To Be Argued By:
Christopher R. Carroll
Time Requested: 30 Minutes

APL-2021-00183

New York County Clerk's Index No. 652422/2011
Appellate Division, First Department Case No. 2019-04601

Court of Appeals

STATE OF NEW YORK

34-06 73, LLC, BUD MEDIA, LLC
and COORS MEDIA, LLC,

Plaintiffs-Respondents,

against

SENECA INSURANCE COMPANY,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the 22 NYCRR §§ 500.1(f) and 500.13(a), Defendant-Appellant, Seneca Insurance Company ("Seneca"), hereby discloses the following corporate parents, subsidiaries, or affiliates:

Seneca Insurance Company, Inc., a New York corporation, is wholly-owned by The North River Insurance Company, a New Jersey corporation, which is wholly-owned by United States Fire Insurance Company, a Delaware corporation, which is wholly-owned by Crum & Forster Holding Corp., a Delaware corporation, which is wholly-owned by Fairfax (US) Inc., a Delaware corporation, which is substantially owned by FFHL Group Ltd., a Canadian corporation, which is wholly-owned by Fairfax Financial Holdings Limited, a Canadian public company with shares listed on the Toronto Stock Exchange under the symbol "FFH."

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I. PRELIMINARY STATEMENT

Defendant/Appellant, Seneca Insurance Company ("Seneca"), appeals from a Decision and Order of the Appellate Division, First Judicial Department dated January 28, 2021, which affirmed the Trial Court's Decision and Order dated October 18, 2019, and final judgment entered on December 4, 2019, wherein the Appellate Division ignored or rejected binding Court of Appeals' precedent.

When the Plaintiffs-Respondents, 34-06 73, LLC, Bud Media, LLC, and Coors Media, LLC ("Plaintiffs"), filed this action, they asserted only a singular count—breach of contract. That is it.

In the Complaint, Plaintiffs alleged that five months after Seneca issued a policy to them, they submitted a fire loss claim to Seneca and that, despite Plaintiffs allegedly complying with all of the conditions precedent and subsequent in the policy, Seneca refused to pay the claim in breach of the policy. Noticeably absent from the three-page Complaint are any allegations related to what took place prior to the issuance of the policy, *i.e.*, there are no allegations of any mistakes made during the negotiation or issuance of the policy. Plaintiffs never amended their Complaint throughout the course of discovery to add any additional facts or causes of action. Instead, and only after resting at trial, Plaintiffs sought to amend their Complaint to assert a reformation claim, one which is based solely on events that took place before the policy was issued, for the very first time.

Despite the fact that eight years had passed between when the Complaint was filed and when Plaintiffs sought to assert the reformation claim for the first time, and despite the fact that Plaintiffs never pleaded any of the facts necessary to support the reformation claim during those eight years, the Trial Court inexplicably allowed Plaintiffs to amend their Complaint after Plaintiffs rested at trial. The Appellate Division plainly erred in several respects in affirming the Trial Court's Decision, including in ignoring binding Court of Appeals' precedent that mandated a reversal.

In *Matter of SCM Corp. (Fischer Park Lane Co.)*, 40 NY2d 788 (1976), this Court explicitly held that reformation claims do not, by their very nature, relate back to breach of contract claims. Despite the existence of this clear and binding precedent, the Appellate Division concluded that the relation back doctrine codified at CPLR 203(f) saved Plaintiffs' reformation claim that was otherwise time barred, even though the only claim that Plaintiffs alleged in their initial pleading was breach of contract. The Appellate Division's conclusion in this regard is plainly contrary to this Court's decision in *Matter of SCM Corp.* (and subsequent Appellate Division cases that rely upon *Matter of SCM Corp.*). For this reason alone, this Court should reverse the Appellate Division's Decision and Order.

This was not, however, the only error made by the Appellate Division in affirming the Trial Court's Decision and Order permitting the amendment. The Appellate Division also erred in finding that Plaintiffs could amend their Complaint

pursuant to CPLR 3025(c). The Complaint did not set forth any facts that supported the reformation claim, and the Plaintiffs had the ability to raise the reformation claim years before the trial. CPLR 3025(c) does not permit amendment where, as here, Plaintiffs never pleaded any of the facts necessary to support the reformation claim. Seneca was never put on notice that Plaintiffs' intention was to pursue a reformation claim. As such, Seneca was undeniably prejudiced because it could not properly defend the claim raised for the first time at trial, in part given that such a defense relies upon the memories of witnesses which naturally fade over time (in this case, over ten years).

Moreover, if Plaintiffs' key witness was testifying truthfully at trial: (a) that he never intended to insure the premises as a sprinklered building; (b) that he communicated this to his broker; (c) that he believed the broker communicated this to Seneca; and (d) that the policy still contained the Protective Safeguards Endorsement ("PSE"), it is undeniable that Plaintiffs had all of the "facts" necessary to assert a reformation claim when they first filed the Complaint. New York law does not permit waiting to assert a claim until after resting at trial when the information necessary to assert the claim is in the possession of the plaintiffs long before trial. Through the Appellate Division's affirmance of the Trial Court's Decision to allow the amendment, the Plaintiffs have improperly been rewarded for their gamesmanship in waiting until trial to ask the key questions supporting an

entirely new and distinct legal theory that they had in their back pocket the entire litigation. This is the exact type of surprise that our courts should be the gatekeepers of forbidding.

The Appellate Division further erred in failing to recognize that the Plaintiffs did not timely assert their reformation claim pursuant to CPLR 213(6), when Plaintiffs had possession of documents reflecting the mistake prior to filing this action but waited until eight years later to assert the claim. Under well-established New York law, the reformation claim was time barred because the statute of limitations on that claim ran from when the mistake allegedly occurred – April 1, 2009 (the date the policy was issued). When Seneca produced the underwriting file in connection with this action is irrelevant to the question of timeliness because, while that file may have been necessary to prove the reformation claim, it was not necessary to assert the claim. Plaintiffs had sufficient information to assert their reformation claim before commencing this action and clearly failed to act diligently in asserting their claim that a mistake had been made.

The Appellate Division's Decision and Order, if allowed to stand, will be at odds with long-standing Court of Appeals' precedent and will effectively change the way in which all breach of contract actions proceed through discovery and are prepared for trial by requiring defendants to anticipate and prepare to defend claims based on facts that were never pled and, thus, of which defendants had no notice. It

is respectfully urged that this Court should reverse the Appellate Division's Decision and Order and, in doing so, reverse the Trial Court's Decision and Order allowing the amendment to assert a reformation claim, and enter judgment in favor of Seneca because reformation was the only claim on which the jury found against Seneca..

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to CPLR 5602(a)(1)(i). This action originated in the Supreme Court, New York County (Crane, J.). The Decision and Order of the Appellate Division, entered January 28, 2021 (R. 2772), was a final determination affirming the Supreme Court's Decision and Order, dated October 18, 2019 (R. 28), and the final judgment entered on December 4, 2019 (R. 3). The Appellate Division's Decision and Order was not appealable as of right. On May 25, 2021, the Appellate Division denied Seneca's motion to reargue or, in the alternative, for leave to appeal to the Court of Appeals. (R. 2778.) On November 23, 2021, this Court granted Seneca's motion for leave to appeal to the Court of Appeals. (R. 2771.)

III. QUESTIONS PRESENTED

1. Did the Appellate Division err in concluding that the relation back doctrine codified at CPLR 203(f) saved Plaintiffs' reformation claim that was otherwise time barred when the only claim that Plaintiffs had alleged in their initial

pleading was breach of contract, in direct contravention of this Court's decision in *Matter of SCM Corp.*, 40 NY2d 788? (R. 29; 1305; 1312; 2460; 2469-70; 2773-75.)

2. Did the Appellate Division err in failing to conclude that the Plaintiffs did not timely assert their reformation claim pursuant to CPLR 213(6) when Plaintiffs had possession of all information concerning the alleged "mistake" prior to filing the original Complaint, but waited until eight years later to assert the claim? (R. 30; 1299-1300; 1305; 1312; 1305; 2467-2469; 2773-75.)

3. Did the Appellate Division err in permitting Plaintiffs to amend their Complaint, pursuant to CPLR 3025(c), to assert a reformation claim for the first time eight years after the Complaint was first filed and after trial when the Complaint did not set forth any facts that support the reformation claim, and when the Plaintiffs had the ability to raise the reformation claim years before trial? (R. 30; 1299-1300; 1305; 1311; 2459-63; 2470; 2773-75.)

