CIVIL PRACTICE

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INTRODUCTION

During this *Survey* year,[1] New York's Court of Appeals and appellate divisions published hundreds of decisions that impact virtually

1. July 1, 2010 through June 30, 2011.

all practitioners. These cases have been "surveyed" in this article, meaning that the author has made an effort to alert practitioners and academicians about noteworthy changes in New York State law and to provide basic detail about the changes in the context of the Civil Practice Law and Rules (CPLR). Whether by accident or design, the author did not endeavor to discuss every Court of Appeals or appellate division decision.

I. LEGISLATIVE ENACTMENTS

This *Survey* year was quiet on significant amendments to the CPLR.

Practitioners should note that Chapter 29 of the Laws of 2010, signed by Governor Patterson on March 30, 2010, became effective on January 1, 2011. This amendment to the CPLR created the Uniform Interstate Depositions and Discovery Act.[2] It was discussed in last year's *Survey*.[3]

II. CASE LAW DEVELOPMENTS

A. Article 1: Applicability and Definitions

1. Form of Judicial Proceedings

CPLR 103 provides that (1) civil judicial proceedings shall be brought in the form of an action unless a special proceeding has been authorized, (2) special proceedings and actions are usually governed by the same rules of procedure, and (3) a civil judicial proceeding should not be dismissed just because it was not brought in the proper form.[4]

The Fourth Department visited the issue of proper form in *Nichols v. BDS Landscape Design*.[5] The plaintiff in *Nichols* was injured when she slipped and fell on ice in an area maintained by the defendant.[6] The plaintiff successfully filed a workers' compensation claim and, thereafter, entered into settlement negotiations on her negligence claim against the defendant.[7] The negligence claim was settled, orally,[8]

2. N.Y. C.P.L.R. 3119 (McKinney 2011).

3. Michael A. Bottar & Kimberly Wolf Price, *Civil Practice, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 631, 632-33 (2011).

4. N.Y. C.P.L.R. 103(b)-(c).

5. *See* 79 A.D.3d 1690, 913 N.Y.S.2d 841 (4th Dep't 2010).

6. *Id*.

7. *Id*., 913 N.Y.S.2d at 841-42.

8. To ensure a settlement is binding it should be in writing and signed, reduced to an order, or placed on the record. N.Y. C.P.L.R. 2104; *see discussion infra* Part II.K.1.

"subject to the consent and waiver of the lien" by the workers' compensation carrier.[9] The plaintiff did not obtain consent before the statute of limitations on the negligence claim expired.[10] The defendant argued that the case was not settled and the plaintiff's claims where time-barred.[11]

The plaintiff commenced a special proceeding by order to show cause to enter a judgment against the defendant and toll the statute of limitations.[12] The trial court granted the plaintiff the relief requested.[13] On appeal, the Fourth Department held that it had "power to convert this 'special proceeding' to an action" by "deem[ing] the order to show cause to be a summons and the petition to be a complaint."[14] The Fourth Department also ruled on the merits of the action, stating that "plaintiff failed to establish the existence and terms of the settlement agreement as a matter of law."[15]

B. Article 2: Limitations of Time

1. Methods for Computing Limitations Periods

CPLR 203 instructs practitioners how to calculate the time period for a statute of limitations, including when a claim is considered commenced (i.e, typically when the summons is served upon the defendant), when a defense or counterclaim is considered interposed (i.e., typically when the pleading containing it is served), and when claims contained in amended pleadings are considered asserted.[16]

Claims contained in an amended pleading were at issue in *Haidt v. Kurnath*.[17] In *Haidt*, the defendant, Lynn Wengender ("Wengender"), moved for summary judgment against the plaintiff's first amended complaint on the grounds that it was time-barred.[18] The plaintiff cross-moved to dismiss the defendants' fifth affirmative defense.[19] The trial court denied the defendants' motion and granted the plaintiff's

9. *Nichols*, 79 A.D.3d at 1690, 913 N.Y.S.2d at 842.
10. *Id*. at 1691, 913 N.Y.S.2d at 842.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Nichols*, 79 A.D.3d at 1691, 913 N.Y.S.2d at 842.
15. *Id*.
16. N.Y. C.P.L.R. 203 (McKinney 2011).
17. *See* 86 A.D.3d 935, 927 N.Y.S.2d 256 (4th Dep't 2011).
18. *Id*. at 935, 927 N.Y.S.2d at 257.
19. *Id*.

motion.[20] The defendants appealed.[21]

On appeal, the Fourth Department noted that the plaintiff's first amended complaint against Wengender was not time-barred because of the relation back doctrine.[22] The court noted that the plaintiff had satisfied the three-prong test set out in *Buran v. Coupal*.[23] Declaring that the defendants were "united in interest," and focusing on *Buran's* third-prong, the court stated that:

> plaintiff submitted evidence demonstrating that she did not have sufficient knowledge of defendant's role in prescribing the antibiotic when the alleged medical malpractice occurred or when the action was timely commenced against defendant Joseph F. Kurnath, M.D., approximately 2 ½ years later. Rather, the testimony of plaintiff at her first deposition, more than two years after the action was commenced against Dr. Kurnath, establishes that her "knowledge" of defendant's role was largely the result of leading questions by Dr. Kurnath's attorney.[24]

A two justice dissent agreed with the majority about the first two prongs of *Buran*, but concluded that the plaintiff did not satisfy the third prong.[25] The dissent highlighted evidence in the record that suggested the plaintiff was on notice about the potential role played by Wengender, and emphasized the fact that "the original complaint was not served upon Dr. Kurnath until after the expiration of the statute of limitations."[26] As no one was timely served with the summons and complaint, there was "no basis to conclude that defendant [Wengender] had any idea that a lawsuit was pending, much less that [she] would be among the named defendants."[27]

2. Statutes of Limitations

Article 2 of the CPLR sets forth statutes of limitations for claims. The time periods range in duration from less than one year through twenty years.[28] Some of the most commonly used time periods are six

20. *Id.*

21. *Id.*

22. *Haidt*, 86 A.D.3d at 935, 927 N.Y.S.2d at 258.

23. *Id.* (citing Buran v. Coupal, 87 N.Y.2d 173, 178, 661 N.E.2d 978, 982, 638 N.Y.S.2d 405, 409 (1995)).

24. *Id.* at 936, 927 N.Y.S.2d at 258.

25. *Id.* at 937, 927 N.Y.S.2d at 259 (Smith and Peradotto, JJ., dissenting).

26. *Id.* at 938, 927 N.Y.S.2d at 259-60.

27. *Haidt*, 86 A.D.3d at 938, 927 N.Y.S.2d at 260.

28. *See* N.Y. C.P.L.R. 211-18 (McKinney 2011).

years under CPLR 213[29] and three years under CPLR 214.[30]

In *Roslyn Union Free School District v. Barkan*, the Court of Appeals had the final say on whether the action was governed by CPLR 213 or CPLR 214 and, in turn, whether the plaintiff's claim for breach of fiduciary duty was valid or time-barred.[31]

In September of 2002, an accountant hired by the Roslyn Union Free School District (the "District") identified irregularities in the district's financial records.[32] An audit revealed that an assistant superintendent had stolen $223,000 from the District's accounts.[33] The District's Board of Education (the "Board") was notified.[34] Rather than notify law enforcement or the public, the Board decided to allow her to repay the stolen funds.[35] The funds were not repaid.[36] Subsequently, $11 million in additional financial irregularities were uncovered.[37]

In April of 2005, the District filed a breach of fiduciary duty lawsuit against the Board.[38] One member of the Board, who served from 2000 to 2001, argued that the District's claim was governed by the three year statute of limitations in CPLR 214(4) and, in turn, it was untimely.[39] The District argued that the six year statute of limitations in CPLR 213(7) applied because the action was one by a municipal corporation.[40] The supreme court agreed with the Board member and dismissed the claims against her and the Second Department affirmed.[41]

The Court of Appeals surveyed New York's constitution, as well as various New York State laws, e.g., the General Construction Law, Education Law, General Municipal Law, and Public Officers Law.[42] The Court concluded that the District was a corporation and restored the claims against the Board member, stating that:

> The Legislature could have enacted a statute that narrowly imposes

29. *Id.* § 213.
30. *Id.* § 214.
31. 16 N.Y.3d 643, 645, 950 N.E.2d 85, 85, 926 N.Y.S.2d 349, 349 (2010).
32. *Id.* at 646, 950 N.E.2d at 86, 926 N.Y.S.2d at 350.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Roselyn Union Free Sch. Dist.*, 16 N.Y.3d at 646, 950 N.E.2d at 86, 926 N.Y.S.2d at 350.
37. *Id.*
38. *Id.* at 646-47, 950 N.E.2d at 86, 926 N.Y.S.2d at 350.
39. *Id.* at 647, 950 N.E.2d at 87, 926 N.Y.S.2d at 351.
40. *Id.*
41. *Roselyn Union Free Sch. Dist.*, 16 N.Y.3d at 647, 950 N.E.2d at 87, 926 N.Y.S.2d at 351.
42. *See id.* at 649-51, 950 N.E.2d at 88-90, 926 N.Y.S.2d at 352-54.

> time limitations for actions commenced by school districts against present or former board members, but it has not done so. In the absence of such a legislative directive, the appropriate limitations period must be determined by referring to the CPLR which is general by design.[43]

At the request of the United States Court of Appeals for the Second Circuit, the Court of Appeals visited New York's discovery rule in *Giordano v. Market America, Inc*.[44] The plaintiff in *Giordano* filed suit against the manufacturer of ephedra, a dietary supplement, for a stroke he suffered in 1999 following his use of the substance.[45] The court noted that, in 1999, there was no scientifically credible link between ephedra and stroke.[46] The plaintiff alleged that he first learned of a connection between ephedra and stroke in 2003, when a baseball player taking the supplement died.[47] A lawsuit was filed on July 28, 2003, approximately four years and four months after the plaintiff's stroke.[48] The defendant argued that the plaintiff's claims were time-barred under CPLR 214(5).[49] The District Court granted the defendants' motion to dismiss.[50] Following appeal to the Second Circuit, three questions were certified:

> 1. Are the provisions of N.Y. C.P.L.R. 214-c(4) providing for an extension of the statute of limitations in certain circumstances limited to actions for injuries caused by the latent effects of exposure to a substance?
>
> 2. Can an injury that occurs within 24 hours to 48 hours of exposure to a substance be considered 'latent' for these purposes?
>
> 3. What standards should be applied to determine whether a genuine issue of material fact exists for resolution by a trier of fact as to whether 'technical, scientific or medical knowledge and information sufficient to ascertain the cause of [the plaintiff's] injury' was 'discovered, identified or determined' for N.Y. C.P.L.R. 214-c(4) purposes?[51]

The Court of Appeals answered "yes" to questions one and two.[52]

43. *Id*. at 649, 650, 950 N.E.2d at 88, 89, 926 N.Y.S.2d at 352, 353.
44. *See generally* 15 N.Y.3d 590, 941 N.E.2d 727, 915 N.Y.S.2d 884 (2010).
45. *Id*. at 594, 941 N.E.2d at 728, 915 N.Y.S.2d at 885.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Giordano*, 15 N.Y.3d at 595, 941 N.E.2d at 729, 915 N.Y.S.2d at 886.
50. *Id*.
51. *Id*. at 595-97, 941 N.E.2d at 729-30, 915 N.Y.S.2d at 886-87.
52. *Id*. at 597, 941 N.E.2d at 730, 915 N.Y.S.2d at 887.

Question three was answered by reference to evidence of "general acceptance in the relevant technical, scientific or medical community."[53]

Most notably, the Court of Appeals ruled that the restrictive language from CPLR 214-c(2) and (3), i.e., that a statute of limitations runs "from the date of discovery of the injury . . . or from the date when . . . such injury should have been discovered," should be read into CPLR 214-c(4).[54] The Court also ruled that effects "concealed for a few hours may be 'latent' within the meaning of the statute."[55] Finally, the Court of Appeals commented on scientific and medical standards, stating:

> It is not reasonable to extend the statute of limitations until the time when a reasonable layperson or lawsuit could 'ascertain' the cause without consulting an expert—in many cases, that time might never come. Plaintiff suggests that the statute of limitations in his case did not begin to run until the relevant scientific findings were publicized in the non-expert community, but the statute's language does not create a "publicity" test. We see no unfairness in requiring that injured people who want to protect their rights seek out expert advice, rather than waiting for the media to bring a possible cause of the injury to their attention.[56]

The Court of Appeals also offered parenthetical commentary on what level of certainty "to ascertain" implies.[57] In so doing, the Court appeared to endorse the appellate division's use of the "probable causal relationship," but made the test more specific by requiring "general acceptance" in the relevant technical, scientific, or medical community.[58] This rule is similar to the test set forth in *Frye v. United States*.[59]

The Third Department's decision in *City of Binghamton v. Hawk Engineering, P.C.*, is also worth mentioning.[60] In *City of Binghamton*, the plaintiff contracted with the defendant for engineering services relating to a bridge.[61] The defendant delivered the plan and bill in

53. *Id*.
54. *Giordano*, 15 N.Y.3d at 597, 941 N.E.2d at 730, 915 N.Y.S.2d at 887.
55. *Id*. at 598, 941 N.E.2d at 731, 915 N.Y.S.2d at 888.
56. *Id*. at 601, 941 N.E.2d at 733, 915 N.Y.S.2d at 890.
57. *Id*.
58. *Id*.
59. *See* 293 F. 1013 (D.C. Cir. 1923).
60. 85 A.D.3d 1417, 925 N.Y.S.2d 705 (3d Dep't 2011).
61. *Id*. at 1417, 925 N.Y.S.2d at 707.

