NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0518-19

JAMES KENNEDY, II,[1]
on behalf of himself and all
other similarly situated persons,

Plaintiff-Respondent,

v.

WEICHERT CO., d/b/a
WEICHERT REALTORS,

Defendant-Appellant.

APPROVED FOR PUBLICATION

February 9, 2023

APPELLATE DIVISION

Argued March 23, 2020 – Decided July 2, 2021.
Remanded by the Supreme Court June 1, 2022.
Resubmitted November 9, 2022 – Decided January 30, 2023

Before Judges Messano, Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2266-19.

Laddey, Clark & Ryan, LLP, John F. Birmingham (Foley & Lardner, LLP) of the Michigan bar, admitted pro hac vice, and Jennifer M. Keas (Foley & Lardner, LLP) of the District of Columbia bar, admitted pro hac vice, attorneys for appellant (Thomas N. Ryan, John F. Birmingham, Jennifer M. Keas, on the briefs).

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[1] The Notice of Appeal, Case Information Sheet, and prior motions identify plaintiff as James Kennedy, III.

Sattiraju & Tharney, LLP, attorneys for respondent (Ravi Sattiraju, of counsel and on the brief; Edward J. Herban and Gareth D. Horell, on the brief).

Greenbaum, Rowe, Smith & Davis, LLP, attorneys for amicus curiae New Jersey Realtors (Barry S. Goodman and Darren C. Barreiro, of counsel; Conor J. Hennessey, on the brief).

Matthew J. Platkin, Attorney General, attorney for amicus curiae New Jersey Department of Labor and Workforce Development (Mayur P. Saxena, Assistant Attorney General, of counsel; Joana Gretz, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

MESSANO, C.J.A.D.

As we explained in our prior opinion, plaintiff James Kennedy, II, was a fully commissioned real estate salesperson with defendant Weichert Company, a licensed real estate broker. Kennedy v. Weichert Co., No. A-0518-19 (App. Div. July 2, 2021) (slip op. at 2). Plaintiff alleged on behalf of himself and a putative class of those similarly situated that defendant had violated N.J.S.A. 34:11-4.4, a provision of the Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 to -4.14.

The WPL "governs the time and mode of payment of wages due to employees." Hargrove v. Sleepy's, LLC, 220 N.J. 289, 302 (2015). Unless permitted by law as an exception in the statute or otherwise, the WPL prohibits

an "employer" from "withhold[ing] or divert[ing] any portion of an employee's wages." N.J.S.A. 34:11-4.4. With limited exceptions, the WPL also makes it "unlawful for any employer to enter into or make any agreement with any employee for the payment of wages . . . otherwise than as provided in [the WPL]." N.J.S.A. 34:11-4.7.

Plaintiff claimed defendant had violated N.J.S.A. 34:11-4.4 "by deducting marketing, insurance, and other expenses" from plaintiff's wages without authorization. Kennedy, slip op. at 2. Defendant moved to dismiss plaintiff's complaint for failure to state a claim as a matter of law and argued "that fully commissioned real estate salespersons are independent contractors, whom the WPL does not cover." Kennedy, slip op. at 2 (citing N.J.S.A. 34:11-4.1). Under the WPL, "'Employee' means any person suffered or permitted to work by an employer, except that independent contractors . . . shall not be considered employees." N.J.S.A. 34:11-4.1(b).

The Law Division judge denied defendant's motion "after declaring that the 'ABC test' under the Unemployment Compensation Law (UCL), N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), determines a real estate salesperson's status as an independent contractor under the WPL." Id. at 2–3. In this regard, the judge followed the Court's holding in Hargrove "that the 'ABC' test derived from . . .

[the UCL], governs whether a plaintiff is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim." 220 N.J. at 295.