IV. STATEMENT OF FACTS

A. THE POLICY

Seneca issued a commercial policy to Plaintiffs, policy number FTZ 1000661, with effective dates of April 1, 2009 to April 1, 2010 (the "Policy"). (R. 1642.) The Policy contains a Commercial Property Coverage Part, which provides, among other things, building coverage for 50-09 27th Street, Long Island City, New York 11101 (the "Premises") with a limit of $4,000,000. (R. 1656-1657.)

The Policy undisputedly did, at all times, contain a Protective Safeguards Endorsement ("PSE"), which is specifically applicable to the Commercial Property Coverage Part. (R. 1650.) The PSE provides, in relevant part:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PROTECTIVE SAFEGUARDS

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
FARM COVERAGE PART

SCHEDULE*

Prem. No.	**Bldg. No.**	**Protective Safeguards Symbols Applicable**
1, 3, 6-11, 13	1	"P-1" & "P-9"

***

A. The following is added to the:

Commercial Property Conditions

***

PROTECTIVE SAFEGUARDS

1. As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above.

2. The protective safeguards to which this endorsement applies are identified by the following symbols:

"P-1" Automatic Sprinkler System, including related supervisory services.

Automatic Sprinkler System means:

a. Any automatic fire protective or extinguishing system, including connected:

(1) Sprinklers and discharge nozzles;

(2) Ducts, pipes, valves and fittings;

(3) Tanks, their component parts and supports; and

(4) Pumps and private fire protection mains.

b. When supplied from an automatic fire protective system:

(1) Non-automatic fire protective systems; and

(2) Hydrants, standpipes and outlets.

***

B. The following is added to the EXCLUSIONS section of:

CAUSES OF LOSS – BASIC FORM

***

We will not pay for loss or damage caused by or resulting from fire if, prior to the fire you:

1. Knew of any suspension or impairment in any protective safeguard listed in the Schedule above and failed to notify us of that fact; or

> **2.** Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.
>
> If part of an Automatic Sprinkler System is shut off due to breakage, leakage, freezing conditions or opening of sprinkler heads, notification to us will not be necessary if you can restore full protection within 48 hours.

(R. 1650-1651.)

B. THE FIRE AND SENECA'S DISCLAIMER

On or about September 8, 2009, a fire occurred at the Premises. (R. 2494.) Plaintiffs submitted a claim to Seneca in connection with damages sustained as a result of the fire.

Seneca investigated the claim and during its investigation, learned that the building did not contain an operational sprinkler system at the time of the fire, notwithstanding a recommendation provided by Seneca five months earlier, before the fire, that the Plaintiffs should have the sprinkler system checked. (R. 2487, 2492.)

After completing its investigation, on April 13, 2011, Seneca advised Plaintiffs that there was no coverage for the claim. (R. 2487-2492.) In the April 13, 2011 disclaimer letter, Seneca quoted the PSE, among other policy terms, and stated that "Seneca will not pay for any loss or damage caused by fire because you did not

maintain the sprinkler system 'in complete working order[,]'" as required by the PSE. (R. 2492.)

C. THE PLEADINGS

On or about September 1, 2011, Plaintiffs instituted the instant matter by filing a Complaint against Seneca in the Supreme Court of the State of New York County of New York under Index No. 652422/2011. (R. 2493.)

Plaintiffs alleged that the fire loss "was a peril insured against under the Policy" and that they "sustained a covered loss in the amount to be determined but believed to exceed $2,481,395.63." (R. 2494.) They further alleged that "[a]lthough Plaintiffs timely submitted a claim to Defendant for its property damage in connection with its September 8, 2009 loss, Defendant to date has failed to pay the aforesaid claim." (*Id.*) Plaintiffs alleged that they "complied with all of the conditions precedent and subsequent pursuant to the terms of the subject policy of insurance." (*Id.*) Plaintiffs then alleged that Seneca's "failure to indemnify Plaintiffs for its loss constitutes a breach of contract." (*Id.*) As a result of the alleged breach, Plaintiffs claimed to have suffered property damages in excess of $2,481,395.63. (*Id.*) The sole cause of action was Breach of Contract. (*Id.*)

The Complaint is solely focused on what took place after the fire loss on September 8, 2009. The Complaint does not contain a single factual allegation related to interactions between Seneca and Plaintiffs at any time prior to or on April

1, 2009, the date the Policy went into effect. The Complaint is devoid of any allegations related to the negotiation or issuance of the Policy.

On or about October 5, 2011, Seneca filed its Answer to the Complaint. (R. 2497.) The Fourth Affirmative Defense in the Answer quotes the PSE and states that "Plaintiffs, and/or their agents failed to maintain an 'Automatic Sprinkler System' as required by the Policy and thus, the Policy does not provide coverage to plaintiffs." (R. 2500.)

The Complaint and Seneca's Answer remained the operative pleadings for the entirety of the case and are what guided discovery and preparation for trial.

D. PRE-TRIAL DISCOVERY AND MOTION PRACTICE

Pre-trial discovery revealed that Seneca retained a company to perform loss control inspections of the properties covered under the Policy, including the Premises. The company inspected the Premises on April 27, 2009 (after the Policy was issued with a PSE) and the inspection revealed that the automatic sprinkler system was out of service. (R. 1801.) Based upon the report, on August 30, 2009, Seneca sent a letter to the Plaintiffs which set forth a list of recommendations, including to make the Plaintiffs "aware that the fire sprinkler system is currently out of service." (R. 2526.)

Seneca was under no obligation to either do the inspection post-policy issuance or to follow up with Plaintiffs with respect to the sprinkler system

recommendation, and it was unnecessary from Seneca's perspective because it had the protection of the PSE, but it believed the insured would benefit from, and hopefully comply with, the recommendations. (R. 781.)

The Plaintiffs' principal, Mohammad Malik, was deposed on February 3, 2015. (R. 445.) Mr. Malik testified at his deposition that Plaintiffs retained a company to perform inspections of the automatic sprinkler system in light of the requirement in the PSE requiring an automatic sprinkler system at the Premises. (R. 446.) Mr. Malik did not reveal in written discovery or at his deposition that it was his position that the PSE should not have been in the Policy (indeed, Plaintiffs have never claimed that they raised this position at any time prior to trial).

On April 28, 2016, Seneca produced a copy of its underwriting file to Plaintiffs. (R. 2705.)

On August 31, 2016, the Plaintiffs subpoenaed the deposition of Robert Guardino, the Seneca underwriter who was responsible for issuing the Policy. (R. 2694.) Given certain health issues, Mr. Guardino was unable to be deposed. (R. 2707-2709.)

As a result, Seneca offered and the Plaintiffs chose to proceed with the deposition of Carol Muller, a Vice President in the Underwriting Department, on April 5, 2017. (R. 2533-545; R. 670.) Plaintiffs had access to the underwriting file at the time of Ms. Muller's deposition and were able to question her regarding

anything contained therein or anything they thought might be missing. Plaintiffs did not ask any questions that went to the issue of whether it may have been a mistake to include the PSE in the Policy (nor have Plaintiffs claimed they ever broached the subject with Ms. Muller (or anyone else at Seneca) prior to trial).

On June 12, 2017, the Plaintiffs moved to dismiss Seneca's Fourth Affirmative Defense (that the PSE bars coverage for Plaintiffs' claim) on the basis that Seneca waived its right to enforce the PSE. (R. 2547-2566.) Plaintiffs argued that the Motion Court should dismiss the Fourth Affirmative Defense because the fire sprinkler system at the Premises was in working order at the time of the fire or, in the alternative, if the fire sprinkler system was not in working order at the time of the fire, Seneca waived its right to disclaim coverage on the basis of the PSE because Seneca knew of the alleged non-compliance, but chose not to exercise its right to cancel the Policy. (R. 2551; R. 2556.)

Plaintiffs admitted, throughout their moving and reply papers, that the PSE was properly in the Policy; that the PSE required them to maintain a functioning sprinkler system; and that had Seneca cancelled the Policy after learning the sprinkler system was not in working order, Seneca would have been entitled to do so. (R. 2547-2579.)

In connection with their motion, Plaintiffs presented absolutely no facts or arguments with respect to the negotiation and issuance of the Policy. Plaintiffs did

not assert or even allude to the possibility that the PSE may have been included in the Policy by mistake. Indeed, just the opposite.

In their moving and reply papers, Plaintiffs did not state that *prior* to the issuance of the Policy, Seneca was made aware that the Premises did not have a functioning sprinkler system or that Plaintiffs did not want to insure the Premises as a sprinklered building. The entirety of the facts and arguments presented by Plaintiffs in support of their motion was how Seneca reacted *after* it was informed that the Premises did not have a functioning sprinkler system nearly a month *after* the Policy was issued. At the very most, this was probative evidence on the issue of waiver and estoppel, and it is noteworthy here that, as set forth below, the jury rejected those claims.

