant is not prejudiced by his or her attorney's ill-advised failure to appeal. That rationale, however, would actually not apply to *Koscinski* itself, inasmuch as the appellate ruling that the non-appellant there sought to exploit was a *non-merits* dismissal. In essence, a defendant who may or may not have stood liable on the actual merits of the medical malpractice action successfully obtained a non-merits dismissal by virtue of adversarial missteps (repeated failures to prosecute) that were obviously subject to waiver (as would have occurred, for example, had the defendants not opposed the plaintiff's motion to restore, or if neither defendant had cross-moved for dismissal, or if neither defendant had appealed from the denial of the cross-motion).

As interesting as those questions may be, a completely different question may lead to proper resolution of the other questions: was the so-called motion to renew in *Koscinski* really a proper motion to renew within the meaning of CPLR 2221(e)? Or was it a disguised motion to reargue made long after the deadline had passed?

The key here is the 1999 amendment of the provision. As Professor Siegel nicely explained in his Practice Commentary, the 1999 amendment partly codified and partly clarified the existent case law.[87] Prior to the amendment, it was unclear whether a

[87] David D. Siegel, *Practice Commentaries*, C2221:9 *in* N.Y. C.P.L.R. 2221 (McKinney

motion asking for reconsideration based upon a subsequent change in the law was properly designated as a motion to renew or a motion to reargue.[88] The proper characterization is now set forth in the provision itself. If the motion for reconsideration is premised upon "a change in the law that would change the prior determination," then the motion is a motion to renew and it need not be made by any particular deadline.[89] If, by contrast, the ruling that the movant seeks to overturn was wrong at the time it was made because of "matters of fact or law allegedly overlooked or misapprehended by the court," then the motion for reconsideration is a motion for reargument that must be made within thirty days of service with notice of entry of the wrongly decided decision or order.[90]

Now, with this for context, let us re-examine the situation in *Koscinski*.

Did the appellate division's ruling in *Koscinski* announce or purport to effect any change in the standards that applied to a plaintiff's application to restore a case to "active status?" It very plainly did not.

Koscinski I did not change the law and did not purport to change the law. Nor did the appellant in *Koscinski I* ask for any change in the law. The gist of *Koscinski I* was not that the lower court's ruling was correct when made, but that the law would now be changed. The appellate division pronounced that the lower court's ruling was wrong at the time it was made because the motion court had disregarded the long-settled requirement that a plaintiff seeking to restore his or her case must "demonstrate a reasonable excuse for his default."[91]

For this reason, the non-appellant's subsequent motion for relief, although *labeled* as a "motion to renew" and treated as such without any complaint from the non-appellant's adversary, was in reality a motion to reargue.[92] What is more, when Mr. Aloe defended the

2010).

[88] *Id.*

[89] N.Y. C.P.L.R. 2221(e) (McKinney 2010).

[90] N.Y. C.P.L.R. 2221(d).

[91] *Koscinski I*, 24 A.D.3d 421, 422, 805 N.Y.S.2d 123, 123 (App. Div. 2d Dep't 2005).

[92] Consider, by way of analogy, the disposition in Jackson v. Westminster House Owners, Inc., 52 A.D.3d 404, 861 N.Y.S.2d 315 (App. Div. 1st Dep't 2008). In *Jackson*, the substantive issue was whether a certain paragraph of a proprietary lease entitled the defendant co-op to recover attorneys' fees. The supreme court ruled in the negative and the appellate division affirmed the ruling. Later, however, the Appellate Division for the First Department construed an identical provision as providing for recovery of attorneys' fees.

So, the losing party moved to renew, citing the subsequently decided ruling as regards an

ruling in *Koscinski II* on the ground that "all that the trial court did was correct its own mistake based on the appellate ruling,"[93] such analysis rested on an inherent contradiction. If the trial court's initial ruling was a "mistake"—as opposed to a correct ruling later made incorrect by a change in the law—the CPLR provided a mechanism for its correction, but that mechanism was subject to a thirty-day deadline. Further, while one could argue that it is "wrong" for an erroneous ruling to stand, the answer is that there are also considerations of judicial economy and finality, and, more simply, that the legislature could have set no deadline at all for a motion to reargue but instead chose to set a thirty-day deadline.

Why, then, was *Koscinski II* decided as it was decided? One answer may be that the point made here, that the motion was really one for reargument, was never made by the plaintiff-adversary in *Koscinski II* and was apparently not considered by the court.[94]

Another answer may be that, compared to the usual motion for reargument, the motion in *Koscinski* was qualitatively so much stronger. After all, the non-appealing defendant had the best and most definitive possible proof that the initial ruling was erroneous: an appellate reversal. Yet, CPLR 2221(d) does not say that a motion to reargue "shall be made within thirty days *unless it is plainly meritorious*." It says only that the motion must be made within thirty days.

A third possible explanation is that the motion, which the movant *called* a motion to renew, *looked* something like such a motion inasmuch as it was premised upon one, allegedly dispositive appellate ruling. Yet, if instead of citing one appellate reversal in the case at bar the movant had instead cited ten subsequently decided appellate decisions all holding that a plaintiff must demonstrate a reasonable excuse in order to restore his or her case on the trial calendar, would that have in any way altered *the nature* of the motion? Would that have been any more, or any less, a motion for reargument based upon a mistaken ruling rather than a motion to renew predicated on "*a change* in the law"?

identically-worded paragraph in another lease. But the appellate division's answer was that the ruling that the movant relied upon "was neither new law nor a clarification of prior law, and thus cannot serve as a basis for renewal." *Id.* at 405, 861 N.Y.S.2d at 316.

[93] Aloe, *supra* note 83, at 617.

[94] Indeed, the very terms "reargue" and "reargument" did not appear in either side's appellate brief.

VII. CONCLUSION

Whether *Koscinski* is an aberration or whether it presages a significant limitation of the general rule set forth in *Hecht*, there is one point upon which all commentators that have addressed the subject have agreed. Except in the one arcane instance in which appellate relief can be obtained only by virtue of the adversary's appeal, the safer course for any party who feels that an order was wrongly decided is to file your own notice of appeal rather than depending "on the kindness of strangers." This applies with even greater force when the allegedly erroneous determination is not merely an interlocutory order but a final judgment as to which even a "real" motion to renew will therefore not lie. And it applies with still greater force if, as is suggested above, the so-called motion to renew made in *Koscinski* was, for reasons never brought to the court's attention, a mislabeled and untimely motion for reargument.