We granted defendant's motion for leave to appeal. Kennedy, slip op. at 6. Among other things, defendant argued the ABC test did not apply to fully commissioned real estate salespersons because the UCL expressly exempts them from its reach. Kennedy, slip op. at 15; see N.J.S.A. 43:21-19(i)(7)(K) ("[T]he term 'employment' shall not include . . . [s]ervices performed by real estate salesmen or brokers who are compensated wholly on a commission basis"). We rejected that argument, "conclud[ing] that the UCL's special treatment of commissioned real estate salespersons d[id] not render the ABC test inappropriate to determine a real estate salesperson's independent-contractor status under the WPL." Kennedy, slip op. at 20.[2]

[2] We note that after Hargrove, which resolved a question of law certified by the Third Circuit involving a WPL claim brought by delivery truck drivers, 220 N.J. at 295, the Third Circuit again certified questions of law to our Supreme Court involving the WPL in another context more like the facts presented here. Specifically, the Third Circuit asked whether, under New Jersey law and by application of the ABC test, commissioned insurance agents are employees or independent contractors and whether the UCL's statutory exemption for fully commissioned insurance agents, N.J.S.A. 43:21-19(i)(7)(j), applies to determine whether those agents are employees or independent contractors. See Walfish v. Nw. Mut. Life Ins. Co., 2020 U.S. App. LEXIS 42191 (3d Cir. 2020). The

Defendant also argued that application of the ABC test was inconsistent with the Real Estate Brokers and Salesmen Act (the Brokers Act), N.J.S.A. 45:15-1 to -29.5. Kennedy, slip op. at 20. We traced relevant 2018 amendments to the Brokers Act and noted

> [t]he 2018 statute included a provision expressly stating that "[n]otwithstanding any provision of . . . [the Brokers Act] or any other law, rule, or regulation to the contrary, a business affiliation between a broker and a broker-salesperson or salesperson may be that of an employment relationship or the provision of services by an independent contractor." L. 2018, c. 71, § 3(b), codified at N.J.S.A. 45:15-3.2(b). The amendments required that every salesperson enter into a written agreement with his or her broker before starting work, L. 2018, c. 71, § 3(a), codified at N.J.S.A. 45:15-3.2(a), and "[t]he nature of the business affiliation shall be defined in the written agreement," L. 2018, c. 71, § 3(b), codified at N.J.S.A. 45:15-3.2(b). The amendments also added the words "or contracted" almost everywhere the word "employed" was found in the act, and added "or contractors" after the word "employees." See L. 2018, c. 71.
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> [Kennedy, slip op. at 22–23 (alterations in original).]

We recognized that as a result of these amendments, the Brokers Act "may affect the application of a test for determining a real estate salesperson's employment status under the WPL[,]" because "[b]ased on the 2018 statute's

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litigation subsequently settled, and the Court dismissed the appeal without answering the certified questions. 248 N.J. 379 (2021).

plain language, the Legislature evidently concluded that an independent contractor relationship could subsist, even though a broker exercised the extensive controls over his or her salespersons that the Brokers Act required." Id. at 23–24. We reasoned, "[I]t would be inconsistent with the intent of the 2018 statute to apply an employment status test," such as the ABC test, "in . . . a way that it would deny independent-contractor status solely on the basis of compliance with Brokers Act requirements." Id. at 24.

Nonetheless, we also concluded the 2018 amendments were "prospective in effect." Id. at 29. And because the amendments became effective August 10, 2018, "at most, they c[ould] have only a minor impact" on plaintiff's claim, which sought "damages for the period between August 8, 2012 and November 6, 2018." Ibid. Although we affirmed denial of defendant's motion to dismiss because the ABC test applied to plaintiff's pre-August 2018 claims, we took note of "the slim record before us," including the lack of any written agreement between plaintiff and defendant during the relevant timeframe. Id. at 29-30. As a result, "we decline[d] to declare the [Brokers Act] amendments' impact" on plaintiff's claims "for that brief period" between August and November 2018. Id. at 29.

On November 16, 2021, the Court granted defendant leave to appeal from our judgment. Kennedy v. Weichert Co., 249 N.J. 66 (2021). While the appeal was pending, the Legislature acted.

I.