At the same time that Plaintiffs moved for dismissal of the Fourth Affirmative Defense, Seneca moved for summary judgment as to that defense. In opposing Seneca's motion, Plaintiffs again admitted that the PSE was properly in the Policy and that the PSE required Plaintiffs to maintain an automatic fire sprinkler system in working order. (R. 2584; R. 2587.) In support of their position that they complied with the PSE, Plaintiffs cited to Mr. Malik's deposition testimony that Plaintiffs retained Chief Fire to perform monthly inspections and necessary repair work to maintain the fire sprinkler system in working order. (R. 2588.) Notably, Mr. Malik's deposition testimony in this regard makes clear that Mr. Malik never, prior to trial,

expressed surprise over the inclusion of the PSE in the Policy—based on his deposition testimony and Plaintiffs' subsequent reliance on that testimony, it is clear that the inclusion of the PSE in the Policy was not a mistake.

The Motion Court ultimately denied Plaintiffs' and Seneca's motions, finding issues of fact that could not be resolved on summary judgment. (R. 2609; R. 2611.) The Motion Court found, based on the facts and arguments presented by Plaintiffs and Seneca, that the issues to be decided at trial with respect to the PSE were: (1) whether Seneca waived the ability to disclaim coverage on the basis of noncompliance with the PSE (which Plaintiffs admitted was otherwise enforceable) because Seneca failed to cancel the Policy at any time after it learned that the Premises did not have a functioning sprinkler system (which fact it learned nearly one month *after* the Policy became effective); and (2) if not, whether Plaintiffs complied with the terms of the PSE. (R. 2602-2612.) That is it—there was no issue to be tried concerning the PSE's inclusion in the Policy.

In sum, at no point in time prior to trial beginning on March 14, 2019 did Plaintiffs indicate they had any intention to claim that the PSE was included in the Policy by mistake, or that any pre-policy communications were even relevant.

E. <u>TRIAL</u>

This case proceeded to a jury trial, which began on March 14, 2019. (R. 3.) On March 14, 2019, during their opening statement, Plaintiffs claimed, *for the first*

time, that there was a dispute with regard to whether the Policy was issued with the proper terms. More specifically, Plaintiffs stated in their opening statement that the evidence would show that it was not Plaintiffs' intent to insure the building located at the Premises as a sprinklered building and, as such, it did not matter whether the fire sprinkler system worked at the time of the fire. (R. 64.)

Thus, Plaintiffs were, at the time of opening statements and for the very first time after eight years of litigation and after the close of discovery and the filing and ruling on motions for summary judgment, explicitly asserting a new, inconsistent theory of the case. Prior to trial, Plaintiffs indisputably and repeatedly claimed that the PSE was properly in the Policy and that they were required to comply with the PSE. Upon commencing trial, all of that changed when they added the theory that the PSE never should have been in the Policy in the first place.

The substance of Mr. Malik's testimony at trial as to his intentions with respect to the contents of the Policy, upon which Plaintiffs largely relied to support their newly asserted claim, was available to Plaintiffs since before this case began.[1]

[1] To plead a reformation claim, a plaintiff must allege either a mutual mistake, by asserting that the parties' written agreement does not express a prior oral agreement reached by the parties; or a unilateral mistake accompanied by fraud, by asserting that one party to the agreement fraudulently misled the other such that the writing does not express the intended agreement (*Greater New York Mut. Ins. Co. v. United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [1st Dept 2007]). If it was always Mr. Malik's contention that the PSE was in the Policy by mistake (and not just an opinion he contrived at the time of trial), then Plaintiffs had what they needed to asserted the reformation claim in the original Complaint.

Mr. Malik is the owner of the Plaintiffs and, as such, the Plaintiffs would have had his knowledge on this subject since the Policy was negotiated and issued. The application was available to Plaintiffs, at the latest, during pre-trial discovery and prior to the summary judgment motion practice, through their broker's file (the application was submitted by the broker to Seneca on behalf of Plaintiffs)[2] and again when they received Seneca's underwriting file on April 28, 2016, (R. 2705.).[3]

Nonetheless, Plaintiffs never claimed that there was any possibility that the PSE may have been included in the Policy by mistake until their opening statement.

Mr. Malik testified at trial, for the first time, that he did not want to maintain a sprinkler in the Premises and it was not his intent to obtain a policy which contained a PSE (R. 336; 433.) He further testified that he communicated his intent to obtain a policy without a PSE to his broker by way of an oral conversation. (R. 433-434.) Mr. Malik also testified that it was his understanding that the broker communicated his desire to obtain a policy without a PSE to Seneca. (R. 434-435.)

Mr. Malik admitted that he received the Policy prior to the fire, but asserted that he did not read it. (R. 440, 776.) It is clear that the insured's broker also received

[2] Plaintiffs served a Subpoena Duces Tecum on their broker on or about January 15, 2013. (R. 2689.)

[3] The application may have been available to and in the possession of the Plaintiffs even before the case began given that it was a document submitted on behalf of Plaintiffs to Seneca and not a document created by Seneca.

the Policy prior to the fire and read it because the broker noted several mistakes (but did not note that the inclusion of the PSE was a mistake), requested that Seneca correct them, and Seneca did so. (R. 2618-2622.).

Contrary to Mr. Malik's testimony, there is no indication in any written documents that the broker ever asked Seneca to delete the PSE. Prior to trial, Seneca never deposed the broker and, thus, never asked the broker about whether there was an oral conversation between Mr. Malik and the broker about the PSE because the broker's testimony was not relevant to the only claim that was pled—breach of contract.

Of course, if reformation had been pled, Seneca would have taken that deposition and it would have been relatively contemporaneous with when any conversation between Mr. Malik and the broker would have taken place—ten years prior to trial.

Moreover, it is undisputed that Mr. Malik received Seneca's disclaimer letter, which quoted the PSE and disclaimed coverage on the basis that Plaintiffs failed to comply with the PSE (R. 427-429; 431-433; 2487-2492), and yet he never advised Seneca of his position that it should not have been put into the Policy until trial.

Prior to Plaintiffs questioning Ms. Muller at trial, Seneca objected to her anticipated testimony given Plaintiffs' assertion of a reformation claim for the first time in their opening statement. (R. 513-514; 519; 526-527; 538-539). Despite

Plaintiffs' clear insertion of a new theory into the case during opening statements, Plaintiffs incorrectly represented to the Trial Court that they were not changing their theory. (R. 514.)

The Trial Court then proceeded to rule that the new claim was "part and parcel of the whole thing" (*Id.*); that "the theory that's advanced is just a variation on the theme" (R. 519); and that "waiver is a variation on a theme of it not being in the policy or these weren't insured buildings" (R. 527.). Of course, none of these conclusions were accurate.

The focus of Plaintiffs' questioning of Ms. Muller at trial was on the contents of the underwriting file, a file that Plaintiffs were given on April 28, 2016 and had during Ms. Muller's deposition, which took place on April 5, 2017. Plaintiffs specifically focused their questioning on establishing proof that the inclusion of the PSE in the Policy was a mistake, a strategy they certainly did not take at Ms. Muller's deposition.

On March 20, 2019, a day after Plaintiffs rested, they moved to amend the Complaint to assert a claim for reformation. (R. 1006.) Plaintiffs' motion to amend was based entirely on Mr. Malik's trial testimony, what was and was not contained in the underwriting file, and Ms. Muller's trial testimony. (R. 1006-1009.)

Contrary to Plaintiffs' contention, it is plain that all of this evidence was, or could have been, available to Plaintiffs from, at the latest, April 5, 2017, the date

upon which Ms. Muller was deposed. At that time, Plaintiffs knew (or had access to) Mr. Malik's version of events; had the underwriting file; and had deposed Ms. Muller. What Plaintiffs failed to do at any time during the litigation prior to trial, and waited until trial to do, much to the surprise of Seneca, was to present Mr. Malik's testimony regarding his intention to have a Policy without the PSE and to ask an entirely new line of questions to Ms. Muller with respect to the underwriting of the Policy, questions that could have been asked at her deposition but were not.

Seneca responded to the motion by arguing that there is no basis to allow reformation. (R. 1022-1023.) The Trial Court reserved its decision until the end of Seneca's case. (R. 1023.)

During the charge conference, the Trial Court addressed the issue of reformation again. (R. 1298-1312.) Seneca further argued that the reformation claim was barred by the statute of limitations. (R. 1299-1312.) Plaintiffs again contended that it was not until trial that the evidence came out that there was never any basis to include the PSE in the Policy, again based on the testimony of Ms. Muller. (R. 1301.) In so arguing, Plaintiffs conceded that their reformation claim was entirely new.