September of 2005.[62] Construction of the bridge was finished in October of 2007.[63] In December of 2007, the New York State Department of Transportation (DOT) issued a report stating that the bridge strength was inadequate.[64] After the plaintiff received the DOT report, it repaired the bridge and, in June of 2008, demanded repayment from the defendant.[65] The defendant refused.[66] The plaintiff filed suit in April of 2009, seeking damages for the cost of the repairs.[67] The defendant moved to dismiss citing the three-year limitations period in CPLR 214(6).[68] The plaintiff argued that the statute of limitations was tolled because of continuous representation—based upon the plaintiff's 2008 demand that the defendant pay for the repairs.[69] The trial court granted the defendant's motion.[70] On appeal, the Third Department affirmed, stating that: "[t]he interactions between plaintiff and defendant after the 2 1/2-year interruption constitutes a *resumption*, rather than a *continuation*, of their previous professional relationship, and so fails to establish the applicability of the [continuous representation] doctrine."[71]

The Fourth Department visited the issue of equitable estoppel and CPLR 214 in *Richey v. Hamm*.[72] The plaintiff in *Richey* was injured in a car accident on July 12, 2005.[73] An action was commenced on July 14, 2008,[74] following failed negotiations between the plaintiff's attorney and the defendant's insurance company. According to an affirmation submitted by the plaintiff's attorney, the insurance adjuster told him to

62. *Id*.
63. *Id*.
64. *Id*.
65. *Hawk Eng'g, P.C.*, 85 A.D.3d at 1417, 925 N.Y.S.2d at 707.
66. *Id*.
67. *Id*.
68. *Id*. at 1417-18, 925 N.Y.S.2d at 707.
69. *Id*. at 1419-20, 925 N.Y.S.2d at 709.
70. *Hawk Eng'g, P.C.*, 85 A.D.3d at 1418, 925 N.Y.S.2d at 707.
71. *Id*. at 1420, 925 N.Y.S.2d at 709 (emphasis added).
72. 78 A.D.3d 1600, 910 N.Y.S.2d 791 (4th Dep't 2010).
73. *Id*. at 1601, 910 N.Y.S. 2d at 792.
74. *Id.*

Contrary to the contention of defendant, plaintiff timely commenced the first action on July 14, 2008 by filing the summons and complaint. The accident occurred on July 12, 2005 and, although the three-year statute of limitations set forth in CPLR 214 would appear to have expired on July 12, 2008, we take judicial notice of the fact that July 12, 2008 was a Saturday (*see* Persing v. Coughlin, 214 A.D.2d 145, 149, 632 N.Y.S.2d 366, 367 (1995)). Thus, pursuant to General Construction Law [section] 25a-(1), the statute of limitations did not expire until Monday, July 14, 2008.
Id.

"hold off with effecting service . . . in contemplation of furthering efforts to settle the claim and to allow the [insurer] an opportunity to obtain [p]laintiff's medical records."[75] In reliance upon the insurance adjuster's representation(s), the plaintiff did not serve the complaint.[76] Immediately after the time period expired, the claim was transferred to a new adjuster who refused to pay on the claim.[77] The trial court granted the defendant's motion to dismiss.[78] On appeal, the Fourth Department reversed the trial court, stating that a hearing should have been held to determine if, under principles of equitable estoppel, the defendant "is estopped from pleading a statute of limitations defense if the 'plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action' and the plaintiff's reliance on the fraud, misrepresentations or deception was reasonable."[79]

In *Shanahan v. Sung*, the Fourth Department reviewed the continuous treatment doctrine.[80] The plaintiff in *Shanahan* filed a medical malpractice action against a radiologist for leaving a metallic fragment in her right breast during a biopsy procedure performed in June of 2005.[81] During discovery, the plaintiff learned that the fragment may have been left behind during a procedure performed in May of 2004 and sought to amend the complaint to add a physician.[82] The plaintiff argued that the two-and-a-half year statute of limitations set forth in CPLR 214-a had been extended by continuous treatment.[83] In other words, the biopsy performed in June of 2005 was a continuation of treatment from May of 2004.[84] The trial court granted the plaintiff's motion for leave to amend the complaint and denied the physician's motion for summary judgment.[85] The Fourth Department concluded that the continuous treatment doctrine did not apply because the procedures performed in 2004 and 2005 were for different nodules in the breast—one being at eleven o'clock and the other being at twelve

75. *Id*. at 1602, 910 N.Y.S.2d at 793.

76. *Richey*, 78 A.D.3d at 1602, 910 N.Y.S.2d at 793.

77. *Id*.

78. *Id*. at 1601, 910 N.Y.S.2d at 792.

79. *Id*. at 1601-02, 910 N.Y.S.2d at 793-94 (quoting Ross v. Louise Wise Servs., Inc., 8 N.Y.3d 478, 491, 868 N.E.2d 189, 198, 836 N.Y.S.2d 509, 517 (2007)) (citations omitted).

80. 75 A.D.3d 1132, 904 N.Y.S.2d 853 (4th Dep't 2010).

81. *Id*. at 1132, 904 N.Y.S.2d at 854.

82. *Id*. at 1133, 904 N.Y.S.2d at 854.

83. *Id*. at 1133-34, 904 N.Y.S.2d at 854-55.

84. *See id*.

85. *Shanahan*, 75 A.D.3d at 1133, 904 N.Y.S.2d at 854.

o'clock.[86] The court noted that: "although Dr. Wopperer continued to monitor plaintiff for fibrocystic changes in her breasts after the May 2004 biopsy, it is well established that 'neither the mere 'continuing relation between physician and patient' nor 'the continuing nature of a diagnosis' is sufficient to satisfy the requirements of the doctrine.'"[87]

A two-Justice dissent noted that "the majority is inconsistent in determining that there is no issue of fact concerning the applicability of the continuous treatment doctrine."[88]

3. Accrual

The Second Department addressed the topic of when a claim accrues in *Dixon v. City of New York*.[89] In *Dixon*, the plaintiffs filed an action against the City of New York for actions taken by the Office of the Chief Medical Examiner.[90] Apparently, following an autopsy, the plaintiffs' son was returned to them without a brain and other organs.[91] This gave rise to claims for sepulcher and negligent infliction of emotional distress.[92] The defendant moved to dismiss the action because a notice of claim was not served within ninety days from the date of the autopsy.[93] The trial judge denied the motion.[94] On appeal, the Second Department affirmed, stating that the plaintiffs' claims did not accrue until "the plaintiffs became aware of the defendants' actions and suffered mental anguish as a result."[95]

C. Article 3: Jurisdiction and Service

1. Long-Arm Jurisdiction

CPLR 302(a) provides that a court may exercise jurisdiction over a non-domiciliary if the cause of action arises out of the non-domiciliary's contacts with New York, such as transacting business within New York, committing a tort in New York, or committing a tort outside of New York that causes injury to a person or property within

86. *Id*. at 1134, 904 N.Y.S.2d at 855.

87. *Id*. (quoting Nyorchuck v. Henriques, 78 N.Y.2d 255, 259, 577 N.E.2d 1026, 1028, 573 N.Y.S.2d 434, 436 (1991)).

88. *Id*. at 1135, 904 N.Y.S.2d at 856.

89. 76 A.D.3d 1043, 908 N.Y.S.2d 433 (2d Dep't 2010).

90. *Id*. at 1043, 908 N.Y.S.2d at 433.

91. *Id*.

92. *Id*.

93. *Id*. at 1043-44, 908 N.Y.S.2d at 433-34.

94. *Dixon*, 76 A.D.3d at 1043, 908 N.Y.S.2d at 433.

95. *Id*. at 1044, 908 N.Y.S.2d at 434.

New York.[96]

Defining the situs of an injury remains a challenge in the era of e-commerce. As businesses realize sustainable growth via the internet, the opportunities for damage to revenue, reputation, and intellectual property increase. Injury to intellectual property was the subject of discussion in *Penguin Group v. American Buddah*.[97]

The plaintiff in *Penguin Group* was a large New York trade book publisher who filed a copyright infringement suit[98] against the defendant, a not-for-profit corporation based in Oregon, with a principal place of business in Arizona.[99] The defendant operated websites hosted on servers in Oregon and Arizona.[100] The defendant argued that it had insufficient contacts with New York and moved to dismiss the case based on lack of personal jurisdiction.[101] The trial court dismissed the complaint and the plaintiff appealed to the United States Court of Appeals for the Second Circuit, which certified the following question (as reframed by the Court of Appeals):

> [I]n copyright infringement cases involving the uploading of a copyrighted printed literary work onto the internet, is the situs of injury for purposes of determining long-arm jurisdiction under N.Y. [CPLR] 302(a)(3)(ii) the location of the infringing action or the residence or location of the principal place of business of the copyright holder?[102]

The Court of Appeals held that the location of the copyright holder controls, stating:

> The role of the Internet in cases alleging the uploading of copyrighted books distinguishes them from traditional commercial tort cases where courts have generally linked the injury to the place where sales or customers are lost. The location of the infringement in online cases is of little import inasmuch as the primary aim of the infringer is to make the works available to anyone with access to an Internet connection,

96. *See* N.Y. C.P.L.R. 302(a) (McKinney 2011).

97. 16 N.Y.3d 295, 946 N.E.2d 159, 921 N.Y.S.2d 171 (2011).

98. *See id*. at 300, 946 N.E.2d at 160, 921 N.Y.S.2d at 172. The plaintiff's claim was based upon American Buddha's alleged infringement on the plaintiff's copyrights to four books, including *Oil*, by Upton Sinclair; *It Can't Happen Here*, by Sinclair Lewis; *The Golden Ass*, by Apuleius; and *On the Nature of the Universe*, by Lucretius. *Id.* The plaintiff's complaint alleged that the defendant published complete copies of these works on its two websites, making them available free of charge to approximately 50,000 members. *Id.*

99. *Id.*

100. *Penguin Grp.*, 16 N.Y.3d at 300, 946 N.E.2d at 160, 921 N.Y.S.2d at 172.

101. *Id*., 946 N.E.2d at 161, 921 N.Y.S.2d at 173.

102. *Id*. at 301, 946 N.E.2d at 161, 921 N.Y.S.2d at 173.

> including computer users in New York. In addition, the injury to a New York copyright holder, while difficult to quantify, is not as remote as a purely indirect financial loss due to the broad spectrum of rights accorded by copyright law. The concurrence of these two elements—the function and nature of the Internet and the diverse ownership rights enjoyed by copyright holders situated in New York—leads us . . . [to] conclude that the alleged injury in this case occurred in New York for purposes of CPLR 302(a)(3)(ii).[103]

2. Commencing An Action

CPLR 304, 305, 306-a, and 306-b require a plaintiff to purchase an index number and file a summons and complaint with the county clerk to commence a lawsuit before serving the defendant.[104] Failing to follow the rules may be fatal to claim.

In *Goldenberg v. Westchester*, the Court of Appeals reviewed the significance of a filing error.[105] The plaintiff in *Goldenberg* commenced a special proceeding to file a late notice of claim for medical malpractice against Westchester County Health Care Corporation (WCHCC).[106] A proposed complaint was attached as an exhibit to the petition.[107] On September 25, 2007, the trial court granted the petition and directed the plaintiff to serve the notice of claim within twenty days.[108] On October 9, 2007, the plaintiff served WCHCC with a notice of claim and summons and complaint.[109] Neither document had an index number, and affidavits filed after service bore the index number of the special proceeding.[110] In addition, the summons and complaint served differed from the version appended to the petition in that there was a new cause of action and different dates of treatment.[111] WCHCC raised the statute of limitations as an affirmative defense and, eventually, moved to dismiss.[112] The trial court granted WCHCC's motion and the Second Department affirmed.[113] Following a brief discussion of CPLR 2011, the Court of Appeals affirmed, stating that:

103. *Id*. at 306-07, 946 N.E.2d at 165, 921 N.Y.S.2d at 177.
104. *See* N.Y. C.P.L.R. 304, 305, 306(a), (b) (McKinney 2011).
105. 16 N.Y.3d 323, 946 N.E.2d 717, 921 N.Y.S.2d 619 (2011).
106. *Id*. at 325, 946 N.E.2d at 717, 921 N.Y.S.2d at 619.
107. *Id*. at 323, 946 N.E.2d at 717, 921 N.Y.S.2d at 619.
108. *Id*.
109. *Id*. at 325, 946 N.E.2d at 717-18, 921 N.Y.S.2d at 619.
110. *Goldenberg*, 16 N.Y.3d.at 325-26, 946 N.E.2d at 717-18, 921 N.Y.S.2d at 619-20.
111. *Id*. at 326, 946 N.E.2d at 718, 921 N.Y.S.2d at 620.
112. *Id.*
113. *Id*. at 326-27, 946 N.E.2d at 718, 921 N.Y.S.2d at 620.