The 2018 amendments added an entirely new section to the Brokers Act that provided:

> a. No . . . salesperson shall commence business activity for a broker and no broker shall authorize a . . . salesperson to act on the broker's behalf until a written agreement, as provided in this subsection, has been signed by the broker and . . . salesperson. Prior to an individual's commencement of business activity as a . . . salesperson under the authority of a broker, the broker and . . . salesperson shall both sign a written agreement which recites the terms under which the services of the . . . salesperson have been retained by the broker.
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> b. Notwithstanding any provision of [the Brokers Act] or any other law, rule, or regulation to the contrary, a business affiliation between a broker and a . . . salesperson may be that of an employment relationship or the provision of services by an independent contractor. The nature of the business affiliation shall be defined in the written agreement required pursuant to subsection a. of this section.
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> [N.J.S.A. 45:15-3.2 (Section 3.2) (emphasis added).]

On December 6, 2021, less than one month after the Court had granted leave to appeal, the Legislature introduced A. 6206, which sought to amend Section 3.2 to include the following language:

> If a current or previously written agreement exists or existed between the broker and the . . . salesperson that defines, sets forth, identifies, or provides that the . . . salesperson is or at any time has been an independent contractor of the broker, the . . . salesperson shall be deemed to . . . have been an independent contractor during the period in which the agreement is or was effective and shall not be classified as an employee for any purpose under any law, rule, or regulation for that period of time, except that the . . . salesperson shall satisfy the test set forth in [N.J.S.A.] 43:21-19(i)(7)(K) in order to be deemed an independent contractor under [the UCL]. The . . . salesperson shall not be required to satisfy any other test for any other law, rule, or regulation, including, but not limited to, the tests set forth at or applied to [the WPL] . . . to be deemed an independent contractor as provided in this section for purposes of any other law, rule or regulation.
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> . . . .
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> This act shall take effect immediately and shall apply retroactively to enforce but not change any written agreement between a . . . salesperson and a broker where the written agreement defines, sets forth, identifies or provides that the . . . salesperson is or was an independent contractor.
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> [Ibid. (emphasis added).]

Governor Murphy conditionally vetoed A. 6206, recommending changes that would "more directly satisfy its intent" and specifically "clarify that the Brokers Act should be given retroactive effect." Governor's Veto Statement to A. 6206 (Jan. 10, 2022). In particular, the Governor recommended deleting the entire first paragraph of A. 6206 quoted above. Ibid.

In his veto message, the Governor recognized the purpose of the bill was to "reaffirm the intent of the Legislature as stated in the Brokers Act, regarding the employment relationship or independent contractor relationship of real estate brokers, and to retroactively enforce past written agreements regarding same." Ibid. The Governor continued:

> While I do not object to the general intent . . . to give certain provisions of the Brokers Act retroactive effect, I am concerned that several of the bill's provisions, as drafted, could be used as a basis for other employers in the State to misclassify workers. One provision of the bill would impose independent contractor-status upon an individual on the basis that the individual is exempt from coverage under the UCL. The UCL excludes from its coverage [twenty-five] categories of services under N.J.S.A. 43:21-19(i)(7)(A)-(Z), including certain types of agricultural work, brokerage services, domestic work, sales work, theatrical work, and transportation services, among several other categories. The categorical exemptions within the UCL are not indicative of an individual's status as an employee or independent contractor, as my Administration has argued in court filings that the

> UCL's categorical exemptions are specifically tailored to the context of unemployment benefits.
>
> The effect of imparting independent contractor status upon employees in the way contemplated by this legislation could seriously erode the basic protections afforded to employees by allowing employers to use a categorical UCL exemption as a basis to deem an employee an independent contractor notwithstanding the particulars of that employee's relationship with his or her employer. Although this bill is limited in scope to the treatment of broker-salespersons or salespersons of a broker, the legal theories upon which the bill relies could be used by other employers across the State to misclassify their employees as independent contractors. The actual relationship and circumstances surrounding an individual's employment should govern, not the existence of an unrelated exemption contained in the UCL law.
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> [Ibid.]

The Legislature accepted the Governor's recommendations and approved the final version of A. 6206 on January 18, 2022. L. 2021, c. 486. As enacted, the bill amended Section 3.2 to provide only that it

> shall apply retroactively to enforce but not change any written agreement between a . . . salesperson and a broker where the written agreement defines, sets forth, identifies or provides that the . . . salesperson is or was an independent contractor. The remainder of [L. 2018, c. 71] shall take effect on January 1, 2018 . . . .
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> [L. 2021, c. 486.]