The Trial Court ultimately decided to send the issue of mutual mistake to the jury stating that it did not "think reformation is necessarily time barred under the

facts of this case because I think it's part of the whole thrust of the complaint originally." (R. 1311.)

At the close of trial, the Trial Court submitted the following four questions to the jury:

1. Did plaintiffs prove by clear and convincing evidence that the parties' true agreement was a Policy *without* a Protective Safeguard Endorsement, and that it was a mistake to include the Protective Safeguard Endorsement in the Policy?

2. Did plaintiffs prove by a preponderance of the evidence that Seneca knowingly, voluntarily, and intentionally waived its right to enforce the Protective Safeguard Endorsement in connection with Seneca's denial of plaintiffs' insurance claim?

3. Did plaintiffs prove by a preponderance of evidence that Seneca should be estopped from relying on the Protective Safeguard Endorsement in connection with Seneca's denial of plaintiffs' insurance claim?

4. Did plaintiffs prove by a preponderance of the evidence that it exercised due diligence in maintaining an automatic sprinkler system in their building at the time of the fire?

(R. 2131-2135.)

Each question was to be answered individually, without consideration of the answers to the preceding or following questions. (*Id.*) Five of the jurors answered "yes" to the first question; six of the jurors answered "no" to the second question; five of the jurors answered "no" to the third question; and six of the jurors answered "no" to the fourth question. (*Id.*)

Thus, the only claim on which the jury returned a verdict against Seneca was the newly contrived reformation claim. Plaintiffs failed to meet their burden of proof as their waiver and estoppel claims as well as their claim that they complied with the terms of the PSE. As such, the jury rejected the *only* claims the Plaintiffs had asserted for the first eight years of the litigation. The jury accepted *only* the newly created claim of reformation.

F. POST-TRIAL PROCEEDINGS

On April 15, 2019, Seneca moved the Trial Court, pursuant to CPLR 4404(a), to set aside the verdict in favor of Plaintiffs on the issue of reformation and to direct that judgment be entered in favor of Seneca as a matter of law. (R. 2457.) Seneca argued that the reformation claim was time-barred and did not relate back to the breach of contract claim and that Seneca was surprised and prejudiced when Plaintiffs added an entirely new theory of reformation to the case during trial, nearly eight years after the Complaint was filed. (R. 2459.) Plaintiffs opposed the motion. (R. 2627.)

The Trial Court denied Seneca's motion by way of Order dated October 18, 2019. (R. 29.) The Trial Court found that Plaintiffs' reformation claim related back to the original breach of contract claim. (*Id.*) The Trial Court found that there was support for the verdict against Seneca on the reformation claim because Seneca knew that the Plaintiffs did not have a working sprinkler system at the Premises. (R. 30.)

The Trial Court stated that Seneca "received inspection reports reflecting the lack of sprinklers at vacant properties and vacant lots, including the damaged premises. Defendant's underwriting files and the trial testimony demonstrated that the damaged premises did not have functioning sprinklers, that defendant was aware of this circumstance, but took no action." (*Id.*) The Trial Court further commented that "[t]his evidence was the same as that plaintiff used to support its original breach of contract claim. Plaintiff has contended from day one that the PSE was unenforceable. Essentially, reformation was a variation on the theory of breach of contract . . ." (*Id.*) In so concluding, the Trial Court relied on the evidence that the jury rejected in its findings on the second, third, and fourth questions presented.

None of those conclusions by the Trial Court, and none of the evidence it referred to, are relevant to the proofs necessary for a reformation claim: pre-policy inception communications. On December 4, 2019, the Trial Court entered final judgment in the amount of $4,541,957.73. (R. 3-4.)

G. THE APPEAL

Seneca timely filed a Notice of Appeal on December 5, 2019, seeking reversal of the Trial Court's October 18, 2019 Decision and Order and the final judgment entered on December 4, 2019. (R. 2.)

After the appeal was fully briefed, the Appellate Division issued its Decision and Order on January 28, 2021. (R. 2772.) The Appellate Division unanimously

affirmed the decision of the Trial Court to deny Seneca's motion pursuant to CPLR 4404(a). (*Id.*)

The Appellate Division found that the Trial Court properly granted Plaintiffs' application to conform the pleadings to the proof at trial to assert a claim for reformation as it related back to the Complaint because the PSE "has been at the heart of the litigation from the outset" and the same evidence used to support the waiver claim supports the reformation claim. (*Id.*) Contrary to the Appellate Division's Decision, the focus of the case leading up to trial was whether Plaintiffs had complied with the PSE or, in the alternative, whether Seneca waived its right to enforce the PSE based upon its failure to cancel the Policy *after* it was issued. Thus, the evidence and claims at issue prior to trial were all focused on *post*-Policy issuance actions. The reformation claim, on the other hand, by its very nature, was focused on what took place *pre*-Policy issuance, a topic which was not pled or explored in discovery.

The Appellate Division also found that Seneca's assertion of prejudice was unpersuasive because Seneca "had in its possession the underwriting file which provided the basis for the testimony of its vice president tending to show inclusion of the endorsement in the policy was a mistake but failed to produce it to plaintiffs for more than four years." (*Id.*) This conclusion is also contrary to well-established law that the timing of Seneca's production of the underwriting file and the trial

testimony of Ms. Muller have no impact on whether the reformation claim was time barred or whether the amendment was proper. This is particularly so where, as here, the Plaintiffs were in possession of the underwriting file years before trial, but did nothing to explore the issue of a potential mistake until trial began.

Seneca moved for reargument or, in the alternative, leave to appeal to the Court of Appeals. On May 25, 2021, the Appellate Division denied the motion in its entirety. (R. 2778.)

Seneca then moved before this Court for leave to appeal the Appellate Division's January 28, 2021 Decision and Order. On November 23, 2021, this Court granted Seneca's motion. (R. 2771.)

V. ARGUMENT

A. THIS COURT HAS THE POWER TO REVERSE THE APPELLATE DIVISION'S DECISION AND SHOULD DO SO BECAUSE THE APPELLATE DIVISION ERRED IN FAILING TO FIND THAT THE TRIAL COURT ABUSED ITS DISCRETION.

"An appeal from a final judgment brings up for review: 1. any non-final judgment or order which necessarily affects the final judgment . . ." (CPLR 5501[a][1]). "[W]hen an order granting or denying a motion to amend relates to a proposed new pleading that contains a new cause of action or defense—the order necessarily affects the final judgment" and, as such, can be reviewed by this Court (*Oaks v. Patel*, 20 NY3d 633, 644-45 [2013]).

Here, this Court has the authority to review the Trial Court's October 18, 2019 Decision alongside the entry of final judgment because that Decision granted a motion to amend after Plaintiff's rested at trial that resulted in a new pleading with a new cause of action—reformation—when previously only a breach of contract claim had been asserted in the Complaint (R. 28). The reformation claim is the only claim on which the jury found against Seneca and, thus, it was the sole basis for judgment in Plaintiffs' favor (R. 2131-2135).

Moreover, the Court of Appeals has authority to review questions of law (CPLR 5501[b]). Among those questions of law is whether a lower court abused its discretion, such as in allowing the amendment of a pleading (Siegel & Connors, NY Prac § 529 [6th ed. 2018]; *Herrick v. Second Cuthouse, Ltd.*, 64 NY2d 692 [1984]). In reviewing discretionary decisions, this Court can review the trial court's factual and legal decisions (*See e.g.*, *Oakes*, 20 NY3d at 645-47). This Court has the power to determine whether the Appellate Division erred in finding that the Trial Court providently exercised its discretion in permitting Plaintiffs to amend their Complaint (*See Herrick*, 64 NY2d 692; *Steiner v. Wenning*, 43 NY2d 831 [1977]).

It is respectfully submitted that this Court should find that the Appellate Division erred in concluding that the relation back doctrine codified at CPLR § 203(f) saved Plaintiffs' reformation claim that was otherwise time barred when the only claim that Plaintiffs alleged in their initial pleading was breach of contract

because that decision is plainly inconsistent with this Court's opinion in *Matter of SCM Corp.*, 40 N.Y.2d 788. Although this should alone be a sufficient basis to warrant reversing the Appellate Division's Decision, the Appellate Division erred in other ways that also warrant reversal. The Appellate Division erred in finding that Plaintiffs could amend their Complaint, pursuant to CPLR § 3025(c), to assert a reformation claim for the first time eight years after the Complaint was first filed and after trial when the Complaint did not set forth any facts that support the reformation claim, and when the Plaintiffs had the ability to raise the reformation claim years before the trial. The Appellate Division further erred in failing to recognize that the Plaintiffs did not timely assert their reformation claim pursuant to CPLR § 213(6), when Plaintiffs had possession of all information concerning the alleged "mistake" prior to filing the original Complaint, but waited until eight years later to assert the claim. These errors by the Appellate Division will, if left undisturbed, effectively change the way in which all breach of contract actions proceed through discovery and are prepared for trial by requiring defendants to anticipate and prepare to defend based on facts that were never pled and of which defendants have no notice.