> plaintiff never filed a summons and complaint. The closest he came was the proposed complaint attached to the petition he filed when seeking permission to file a late notice of claim, itself a prerequisite to the commencement of this action. Given the absence of a summons, there was a "complete failure to file within the statute of limitations," which CPLR 2001 does not allow a trial judge to disregard.[114]

3. Attorney Appearances

CPLR 321(c) provides for an automatic stay of proceedings where an attorney representing a party (1) dies, (2) becomes physically or mentally incapacitated, (3) is removed, (4) is suspended, or (5) becomes otherwise disabled, at any time before judgment.[115]

In *Moray v. Koven & Krause, Esqs.*,[116] a legal malpractice action was commenced on December 31, 2007.[117] For unrelated reasons, the plaintiff's attorney's license to practice was suspended on January 24, 2008.[118] A summons with notice was served upon the defendant on February 5, 2008.[119] A notice of appearance and demand for complaint was served on February 25, 2008.[120] A complaint was not served and the defendant moved to dismiss on April 22, 2008.[121] The trial court dismissed the complaint and the Second Department affirmed.[122] The Court of Appeals reversed, stating that "[t]his lawsuit was automatically stayed by operation of CPLR 321(c) on January 24, 2008, the date when plaintiff's attorney was suspended from the practice of law."[123] As the defendant never took steps to lift the stay, the trial court's order was invalid.[124] The Court of Appeals noted that "unrepresented litigants should not be penalized for failing to alert a trial court to the existence of an automatic stay created for the very purpose of safeguarding them against adverse consequences while they are unrepresented."[125]

114. *Id*. at 328, 946 N.E.2d at 719-20, 921 N.Y.S.2d at 621.

115. *See* N.Y. C.P.L.R. 321(c) (McKinney 2011).

116. 15 N.Y.3d 384, 938 N.E.2d 980, 912 N.Y.S.2d 547 (2010).

117. *Id.* at 386, 938 N.E.2d at 982, 912 N.Y.S.2d at 548.

118. *Id*. at 387, 938 N.E.2d at 982, 912 N.Y.S.2d at 548.

119. *Id*. at 386, 938 N.E.2d at 982, 912 N.Y.S.2d at 548.

120. *Id*.

121. *Moray*, 15 N.Y.3d at 386, 938 N.E.2d at 982, 912 N.Y.S.2d at 548.

122. *Id*. at 387-88, 938 N.E.2d at 983, 912 N.Y.S.2d at 549.

123. *Id*. at 389, 938 N.E.2d at 984, 912 N.Y.S.2d at 550.

124. *Id.* To lift the stay, the defendant should have served a notice upon the plaintiff to appoint new counsel within thirty days. *Id.*

125. *Moray*, 15 N.Y.3d at 390, 938 N.E.2d at 985, 921 N.Y.S.2d at 551.

D. Article 5: Venue

1. Grounds to Change Venue

CPLR 510 provides that a court may change the place of trial if the county selected by the plaintiff was not proper, if the court has reason to believe that an impartial trial cannot be had in the proper county, or for the convenience of the witnesses.[126]

A frequent subject of motion practice is the witness convenience basis for venue change. The Third Department visited the issue in *State v. Quintal, Inc*.[127] In *Quintal*, the plaintiff filed a lawsuit in Albany County for damage to a bridge located in Suffolk County.[128] The defendants moved to transfer venue for the convenience of twelve witnesses.[129] Of the twelve witnesses, two were defendants and six others were employees of the plaintiff.[130] The trial court denied the motion.[131] The Third Department affirmed, noting that a "discretionary change of venue under CPLR 501(3) is addressed to the convenience of nonparty witnesses."[132] The court also noted that "the mere fact that witnesses must travel a significant distance does not establish, without more, that requiring their testimony would impose an undue burden."[133]

2. How to Change Venue

CPLR 511 requires a party seeking to change venue to serve a demand that venue be changed to a proper county.[134] Thereafter, the defendant may move to change venue.[135] In opposition to a motion, the plaintiff must submit an affidavit establishing either that the present venue is proper or the venue proposed by the defendant is improper.[136]

The substance of a defendant's motion to change venue was at issue in *HVT, Inc. v. Safeco Insurance Co. of America*.[137] In *HVT*, the plaintiff commenced an action in Erie County.[138] The defendant served

126. *See* N.Y. C.P.L.R. 510 (McKinney 2011).
127. 79 A.D.3d 1357, 1357, 915 N.Y.S.2d 168, 169 (3d Dep't 2010).
128. *Id*.
129. *Id*.
130. *Id.*
131. *Id*.
132. *Quintal*, 79 A.D.3d at 1357-58, 915 N.Y.S.2d at 169 (citations omitted).
133. *Id*. at 1358, 915 N.Y.S.2d at 170 (citations omitted).
134. *See* N.Y. C.P.L.R. 511(b) (McKinney 2011).
135. *Id.*
136. *Id*.
137. 77 A.D.3d 255, 256, 908 N.Y.S.2d 222, 224 (2d Dep't 2010).
138. *Id*. at 258, 908 N.Y.S.2d at 225.

a demand that the action be transferred to Westchester County, where the plaintiff's principal place of business was located.[139] In response, the plaintiff served an affidavit from its attorney stating, quite simply, that venue in Erie was proper.[140] The defendant then moved in a Westchester County court to change venue and, in its motion, argued that the plaintiff's affidavit failed to address the issue of residence of the parties.[141] The trial court denied the motion.[142]

On appeal, the Second Department analyzed the First Department's decision in *Ludlow Valve Manufacturing Co. v. S.S. Silberblatt, Inc.*,[143] and the Third Department's decision in *Payne v. Civil Service Employees Ass'n*,[144] noting that the *Payne* court previously held that mere service of a document, regardless of content, was inadequate to oppose a CPLR 511(b) motion.[145] In holding that the defendant's motion should have been granted, the Second Department commented upon the contents of the plaintiff's affidavit, stating:

> The affidavit of the plaintiff's attorney included a number of statements allegedly indicating why venue in Erie County was proper. However, none of these pertained to the residency of either party. Rather, they pertained to facts and circumstances relevant to the underlying action and their nexus to Erie County. These contentions would have been more relevant had they been advanced in connection with a motion to change the place of trial to promote "the convenience of material witnesses and the ends of justice."[146]

E. Article 9: Class Actions

1. Attorneys' Fees

CPLR 909 governs attorney's fees in class actions, and enables class counsel to seek fees for the reasonable value of services rendered if there is a favorable outcome.[147] However, CPLR 909 is silent on whether an attorney may seek fees from a member of the class who has objected to counsel fees.[148]

139. *Id*.
140. *Id*.
141. *Id*.
142. *HVT, Inc.*, 77 A.D.3d at 259, 908 N.Y.S.2d 225-26.
143. *See generally* 14 A.D.2d 291, 220 N.Y.S.2d 239 (1st Dep't 1961).
144. *See generally* 15 A.D.2d 265, 222 N.Y.S.2d 725 (3d Dep't 1961).
145. *HVT, Inc.*, 77 A.D.3d at 261-65, 908 N.Y.S.2d at 227-30 (citations omitted).
146. *Id*. at 268-69, 908 N.Y.S.2d at 232.
147. N.Y. C.P.L.R. 909 (McKinney 2006).
148. *See id*.

This issue was address by the Court of Appeals in *Flemming v. Barnwell Nursing Home & Health Facilities, Inc*.[149] In *Flemming*, 242 nursing home residents brought a class action against the home for its alleged failure to comply with state-imposed standards of care.[150] After six years of litigation, the case was settled provisionally for $950,000.[151] In connection with the trial court's review of the proposed settlement, one resident filed objections to the proposed award of fees to class counsel, as well as an incentive award to the class representative.[152] The trial court denied the objections and approved the settlement, fees, incentive award, and award to the settlement fund administrator.[153] The court also rejected a cross-motion for attorney's fees.[154]

On appeal, the Third Department modified the attorney's fees from $448,483 to $425,000, and rejected the incentive and settlement fund awards.[155] The Court of Appeals affirmed.[156] A dissenting Justice Smith noted that:

> A class action lawyer who recovers money for the class is, of course, entitled to apply to the court for a fee to be paid out of the class's recovery. But the majority today holds that a class member's lawyer who opposes the fee application, even if he does so successfully, must work for free or be paid entirely from the resources of the person who hired him. This result is bad policy; it is contrary to New York's common law; and it is not required by any statute.[157]

2. Prerequisites to a Class Action

The Third Department also issued a decision addressing CPLR 901 and class actions in *Hurrell-Harring v. State*.[158] There, a number of plaintiffs who had criminal charges pending against them started a class action alleging that the public defender system is inadequate.[159] The trial court denied their request for certification because the plaintiffs failed to demonstrate (1) that they would fairly and adequately protect

149. 15 N.Y.3d 375, 378, 938 N.E.2d 937, 937, 912 N.Y.S.2d 504, 504 (2010).

150. *Id*., 938 N.E.2d at 938, 912 N.Y.S.2d at 505.

151. Flemming v. Barnwell Nursing Home & Health Facilities, Inc., 56 A.D.3d 162, 164, 865 N.Y.S.2d 706, 707-08 (3d Dep't 2008).

152. *Flemming*, 15 N.Y.3d at 378, 938 N.E.2d at 938, 912 N.Y.S.2d at 505.

153. *Id*.

154. *Id*.

155. *Flemming*, 56 A.D.3d at 168, 865 N.Y.S.2d at 710.

156. *Flemming*, 15 N.Y.3d at 378, 938 N.E.2d at 938, 912 N.Y.S.2d at 505.

157. *Id*. at 380, 938 N.E.2d at 939, 912 N.Y.S.2d at 506.

158. *See generally* 81 A.D.3d 69, 914 N.Y.S.2d 367 (3d Dep't 2011).

159. *Id*. at 71, 914 N.Y.S.2d at 369.

the interests of the class, and (2) that a class action was superior to other available methods for resolving claims.[160] The Third Department disagreed, stating "[t]hat the class members may have suffered the deprivation of their constitutional right to counsel in varying manners—be it through outright denial of counsel during arraignment or a bail hearing, or nonrepresentation at a critical stage—does not compel a conclusion that individual issues predominate" as "it is 'predominance, not identity or unanimity,' that is the linchpin of commonality."[161] The court also noted that the representative plaintiffs could adequately represent the class and that a class action was superior under the circumstances because "denial of class certification gives rise to the possibility of multiple lawsuits," and "proceeding in the absence of class action status would subject the prosecution of this case to significant discovery challenges."[162] Finally, the court noted that "our research has failed to identify a single case involving claims of systemic deficiencies which seek widespread, systematic reform that has not been maintained as a class action."[163]

F. Article 10: Parties

1. Substitution Upon Death

CPLR 1015 provides that an action is automatically stayed following the death of a party until a representative is appointed.[164] However, substitution is unnecessary when a cause of action asserted on behalf of a deceased plaintiff survives and passes to a co-plaintiff. In that circumstance, the action may proceed without substitution.[165]

The plaintiffs in *Neuman* were a father and son who filed an action to set aside a real property conveyance and encumbrances.[166] They alleged that they had been defrauded into selling property owned by the son, and in which the father held a life estate.[167] At some point after the lawsuit was commenced, the father died.[168] Shortly before trial, one defendant made a motion under CPLR 1015(a) to stay the action

160. *Id*.

161. *Id*. at 73, 914 N.Y.S.2d at 370 (quoting N.Y.C. v. Maul, 14 N.Y.3d 499, 514, 929 N.E.2d 366, 376, 903 N.Y.S.2d 304, 314 (2010)) (citations omitted).

162. *Id*. at 74-75, 914 N.Y.S.2d at 371-72.

163. *Hurrell-Harring*, 81 A.D.3d at 75, 914 N.Y.S.2d at 372 (citations omitted).

164. *See* N.Y. C.P.L.R. 1015(a) (McKinney 1997).

165. Neuman v. Neumann, 85 A.D.3d 1138, 1139, 926 N.Y.S.2d 632, 634 (2d Dep't 2011).

166. *Id*., 926 N.Y.S.2d at 633-34.

167. *Id*., 926 N.Y.S.2d at 634.