On June 6, 2022, the Court vacated its order granting defendant's motion for leave to appeal and remanded the matter for us "to consider the impact of new legislation, L. 2021, c. 486, in the first instance." Kennedy v. Weichert Co., 251 N.J. 22 (2022).

We issued a new scheduling order permitting the parties to file supplemental briefs. We also granted motions filed by the New Jersey Realtors (NJR) and the New Jersey Department of Labor and Workforce Development (DOL) to appear as amici curiae, and both have filed briefs for our consideration. Lastly, at our request the parties have furnished copies of the executed agreement between plaintiff and defendant dated August 8, 2012, and an executed addendum dated June 8, 2017.

II.

It is undisputed that we must apply Section 3.2 retroactively; it therefore affects the entire time frame of plaintiff's WPL claim.[3] Defendant argues that the Legislature now has made clear that Section 3.2 applies "to enforce . . . [the] written agreement between a . . . salesperson and a broker where the written

[3] L. 2021, c. 486 made only Section 3.2 retroactive, meaning that the other provisions of the 2018 amendments, while illuminating the Legislature's intended purposes, were not in effect for much of the time covered by plaintiff's complaint. For reasons we explain, we need not revisit the retroactive/prospective dilemma we faced in our earlier decision.

agreement . . . provides," as do the agreements here, "that the . . . salesperson is or was an independent contractor." L. 2021, c. 486. Defendant contends that Section 3.2(b) permits salespersons and brokers to define their relationships in their written agreements, "[n]otwithstanding any provision of [the Brokers Act] or any other law, rule, or regulation to the contrary," including the UCL and the WPL. Ibid.

Defendant maintains we must reverse the Law Division's order and remand for the court to dismiss plaintiff's complaint. Alternatively, defendant urges us to grant declaratory relief and remand the matter to the Law Division with instructions that the ABC test does not apply to plaintiff's WPL claim for the entire period pled in his complaint.

Amicus NJR echoes defendant's arguments. It asserts that for purposes of the WPL, the Brokers Act as now retroactively amended precludes any application of the ABC test to salespersons who have written contracts with a broker. NJR states a contrary decision would have "significant impact" on the real estate industry statewide.

Plaintiff argues that notwithstanding the retroactivity of Section 3.2, the Brokers Act does not determine the employment relationship of the parties, and, pursuant to Hargrove, the ABC test still should govern whether a real estate

salesperson is an employee or independent contractor for purposes of the WPL. He urges us to restate our affirmance and remand the matter to the Law Division for further proceedings.

Amicus DOL asserts that the 2018 amendments to the Brokers Act do not permit parties to contractually avoid the WPL, and the 2021 legislation, expressly making Section 3.2 retroactive, does not supersede Hargrove or other existing WPL jurisprudence. Citing the widespread implications of our decision, DOL asserts that the ABC test still applies to determine employment status under the WPL, but it also acknowledges that written agreements between real estate salespersons and brokers are "one factor – not the only factor – in considering their relationship under the WPL."

We hew closely to the parameters of the Court's remand order, which instructed us to "consider the impact of new legislation, L. 2021, c. 486" on defendant's appeal and implicitly our prior opinion.[4] We understand the Court's remand to require us to address the following:

[4] In less than a page in its brief, defendant also reasserts that the UCL exemption from the ABC test for commissioned real estate salespersons applies per force to the WPL and requires dismissal of plaintiff's complaint as a matter of law. We rejected that argument in our prior opinion. Kennedy, slip op. at 20. Given our understanding of the Court's remand order, we do not address the issue again.

1. Because the Legislature has now declared written agreements between the parties shall be "enforce[d] but not change[d]," and the agreements in this case denote plaintiff's status as an independent contractor, does Section 3.2 of the Brokers Act compel dismissal of plaintiff's complaint for failure to state a claim as a matter of law? R. 4:6-2(e).
2. Alternatively, does the Legislature's enactment of Section 3.2, in conjunction with other provisions of the 2018 amendments, mean the ABC test does not determine employment status under the WPL of a fully commissioned real estate salesperson who has entered into a written agreement with a real estate broker?
3. If the latter, does the existing record permit us to decide whether plaintiff is or is not an employee of defendant for purposes of the WPL?