B. THE APPELLATE DIVISION ERRED BY FAILING TO APPLY THE BINDING COURT OF APPEALS' PRECEDENT ESTABLISHING THAT CPLR 203(f) CANNOT BE USED TO SAVE A REFORMATION CLAIM WHEN THE ONLY CLAIM PREVIOUSLY ASSERTED IS A BREACH OF CONTRACT CLAIM.

The Appellate Division's decision is directly at odds with this Court's decision in *Matter of SCM Corp.*, where this Court held that reformation claims do not relate back to breach of contract claims because they do not arise out of the same transactions or occurrences (40 NY2d at 792). As such, this Court should reverse the Appellate Division's Decision.

In *Matter of SCM Corp.*, this Court held that a reformation claim does not relate back to a breach of contract claim, because the former involves negotiation and articulation of the agreement prior to its execution and the latter involves performance under the agreement after its execution (40 NY2d 788). In that same decision, this Court went on to explicitly reject the Appellate Division's holding in this case that simply because the agreement or a particular provision of the agreement is at issue with relation to both a breach of contract and reformation claim, those claims arise out of the same transaction or occurrence (*Matter of SCM Corp.*, 40 NY2d at 792).

In *Matter of SCM Corp.*, a tenant served a demand for arbitration claiming that the landlord's calculation of the "Expense Base Factor" (a term defined in the lease agreement) and annual increments in expenses had been improper and that the

landlord violated section 2.02 of the lease insofar as taxes on the property were concerned. Shortly before the first arbitration hearing, nearly two years after the tenant served the demand for arbitration and nearly eight years after the parties entered the lease agreement, the landlord sought to reform the same section of the lease agreement on which the tenant's claims were based. In finding that the reformation claim was time barred, the Court explained as follows:

> The tenant's demand for a refund of rent overpayment is predicated on acts of the landlord related to, or by which it computed and assessed, escalations of rent after the term of the lease commenced in February, 1968; the landlord's demand for reformation is grounded on allegations as to the intention of the contracting parties prior to and as the time the lease was executed with respect to the proportionate share of electrical expense to be borne by the tenant. The tenant's claim relates to performance under the contract; the landlord's relates to the negotiation and articulation of the agreement made between the parties prior to its execution. *While in a most general sense both might be said to be associated with the lease, in the language of CPLR 203 (subd [c]), the claims do not arise out of the same transactions or occurrences* (*Matter of SCM Corp.*, 40 NY2d at 791-92 [emphasis added]).

Thus, this Court has made clear that a claim relating to the negotiation and articulation of a written agreement, *i.e.*, reformation, cannot relate back to a claim related to performance under that written agreement, *i.e.*, breach of contract, because they do not arise out of the same transactions or occurrences, as is required by CPLR 203(f).[4] Notably, this Court did not qualify its decision or suggest that if a

[4] CPLR 203(f) provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original

reformation claim is based upon evidence of which the adversary is aware, then a reformation claim may relate back. That simply is not the case. As such, the Appellate Division was required to find that Plaintiffs' reformation claim did not relate back to the breach of contract claim asserted in the original Complaint.

This conclusion is further supported by subsequent Appellate Division decisions relying upon *Matter of SCM Corp.* In *First National Bank of Rochester v. Volpe,* the Fourth Department found that a claim to reform a "Modification and Extension Agreement" based on a theory of mutual mistake did not relate back to the original complaint, which alleged that the defendants breached their obligations under promissory notes and guarantees related to a mortgage on real property (217 AD2d 967, 967 [4th Dept 1995]). The court found that the original pleading "did not give notice of the same transactions or occurrences sought to be proved by the proposed amendment, which alleges a mistake in the formulation or articulation of the contract" (*Id.*; *see also Davis v. Davis*, 95 AD2d 674 [1st Dept 1983] [relying on *Matter of SCM Corp.* to find that defendant's untimely counterclaim for reformation of a separation agreement did not arise out of the same transactions or occurrences as the plaintiff's claim for breach of the agreement]; *182 Franklin St. Holding Corp. v. Franklin Pierrepont Assoc.*, 217 AD2d 508 [1st Dept 1995] [relying on *Matter of*

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pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

SCM Corp. to find that a defense seeking reformation of a note and mortgage does not arise out of the same transactions or occurrences as a claim for breach of the note and mortgage]; *Levy v. Kendricks*, 170 AD2d 387, 388 [1st Dept 1991] [relying on *Matter of SCM Corp.* and *Davis* and holding "[w]here, as in this case, the plaintiff's claims relate to its right to performance under the terms of an agreement, counterclaims arising out of the negotiation and events leading up to the execution of the agreement are not revived pursuant to CPLR 203(c)"]).

Here, as in *Matter of SCM Corp.* and the Appellate Division decisions relying on *Matter of SCM Corp.*, Plaintiffs' breach of contract claim and Seneca's Fourth Affirmative Defense related to performance under the Policy. The breach of contract claim and Fourth Affirmative Defense relied upon the terms of the Policy being in effect and the actions taken after the Policy was issued. Plaintiffs' reformation claim, on the other hand, related to the intentions of the parties in negotiating the Policy and up to the time of issuance of the Policy. As such, this Court has ruled on this exact issue and it found that such a reformation claim should not be permitted.

In this case, the Appellate Division distinguished *Matter of SCM Corp.* and some of the subsequent Appellate Division decisions relying on *Matter of SCM Corp.* on their facts by stating that the instant matter is unique in that the PSE was always at issue in this action and that the same evidence used to support the waiver claim also supports reformation. This conclusion is incorrect for several reasons and

the Appellate Division should have applied *Matter of SCM Corp.* as it was bound to do so.

The law is clear that the only documents that should have been considered in determining whether the relation back doctrine saved the reformation claim were the original Complaint and the proposed amended complaint (CPLR 203[f] [providing that the relation back doctrine applies where the original pleading gives notice of the transactions, occurrences, or series of transactions or occurrences sought to be proved by way of the claim asserted in the proposed amended pleading]). As such, neither the Trial Court nor the Appellate Division should have considered the evidence exchanged during discovery or claims that only came to light during discovery and motion practice (waiver and estoppel).

If the Trial Court (and, in turn, the Appellate Division) had simply compared the Complaint to the proposed amended complaint, as it was required to by law, it would have had no choice but to find that the reformation claim did not relate back because the Complaint did not contain any allegations related to what took place before the Policy was issued, allegations that would be necessary to support a reformation claim.

Even if the law permitted the Trial Court and the Appellate Division to look to the evidence exchanged during discovery and claims advanced during discovery and motion practice, which it does not, the conclusion still should have been the

same: the reformation claim does not relate back. Contrary to the Appellate Division's conclusion, the way in which the PSE was at issue in this action drastically changed between the filing of the original Complaint and when Plaintiffs rested at trial.

In connection with the breach of contract claim asserted in the Complaint, the Fourth Affirmative Defense asserted in the Answer, and the waiver and estoppel claims pursued throughout discovery and motion practice, the issue with respect to the PSE was always whether Plaintiffs complied with the terms of the PSE or, in the alternative, whether Seneca waived or should be estopped from disclaiming coverage on the basis of the PSE where it allegedly knew of Plaintiffs' non-compliance with the terms of the PSE and failed to exercise its right to cancel the Policy. For each of these claims, it must be accepted that the PSE was properly in the Policy, something which Plaintiffs admitted to be the case throughout discovery and motion practice. Thus, the focus was always on *post*-Policy issuance actions. The reformation claim, on the other hand, by its very nature, requires a focus on *pre*-Policy issuance actions and communications. Prior to trial, there was absolutely no indication that Plaintiffs ever intended to pursue a claim that anything went wrong during the issuance of the Policy or any evidence presented in support of such a claim.

As this Court made clear in *Matter of SCM Corp.*, the distinction between pre-contract formation claims and post-contract formation claims is not to be overlooked in determining whether the relation back doctrine applies, which is what it appears that the Appellate Division did here.