168. *Id*. at 1139, 926 N.Y.S.2d at 634.

pending appointment of a representative for the deceased plaintiff.[169] The trial court denied the motion.[170] On appeal, the Third Department noted that the complaint asserted causes of action on the part of the deceased plaintiff as well as the surviving plaintiff, concluding that "[t]he decedent's right to recover monetary damages for the alleged injury to his property interest as a life tenant was not extinguished by his death, and does not survive only to the remaining plaintiff . . . ."[171] As the decedent's claims "must be prosecuted on behalf of the beneficiaries of his estate" the appellate division ruled that "the action may not proceed until there has been a substitution of a personal representative for the decedent."[172]

2. Substitution Procedure and Timing

While the CPLR is silent on a deadline for substitution of a party, section 1021 provides that substitution should be made within a "reasonable time."[173]

Timing of substitution was addressed recently in *Borruso v. New York Methodist Hospital*.[174] The plaintiff in *Borruso* filed a medical malpractice action in 1998 based upon medical care rendered in 1997.[175] The plaintiff died in 2001.[176] In 2009, the defendants moved to dismiss the case pursuant to CPLR 1021.[177] Each argued that the plaintiff failed to timely substitute a representative from the decedent's estate for the decedent.[178] At the time of the motion, more than six years had passed since an estate representative had been appointed.[179] In an attempt to save the action, the plaintiff's attorney cited law firm failure, a bankruptcy stay, and difficulty scheduling depositions.[180] The trial court granted the defendants' motions.[181] After noting that the "determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has

169. *Id*.
170. *Neuman*, 85 A.D.3d at 1139, 926 N.Y.S.2d at 634.
171. *Id*.
172. *Id*.
173. *See* N.Y. C.P.L.R. 1021 (McKinney 1997).
174. *See generally* 84 A.D.3d 1293, 924 N.Y.S.2d 152 (2d Dep't 2011).
175. *Id*. at 1293, 924 N.Y.S.2d at 153.
176. *Id*.
177. *Id*. at 1293-94, 924 N.Y.S.2d at 153.
178. *Id*. at 1294, 924 N.Y.S.2d at 153.
179. *Borruso*, 84 A.D.3d at 1294, 924 N.Y.S.2d at 153.
180. *Id*., 924 N.Y.S.2d at 154.
181. *Id*., 924 N.Y.S.2d at 153.

shown that the action or defense has merit," the Second Department held that the plaintiff had not been diligent, and affirmed.[182]

G. Article 14-A: Damage Actions

1. Contributory Negligence

Pursuant to CPLR 1411, in any action to recover damages for personal injury, injury to property, or wrongful death, a defendant is entitled to reduce its responsibility for a damage award by culpable conduct on the part of the plaintiff and/or some other party.[183]

The issue of the plaintiff's assumption of the risk was addressed by the Second Department in *Palladino v. Lindenhurst Union Free School District.*[184] In *Palladino*, the plaintiff filed suit for injuries his eleven-year-old son sustained when he stepped on a grate while playing handball on the defendant's premises.[185] The child was aware[186] of the condition of the grate.[187] The trial court denied the defendant's motion for summary judgment based upon primary assumption of the risk.[188] On appeal, the Second Department noted that the risks of injury to the child were "known by or perfectly obvious to the player" and, in turn, the school district was not liable.[189]

182. *Id*. at 1294-95, 924 N.Y.S.2d at 154 (quoting Reed v. Grossi, 59 A.D.3d 509, 511, 873 N.Y.S.2d 676, 678 (4th Dep't 2009)).

183. *See* N.Y. C.P.L.R. 1411 (McKinney 1997).

184. 84 A.D.3d 1194, 924 N.Y.S.2d 474 (2d Dep't 2011).

185. *Id*. at 1195, 924 N.Y.S.2d at 475.

186. In August 2007 the plaintiff's infant son:

was playing [handball] on the middle court, where, flush with the wall against which the handball was thrown, there were ventilation grates built into the top of a raised cement block. The grates allowed for airflow from the exterior to the interior of the school building. The ventilation grates were ordinarily secured with bars because vandals had been known to lift the grates and enter the crawl space below. However, the security bar on the subject grates had been removed, and one of the grates was improperly placed, such that it was lying partially on top of another properly placed grate, leaving a three-to-six-inch uncovered space between the edge of the cement block and the edge of the improperly placed grate. In the course of play, the infant stepped onto the improperly placed grate, causing the grate to cave in and the infant's leg to fall through the grate. The grate cut into the infant's leg, down to the bone, allegedly causing a wound seven inches long, which required [forty-six] sutures. The infant had played handball on the subject courts more than five times before the day of his accident, and had noticed the presence of the ventilation grates. Two or more days before the accident, the infant had noticed the space created by the improperly placed grate. On the day of the accident, he warned his friends about the space, and told them to "be careful."

Id. at 1196, 924 N.Y.S.2d at 476 (Skelos, J., concurring).

187. *Id*. at 1195, 924 N.Y.S.2d at 475.

188. *Id*.

189. *Palladino*, 84 A.D.3d at 1195, 924 N.Y.S.2d at 475.

Justice Skelos concurred "only under constraint of this Court's precedent,"[190] stating that "application of the doctrine [of assumption of the risk] under these circumstances is neither mandated by Court of Appeals precedent nor consonant with the narrow reach properly afforded the doctrine . . . ."[191] He added that that the doctrine of primary assumption of the risk does not mean that "a voluntary participant in a sport or recreation activity consents to all defects in a playing field so long as the defects are either known to the plaintiff or open and obvious."[192]

H. Article 16: Joint Liability

1. Application

Under CPLR 1602, a party held liable by reason of the use, operation, or ownership of a motor vehicle is exempt from the limited liability provisions of Article 16 and, in turn, can be held liable for one hundred percent of the plaintiff's damages without regard for its percentage of fault.[193]

The issue of joint liability and conflict of laws was the subject of debate in *Shaw v. Carolina Coach*.[194] In *Shaw*, a New York plaintiff was injured in a car accident.[195] At the time of the accident, he was a passenger in a car owned by his mother, a New York resident.[196] The car collided with a bus in New Jersey.[197] The bus was owned by Carolina Coach ("Carolina") and Greyhound Lines, Inc. ("Greyhound").[198] Carolina was domiciled in North Carolina.[199] Greyhound was incorporated in Delaware and had a principal place of business in Texas.[200] The bus driver was a resident of Maryland.[201]

After the action was commenced, the defendants moved to apply New Jersey law—specifically, New Jersey Statutes Annotated 2A:15-5.3.[202] The plaintiffs sought joint liability under Article 16 of the

190. *Id*. at 1201, 924 N.Y.S.2d at 480.
191. *Id*. 1196, 924 N.Y.S.2d at 475.
192. *Id*. at 1200, 924 N.Y.S.2d at 479 (citations omitted).
193. *See* N.Y. C.P.L.R. 1602(6) (McKinney 1997 & Supp. 2012).
194. 82 A.D.3d 98, 99, 918 N.Y.S.2d 120, 122 (2d Dep't 2011).
195. *Id*.
196. *Id*.
197. *Id.* at 100, 918 N.Y.S.2d at 122.
198. *Id.* at 99, 918 N.Y.S.2d at 122.
199. *Shaw*, 82 A.D.3d at 100, 918 N.Y.S.2d at 122.
200. *Id.*
201. *Id.*
202. *Id.*

CPLR.[203] The trial court held that New York law applies.[204] After a thorough analysis of New York's choice-of-law principles,[205] the Second Department held that "the law of the place of the tort—should yield in this case to the law of New York," and affirmed.[206] Integral to its decision was a recent decision by a New Jersey Court, which applied New Jersey law after utilizing "a nearly identical choice-of-law interest analysis as that employed by New York" to a case "brought by a New Jersey resident plaintiff against two New York defendants for an accident occurring in New Jersey."[207]

I. Article 20: Mistakes and Defects

1. Service

CPLR 2001 empowers a court to permit correction of a mistake, omission, defect, or irregularity made at any stage of an action, provided a substantial right of a party is not prejudiced.[208]

Deficient service of process was addressed in *Ruffin v. Lion Corp*.[209] The plaintiff in *Ruffin* was injured while riding a tour bus in New York City.[210] She timely filed a summons and complaint.[211] Thereafter, a process server[212] was hired to personally serve the defendants in Pennsylvania.[213] One defendant failed to respond to the summons and complaint and the trial court granted the plaintiff's motion for a default judgment.[214] At an inquest, the plaintiff was

According to that statute, a plaintiff may recover the full amount of his or her damages from any party determined to be [sixty percent] or more at fault in the happening of the accident, while a party found to be less than [sixty percent] at fault is only responsible for its proportionate share of the damages.

Id.

203. *Shaw*, 82 A.D.3d at 100, 918 N.Y.S.2d at 122.

204. *Id.*

205. *See generally* Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Cooney v. Osgood Mach., 81 N.Y.2d 66, 612 N.E.2d 277, 595 N.Y.S.2d 919 (1993).

206. *Shaw*, 82 A.D.3d at 106-07, 918 N.Y.S.2d at 127-28.

207. *Id*. at 106, 918 N.Y.S.2d at 127.

208. *See* N.Y. C.P.L.R. 2001 (McKinney 1997 & Supp. 2012).

209. 15 N.Y.3d 578, 940 N.E.2d 909, 915 N.Y.S.2d 204 (2010).

210. *Id*. at 580, 940 N.E.2d at 910, 915 N.Y.S.2d at 205.

211. *Id*.

212. The process server was a resident of Pennsylvania. *Id*.

213. *Id*.

214. *Ruffin*, 15 N.Y.3d at 580, 940 N.E.2d at 910, 915 N.Y.S.2d at 205.

awarded $450,000.[215] Two years later, the defendant moved to vacate the default and dismiss the action.[216] The defendant noted that plaintiff's process server was not a New York resident, was not a sheriff authorized to serve process in Pennsylvania, and was not an attorney, solicitor, barrister, or equivalent.[217] Thus, plaintiff failed to comply with CPLR 313.[218] The trial court denied the defendant's motion.[219] However, the Second Department held that the defect was fatal to the plaintiff's claims.[220]

The Court of Appeals reversed the appellate division, stating that CPLR 2001 could be used in this instance to correct a "technical infirmity."[221] Focusing on the element of notice to the defendant, the Court noted that "delivery of a summons and complaint by a process server who is unauthorized to serve simply because of his place of residence will not affect the likelihood that the summons and complaint will reach defendant and inform him that he is being sued."[222] Thus, "the court may choose to correct or disregard" this defect.[223]

J. Article 21: Papers

1. Form of Papers

All papers filed with the court shall be in English.[224] Where a document that accompanies a filing is in a language other than English, it shall be translated into English.[225] An affidavit from the translator should be submitted stating that the translation is accurate.[226]

Foreign language submissions were at issue in *Reyes v. Arco Wentworth Management Corp*.[227] In *Reyes*, the Spanish-speaking plaintiff submitted an affidavit in opposition to a motion for summary judgment—in English—but without a translator affidavit.[228] The

215. *Id*.
216. *Id*.
217. *Id*.
218. *Id*. at 580-81, 940 N.E.2d at 910, 915 N.Y.S.2d at 205.
219. *Ruffin*, 15 N.Y.3d at 581, 940 N.E.2d at 910, 915 N.Y.S.2d at 205.
220. *Id*.
221. *Id*. at 582, 940 N.E.2d at 911, 915 N.Y.S.2d at 206 (quoting Miller v. Bd. of Assessors, 91 N.Y.2d 82, 87, 689 N.E.2d 906, 909, 666 N.Y.S.2d 1012, 1015 (1997)).
222. *Id*. at 583, 940 N.E.2d at 912, 915 N.Y.S.2d at 207.
223. *Id*.
224. *See* N.Y. C.P.L.R. 2101(b) (McKinney 1997 & Supp. 2012).
225. *Id*.
226. *Id*.
227. *See generally* 83 A.D.3d 47, 919 N.Y.S.2d 44 (2d Dep't 2011).
228. *Id.* at 54, 919 N.Y.S.2d at 50.

plaintiff testified at his deposition in Spanish.[229] The defendant argued that without a translator affidavit, the plaintiff's affidavit was inadmissible.[230] The trial court denied the defendant's motion.[231] On appeal, the Second Department stated that "the absence of a translator's affidavit, required of foreign language witnesses, renders the witness's English affidavit facially defective and inadmissible."[232] The court reasoned that: "[a] witness at trial [could] not be permitted to testify in a foreign language, or to proffer documents in a foreign language, without the benefit of a sworn English-language translation, and there is no valid reason why a more relaxed evidentiary standard should govern summary judgment applications."[233] Even so, it affirmed denial of the motion.[234]

K. Article 22: Stays, Motions, and Orders

1. Stipulations

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.[235]

In *Genger v. Genger*, a woman sued her husband for divorce.[236] The parties entered into a stipulation of settlement.[237] The plaintiff then moved to compel the production of documents pursuant to the stipulation.[238] The trial court granted the plaintiff's motion, but limited the materials for production to assets not listed on the marital balance sheet and not the subject of the previous audit and arbitration.[239] On appeal, the First Department concluded that the court's ruling was improper because it, in effect, "[rewrote] the stipulation by imposing additional terms."[240] When reversing the trial court, the appellate division noted that the stipulation was "patently unambiguous," "clearly evince[d] the parties' intent," and contained "no restriction or limitation

229. *Id*.
230. *Id*.
231. *Id*. at 53-54, 919 N.Y.S.2d at 49-50.
232. *Reyes*, 83 A.D.3d at 54, 919 N.Y.S.2d at 50.
233. *Id.*
234. *Id*. at 55, 919 N.Y.S.2d at 51.
235. *See* N.Y. C.P.L.R. 2104 (McKinney 1997 & Supp. 2012).
236. *See* 81 A.D.3d 561, 917 N.Y.S.2d 190 (1st Dep't 2011).
237. *Id.* at 561, 917 N.Y.S.2d at 191.
238. *Id*.
239. *Id*.
240. *Id*.

on the scope of the audits."[241] Therefore, "[t]he court was not at liberty to alter or change any of the provisions of the stipulation without the consent of both parties."[242]

2. Motion Affecting Prior Order

"A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination."[243] What constitutes "new facts" is an issue frequently before the courts.

