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COMMENTARY

  **Do You Need to Cross-Petition for Certification? 'No,' Says NJ Supreme Court**

 Must I also file a cross-petition for certification to preserve the right to raise each of the other bases that the appellate panel did not reach to preserve my summary judgment win?

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 Litigation
By Brian M. Block | June 12, 2023 at 10:00 AM



Consider this not-too-uncommon scenario. The trial court granted your motion for summary judgment and dismissed the complaint. The case is over, and your client is thrilled. Your adversary files an appeal. You urge the appellate panel to affirm on any or all of the independent grounds the trial court held were sufficient to grant summary judgment. The appellate division affirms the judgment but reaches only a single issue to do so. And so, while you would have liked the panel to affirm on several bases, you're nonetheless elated that your client's victory on summary judgment is secure. Then, 20 days later, much to your chagrin, you get your adversary's petition for certification to the Supreme Court of New Jersey.

Your adversary's petition presents a single issue that the appellate panel reached to affirm summary judgment. You will, of course, oppose certification on that issue. However, you then ask yourself the following question: Must I also file a cross-petition for certification to preserve the right to raise each of the other bases that the appellate panel did not reach to preserve my summary judgment win? Lucky for you, nearly 70 years ago, Chief Justice Arthur T. Vanderbilt answered that arcane procedural question in the negative. And that answer has carried over into our current court rules.

Rule 2:12-11 states that the "respondent may seek affirmative relief only by cross petition for certification." In other words, cross-petition by the respondent is necessary only if the respondent seeks affirmative relief from the Supreme Court. But what exactly does that mean?

The court rule finds its roots in *State v. Lefante*, 14 N.J. 584, 589-90 (1954). In that seminal opinion, Vanderbilt explained that if a respondent "is not seeking affirmative relief," then a cross-petition "is not required." He continued, "Only when the respondent in certification is not relying on his judgment below but is seeking affirmatively to overrule or modify it must he cross-petition for certification." Therefore, "a respondent who is merely seeking to maintain his judgment may brief and argue on the appeal any points that will sustain his judgment." Indeed, Vanderbilt observed that where the respondent "is seeking merely to sustain the judgment below," the "rule is entirely different" than where the respondent

wishes to have the court modify or overrule the judgment. Applying these rules, the court explained that when it granted the state's petition on a single issue that sought to overturn the appellate division's reversal, it was then incumbent on the defendant to raise and argue every point raised below that would sustain the reversal.

As the principal architect of New Jersey's modern judiciary, Vanderbilt, more than anyone, was in the best position to opine on the procedural rules governing it. See Judge Jaynee LaVecchia's "Reflections on Judicial Independence After Twenty-One Years on the Supreme Court of New Jersey," 74 Rutgers U.L. Rev. 891, 892 (2021) (observing his well-known role as the architect of the modern judiciary).

In each of the two years that followed, the Supreme Court reaffirmed these procedural rules, first in *Weisberg v. Koprowski*, 17 N.J. 362, 380 (1955), and then again in *State v. Siciliano*, 21 N.J. 249, 260 (1956). In the latter decision, where there were errors in the trial court that the appellate division did not reach, the court wrote: "Inasmuch as the defendant is merely seeking to maintain the judgment below, he may, of course, brief and argue on this appeal any additional matters which will support that judgment, despite the fact that no cross-petition for certification was filed."

So, returning to the question that kicked off this assessment, there is no need to cross-petition for certification on those bases that were argued below, but that the appellate division had no need to reach. In fact, filing a cross-petition without considering Rule 2:12-11 can only have a downside; that is, it gives the court an opportunity to affirmatively exclude any issues raised before reaching their merits. Such a procedural headache is an appellate litigator's worst nightmare. All that said, it is strategically prudent to oppose your adversary's petition by not only attacking the issue that is the subject of the petition, but also by advising the court that your judgment can stand on several other independent grounds that the court would be forced to confront if it grants certification. If the Supreme Court grants your adversary's petition (hopefully not!), you can argue the other bases to maintain your judgment.

Notably, these procedural rules governing petitions are not any different from those—perhaps more well-known rules—that govern appeals to the appellate division. As found in *Chimes v. Oritani Motor Hotel*, 195 N.J. Super. 435, 443 (App. Div. 1984), because "appeals are taken from judgments, not opinions," it is well-settled that "without having filed a cross-appeal, a respondent can argue any point on the appeal to sustain the trial court's judgment." (See also *State v. Eldakroury*, 439 N.J. Super. 304, 307 n.2 (App. Div. 2015) (explaining the converse).) In other words, a party that prevails in full in the trial court has no obligation to cross-appeal to preserve its right to argue on appeal any bases it raised below that would sustain the trial court's judgment.

Although largely beyond the scope of this article, it may surprise some to learn that the rule for cross-petitions in the U.S. Supreme Court essentially mirrors those identified above that are embodied in *Lefante*. Pointedly, in *Union Pacific Railroad v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment, Central Region*, 558 U.S. 67, 80 (2009), the court reaffirmed that as a general rule, "[s]o long as a respondent does not seek to modify the judgment below ... it is well accepted that the respondent may, without filing a cross-appeal or cross-petition, rely upon any matter appearing in the record in support of the judgment." Caveats and inconsistencies abound, however. For those interested, 16B Wright and Miller's "Federal Practice & Procedure" Section 4004.4 (3rd edition), contains a broader discussion and collection of case law on this issue.

Appellate practice is rife with nuance and procedural considerations. While some may consider the subject of this article to be esoteric, having a command of the rules that govern petitions and cross-petitions is essential to successfully litigating a case to its ultimate conclusion.

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