The fact that the PSE was always at the "heart" of this case is no different than saying that the agreements allegedly breached in the other cases cited above were always at issue. Nonetheless, each of those courts rejected such arguments in support of a late reformation claim because the proofs necessary to support and the relief sought in the proposed reformation claim were distinct from the proofs necessary to support and the relief sought in connection with the breach of contract claim. Most importantly, this Court has rejected this argument, stating that while a breach of contract action and reformation claim "in a most general sense both might be said to be associated with the lease, in the language of CPLR 203 (subd. (c)), the claims do not arise out of the same transactions or occurrences" (*Matter of SCM Corp.*, 40 N.Y.2d at 792). The Appellate Division was required to follow this Court's holding yet failed to do so. For this reason alone, this Court should reverse the Appellate Division's Decision and Order. There are, nonetheless, other errors that also warrant reversal of the Appellate Division's Decision and Order.

C. THE APPELLATE DIVISION ERRED IN FINDING THAT THE PLAINTIFFS' REFORMATION CLAIM WAS TIMELY ASSERTED AND NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

CPLR 213(6) provides that actions based upon a mistake must be commenced within six years. Pursuant to well-established New York law, the statute of limitations begins to run on the date of the purported mistake (*1414 APF, LLC v. Deer Stags, Inc.*, 39 AD3d 329, 330 [1st Dept 2007]). Therefore, here, the statute of limitations began to run on April 1, 2009 and ended on April 1, 2015, nearly four years before Plaintiffs asserted their reformation claim. As such, Plaintiffs' claim should have been rejected as untimely.[5]

Plaintiffs argued that Seneca should not be permitted to rely on the statute of limitations because it failed to provide its underwriting file to Plaintiffs until 2016. However, the underwriting file has nothing to do with the statute of limitations. The statute of limitations is based upon when the mistake occurred, not when Plaintiffs had sufficient evidence to prove their reformation claim. Plaintiffs have asserted that they could not pursue a reformation claim until they had gathered all of the

[5] In affirming the decision to permit Plaintiffs to amend their Complaint to assert a reformation claim after they rested at trial, the Appellate Division failed to apply New York law that requires that an equitable claim like a reformation claim must be asserted timely (*Harwood v. U.S. Shipping Board Emergency Fleet Corp.*, 32 F2d 680, 683 [2d Cir. 1929] ["One seeking relief by rescission or reformation must do so promptly on discovery of the mistake and must restore the former status."]).

evidence to support that claim but, as discussed above and in this section, that is simply untrue and ignores the purpose of the discovery process. Plaintiffs were required to assert their reformation claim promptly, which would have been at the time of filing the Complaint. If taken at their word, Plaintiffs certainly knew of the "mistake" at the time the disclaimer was sent on April 13, 2011.

To the extent Plaintiffs sought to have the Appellate Division or the Trial Court toll the statute of limitations (presumably based upon a delay in receiving the underwriting file), such a request should have been rejected. The First Department has previously held that the two-year discovery accrual set forth in CPLR 203(g) is not applicable to claims of mistake because such claims are not ones in which accrual is measured by actual or constructive knowledge (*National Amusements, Inc. v. South Bronx Develop. Corp.*, 253 AD2d 358, 359 [1st Dept 1998] [citing *First Nat. Bank of Rochester*, 217 AD2d at 967]). Even if the reformation claim is subject to the two-year accrual set forth in CPLR 203(g), that statute still would not save Plaintiffs' reformation claim because they had possession of the documents reflecting the alleged mistake prior to commencing this action.

The First Department has held that CPLR 203(g) does not apply where the party seeking to assert a reformation claim had possession of the document it is claiming contained a mistake (*1414 APF, LLC*, 39 AD3d at 330 [finding that the two-year date of discovery accrual did not apply because the plaintiff presumably

had possession of the document containing the mistake and, thus, could not demonstrate the due diligence necessary to satisfy CPLR 203[g]]; *F.D.I.C. v. Five Star Mgmt., Inc.*, 258 AD2d 15, 20 [1st Dept 1999] [finding that the two-year date of discovery accrual did not apply to a reformation claim where the party seeking to assert the claim had possession of the document containing the mistake]).

Here, Mr. Malik admitted that he received a copy of the Policy, which contained the PSE, and the disclaimer letter, which referenced the PSE. (R. 427-429; 430-433; 440; 776; 2487-2492). Plaintiffs were in possession of both of these documents prior to filing this action in 2011, yet waited until 2019 to assert a reformation claim. Pursuant to the precedent in the First Department, it is plain that such an amendment should not have been permitted because Plaintiffs knew or should have known through the exercise of due diligence that their Policy contained a mistake prior to filing this action and years before asserting the reformation claim for the first time at trial.

D. THE APPELLATE DIVISION ERRED IN FINDING THAT CPLR 3025(c) CAN BE USED TO ASSERT A CLAIM THAT IS BASED ON FACTS NOT PREVIOUSLY PLED AND EVIDENCE THAT WAS AVAILABLE TO PLAINTIFFS YEARS PRIOR TO ASSERTING THE CLAIM.

In deciding that it was proper for the Trial Court to permit Plaintiffs to amend their Complaint pursuant to CPLR 3025(c) by finding that the reformation claim related back to the Complaint, which contained only a breach of contract claim, the

Appellate Division: (1) conflated amendment pursuant to CPLR 3025(c) and the relation back doctrine codified at CPLR 203(f); (2) failed to apply the law that limits when CPLR 3025(c) permits amendment; and (3) failed to conclude that the Complaint did not put Seneca on notice of any facts that would support the reformation claim raised for the first time at trial, and the prejudice caused to Seneca by Plaintiffs having possession of the information they needed to assert a reformation claim for years, but waiting to surprise Seneca with that claim at trial.

1. It Was An Abuse Of The Trial Court's Discretion To Permit Amendment Pursuant to CPLR 3025(c).

The first issue that should have been considered by the Appellate Division in determining whether Plaintiffs should have been permitted to amend their Complaint to assert a reformation claim is whether amendment was proper under CPLR 3025(c). While the relation back doctrine codified at CPLR 203(f) applies a similar standard, as set forth above, there is no reason to consider whether the relation back doctrine saves a claim unless and until an amendment would be procedurally proper under CPLR 3025(c). If the proposed amendment is procedurally improper pursuant to CPLR 3025(c), then there is no need to determine whether the new claim relates back to the original pleading pursuant to CPLR 203(f). Seneca submits that in its Decision on the Appeal, the Appellate Division conflated the bases of amendment under CPLR 3025(c) and the application of CPLR 203(f) by finding that amendment was proper because the reformation claim related back to the breach of contract

claim in the Complaint. The two statutes are distinct and must be analyzed separately.

In finding that amendment pursuant to CPLR 3025(c) was proper, the Appellate Division failed to properly apply the law that limits application of that statute to cases where the facts necessary to support the new theory were previously pled. The statute is not intended to be applied to theories and evidence developed during discovery that are never pled.

a. For CPLR 3025(c) to Apply, The Facts Necessary to Support the Reformation Claim were Required to be Present in the Complaint.

CPLR 3025(c) provides that "[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances." Although leave to amend is to be freely given, CPLR 3025(c) is not without its limits. The First Department has stated that "[w]here amendment of the complaint to conform to the evidence presented at trial (CPLR 3025[c]) prejudices the opposing party by 'the interjection, at trial, of a new or alternate theory supported by previously unpleaded facts,' it is an abuse of discretion" (*Symbax, Inc. v. Bingaman*, 219 AD2d 552, 553 [1st Dept 1995] [quoting *DiMauro v. Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 240 [2d Dept 1984] ["[w]hile a proposed amendment which merely changes the theory of recovery without adding any new facts generally would not be regarded as

prejudicial [*see, e.g., Eng v. Di Carlo*, 79 AD2d 1018], the same cannot be said of the interjection, at trial, of a new or alternate theory supported by previously unpleaded facts [cf. *Forman v. Davidson*, 74 AD2d 505"]). Accordingly, in order to determine whether an amendment pursuant to CPLR 3025(c) is proper, courts must closely examine the allegations in the previously filed pleading(s).

Here, both the Trial Court and Appellate Division failed to conduct any analysis of the allegations in the Complaint when determining whether an amendment to assert a reformation claim at the time of trial was proper. Instead, the Trial Court and the Appellate Division focused on what information Seneca learned during discovery, which, as explained further below, cannot be a basis for permitting the amendment. The focus must remain on the allegations actually contained in pleadings. That is what the statute and binding New York precedent mandates.