In *Santiago v. New York City Transit Authority*, a petitioner moved for leave to file a late notice of claim.[244] After his motion was denied, he moved to renew.[245] The "new facts" alleged were color photographs of the alleged defect at issue.[246] The motion to renew was denied.[247] On appeal, the First Department affirmed, stating that "[t]he color photographs of the alleged defect [did] not constitute new facts not offered on the prior motion that would change the prior determination."[248]

"New facts" were also discussed in *Kirby v. Suburban Electrical Engineers Contractors, Inc.*[249] In *Kirby*, a trial court granted the plaintiff's motion to renew its opposition to the defendant's cross-motion for summary judgment, which had been granted.[250] Upon renewal, the plaintiff submitted two additional employee affidavits and the trial court denied the cross-motion.[251] The appellate division reversed, stating that "plaintiffs failed to demonstrate that their purported new evidence was not in existence or not available at the time of [the defendant's] cross motion."[252] The court noted that the information contained in the affidavits "could have been discovered and presented earlier with due diligence."[253]

241. *Genger*, 81 A.D.3d at 561, 917 N.Y.S.2d at 191.
242. *Id.*
243. N.Y. C.P.L.R. 2221(e)(2) (McKinney 2010).
244. 85 A.D.3d 628, 628, 925 N.Y.S.2d 500, 501 (1st Dep't 2011).
245. *Id.*
246. *Id.* at 629, 925 N.Y.S.2d at 501.
247. *Id.* at 628, 925 N.Y.S.2d at 501.
248. *Id.* at 629, 925 N.Y.S.2d at 501.
249. *See* 83 A.D.3d 1380, 919 N.Y.S.2d 698 (4th Dep't 2011).
250. *Id.*, 919 N.Y.S.2d at 699.
251. *Id.* at 1381, 919 N.Y.S.2d at 699.
252. *Id.*
253. *Id.*

The Fourth Department also addressed a renewal motion in *Garland v. RLI Insurance. Co*.[254] There, a plaintiff sought leave to renew and reargue a motion for summary judgment that had been denied.[255] The "new" evidence was an attorney affidavit that advanced a theory that could have been, but was not asserted, in connection with the original motion.[256] The trial court permitted reargument.[257] The Fourth Department reversed, stating that "those parts of plaintiff's motion seeking leave to reargue were premised upon a legal theory not advanced in support of the original motion or in opposition to defendant's cross motion, and thus they should have been denied."[258] Justice Sconiers noted in dissent that:

> In a case such as this, where the court gave due weight and consideration to the relevant factors in granting that part of the motion seeking leave to renew, we should not second guess the court's exercise of discretion, especially where doing so would deprive a party of a determination on the merits. It is one thing to reverse an order denying a motion seeking leave to renew and thereby decide a case on the merits but it is quite another to reverse an order granting a motion seeking leave to renew, thus depriving a party of the benefit of a determination on the merits. This Court has been, and should be, reluctant to do so. In fact, I could find only one instance since CPLR 2221 was amended in 1999 where this Court reversed an order granting a motion seeking leave to renew, and that was in a case where virtually no justification was provided for the failure to produce the additional proof on the prior motion. Further, this Court has not previously reversed an order granting a motion seeking leave to reargue where the motion was timely.[259]

L. Article 30: Remedies and Pleading

1. Particularity

CPLR 3016 requires a party to plead certain claims and defenses with particularity.[260] Where an action or defense is based upon the law of a foreign county, the party relying upon the law must state its substance.[261]

254. *See* 79 A.D.3d 1576, 914 N.Y.S.2d 509 (4th Dep't 2010).
255. *Id*., 914 N.Y.S.2d at 509.
256. *Id*. at 1577, 914 N.Y.S.2d at 510.
257. *Id*. at 1576, 914 N.Y.S.2d at 510.
258. *Id*. at 1577, 914 N.Y.S.2d at 510-11.
259. *Garland*, 79 A.D.3d at 1578, 914 N.Y.S.2d at 511 (citations omitted).
260. *See* N.Y. C.P.L.R. 3016 (McKinney 2010).
261. *Id.* § 3016(e).

The applicability of foreign law was at issue in *Edwards v. Erie Coach Lines Co.*, a 2011 Court of Appeals decision with broad and significant consequences.[262]

The plaintiffs in *Edwards* filed suit for injuries or wrongful deaths arising out of a charter bus accident that occurred on a highway near Geneseo, New York.[263] Apparently, the bus drove into the rear of a tractor trailer parked on highway's shoulder.[264] The charter bus driver (Comfort), his employer (Erie Coach), the company that leased the bus for the trip (Trentway), and all of the bus passengers were domiciliaries of Ontario, Canada.[265] The tractor trailer driver (Zeiset), his employer (French), and the company that hired the trailer (Verdelli) were domiciliaries of Pennsylvania.[266] New York does not have a cap on non-economic damages.[267] However, Ontario caps non-economic damages at CDN $100,000 in 1978 dollars.[268] Following discovery, the defendants moved to apply Ontario law to "all loss allocation issues."[269] Citing the third rule of *Neumeier v. Keuhner*,[270] the trial court granted the defendants' motions.[271] Trial of the cases was bifurcated.[272] During a jury trial on liability, the cases settled by attributing ninety percent of fault to the Canadian defendants, and ten percent of fault to the Pennsylvania defendants.[273] The plaintiffs appealed and the Fourth Department affirmed.[274]

As it relates to CPLR 3016, the Fourth Department relied upon *Burns v. Young*[275] and determined that the trial court "did not abuse its

262. *See generally* 17 N.Y.3d 306, 952 N.E.2d 1033, 929 N.Y.S.2d 41 (2011).

263. *Id*. at 318, 952 N.E.2d at 1034-35, 929 N.Y.S.2d at 42-43.

264. *Id*., 952 N.E.2d at 1034, 929 N.Y.S.2d at 42.

265. *Id*. at 325, 952 N.E.2d at 1039, 929 N.Y.S.2d at 47.

266. *Id*., 952 N.E.2d at 1039-40, 929 N.Y.S.2d at 47-48.

267. *Edwards*, 17 N.Y.3d at 325, 952 N.E.2d at 1040, 929 N.Y.S.2d at 48.

268. *Id*. (citations omitted).

269. *Id*.

270. *See* 31 N.Y.2d 121, 128-29, 286 N.E.2d 454, 458, 335 N.Y.S.2d 64, 70-71 (1972) (law of the state where the accident occurred governs unless it can be shown that "displacing the normally applicable rule will advance the relevant substantive law purposes" without impairing the smooth working of the multi-state system or producing great uncertainty for litigants).

271. *Edwards*, 17 N.Y.3d at 326, 952 N.E.2d at 1040, 929 N.Y.S.2d at 48.

272. *Id.*

273. *Id.*

274. Butler v. Stagecoach Grp., PLC, 72 A.D.3d 1581, 1586, 900 N.Y.S.2d 541, 545 (4th Dep't 2010); Roach v. Coach USA, Inc., 74 A.D.3d 1813, 1813, 902 N.Y.S.2d 478, 478 (4th Dep't 2010).

275. 239 A.D.2d 727, 728, 657 N.Y.S.2d 502, 504 (3d Dep't 1997) (because CPLR 4511(b) permits judicial notice of the laws of foreign countries that are presented "prior to the presentation of any evidence at trial" a court has discretion to apply the law of a foreign

discretion by taking judicial notice of Ontario law" despite the fact that the defendants did not raise its applicability as an affirmative defense in their pleadings.[276] The Fourth Department also affirmed the trial court's application of the Ontario non-economic damages cap to the plaintiffs' claims against the Ontario defendants, and New York's law to the plaintiffs' claims against the Pennsylvania defendants.[277] The Fourth Department then granted the plaintiffs permission to appeal both issues to the Court of Appeals.[278]

The Court of Appeals affirmed.[279] With respect to CPLR 3016(e), the Court of Appeals employed a prejudice analysis, noting that "[a] split domicile lawsuit, such as this one, always presents a choice-of-law dilemma where loss-allocation rules conflict. This issue may have lain dormant during discovery, but there was no reason for plaintiffs to assume that it had vanished."[280]

The Court of Appeals then addressed the plaintiffs' argument that a "single, joint *Neimeier* analysis" should be applied.[281] The Court of Appeals disagreed, stating that "[i]n our view . . . the correct way to conduct a choice-of-law analysis is to consider each plaintiff vis-à-vis each defendant."[282] The Court decided that "the Ontario cap controls any award of noneconomic damages against the bus defendants because they share an Ontario domicile with plaintiffs."[283] It reasoned that "[i]n lawsuits brought in New York by Ontario-domiciled plaintiffs against Ontario-domiciled defendants, New York courts should respect Ontario's decision, which differs from but certainly does not offend New York's public policy."[284] In addition, the Court ruled that the Pennsylvania defendants could not benefit from the Ontario cap, and decided against deviating from the "normally applicable" law of the situs of the accident, i.e., New York.[285] Justice Ciparick noted in dissent that a single *Neumeier* analysis should be applied "where nondomiciliary defendants are jointly and severally liable to

county notwithstanding "a party's failure to comply with the requirement in CPLR 3016(e) that the substance of such laws shall be set forth in the pleading").

276. *Edwards*, 17 N.Y.3d at 326, 952 N.E.2d at 1040-41, 929 N.Y.S.2d at 48-49 (quoting *Butler*, 72 A.D.3d at 1583, 900 N.Y.S.2d at 543).

277. *Id*. at 326-27, 952 N.E.2d at 1041, 929 N.Y.S.2d at 49.

278. *Id*. at 327, 952 N.E.2d at 1041, 929 N.Y.S.2d at 49.

279. *Id*. at 331, 952 N.E.2d at 1044, 929 N.Y.S.2d at 52.

280. *Id*. at 328, 952 N.E.2d at 1042, 929 N.Y.S.2d at 50.

281. *Edwards*, 17 N.Y.3d at 329, 952 N.E.2d at 1042, 929 N.Y.S.2d at 50.

282. *Id*.

283. *Id*. at 329, 952 N.E.2d at 1043, 929 N.Y.S.2d at 51.

284. *Id*. (citations omitted).

285. *Id*. at 330, 952 N.E.2d at 1044, 929 N.Y.S.2d at 52.

nondomiciliary plaintiffs in a tort action arising out of a single incident within the State of New York, and that under such an analysis New York law should apply to all defendants for purposes of uniformity and predictability."[286]

2. Bills of Particulars

CPLR 3042 provides that a party shall respond to a demand for a bill of particulars within thirty days, either by supplying the information requested or supplying objections.[287] The failure to respond to a proper bill of particulars may result in the imposition of penalties, including a conditional order directing compliance or, in the alternative, issue preclusion.[288]

At the risk of stating the obvious—do not ignore court orders. The plaintiff failed to follow the rules in *Gibbs v. St. Barnabas Hospital*[289] and was punished. *Gibbs* was a medical malpractice action commenced in 2005.[290] The defendant answered and served a demand for a bill of particulars.[291] After the passage of thirty days, the defendant's attorney sent three letters requesting compliance.[292] The defendant than moved to compel and requested sanctions, including dismissal or issue preclusion.[293] The plaintiff served a bill of particulars and the defendant withdrew its motion.[294] At a preliminary conference, the trial court determined that the plaintiff's bill of particulars was "unsatisfactory."[295] The plaintiff was directed to supplement it within thirty days.[296] When he did not, the defendant moved to compel or preclude.[297] The trial court issued a conditional order directing the plaintiff to serve a supplemental bill of particulars within forty-five days.[298] Despite a reminder letter from the defense, the plaintiff did not timely supplement.[299] The defendant then moved to enforce the conditional

286. *Edwards*, 17 N.Y.3d at 331-32, 952 N.E.2d at 1044, 929 N.Y.S.2d at 52.
287. N.Y. C.P.L.R. 3042(a) (McKinney 2010).
288. *Id*. § 3042(d).
289. 16 N.Y.3d 74, 942 N.E.2d 277, 917 N.Y.S.2d 68 (2010).
290. *Id.* at 77, 942 N.E.2d at 278, 917 N.Y.S.2d at 69.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Gibbs*, 16 N.Y.3d at 77, 942 N.E.2d at 278, 917 N.Y.S.2d at 69.
295. *Id.* at 78, 942 N.E.2d at 278, 917 N.Y.S.2d at 69.
296. *Id.*
297. *Id.*
298. *Id.*
299. *Gibbs*, 16 N.Y.3d at 78, 942 N.E.2d at 278, 917 N.Y.S.2d at 69.

preclusion order.[300] The trial court granted the motion, but only to the extent that it directed the plaintiff to pay $500 as costs for his delay.[301] The First Department affirmed.[302]

The Court of Appeals noted that the First Department overlooked the two-part test that applies to whether relief set forth in a conditional order should be vacated: (1) a reasonable excuse for default, and (2) existence of a meritorious claim or defense.[303] As the plaintiff did not satisfy these elements, the Court reversed, stating that "our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice."[304] It rejected the plaintiff's premise that his conduct was not "willful."[305] Case dismissed.