We conclude the Court's holding in Hargrove does not apply to WPL claims asserted by fully commissioned real estate salespersons because the Brokers Act forecloses application of the ABC test. We also conclude, however, that the written agreement required by Section 3.2(a) of the Brokers Act is a factor, but not the sole factor, in determining the employment status of a fully commissioned real estate salesperson. Therefore, we affirm, as modified, the Law Division's order denying defendant's motion to dismiss for failure to state

a claim. Because of the paucity of the record, we decline the opportunity to adopt a specific "test" to determine whether in any given set of circumstances a fully commissioned real estate salesperson is a broker's employee or an independent contractor, and we remand the matter to the Law Division for further proceedings.

III.

Addressing our second question first, in our prior opinion we expressed deep reservations about application of the ABC test to determine the employment status of fully commissioned real estate salespersons after enactment of the 2018 amendments to the Brokers Act. Kennedy, slip op. at 22–25. In the first instance, we must construe Section 3.2 and the other 2018 amendments and evaluate their interplay with other statutory provisions to decide their consequence for plaintiff's complaint.

We apply well-known canons of statutory interpretation. "The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." Garden State Check Cashing Serv., Inc. v. Dep't of Banking & Ins., 237 N.J. 482, 489 (2019) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). "If a statute's plain language is clear, we apply that plain meaning and end our inquiry." Ibid.

(citing State v. Fede, 237 N.J. 138, 147 (2019)). However, "[i]f, there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'" Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 9–10 (2019) (quoting DiProspero, 183 N.J. at 492–93).

Under the UCL, a person is presumptively an employee

> unless and until it is shown . . . that:
>
> > (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;
> >
> > (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> >
> > (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
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> [N.J.S.A. 43:21-19(i)(6).]

"The ABC test is conjunctive; thus, all three prongs must be satisfied for a worker to be considered an independent contractor." East Bay Drywall, LLC v.

Dep't of Labor & Workforce Dev., 251 N.J. 477, 495 (2022) (citing Schomp v. Fuller Brush Co., 124 N.J.L. 487, 489 (Sup. Ct. 1940)).

Even prior to the 2018 amendments, various provisions of the Brokers Act virtually compelled the conclusion that under the ABC test, every fully commissioned real estate salesperson presumptively was an employee. For example, both before and after the 2018 amendments, the Brokers Act: defined a real estate salesperson as "any natural person who, for compensation, valuable consideration or commission . . . operates under the supervision of a licensed real estate broker," N.J.S.A. 45:15-3 (emphasis added); provided that only the broker, not the salesperson, may bring a suit for compensation, ibid.; further provided that the licenses of all salespersons "shall be kept by the broker," and upon the licensee's termination or resignation, the salesperson cannot perform any acts contemplated by the Brokers Act until he or she furnishes proof of an affiliation "with another licensed broker," N.J.S.A. 45:15-14; and prohibited any salesperson from accepting a commission or other valuable consideration except from his or her broker, N.J.S.A. 45:15-16. It is unlikely that a fully commissioned real estate salesperson, who complied with these and other

requirements of the Brokers Act and regulations adopted by the Real Estate Commission, could ever be an independent contractor under the ABC test.[5]

Section 3.2(b) provides that "[n]otwithstanding any provision of [the Brokers Act] or any other law, rule or regulation to the contrary, a business affiliation between a broker and a . . . salesperson may be" either "an employment relationship or the provision of services by an independent contractor." The plain language of Section 3.2(b) renders the ABC test, a standard virtually unattainable for real estate salespersons who comply with the Brokers Act, and one contained in another law — the UCL — inapplicable to this case.

