CIVIL PRACTICE

Michael A. Bottar[†] & Kimberly Wolf Price[‡]

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† J.D., *summa cum laude*, Syracuse University College of Law (Order of the Coif, Order of Barristers); B.A., Colgate University; Attorney, Bottar Leone, PLLC, Syracuse, New York; Adjunct Professor, Syracuse University College of Law; Board of Directors, Syracuse University Law Alumni Association and New York State Academy of Trial Lawyers.

‡ J.D., *magna cum laude,* Syracuse University College of Law (Order of the Coif); B.A., Colgate University; Assistant Dean, Office of Professional and Career Development, Syracuse University College of Law; Adjunct Professor, Syracuse University College of Law.

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INTRODUCTION

This *Survey* year includes several key legislative enactments and case developments that impact virtually all practitioners.[1] These developments have been "surveyed" in this Article, meaning that the authors have made an effort to alert practitioners and academicians about noteworthy changes in New York State law and to provide basic detail about the change in the context of the Civil Practice Law and Rules (CPLR). Whether by accident or design, we did not endeavor to discuss every Court of Appeals or appellate division decision.

I. LEGISLATIVE ENACTMENTS

A. *Interstate Depositions and Discovery*

Recognizing the complexities of out-of-state depositions and discovery, chapter 29 of the Laws of 2010, effective January 1, 2011, created the "Uniform Interstate Depositions and Discovery Act."[2]

The new amendment seeks to assist out-of-state parties in acquiring discovery materials from non-parties to the suit within New York State.[3] The Sponsor's Memorandum states that the legislation was passed in an effort to create a more "efficient and inexpensive

1. July 1, 2009 through June 30, 2010.
2. Act of March 30, 2010, ch. 29, 2010 McKinney's Sess. Laws of N.Y. 75 (codified at N.Y. C.P.L.R. 3119 (McKinney Supp. 2011)).
3. N.Y. CPLR 3119(b)(2).

procedure for litigants to depose out-of-state individuals and for the production of discoverable materials that may be located" in New York when it is not the trial state.[4] The source for this initiative was the Uniform Interstate Depositions and Discovery Act (the "Act").[5] The Act was originally promulgated by the National Conference of Commissioners of Uniform State Laws in 2007 to simplify and standardize the current patchwork of procedures across the various states for deposing witnesses for purposes of out-of-state litigation.[6]

In this vein, new CPLR 3119 allows out-of-state parties to submit an out-of-state subpoena from a court of record to the county clerk in any New York State county where individuals or materials for discovery are sought.[7] Once the out-of-state subpoena is received, the clerk will issue a subpoena for service to the individual or entity which is the subject of the original subpoena.[8] CPLR 3119(b)(1) makes it clear that "issuance of a subpoena under this section does not constitute an appearance" in a New York State court by the requesting party.[9]

Any subpoenas issued by a county clerk under CPLR 3119 must include the "terms used in the out-of-state subpoena" and must also include or "be accompanied by the names, addresses and telephone numbers of all counsel of record in the proceeding" as well as "of any party not represented by counsel."[10]

B. Electronic Filing

Though the issue of electronic filing was discussed in last year's *Survey*,[11] discussion of this issue is included again as a reminder of the April 26, 2010 effective date. In addition, this ever expanding and important area of procedure requires that practitioners remain diligent in reviewing the new rules.[12]

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4. *Memorandum of Senator Schneiderman*, N.Y. STATE LEGISLATURE (2010), *available at* http://public.leginfo.state.ny.us/menugetf.cgi?QUERYDATA=S4256&SESSYR=2010 (select "Sponsor's Memo").

5. *Id.*; *see generally* UNIF. INTERSTATE DEPOSITIONS AND DISCOVERY ACT §§ 1-9 (2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/iddda/2007act_final.htm.

6. *Memorandum of Senator Schneiderman*, *supra* note 4.

7. N.Y. CPLR 3119(b)(1).

8. *Id.* 3119(b)(2).

9. *Id.* 3119(b)(1).

10. *Id.* 3119(b)(3)(i)-(ii).

11. *See* Paul H. Aloe, *Civil Practice, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 717, 724-25 (2010).