M. Article 31: Disclosure

1. Scope of Disclosure

CPLR 3101(a)(1) provides that there shall be full disclosure by a party, or employee of a party.[306] Full disclosure includes appearing for a deposition.[307]

The defendants in *Riordan v. Cellino & Barnes, P.C.*, attempted to avoid producing their clients for an examination by admitting negligence.[308] Relying upon *Long v. Cellino & Barnes, P.C.*,[309] the defendants argued that since negligence was not at issue, depositions would not provide evidence relevant or necessary to the issues to be determined at trial.[310] The trial court granted the defendant's motion for a protective order.[311] On appeal, the Fourth Department modified the trial court's order, stating that plaintiffs "are entitled to depose the attorneys who represented plaintiff in the underlying action for approximately eight years, despite defendants' admission of negligence."[312] Further, the court stated that "to the extent that our

300. *Id.*
301. *Id.* at 79, 942 N.E.2d at 279, 917 N.Y.S.2d at 70.
302. Gibbs v. St. Barnabas Hosp., 61 A.D.3d 599, N.Y.S.2d 38 (1st Dep't 2009).
303. *Gibbs*, 16 N.Y.3d at 80, 942 N.E.2d at 280, 917 N.Y.S.2d at 71.
304. *Id.* at 81, 942 N.E.2d at 281, 917 N.Y.S.2d at 72.
305. *Id.* at 82, 942 N.E.2d at 281, 917 N.Y.S.2d at 72.
306. N.Y. C.P.L.R. 3101(a)(1) (McKinney 2005).
307. *Id.* § 3101(d)(ii).
308. 84 A.D.3d 1737, 1738, 922 N.Y.S.2d 728, 728 (4th Dep't 2011).
309. 59 A.D.3d 1062, 1063, 873 N.Y.S.2d 805, 806-07 (4th Dep't 2009).
310. *Riordan*, 84 A.D.3d at 1738, 922 N.Y.S.2d at 728.
311. *Id.*, 922 N.Y.S.2d at 728-29.
312. *Id.*, 922 N.Y.S.2d at 729.

decision in [*Long*] holds otherwise, it is no longer to be followed."[313]

CPLR 3101(a) requires full disclosure of all matters material and necessary to the prosecution or defense of an action.[314] Up until 1984, disclosure from a non-party was allowed only where the court, on motion, determined that there were special circumstances. Following legislative amendment in 1984, disclosure from non-parties is appropriate, provided it is "upon notice stating the circumstances or reasons such disclosure is sought or required."[315]

Discovery sought from a non-party was at issue in *Kooper v. Kooper*.[316] *Kooper* was a matrimonial action.[317] The defendant served subpoenas duces tecum on five non-party financial institutions for information about the plaintiff.[318] Each subpoena provided that "[t]he circumstances or reasons said disclosure is sought or required are to identify and value certain marital property, which is material and necessary in the prosecution or defense of this action."[319] The plaintiff demanded that the subpoenas be withdrawn and, after the defendant refused, the plaintiff moved to quash.[320] The trial court granted the plaintiff's motion.[321] After reviewing the history of CPLR 3101(a)(4) and the Second Department's decision in *Dioguardi v. St. John's Riverside Hospital* for a discussion of "special circumstances,"[322] the Third Department affirmed, noting that "our cases have consistently adhered to the principle that '[m]ore than mere relevance and materiality is necessary to warrant disclosure from a nonparty.'"[323] A key consideration remains the ability to obtain discovery from an adversary or a source other than the non-party.[324]

313. *Id*.

314. *See* N.Y. C.P.L.R. 3101(a) (McKinney 2005).

315. *See id.* § 3101(a)(4).

316. 74 A.D.3d 6, 8, 901 N.Y.S.2d 312, 316 (2d Dep't 2010).

317. *See id.*, 901 N.Y.S.2d at 315.

318. *Id.*, 901 N.Y.S.2d. at 316.

319. *Id*.

320. *Id*. at 9, 901 N.Y.S.2d at 316.

321. *Kooper*, 74 A.D.3d at 9, 901 N.Y.S.2d at 317.

322. 144 A.D.2d 333, 333, 533 N.Y.S.2d 915, 915 (2d Dep't 1988).

323. *Kooper*, 74 A.D.3d at 17-18, 901 N.Y.S.2d at 323 (quoting *Dioguardi*, 144 A.D.2d at 334-35, 533 N.Y.S.2d at 916).

324. *Id.* at 16, 901 N.Y.S.2d at 322; *see also* Troy Sand & Gravel Co., Inc. v. Town of Nassau, 80 A.D.3d 199, 203, 912 N.Y.S.2d 798, 801 (3d Dep't 2010) ("[P]etitioners were not entitled to obtain disclosure from Bader, a nonparty. Even assuming that petitioners made a showing of relevancy, they failed to demonstrate that they could not otherwise obtain the information sought from Bader regarding whether Town officials asked her permission before using her property to access the site of the proposed quarry."); Connolly v. Napoli, Kaiser & Bern, LLP, 81 A.D.3d 530, 531, 917 N.Y.S.2d 175, 176 (1st Dep't

Disclosure of minutes from meetings held by a hospital's infection control committee was at issue in *Learned v. Faxton-St. Luke's Healthcare*.[325] The plaintiffs in *Learned* commenced a medical malpractice action for injuries arising out of postoperative wound infections.[326] During discovery, the plaintiffs moved to compel the production of the minutes.[327] The trial court granted the motion.[328] The Fourth Department affirmed because the defendant "did not establish that those minutes were 'generated in connection with a quality assurance review function pursuant to *Education Law* [*section*] *6527(3)* or a malpractice prevention program pursuant to *Public Health Law* [*section*] *2805-j*.'"[329] Thus, the defendants failed to meet their burden of establishing that those minutes were shielded from disclosure.[330]

CPLR 3101(d) provides that, in advance of trial, a party shall identify their expert, the subject matter on which the expert will testify, and the basis for the expert's opinion.[331] In a medical malpractice action, the name of the expert may be withheld.[332]

The contents of an expert disclosure were at issue in *Byrnes v. Satterly*.[333] In *Byrnes*, the plaintiff sought to have his expert testify at trial that the defendant failed to monitor the plaintiff after prescribing medication.[334] As a basis for the testimony, the plaintiff referred to the fact that his expert disclosure provided that the plaintiff's expert would comment on the "treatment rendered to plaintiff by defendant . . . in prescribing Zyprexa."[335] The plaintiff also referred to the allegations of

2011) ("In light of the fact that the employment records the court ordered produced will almost certainly provide the information that defendants seek, the subpoena ad *testificandum* served on the nonparty witnesses was properly quashed.").

325. *See* 70 A.D.3d 1398, 1399, 894 N.Y.S.2d 783, 784 (4th Dep't 2010).

326. *Id.* at 1398, 894 N.Y.S.2d at 783.

327. *Id*.

328. *Id*. at 1399, 894 N.Y.S.2d at 783.

329. *Id*., 894 N.Y.S.2d at 784 (quoting Maisch v. Millard Fillmore Hosp., 262 A.D.2d 1017, 1017, 692 N.Y.S.2d 536, 537 (4th Dep't 1999)).

330. *Learned*, 70 A.D.3d at 1399, 894 N.Y.S.2d at 784; *see also* Coniber v. United Mem. Med. Ctr., 81 A.D.3d 1329, 1329, 916 N.Y.S.2d 398, 398-99 (4th Dep't 2011) (trial court erred in denying plaintiff's motion because defendant failed to establish that Medical Event Report Form was "generated in connection with a quality assurance review function pursuant to *Education Law* [*section*] *6527(3)* or a malpractice prevention program pursuant to *Public Health Law* [*section*] *2805-j*" and the "conclusory statement" submitted by defendant's Director of Quality Assurance that all of the documents were prepared in connection with a quality review function was inadequate).

331. N.Y. C.P.L.R. 3101(d) (McKinney 2005).

332. *Id.*

333. 85 A.D.3d 1711, 1712, 926 N.Y.S.2d 242, 243 (4th Dep't 2011).

334. *Id.*

335. *Id.*

the complaint, which provided that the defendant failed to monitor plaintiff's medication and condition.[336] The defendant contended that the plaintiff's bill of particulars had narrowed the issues to the events of May 10, 2006, the day that Zyprexa was prescribed.[337] In turn, the plaintiff's theory at trial was a surprise.[338] The trial court agreed with the defense.[339]

On appeal, the Fourth Department reversed, stating that "the proposed 'testimony was not so inconsistent with the information and opinions contained [in the expert disclosure statement], nor so misleading, as to warrant preclusion of the expert testimony.'"[340] Moreover, "in light of the allegations in the complaint," the defendant "cannot claim either surprise or prejudice."[341] Justices Scudder and Smith authored a dissent, stating that the "plaintiff misled defendant to believe that his theories of malpractice were limited to acts or omissions occurring in the initial prescribing of Zyprexa."[342]

2. Protective Orders

A court may prevent abusive discovery or suppress information improperly obtained by issuing a protective order that denies, limits, conditions, or regulates discovery.[343]

CPLR 3103 was discussed in *Duval v. Duval*.[344] Duval was an action for divorce and child custody.[345] The plaintiff served a "so ordered" subpoena duces tecum for the defendant's mental health records on Long Island Jewish Medical Center.[346] A so-ordered subpoena was sought to avoid the need to secure the defendant's signature on an authorization to collect the records.[347] The plaintiff then failed to timely serve the defendant with a copy of the subpoena.[348] The

336. *Id*.

337. *Id*. at 1713, 926 N.Y.S.2d at 244 (Scudder, P.J., and Smith, J., dissenting).

338. *See Byrnes*, 85 A.D.3d at 1714, 926 N.Y.S.2d at 244 (Scudder, P.J., and Smith, J., dissenting).

339. *Id*. at 1712, 926 N.Y.S.2d at 243.

340. *Id*. (quoting Neumire v. Kraft Foods, Inc., 291 A.D.2d 784, 786, 737 N.Y.S.2d 457, 460 (4th Dep't 2002)).

341. *Id.* (quoting Ruzycki v. Baker, 9 A.D.3d 854, 855, 780 N.Y.S.2d 253, 254 (4th Dep't 2004)).

342. *Id*. at 1714, 926 N.Y.S.2d at 244 (Scudder, P.J., and Smith, J., dissenting).

343. *See* N.Y. C.P.L.R. 3103(a) (McKinney 2005).

344. 85 A.D.3d 1096, 1098, 925 N.Y.S.2d 900, 901 (2d Dep't 2011).

345. *Id*. at 1097, 925 N.Y.S.2d at 900.

346. *Id*.

347. *Id*., 925 N.Y.S.2d at 901.

348. *Id*.

defendant moved for a protective order and sanctions.[349] The trial court denied the defendant's motion as to the sanctions.[350]

On appeal, the Second Department reversed the trial court, stating that the conduct of the plaintiff's counsel "was frivolous within the meaning of 22 NYCRR 130-1.1(c), as it was completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law."[351] Because "it can be inferred from the record that the challenged conduct was designed primarily to harass and maliciously injure the defendant," the court remitted the matter to the trial court for a hearing on the amount of an appropriate sanction.[352] Further, all information produced by the hospital in response to the subpoena was suppressed.[353]

3. Deposition Conduct

Depositions are governed by CPLR 3113, which provides where depositions shall be held, how witnesses are to be examined, and objections.[354]

In *Thompson v. Mather*, the plaintiff filed a medical malpractice action against various medical providers.[355] In advance of trial, a video deposition was held for a non-party, treating physician.[356] The non-party physician appeared with an attorney.[357] During the deposition, the attorney made objections to the plaintiff's questions.[358] Plaintiff's counsel objected to the participation by the non-party's attorney, and the deposition was suspended.[359] On motion, the trial court ruled that the non-party attorney would not be able to speak at the deposition if the plaintiff provided the non-party physician with a release.[360] The Fourth Department held that the trial court erred.[361] Specifically, "[w]e agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition."[362]

349. *See Duval*, 85 A.D.3d at 1096, 1097, 925 N.Y.S.2d at 900, 901.
350. *Id.* at 1096, 925 N.Y.S.2d at 900.
351. *Id*. at 1096-97, 925 N.Y.S.2d at 900.
352. *Id*. at 1097, 925 N.Y.S.2d at 901.
353. *Id.* at 1098, 952 N.Y.S.2d at 901.
354. N.Y. C.P.L.R. 3113 (McKinney 2005).
355. 70 A.D.3d 1436, 1437, 894 N.Y.S.2d 671, 672 (4th Dep't 2010).
356. *Id*.
357. *Id*.
358. *Id*.
359. *Id*.
360. *Thompson*, 70 A.D.3d at 1437-38, 894 N.Y.S.2d at 672.
361. *See id.* at 1438, 894 N.Y.S.2d at 673.
362. *Id*., 894 N.Y.S.2d at 672.