In discussing the importance of the allegations in the pleadings, the First Department has held that "[i]t is hornbook law that the purpose of pleadings, including of the bill, is to provide a guide to the trial and to limit the issues. The pleadings and bill may not be ignored" (*Forman v. Davidson*, 74 AD2d 505, 506 [1st Dept 1980]). Another New York court aptly explained:

> If substantial disparities between pleading and proof are treated as mere trivia, to be rectified by the granting of pro forma motions to amend, why insist upon pleadings at all? Why not try the case first and write the pleadings later? Why should the Bar inconvenience itself with the drafting of complaints and answers when a motion under CPLR 3025(c) will be granted routinely to relieve a party of the consequences

> of stupidity, inattentiveness, or prevarication? Absurd. Self-evidently, we need pleadings—so that litigants may know what claims or defenses they must prepare to meet, so that issues are defined for trial, so that parties will be discouraged from tempering their testimony to meet the needs of the occasion. Then CPLR 3025(c) has its limits (*DuBose v. Velez*, 63 Misc 2d 956, 958, 313 NYS2d 881 [Civ. Ct., New York County 1970]).

New York courts have consistently held that it is improper to conform a pleading to the proof adduced at trial when the facts necessary to support the new theory advanced at trial have not previously been pled (*Forman*, 74 AD2d 505; *DiMauro*, 105 AD2d 236; *Xavier v. Grunberg*, 67 AD2d 632 [1st Dept 1979]; *D'Angelo v. D'Angelo*, 109 AD2d 773 [2d Dep't 1985]).

As was explained by the First Department in *Forman*:

> It is hornbook law that the purpose of pleadings, inclusive of the bill, is to provide a guide to the trial and to limit the issues. The pleadings and bill may not be ignored. It is not enough to justify injection of a new and surprising theory into a plaintiff's case to point out that defendant's counsel was prepared to cross-examine concerning a possible theory of liability other than that pleaded or particularized. That would be routine preparation for any good trial lawyer readying himself to endeavor to shake a witness' certainty. Further, a plaintiff must reveal the bases for claimed liability in a pleading and, should it be reasonably necessary to change or add a theory, to apply timely for permission to conform pleading to proof rather than to wait until completion of proof to sort out, evaluate, and label what has been presented to the trier of fact . . . A trial is manifestly unfair when a party is suddenly called upon to defend on a theory belatedly brought into the case (74 AD2d at 506 [internal citation omitted]).

Here, the Plaintiffs filed a Complaint on September 1, 2011, in which they asserted one count for breach of contract. (R. 2493-2494.) Plaintiffs alleged that

Seneca issued the Policy; that after the Policy was in effect, the Plaintiffs sustained a fire loss; that Plaintiffs timely submitted a claim to Seneca; that Plaintiffs complied with all of the conditions precedent and subsequent set forth in the Policy; and that Seneca failed to pay for the damages sustained as a result of the fire in breach of the Policy. (R. 2494.) All of these allegations support a breach of contract claim, but none of them give Seneca notice that Plaintiffs believed the PSE was in the Policy by mistake or that Plaintiffs would seek reformation of the Policy.[6]

To plead a reformation claim, a plaintiff must allege either a mutual mistake, by asserting that the parties' written agreement does not express a prior oral agreement reached by the parties; or a unilateral mistake accompanied by fraud, by asserting that one party to the agreement fraudulently misled the other such that the writing does not express the intended agreement (*Greater New York Mut. Ins. Co.*, 36 AD3d at 443). Of course, if fraud is alleged, it must be pled with the requisite particularity (*Id.*) Plaintiffs' Complaint, which Plaintiffs never sought to amend prior to resting at trial, does not contain a single allegation of mistake, either mutual or unilateral. More importantly, Plaintiffs' Complaint does not contain a single allegation related to the negotiation or issuance of the Policy, which is when the mistake would have had to have occurred in order to warrant reformation. The entire

[6] Pursuant to CPLR 3013,"[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

three-page Complaint is related to the handling of the fire loss claim, which was submitted to Seneca approximately five months after the Policy was issued. Seneca has absolutely no indication from the allegations in the Complaint that it would ultimately be called upon to defend a reformation claim.

In affirming the decision to permit the amendment, the Appellate Division went against well-established New York precedent, functionally finding that Seneca is responsible for predicting theories the Plaintiffs might pursue but never actually provide notice of. The Appellate Division's Decision essentially encourages litigants to do exactly what the *DuBose* Court cautioned against—try the case first and write the pleadings later. Pursuant to the Appellate Division's Decision, Seneca must question, as the *DuBose* Court did, why Plaintiffs were required to file a pleading at all if they were going to be permitted to pursue a theory at trial that was not grounded in any of the allegations of the Complaint? The answer, it is respectfully submitted, is that it should never have been permitted.

b. The Theories Pursued and Evidence Discovered During the Discovery Process do not Support Amendment of the Complaint Pursuant to CPLR 3025(c).

Courts have rejected amendments at trial that are not based upon allegations in earlier pleadings, even where the support for the new theory was part of discovery. In *DiMauro*, the Second Department explained that

> [a]lthough the third-party defendant and her attorney may actually have been aware of the defective seat belt from discovery proceedings and

> the like, this abstract 'knowledge' cannot be said to preclude a claim of prejudice where, as here, a party has been directed to proceed to trial on a theory of liability (i.e., the absence of an operable seat belt) of which she had no prior notice . . . An adversary cannot, in all fairness, be expected to proceed to trial on every conceivable theory of liability arising out of an unpleaded state of facts of which he acquires personal knowledge, even though the aforementioned state of facts is revealed during pretrial proceedings (105 AD2d at 241).

In determining whether to allow for amendment to conform to the evidence adduced at trial, the question is not whether the defendant and its attorney gained knowledge during discovery of facts which may support the new claim. Rather, the question is whether those facts previously have been pled. As set forth above, Plaintiffs failed to plead any of the facts that would have put Seneca on notice that Plaintiffs intended to raise a reformation claim and, for that reason alone, Seneca was prejudiced by the late assertion of this theory.

It is respectfully submitted that the Appellate Division erred in failing to apply this case law, in finding that the amendment was proper because Seneca should have known during the course of discovery and motion practice that Plaintiffs might be pursuing waiver and estoppel claims (even though they were not pled, and even though the jury ultimately rejected those claims), and in concluding that the reformation claim, also based on the PSE, was purportedly supported by the same evidence as those claims. This is so for four reasons.

First, contrary to the Appellate Division's conclusion, what Seneca learned during the course of discovery is irrelevant for purposes of determining whether

amendment was proper pursuant to CPLR 3025(c). All that was relevant was what Plaintiffs actually alleged in their pleading, which was nothing that would support a reformation claim.

Second, even if what occurred during discovery was relevant and could be considered as capable of putting a defendant on notice of the claims a plaintiff intended to prove at trial, which Seneca disputes, the breach of contract, waiver, estoppel, and reformation claims at issue here are fundamentally different and the evidence used to support those claims is radically different. As such, the evidence and arguments submitted in support of breach of contract, waiver, and estoppel during discovery and motion practice could not have put Seneca on notice of the facts underlying the reformation claim.

Plaintiffs' waiver and estoppel claims were both based on the theory that Seneca could not enforce the PSE because Seneca failed to exercise its right to cancel the Policy pursuant to the PSE once, post-Policy issuance, it learned that the sprinklers were not working at the Premises and that the Plaintiffs were not in compliance with the PSE. (R. 2547-2566; 2570; 2572-2577.) These claims necessarily relied on the PSE properly being in the Policy, otherwise there would have been nothing to waive or be estopped from enforcing. The reformation claim, on the other hand, did not involve enforcement of the PSE but, rather, a claim that the PSE should not even exist in the Policy. (R. 62-64; 1006-1009.) Not only is this

claim based upon what occurred *before* the Policy was issued, in contrast to the breach of contract, waiver, and estoppel claims that are based upon what occurred *after* the Policy was issued, but this claim also involves a position that is fundamentally inconsistent with the breach of contract, waiver, and estoppel claims.

Moreover, it is plain that, contrary to the Appellate Division's finding, Seneca's inspection of the Premises nearly a month *after* the Policy was issued, and decision not to cancel the Policy, was not and could not be the basis for the reformation claim. The inspection happened after the Policy was issued (R. 1801); thus, the content of that inspection report could not have been contemplated by Plaintiffs or Seneca in connection with the issuance of the Policy. That inspection report and Seneca's decision not to cancel the Policy says absolutely nothing about the intent of the parties in forming the Policy. That inspection report simply states that there is a sprinkler at the Premises, but that it does not currently function properly (*Id.*) The inspection report does not state that Plaintiffs have no intention of making the sprinkler functional or that Plaintiffs wanted a Policy that does not require them to maintain the sprinkler. It also bears noting that simply because the sprinkler did not function properly at the time of the inspection does not give Seneca any reason to believe that the Plaintiffs would not make the sprinkler functional.