Although unnecessary for us to reach our conclusion, examination of the legislative history of the 2018 amendments support this result. That history demonstrates the Legislature's intention to address many provisions of the then-current Brokers Act. See S. Comm. Statement to S.B. 430 (June 11, 2018). Specifically, as to Section 3.2(a), the Legislature recognized a regulation already promulgated by the Real Estate Commission required a written agreement

[5] See also N.J.A.C. 11:5-4.4(a) (requiring "direct" and "full time" supervision of licensed salespersons by the licensed "broker himself or herself, or of a person licensed as a broker-salesperson").

between a broker and a salesperson.[6] Relevant to this appeal, the Legislature intended to permit "the business affiliation between a broker and a . . . salesperson [to] be that of an employment relationship or independent contractor relationship." Ibid. We noted in our prior opinion that the 2018 amendments "added the words 'or contracted' almost everywhere the word 'employed' was found in the act[] and added 'or contractors' after the word 'employees.'" Kennedy, slip op. at 23. This was the method adopted by the Legislature to effectuate throughout myriad provisions of the Brokers Act the goal of permitting a real estate salesperson to affiliate with a broker either as an employee or as an independent contractor, "[n]otwithstanding any provision . . . or any other law, rule, or regulation to the contrary." N.J.S.A. 45:15-3.2(b).

Our conclusion that the requirements of the Brokers Act forecloses application of the ABC test to determine a salesperson's status finds support in a decision with remarkable similarities from the highest court of a sister state, Massachusetts. In Monell v. Boston Pads, LLC, the plaintiffs, fully

[6] See N.J.A.C. 11:5-4.1(a) (requiring a written agreement between broker and salesperson that "contains the terms of their business relationship"). In addition, the Real Estate Commission had also already adopted a regulation equivalent to part of Section 3.2(b), stating that the Commission "interprets 'employment agreement,' 'employ,' and 'employing broker' in [the Brokers Act] . . . to permit an employment relationship or an independent contractor relationship between a broker and a broker-salesperson, salesperson . . . ." N.J.A.C. 11:5-4.1(j).

commissioned licensed real estate salespersons, alleged that the defendant brokers misclassified them as independent contractors rather than employees, thereby violating the Massachusetts independent contractor statute, G. L. c. 149, § 148B. 31 N.E.3d 60, 61–63 (Mass. 2015). The motion judge granted defendants summary judgment, finding there was "a conflict between the independent contractor and real estate licensing statutes insofar as a real estate salesperson would not be able to satisfy all three indicia of an independent contractor relationship while simultaneously complying with the real estate licensing statute." Id. at 63. The Massachusetts Supreme Judicial Court granted the plaintiffs' application for direct review. Id. at 61.

Unlike New Jersey, the Massachusetts wage law included the independent contractor statute within its provisions. Id. at 64. The independent contractor statute made every "individual performing any service" presumptively an employee under the wage law, unless the relationship met a three-prong test that was essentially the equivalent of our ABC test. Ibid.

The court then reviewed the various provisions of Massachusetts' "licensing and registration provisions governing real estate brokers and salespersons." Id. at 65–67.

The court stated that

> [t]he difficulty in seeking to construe [the independent contractor statute] in harmony with the real estate licensing statute, . . . [wa]s that the real estate licensing statute makes it impossible for a real estate salesperson to satisfy the three factors required to achieve independent contractor status, all of which must be satisfied to defeat the presumption of employee status.
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> [Id. at 67.]

The court affirmed the motion judge's determination "that the independent contractor statute does not apply to real estate salespersons." Id. at 69. But the court limited its holding:

> In reaching that conclusion . . . we take no position on whether the plaintiffs in fact are employees or independent contractors, or on how, in the absence of the framework established by the independent contractor statute, it may be determined whether a real estate salesperson is properly classified as an independent contractor or employee.
>
> . . . .
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> Because the plaintiffs based their argument on appeal on the contention that they are employees under the framework set forth in the independent contractor statute, they did not address how the court should determine the nature of their relationship if the court determines, as we have, that the framework does not apply. In light of the potential impact of that issue on the real estate industry as a whole and its significant ramifications for real estate salespersons' access to the rights and benefits of employment, we think it prudent to leave that issue's resolution to another day, when it has been fully briefed and argued. Should the

> Legislature be so inclined, it may wish to clarify how a real estate salesperson may gain employee status under the real estate licensing statute.
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> [Id. at 69–70.]