The appellate division also noted that:

> the practice of conditioning the videotaping of depositions of nonparty witnesses to be presented at trial upon the provision of general releases is repugnant to the fundamental obligation of every citizen to participate in our civil trial courts and to provide truthful trial testimony when called to the witness stand.[363]

4. Deposition Transcripts

CPLR 3116 provides that a deposition transcript shall be sent to a witness for signature.[364] If the witness fails to sign the deposition within sixty days, it may be used as though signed.[365] Once signed, a deposition transcript may be used for almost any purpose.[366]

In *Ramirez v. Willow Ridge Country Club, Inc.*, the First Department held that an unsigned deposition transcript could not be used for cross-examination at trial.[367] The plaintiff in *Ramirez* was injured on a jobsite.[368] During trial, the court prevented the plaintiff's attorney from using an unsigned deposition transcript during cross-examination.[369] Plaintiff appealed.[370] The appellate division affirmed, stating that "[a] failure to comply with *3116(a)* results in a party being unable to use the transcript pursuant to *CPLR 3117*."[371] The court's decision was underscored by plaintiff's failure "to establish that the transcript was sent to [the witness] and that [the witness] failed to return it within [sixty] days."[372] The court also noted that the trial court "need not adjourn a trial during cross-examination of a witness so that the party cross-examining the witness may comply [with the CPLR]."[373]

5. Costs

Under CPLR 3121, a party is entitled to a physical or mental examination of the plaintiff.[374] A common misnomer for this defense-oriented medical examination is the "independent medical

363. *Id*., 894 N.Y.S.2d at 673.
364. N.Y. C.P.L.R. 3116(a) (McKinney 2005).
365. *Id.*
366. *See id.* § 3117.
367. 84 A.D.3d 452, 453, 922 N.Y.S.2d 343, 345 (1st Dep't 2011).
368. *Id*. at 452, 922 N.Y.S.2d at 344.
369. *Id*. at 453, 922 N.Y.S.2d at 345.
370. *Id*. at 452, 922 N.Y.S.2d 343.
371. *Id*. at 453, 922 N.Y.S.2d at 345.
372. *Ramirez*, 84 A.D.3d at 453, 922 N.Y.S.2d at 345.
373. *Id*. at 454, 922 N.Y.S.2d at 345.
374. N.Y. C.P.L.R. 3121(a) (McKinney 2005).

examination," or "IME."

In *Larsen v. Rotolo*, the defense requested an IME.[375] The plaintiff's attorney decided to attend the IME with the plaintiff.[376] He then requested that the defense attorney reimburse him for travel costs in the amount of $450.00.[377] The trial court ordered the defendant to pay the expenses.[378] The Fourth Department reversed, stating that "[i]n New York the general rule is that each litigant is required to absorb the cost of his [or her] own attorney's fees . . . in the absence of a contractual or statutory liability."[379]

6. Penalties

CPLR 3126 provides that a party may be penalized for failing to disclose evidence that a court believes "ought to have been disclosed."[380] Penalties include issue preclusion, an adverse inference charge, and striking a pleading.[381]

Spoliation of evidence was at issue in *Gogos v. Modell's Sporting Goods, Inc*.[382] In *Gogos*, the plaintiffs obtained a court order directing the defendants to produce surveillance tapes.[383] Subsequently, one of the defendant's employees testified that the tapes were in a safe place.[384] A second employee then testified that there were no tapes.[385] No tapes were provided to the plaintiffs, who moved to strike the answer for spoliation of evidence.[386] The trial court granted the plaintiffs' motion to the extent of directing that an adverse inference charge be given to the jury.[387] The First Department affirmed, stating that the sanction was "appropriately tailored to achieve a fair result."[388] The appellate division noted that the charge was appropriate because it was "permissive," meaning that it was for the jury to "determine whether there was a reasonable explanation for the destruction of evidence and, if not, the inference [was] to be drawn from its

375. 78 A.D.3d 1683, 1683, 910 N.Y.S.2d 756, 756 (4th Dep't 2010).
376. *See id.*
377. *Id*.
378. *Id*.
379. *Id*. at 1683-84, 910 N.Y.S.2d at 756 (internal quotations omitted).
380. *See* N.Y. C.P.L.R. 3126 (McKinney 2005).
381. *Id.*
382. 87 A.D.3d 248, 249-50, 926 N.Y.S.2d 53, 54 (1st Dep't 2011).
383. *Id*. at 250, 926 N.Y.S.2d at 54.
384. *Id*.
385. *Id*.
386. *See id*.
387. *Gogos*, 87 A.D.3d at 250, 926 N.Y.S.2d at 54-55.
388. *Id*. at 255, 926 N.Y.S.2d at 58 (internal quotations omitted).

destruction."[389]

N. Article 32: Accelerated Judgment

1. Motions for Summary Judgment

CPLR 3212 provides a mechanism for a court to dispose of a claim, defense, or entire action if there are no genuine issues of fact for jury resolution.[390] Generally, a motion for summary judgment shall be supported by an affidavit, a copy of the pleadings and other available proof, such as documentary evidence.[391]

A document formed the basis of a motion for summary judgment in *Koufakis v. Siglag*.[392] In *Koufakis*, two medical malpractice actions were filed for a birth injury to the infant-plaintiff.[393] The first action was against Alan Adler, M.D. and the second action was against Howard Siglag, M.D.[394] After both actions were commenced, the claim against Dr. Adler was settled for the sum of $400,000.[395] The plaintiff executed a release, which provided that the $400,000 constituted "complete payment for all damages and injuries" and was intended to release "whether presently known or unknown, all other tortfeasors liable or claims to be liable jointly with [Dr. Adler]; and whether presently known or unknown all other potential or possible tortfeasors liable or claimed to be liable jointly with [Dr. Adler]."[396] Dr. Siglag moved for summary judgment after the settlement with Dr. Adler was approved by the court, arguing that the release ran to him.[397] The trial court agreed and the appellate division affirmed, stating that "defendants established their prima facie entitlement to judgment as a matter of law by showing that the release expressly provides for the release of all joint tortfeasors, and that Dr. Siglag falls into that category."[398] Parenthetically, the court also noted that "[t]he plaintiffs' misunderstanding of the terms of the release is an insufficient basis to avoid the consequences of the release," especially because plaintiffs'

389. *Id*. at 254-55, 926 N.Y.S.2d at 58.
390. *See* N.Y. C.P.L.R. 3212 (McKinney 2005).
391. *Id.* § 3212(b).
392. *See* 85 A.D.3d 872, 872, 925 N.Y.S.2d 204, 205 (2d Dep't 2011).
393. *Id*.
394. *Id*.
395. *Id*. at 873, 925 N.Y.S.2d at 205.
396. *Id*.
397. *See Koufakis*, 85 A.D.3d at 872-73, 925 N.Y.S.2d at 205.
398. *Id*. at 874, 925 N.Y.S.2d at 206.

counsel "failed to take any steps to limit the scope of the release."[399]

2. Default Judgment

Where a defendant fails to appear, or where a court orders dismissal for some other neglect to proceed, the plaintiff may seek a default judgment.[400] Generally, a motion for a default judgment shall be on appropriate notice to the defendant.[401]

As a reminder, a motion for a default judgment must be supported with appropriate papers. Where moving papers are deficient, the motion is appropriately denied.[402]

O. Article 40: Trial

1. Controlling the Courtroom

Trial courts have authority to control conduct in the courtroom, as well as the manner in which trials unfold.[403]

In *Mancuso v. Koch*, the conduct of a trial judge was one subject of appeal.[404] *Mancuso* was a medical malpractice action.[405] During trial, the judge questioned the defendant's expert about risks associated with the plaintiff's surgery.[406] The jury returned a defense verdict.[407] The plaintiff appealed, arguing that the judge's conduct showed bias toward the defense.[408] The Fourth Department disagreed and affirmed dismissal of the complaint, stating that "[a]lthough we note that the court could have crafted the wording of its question in a more neutral manner, it cannot be said that the court overstepped its 'broad authority to elicit and clarify testimony . . . when necessary."[409]

In *Barnes v. McKown*, the trial court exercised its authority to control proof by disallowing a mother, who resided in Florida, from

399. *Id*. at 873, 925 N.Y.S.2d at 206.

400. *See* N.Y. C.P.L.R. 3215(a) (McKinney 2005).

401. *Id*.

402. *See* Crane v. 206 W. 41st St. Hotel Assocs., L.P., 87 A.D.3d 174, 180, 926 N.Y.S.2d 438, 443 (1st Dep't 2011) ("Even when the motion [for default judgment] is unopposed, the motion court must satisfy itself that the movant has satisfied the requirements of CPLR 3215. Here, the moving papers were defective.").

403. *See* N.Y. C.P.L.R. 4011-17.

404. *See* 74 A.D.3d 1736, 904 N.Y.S.2d 832 (4th Dep't 2010).

405. *Id*. at 1737, 904 N.Y.S.2d at 834.

406. *Id*. at 1738, 904 N.Y.S.2d at 835.

407. *See id*. at 1737, 904 N.Y.S.2d at 834.

408. *Id*. at 1738, 904 N.Y.S.2d at 835.

409. *Mancuso*, 74 A.D.3d at 1738, 904 N.Y.S.2d at 835 (citation omitted).

testifying via electronic means in a custody proceeding in New York.[410] The mother appealed and the Fourth Department affirmed, stating that the court was not obligated to permit video testimony as Domestic Relations Law section 75-j(2) provides only that a court "*may*" permit an "individual residing in another state to be deposed or to testify by . . . electronic means before a designated court or at another location in that state."[411]

P. Article 44: Trial Motions

1. Judgment During Trial

"Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions."[412]

A formal judicial admission was at issue in *Zegarowicz v. Ripatti*.[413] In *Zegarowicz*, the plaintiff filed suit for personal injuries.[414] In his complaint, the plaintiff alleged that HVT was the owner of the vehicle operated by Ripatti and, as such, HVT was responsible for the acts of Ripatti.[415] In its answer, HVT denied that it was the owner, but admitted (1) that it was listed as the owner on the certificate of title; and (2) that it leased the vehicle to Ripatti.[416] After the plaintiff rested at trial, the defendant made a CPLR section 4401 motion for judgment as a matter of law.[417] Specifically, the defendant argued that the plaintiff did not establish ownership of the vehicle.[418] The trial court granted the motion.[419] On appeal, the Second Department affirmed, and modified the portion of the trial court order that dismissed the complaint.[420] The appellate division noted that "[f]acts admitted by a party's pleadings constitute formal judicial admissions" and, as HVT made a "formal judicial admission that it was listed as owner on the certificate of title,"

410. 74 A.D.3d 1914, 1914, 903 N.Y.S.2d 843, 844 (4th Dep't 2010).
411. *Id*. (quoting N.Y. DOM. REL. LAW § 75-j(2) (McKinney 2010)).
412. N.Y. C.P.L.R. 4401 (McKinney 2007).
413. 77 A.D.3d 650, 653, 911 N.Y.S.2d 69, 72 (2d Dep't 2010).
414. *Id*. at 650, 911 N.Y.S.2d at 70.
415. *Id*. at 652, 911 N.Y.S.2d at 72.
416. *Id*. at 652-53, 911 N.Y.S.2d at 72.
417. *Id*. at 651, 911 N.Y.S.2d at 70-71.
418. *See Zegarowicz*, 77 A.D.3d at 653, 911 N.Y.S.2d at 72.
419. *Id*.
420. *Id*. at 651, 911 N.Y.S.2d at 71.

there was "prima facie evidence of ownership."[421] Because of the admission,[422] a new trial on the issue of liability was warranted.[423]

2. Post-Trial Motions

CPLR 4404 governs post-trial motions to set aside a verdict as being against the weight of the evidence, or in the interests of justice.[424]

Verbiage counts, says the Fourth Department in *Holstein v. Community General Hospital of Greater Syracuse*.[425] In *Holstein*, the plaintiff commenced a medical malpractice action for injuries caused by the acts of the defendant's employee.[426] After the jury returned a verdict for the plaintiff, the defense's counsel orally requested that it be set aside.[427] Apparently, the defense's counsel also requested that the jury be polled.[428] In response, the trial judge stated "[j]ury be polled, they have signed. They have each individually signed."[429] "Defense counsel then stated '[o]kay. All right. Thank you.'"[430] The trial court went on to deny the CPLR 4404(a) motion and the defendant appealed.[431]

On appeal, the Fourth Department summarily affirmed the trial court's denial of the post-trial motion.[432] More interesting, however, was the appellate division's analysis of the jury polling issue.[433] The court stated that the "defendant waived his contention that a new trial is warranted based upon the failure of the court to poll the jury."[434] Citing *Duffy v. Vogel*[435] and *Farhart v. Matuljak*,[436] the court added that the

421. *Id*. at 653, 911 N.Y.S.2d at 72.

422. An oral statement by plaintiff's counsel was at issue in *Caruso v. Northeast Emergency Medical Associates., P.C.*, 85 A.D.3d 1502, 1506, 926 N.Y.S.2d 702, 707 n.5 (3d Dep't 2011) ("We are also unpersuaded that a verdict should have been directed in defendant's favor based upon certain remarks made by plaintiff's counsel in his opening statement, that defendant labels an admission. The remarks could be interpreted in different ways and, even viewing them in defendant's favor, they are not so self-defeating as to be characterized as an admission warranting a directed verdict.").

423. *Zegarowicz*, 77 A.D.3d at 653, 911 N.Y.S.2d at 72.

424. N.Y. C.P.L.R. 4404(a) (McKinney 2007).

425. 86 A.D.3d 911, 926 N.Y.S.2d 785 (4th Dep't 2011).

426. *Id*. at 912, 926 N.Y.S.2d at 786.

427. *Id*.

428. *Id*.

429. *Id*.

430. *Holstein*, 86 A.D.3d at 912, 926 N.Y.S.2d at 786.

431. *Id*.

432. *Id*.

433. *See id.* at 912-13, 926 N.Y.S.2d at 786-87.

434. *Id.* at 912, 926 N.Y.S.2d at 786.