In addition to the inspection report not supporting the reformation claim, the decision not to cancel the Policy also does not support the reformation claim. If

Seneca desired to cancel the Policy, the basis for cancellation would have been Plaintiffs' failure to comply with the PSE, which necessarily relied upon the PSE properly being in the Policy. The reformation claim, unlike the waiver and estoppel claims, relied upon the PSE mistakenly being added to the Policy. Ms. Muller testified at her deposition that one of the reasons that Seneca did not cancel the Policy is because the PSE was in the Policy. (R. 781.) Therefore, Seneca's decision not to cancel the Policy after becoming aware that the Plaintiffs were not in compliance with the PSE cannot establish reformation to remove the PSE from the Policy. It is important to emphasize, however, that Seneca had the right, but not the obligation, to cancel the Policy, and that the Policy continued to provide cover for many other risks, including storm, wind, and floods.

Third, the jury rejected the waiver and estoppel claims and accepted the reformation claim. (R. 2131-2135.) Contrary to Plaintiffs' argument in connection with the Appeal, the Trial Court specifically instructed the jury to consider each claim independently of the other (*Id.*) Thus, the jurors did not reject waiver and estoppel simply because they found a mistake. The jury's verdict further supports that the necessary proofs for each of the claims were different.

Fourth, Plaintiffs, by their actions in this case, have themselves admitted that the inspection report and Seneca's decision not to cancel the Policy in response to that report did not establish their reformation claim. If this course of conduct

established reformation (and it does not), then Plaintiffs certainly should have asserted a reformation claim years ago because Plaintiffs had this information years before the trial. Instead, Plaintiffs asserted in their opening statement that their reformation claim was based upon the applications and Mr. Malik's anticipated trial testimony (R. 62-64) and later in moving to amend, asserted that their reformation claim was based upon evidence that came out at trial through Mr. Malik's testimony as to his intentions in requesting the Policy; the lack of documents showing a request for a PSE; and Ms. Muller's trial testimony regarding the lack of discussion of the PSE prior to binding of the Policy (R. 1006-1009.) All of this "evidence" existed pre-complaint and pertains to pre-complaint actions or communications.

c. As a Result of the Amendment Being Allowed, Seneca Suffered Prejudice which could not be Remedied.

Despite Plaintiffs' suggestion to the contrary, any continuance of the trial after Plaintiffs first raised their reformation claim would not have remedied any prejudice. A continuance would have been unavailing because the only way for Seneca to refute the reformation claim would have been by obtaining testimony about conversations between the broker and Mr. Malik and the broker and Seneca. This would have, at a minimum, required testimony of the broker based upon their knowledge of what occurred ten years prior. Without doubt, that recollection would have faded and likely would have been nonexistent.

It has been said that leave to amend should be denied where "the new theory of liability would necessarily depend on the recollections of the parties, which unavoidably diminish over time and, [where] plaintiff fail[s] to present a reasonable excuse for the delay" (*Raymond v. Ryken*, 98 AD3d 1265, 1266 [4th Dep't 2012]). "'While delay alone is insufficient to deny [leave] to amend, when unexcused lateness is coupled with prejudice to the opposing party, denial of [leave to amend] is justified'" (*Id.* [quoting *Clark v. MGM Textiles Indus., Inc.*, 18 AD3d 1006, 1006 3d Dept 2005]; *see also Burke, Albright, Harter & Rzepka LLP v. Sills*, 187 AD3d 1507 [4th Dept 2020] [affirming trial court's decision to deny leave to amend where there was a 14-year delay, plaintiffs' primary witness died during that time period, and another significant witness suffered from dementia and was unable to recall the events underlying the proposed amendment]). "In deciding whether to grant a motion to serve an amended pleading in a long-pending case, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether the amendment is meritorious, and whether a reasonable excuse for the delay was offered" (*Boyd v. Trent*, 297 AD2d 301, 303-04 [2d Dept 2002] [internal quotations omitted]).

Plaintiffs are the ones who had the burden of proof on the reformation claim (*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22, 29 [1st Dept 1992]). Thus, Plaintiffs had the burden to alert Seneca to this claim and bring forth the evidence

necessary to support this claim. Plaintiffs admittedly knew prior to commencing this action that the PSE was in the Policy. (R. 427-429; 431-433; 2487-2492.) If, as Mr. Malik claimed at trial, the Plaintiffs truly wanted these buildings insured as non-sprinklered buildings and Mr. Malik expressed that intent to the broker, who he thought expressed that intent to Seneca, Plaintiffs had everything they needed to allege a reformation claim in the Complaint filed on September 1, 2011. (R. 336; 433-435.) Indeed, it is not uncommon for a plaintiff to assert a reformation claim at the beginning of a case or before discovery is complete and then to seek discovery in an effort to further support this claim (*See e.g., Imrie v. Ratto,* 145 AD3d 1358, 1360-61 [3d Dept 2016] [finding that it was premature to grant summary judgment in favor of the insurer where the insured had asserted a claim for reformation and had not yet obtained discovery on that issue from the insurer]; *Multiplan, Inc. v. Federal Ins. Co.*, 179 AD2d 541 [1st Dept 1992] [affirming decision to deny summary judgment in connection with reformation claim because discovery on that issue had not yet commenced]). If plaintiffs had to wait until they had all of the evidence necessary to support a claim before they could allege that claim in a pleading, there would be no point in conducting discovery. Plaintiffs could simply file an action and then immediately move for summary judgment in every case. This is plainly not how litigation is meant to work. Although plaintiffs must have a

reasonable basis for asserting a theory, they need not have all of the evidence to support that theory at the time they first assert it.

Plaintiffs did not need to wait until they had the underwriting file or the deposition of Ms. Muller to assert a reformation claim—they theoretically had knowledge of what they needed in the form of Mr. Malik's purported belief that there was a mistake. That claim could have been asserted from the beginning and if Seneca had moved to dismiss it, such motion would likely have been denied because discovery would need to have been conducted on that claim.

Even if it was accepted that Plaintiffs needed further evidence beyond Mr. Malik's knowledge before asserting a claim of reformation, the only other support relied upon by Plaintiffs was the underwriting file and the testimony of Ms. Muller. Those were all things Plaintiffs had years before trial began. The fact that Plaintiffs may not have recognized the potential importance of the contents of the underwriting file and the failure to question Ms. Muller on the issue of mistake during her April 5, 2017 deposition does not mean that the evidence necessary to support a reformation claim at that time did not exist. It simply means that the Plaintiffs failed to seek it out. The better presumption for the Appellate Division to have made, which it failed to properly do, was that the Policy properly contained the PSE; that Plaintiffs' assertion of that position for ten years is clearly demonstrative that that is their true position; and that the late contrived argument is just that.

By affirming the Trial Court's October 18, 2019 Decision and entry of final judgment on December 4, 2019, the Appellate Division encouraged Plaintiffs in this action and other actions to sit idly by during the discovery process, fail or refuse to seek out the information they need to support whatever claims they intend to assert, and then use the same evidence they have had access to for years to change their theory. This is the exact type of gamesmanship and surprise that should have been discouraged by the Appellate Division.

Accordingly, the Appellate Division should have reversed the Trial Court's Decision allowing for amendment pursuant to CPLR 3025(c) and should have found that it was an abuse of discretion to permit the Plaintiffs to raise a reformation claim for the first time at trial.

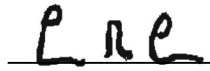
VI. CONCLUSION

The Appellate Division's January 28, 2021 Decision and Order, if left undisturbed, has the potential to establish entirely new standards in terms of how plaintiffs and defendants in other contract-based cases pursue discovery and prepare their defenses. Defendants will be required to anticipate and prepare to defend claims based on facts that were never pled and of which defendants have no notice. Plaintiffs will, as they were in this case, be improperly rewarded for failing to plead the facts necessary to support their claims and waiting until trial to make their legal theories known.

Seneca respectfully requests that this Court reverse the Appellate Division's January 28, 2021 Decision and Order to discourage this type of gamesmanship and to prevent other parties in the future from facing this type of surprise at trial. In reversing the Appellate Division's Decision and Order, Seneca further respectfully requests reversal of the Trial Court's Decision and Order allowing Plaintiffs' amendment to assert a reformation claim, and judgment in favor of Seneca because reformation was the only claim on which the jury found against Seneca.

Dated: New York, New York
January 19, 2022

KENNEDYS CMK LLP



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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)(1), the foregoing brief was prepared on a computer using Microsoft Word.

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