We conclude that the ABC test does not apply to determine whether plaintiff was defendant's employee for purposes of the WPL. Our conclusion does not contradict the Court's holding in Hargrove. Simply put, the plaintiffs in that case were delivery truck drivers. No other statutory scheme, much less a statutory scheme adopted for a highly regulated industry such as the real estate industry, needed to be harmonized with the Court's decision to apply the UCL's ABC test to WPL claims. Nor did the Hargrove Court address any employment relationship, such as real estate salespersons, within the statutory exceptions to the ABC test contained in the UCL.

We have carefully considered the arguments of plaintiff and the DOL to the contrary in this regard and reject them. They contend that the Legislature's subsequent adoption of suggestions in the Governor's conditional veto message signifies an intention to preserve the ABC test in this case. However, the Governor expressed concern only about references to the UCL in A. 6206's proposed language as providing an opportunity for "other employers," outside

the real estate industry, "to misclassify their employees as independent contractors."

Plaintiff also contends that Section 3.2(b) has limited application; in other words, "[n]otwithstanding any provision of [the Brokers Act], or of any other law, rule, or regulation to the contrary" means only that for purposes of the Brokers Act, a salesperson may be an independent contractor. We disagree.

Immediately after this first phrase, Section 3.2(b) states that "a business affiliation between a broker and a broker-salesperson or salesperson may be that of an employment relationship or the provision of services by an independent contractor." Ibid. Plaintiff's interpretation renders the first phrase of the statute surplusage. "In reviewing the Legislature's words, we follow the 'bedrock assumption that the Legislature did not use "any unnecessary or meaningless language."'" Premier Physician Network, LLC v. Maro, 468 N.J. Super. 182, 193 (App. Div. 2021) (citing Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 587 (2013) (quoting Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 418–19 (2009))).

In sum, we are convinced that the ABC test should not apply to determine the business affiliation between a broker and a fully commissioned real estate salesperson.

IV.

Concluding the ABC test does not apply, however, does not mean that plaintiff's complaint should be dismissed for failure to state a claim. R. 4:6-2(e). In other contexts, the Court has addressed the legal effect of parties' denomination of their relationship, whether as employee and employer or as independent contractor. Perhaps most relevant is the Court's holding in MacDougall v. Weichert, 144 N.J. 380 (1996).

There, the plaintiff was a real estate salesperson engaged by the defendant realtor. Id. at 385. The plaintiff brought a common law wrongful discharge suit against the defendant. Id. at 388 (citing Pierce v. Ortho Pharm. Corp., 84 N.J. 58 (1980)). The Court recognized that the initial question was whether the plaintiff was an employee of the defendant, a sine qua non of the claim because Pierce's wrongful discharge doctrine "d[id] not protect independent contractors." Ibid. The Court said, "An individual may be considered an employee for some purposes but an independent contractor for others." Ibid. (emphasis added).

Critically for our purposes, the Court also said, "The categorization of a working relationship depends not on the nominal label adopted by the parties, but rather on its salient features and the specific context in which the rights and

duties that inhere in the relationship are ultimately determined." Ibid.; see also East Bay Drywall, 251 N.J. at 496 ("The factfinder must look beyond the employment contract and the payment method to determine the true nature of the relationship."); D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 122 (2007) (in CEPA litigation where there was a written agreement denominating the plaintiff as an independent contractor, the Court reiterated that it was required to "look beyond the label attached to the relationship" because "labels can be illusory as opposed to illuminating").

On its face, plaintiff's complaint alleges violations of the WPL, a statute with remedial purposes "designed to protect an employee's wages and to assure timely and predictable payment." Hargrove, 220 N.J. at 313 (citing Rosen v. Smith Barney, Inc., 393 N.J. Super. 578, 585 (App. Div. 2007)). "As a remedial statute, the WPL should be liberally construed." Id. at 303.

Whether plaintiff is entitled to the protections of the WPL and the remedies for any violation of the statute requires a determination of whether he was defendant's employee. The WPL contains a broad definition of an employee: "any person suffered or permitted to work by an employer." N.J.S.A. 34:11-4.1(b). Independent contractors are an exception to the definition. Ibid. DOL's WPL regulations provide only the same definition and exception.

N.J.A.C. 12:55-1.2. See Hargrove, 220 N.J. at 303 ("Neither the text of the WPL nor its implementing regulations offer any guidance to distinguish between an employee and an independent contractor.").