435. 12 N.Y.3d 169, 172, 905 N.E.2d 1175, 1175-76, 878 N.Y.S.2d 246, 246-47

"defense counsel was afforded an opportunity to clarify her request prior to the jury being discharged"[437] and, by abandoning the subject, the "court might well have assumed that [defense] counsel acquiesced that the polling was unnecessary."[438] Further, "[i]nasmuch as defense counsel failed to indicate 'that [she] nevertheless . . . wished [to have] the jury polled . . . or [to] ask . . . for a definite ruling,' we conclude that defense counsel failed to make her 'position sufficiently clear to the court to make the question available upon appeal.'"[439]

Q. Article 45: Evidence

1. Collateral Source Payments

CPLR 4545 provides that a claim for certain categories of past and future damages, including medical care and economic losses, may be reduced by the court, if it "finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source."[440]

The import of collateral sources was addressed in *Foote v. Albany Medical Center*.[441] The plaintiffs in *Foote* filed suit for a wrongful birth, seeking damages for extraordinary expenses associated with caring for their child.[442] The defendants moved to dismiss the claim for extraordinary expenses because the plaintiffs would be paid by governmental programs.[443] The plaintiffs proffered expert testimony that the governmental programs were not comprehensive and that the plaintiffs would incur out-of-pocket expenses.[444] The trial court granted the defendants' motion.[445]

On appeal, the Third Department reversed, stating that "a question of fact exists whether there is a difference between the resources provided by government programs and the extraordinary medical and other treatment or services necessary for the child during minority."[446]

(2009).

436. 283 A.D. 977, 978, 130 N.Y.S.2d 611, 613 (3d Dep't 1954).

437. *Holstein*, 86 A.D.3d at 912, 926 N.Y.S.2d at 787.

438. *Id*.

439. *Id*. at 912-13, 926 N.Y.S.2d at 787 (quoting *Farhart*, 283 A.D. at 978, 130 N.Y.S.2d at 613).

440. N.Y. C.P.L.R. 4545 (McKinney 2007).

441. *See generally* 16 N.Y.3d 211, 944 N.E.2d 1111, 919 N.Y.S.2d 472 (2011).

442. *Id*. at 214, 944 N.E.2d at 1112, 919 N.Y.S.2d at 473.

443. *Id*.

444. *Id*.

445. *Id*.

446. *Foote*, 16 N.Y.3d at 214-15, 944 N.E.2d at 1112-13, 919 N.Y.S.2d at 473-74.

The Court of Appeals affirmed the appellate division, stating that "'the availability of another source of compensation does not obviate' plaintiffs' injury but, instead, can only offset any damages awarded after trial."[447]

R. Article 50: Judgments

1. Prejudgment Interest

CPLR 5001 provides that interest shall be recovered upon a sum awarded in an action for breach of contract, or sum awarded in an action over title to property.[448] Generally, the interest begins running from the date the damage was incurred.[449]

The subject of prejudgment interest was discussed in *NML Capital v. Republic of Argentina*.[450] In *NML*, the Second Circuit Court of Appeals asked the New York State Court of Appeals to determine whether Argentina's "obligation to make biannual interest-only payments to bondholders continued after maturity or acceleration of the indebtedness and, if so, whether the bondholders were entitled to CPLR 5001 prejudgment interest on payments that were not made as a consequence of the nation's default."[451] The Court of Appeals held that prejudgment interest was due.[452]

"In 1998, Argentina issued a series of floating rate accrual notes that were scheduled to mature in 2005."[453] Interest was payable to holders twice a year.[454] Argentina paid the interest through October of 2001, when it experienced financial collapse.[455] The plaintiff-investors filed suit, and filed a motion for summary judgment, which was granted.[456] Argentina disputed the plaintiffs' entitlement to nine percent prejudgment interest.[457] The Court of Appeals held that interest payments were due after the bonds matured, and that the plaintiffs were entitled to collect "interest on interest," that is, the investors were entitled to collect prejudgment interest on the unpaid interest payments

447. *Id*. at 216, 944 N.E.2d at 1113, 919 N.Y.S.2d at 474 (internal quotations omitted).
448. *See* N.Y. C.P.L.R. 5001(a) (McKinney 2007).
449. *Id*. § 5001(b).
450. *See* 17 N.Y.3d 250, 952 N.E.2d 482, 928 N.Y.S.2d 666 (2011).
451. *Id.* at 254, 952 N.E.2d at 486, 928 N.Y.S.2d at 670.
452. *Id.* at 267, 952 N.E.2d at 495, 928 N.Y.S.2d at 679.
453. *Id.* at 254, 952 N.E.2d at 486, 928 N.Y.S.2d at 670.
454. *Id.*
455. *NML Capital*, 17 N.Y.S.2d at 255, 952 N.E.2d at 486, 928 N.Y.S.2d at 670.
456. *Id.*, 952 N.E.2d at 487, 928 N.Y.S.2d at 671.
457. *Id.* at 256, 952 N.E.2d at 487, 928 N.Y.S.2d at 671.

due under the notes, despite NML's acceleration of the debt in February of 2005.[458]

Prejudgment interest was also addressed in *Grobman v. Chernoff*.[459] The parties in *Grobman* agreed to arbitrate the issue of damages in a personal injury action.[460] The parties agreed to high/low parameters of $150,000 and $10,000.[461] The arbitrator awarded $125,000.[462] His decision was silent on interest.[463] The defendant tendered a check for $125,000, which the plaintiff did not cash.[464] The parties moved to confirm the arbitration award.[465] The plaintiff sought interest on the arbitration award from the date of injury through the date of the award or, in the alternative, from the date of the arbitration award.[466] The trial court confirmed the award, and directed that the plaintiff receive interest "at the judgment rate from the date of the award with credit to be given to defendants for the payment that was tendered, computed from the date of receipt of the [$125,000] check."[467] The Second Department, citing *Love v. State*, affirmed.[468]

The Court of Appeals granted the defendants' motion for leave to appeal.[469] It rejected the defendants' argument that the parties' arbitration agreement empowered the arbitrator to decide the issue of interest, stating "[w]hile the parties in this case were free to submit the issue of prejudgment interest to the arbitrator, we do not read their arbitration agreement as having done this."[470] In addition, "as plaintiff observes, there was 'no necessity to negotiate whether plaintiff was entitled to interest' as a part of the arbitration agreement because 'she already possessed that right as a matter of law as of the date of her liability verdict.'"[471]

458. *Id.* at 266-67, 952 N.E.2d at 494-95, 928 N.Y.S.2d at 678-79.

459. *See generally* 15 N.Y.3d 525, 940 N.E.2d 557, 914 N.Y.S.2d 731 (2010).

460. *See id.* at 528, 940 N.E.2d at 558, 914 N.Y.S.2d at 732.

461. *Id*.

462. *Id*.

463. *Id*.

464. *Grobman*, 15 N.Y.3d at 528, 940 N.E.2d at 558, 914 N.Y.S.2d at 732.

465. *Id*.

466. *See id*.

467. *Id*.

468. *Id*. at 529, 940 N.E.2d at 559, 914 N.Y.S.2d at 733 (citing 78 N.Y.2d at 545, 583 N.E.2d at 1299, 577 N.Y.S.2d at 362 (1991)).

469. *Grobman*, 15 N.Y.3d at 529, 940 N.E.2d at 559, 914 N.Y.S.2d at 733.

470. *Id*.

471. *Id*.

S. Article 80: Fees

1. Persons Subpoenaed

CPLR 8001 provides that a person subpoenaed for trial shall receive a whopping fifteen dollars as an "attendance fee," together with $0.23 per mile as travel expenses from the location where he or she was served to court, and back.[472] A witness who is not a party shall be paid an extra three dollars.[473] The party who subpoenaed the witness pays the charges in advance.[474]

Payment to a witness was at issue in *Caldwell v. Cabelvision*.[475] In *Caldwell*, a defendant voluntarily paid an emergency room physician $10,000 to testify at trial as a fact witness.[476] The plaintiff attempted to preclude testimony from the physician because the payment to the doctor did not constitute reasonable compensation for his time.[477] The defendant responded that the payment was commensurate with the doctor's charges for testimony as an expert.[478] The trial court permitted the doctor to testify.[479] The appellate division affirmed, stating that "the exclusion of Dr. Krosser's testimony was not the required remedy in this case."[480] Rather:

> the appropriate remedy in a case such as this one, where one might reasonably infer that a fact witness has been paid a fee for testifying, is to permit opposing counsel to fully explore the matter of compensation on cross-examination and summation, and to leave it for a properly instructed jury to consider whether the payment made to the witness was, in fact, disproportionate to the reasonable value of the witness's lost time and, if so, what effect, if any, that payment had on the witness's credibility.[481]

T. Article 83: Costs

1. Frivolous Claims

CPLR 8303-a, authorizes a court to award costs and reasonable

472. *See* N.Y. C.P.L.R. 8001(a) (McKinney 1981 & Supp. 2012).
473. *Id*. § 8001(b).
474. *Id*.
475. 86 A.D.3d 46, 925 N.Y.S.2d 103 (2d Dep't 2011).
476. *Id*. at 49, 925 N.Y.S.2d at 105.
477. *Id*., 925 N.Y.S.2d at 105-06.
478. *Id*., 925 N.Y.S.2d at 106.
479. *Id*.
480. *Caldwell*, 86 A.D.3d at 54, 925 N.Y.S.2d at 109.
481. *Id*. at 55, 925 N.Y.S.2d at 110.

attorney's fees, not exceeding $10,000, should it conclude that a claim or defense is frivolous.[482] A claim or defense is frivolous if it is used or continued "solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another."[483]

The merit of a counterclaim was at issue in *Providence Washington Insurance Co. v. Munoz*.[484] *Providence* was a subrogation case arising out of a car accident that caused property damage.[485] After paying for damage to its insured's car, Providence filed suit against the driver of the other car.[486] In response, the driver of the other car asserted a counterclaim for damage to their car due to the acts of Providence's insured.[487] Motion practice followed.[488] The trial court denied Providence's motion to dismiss the counterclaim and granted a motion against it for costs and sanctions.[489] On appeal, the Second Department reversed, stating that "[t]he defendants failed to demonstrate that Providence's conduct was frivolous within the meaning of 22 NYCRR 130-1.1(c), or that its actions were commenced or continued in bad faith."[490] Further, "the [s]upreme [c]ourt did not follow the proper procedure for imposing costs and an attorney's fee, since it failed to specify in a written decision the conduct upon which the award was based and the reasons why it found the conduct to be frivolous."[491]

III. COURT RULES

Many New York State Office of Court Administration rules ("OCA Rules") were amended this *Survey* year. The most significant changes were to OCA Rules section 118, 150.5, 202.12 and 202.56.[492]

A. OCA Rule 118

On April 1, 2011, section 118.1(d) of the OCA Rules was

482. N.Y. C.P.L.R. 8303-a(a) (McKinney Supp. 2012).
483. *Id.* § 8303-a(c)(i).
484. 85 A.D.3d 1142, 926 N.Y.S.2d 630 (2d Dep't 2011).
485. *Id*. at 1142, 926 N.Y.S.2d at 631.
486. *Id*. at 1143, 926 N.Y.S.2d at 631.
487. *Id*.
488. *Id*., 926 N.Y.S.2d at 632.
489. *Providence Wash. Ins. Co.*, 85 A.D.3d at 1143, 1144, 926 N.Y.S.2d at 632.
490. *Id*. at 1144, 926 N.Y.S.2d at 632.
491. *Id*.
492. *See generally* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 118, 150.5, 202.12, 202.56 (2011).

amended.[493] The amended rule provides that the attorney registration statement can now be filed "by means of an online program implemented by the Chief Administrator."[494]

On May 18, 2011, sections 118.3 and 118.4 were added to the OCA Rules.[495] These sections provide that in-house counsel must file an attorney registration statement[496] that shall be made available to the public.[497]

B. OCA Rule 150.5

On March 24, 2010, OCA Rule section 150.5(f) was added.[498] It provides that "the qualifications commission of the judicial districts of the Appellate Division, Fourth Department, may find a candidate 'highly qualified' for election to the judicial office," provided the candidate is notified and the results are published in a specified manner.[499]

C. OCA Rule 202.12(b)

On August 2, 2010, OCA Rule section 202.12(b) was amended to require that, in a case likely to involve electronic discovery, counsel appearing for a party at a conference "must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery; counsel may bring a client representative or outside expert to assist in such e-discovery discussions."[500]

D. OCA Rule 202.56

OCA Rule section 202.56 was added on May 31, 2011, effective June 29, 2011.[501] The new rule, which pertains only to medical, dental, and podiatric malpractice actions, provides that courts "shall hold a settlement conference" within forty-five days after the filing of the trial note of issue.[502] Attorneys present at the conference must be "fully familiar with the action and authorized to dispose of the case, or [be]

493. *See id.* § 118.
494. *Id.* § 118.1(d).
495. *See id.* §§ 118.3, 118.4.
496. *Id.* § 118.3(a).
497. 22 N.Y.C.R.R. 118.4(a).
498. *Id.* § 150.5(f).
499. *Id.* § 150.5(f).
500. *Id.* § 202.12(b).
501. *See id.* § 202.56.
502. 22 N.Y.C.R.R. 202.56(c)(1).

accompanied by a person empowered to act on behalf of the party represented."[503] Further, the court may order the appearance of representatives from insurance companies.[504]

CONCLUSION

Civil practice is dynamic. Practitioners and academicians alike should use their best efforts to stay current because a failure to follow the rules may bring about an adverse result. Certainly, it is far less traumatic to read about someone else's case.

503. *Id.* § 202.56(c)(2).
504. *Id*. § 202.56(c)(3).