As we noted in our prior opinion, DOL adopted regulations under the Wage and Hour Law (WHL), N.J.S.A. 34:11-56a to -56a41, that specifically incorporated the ABC test "to determine whether an individual [wa]s an employee or independent contractor for purposes of the [WHL]." Kennedy, slip op. at 11 (citing N.J.A.C. 12:56-16.1). It never did so under the WPL.

Our point is that for reasons already stated, applying the ABC test to determine the relationship of the parties in this case is contrary to the plain language and legislative intent of the Brokers Act, because the ABC test compels the conclusion that plaintiff, indeed all fully commissioned salespersons, are employees of their broker regardless of how they defined their relationship. However, no "provision of [the Brokers Act], or any other law, rule or regulation," certainly no provision of the WPL, contravenes the ability of parties to affiliate as employer-employee or as a salesperson providing services as an independent contractor. N.J.S.A. 45:15-3.2(b).

Although Section 3.2(b) states the parties' written agreement shall define "[t]he nature of the business affiliation," the Court has made clear that how the

parties denominate their relationship in a written agreement does not determine as a matter of law their business relationship because a person may be an employee "for some purposes but an independent contractor for others." MacDougall, 144 N.J. at 388. Were we to conclude the written agreements in this case, both of which refer to plaintiff as an independent contractor, definitively determined plaintiff's legal status and, hence the legal sufficiency of his complaint, we would be significantly deviating from decades of precedent that requires us to look beyond the words used in the agreement. Such deviation is more appropriately the province of our Supreme Court. Riley v. Keenan, 406 N.J. Super. 281, 297 (App. Div. 2009) (citing Tynan v. Curzi, 332 N.J. Super. 267, 277 (App. Div. 2000)).

As a result, we affirm the Law Division's order denying defendant's motion to dismiss plaintiff's complaint for failure to state a claim. We modify the order and vacate the second juridical paragraph — that "the 'ABC[]test' is the applicable standard to review plaintiff's [WPL] claim."

V.

Given the paucity of the record, we decline to expound on what the appropriate "test" should be to determine whether plaintiff was an employee or

independent contractor in this case. See Monell, 31 N.E.3d at 69–70. We find support for our reluctance in MacDougall.

There, the Court looked beyond the parties' written agreement, noting "[t]he critical issue is whether the elements of control and dependence coupled with the absence of any employment protection predominate over factors that favor an independent contractor status." 144 N.J. at 389. However, finding "there [we]re material issues of subsidiary facts concerning the working relationship between the parties that [we]re unresolved on th[e] record," ibid., the Court determined summary judgment was inappropriate and remanded the matter to the trial court "to determine whether [the plaintiff] was [the defendant's] employee for purposes of invoking a cause of action based on wrongful discharge," id. at 390.

In D'Annunzio, to determine the plaintiff's employment status in the context of a CEPA claim, the Court adopted a twelve-factor test that we had used earlier in deciding who was an employee entitled to the protections of the Law Against Discrimination. 192 N.J. at 123–24 (citing Pukowsky v. Caruso, 312 N.J. Super. 171, 182–83 (App. Div. 1998)).[7] The Court has said a plaintiff's

[7] We recognize, as did the Court, that CEPA specifically "defines an 'employee' as 'any individual who performs services for and under the control and direction

employment status "properly varies with the varying consequences of the determination, and the public policies engaged." MacDougall, 144 N.J. at 388 (quoting Crowe v. M & M/Mars, 242 N.J. Super. 592, 598 (App. Div. 1990)).

Here, we decline an opportunity to definitively announce a test to determine plaintiff's employment status in advance of the development of a more complete record that permits exposition of the actual business relationship between the parties. We anticipate the parties will develop that more complete record in the Law Division and, in the motion practice that is sure to follow, address in their briefs "how the court should determine the nature of their relationship" in light of our decision today. Monell, 31 N.E.3d at 70.

Affirmed as modified.

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of an employer for wages or other remuneration.'" D'Annunzio, 192 N.J. at 120 (emphasis added) (quoting N.J.S.A. 34:19-2(b)).