12. *See* David D. Siegel, *New Laws: Program for Electronic Filing Expanded; OCA Empowered by Rule to Dispense with Consent by Parties*, 213 SIEGEL'S PRAC. REV. 1

As has been discussed in *Surveys* past, chapter 367 of the Laws of 1999 amended the CPLR to enable a pilot program permitting the use of facsimile transmission or electronic means to commence an action or special proceeding.[13]

Chapter 416 of the Laws of 2009 ended the pilot program and expanded the scope of electronic filing.[14] At the same time, chapter 416 empowered the Office of Court Administration (OCA) to forego consent of parties in three counties, in specific types of cases, for a limited time period, and with certain qualifications.[15]

On April 26, 2010, the amendment was partially implemented in New York and Westchester Counties.[16] That means that in those counties, consent for electronic filing is no longer required.[17] In addition, it is now mandated that electronic filing be the standard practice for commercial cases in New York County and tort matters in Westchester County.[18] If, however, an office lacks the computer equipment and/or savvy to file electronically, provisions are in place for lawyers to opt out of electronic filing.[19]

C. Mortgage Foreclosure Conferences

Chapter 507 of the Laws of 2009 focused on a number of issues stemming from the subprime mortgage crisis, including notice of foreclosure to tenants, which is beyond the scope of this portion of the *Survey*.[20] The new law however, which applies to all actions commenced on or after February 13, 2010, does amend CPLR 3408, making changes to mandatory settlement conferences in residential foreclosure actions.[21]

New CPLR 3408 requires that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution,

(2009).

13. Act of July 27, 1999, ch. 367, 1999 McKinney's Sess. Laws of N.Y. 534 (codified at N.Y. C.P.L.R. 2103 (McKinney Supp. 2011)); Aloe, *supra* note 11, at 724-25.

14. Act of August 31, 2009, ch. 416, 2009 McKinney's Sess. Laws of N.Y. 1139-40 (codified at N.Y. CPLR 2103(b)).

15. *Id.* Information and updates can be found at https://iapps.courts.state.ny.us/nyscef. As of the date of this *Survey*, a rule identifying the third county has yet to be promulgated by the OCA.

16. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.5bb(a)(1)(i)-(ii) (2010).

17. *Id.* § 202.5bb(a)(1).

18. *Id.*

19. *Id.* § 202.5bb(e)(1)-(2).

20. Act of December 15, 2009, ch. 507, 2009 McKinney's Sess. Laws of N.Y. 1384, 1392 (codified at N.Y. C.P.L.R. 3408 (McKinney Supp. 2011)).

21. *Id.* at 1392 (codified at N.Y. CPLR 3408); N.Y. CPLR 3408 (a)-(h).

including a loan modification, if possible."[22] New CPLR 3408 subsection (g) provides that "[t]he plaintiff must file a notice of discontinuance and vacatur of the lis pendens within 150 days after any settlement agreement or loan modification is fully executed."[23]

New CPLR 3408 also includes an amended section (a) and four additional sections, including a mandate that a trial court hold a mandatory settlement conference "[i]n any residential foreclosure action involving a home loan . . . in which the defendant is a resident of the property subject to foreclosure."[24] The conference must be held within sixty days of when service is filed with the county clerk.[25]

Part of the purpose of the new act is to expand the consumer protection laws to include a larger group of distressed homeowners.[26] The amendments to CPLR 3408 were in part made to:

> (1) expand the scope of the mandatory settlement conference in foreclosure proceedings to include cases pertaining to all home loans; (2) impose upon both plaintiff and defendant a duty to negotiate in good faith to reach a mutually agreeable resolution if possible; (3) require the court to compile and report on certain foreclosure information; (4) require the parties to bring certain key documents to the mandatory settlement conference; (5) require the plaintiff to file a motion of discontinuance and vacatur of the lis pendens within 150 days following the execution of any settlement agreement or loan modification; and (6) impose certain restrictions on the imposition of attorney's fees and costs for appearance or participation in the settlement conference.[27]

While straightforward, the new sections are worth a thorough read for any practitioners who find themselves involved in a residential foreclosure action.

D. Electronic Filing of Notice of Claim for Service upon New York City

Chapter 12 of the Laws of 2010 amended section 50-e of the General Municipal Law, allowing for electronic filing of a notice of claim specifically against "a city with a population of over one

22. N.Y. CPLR 3408(f).
23. *Id.* 3408(g).
24. *Id.* 3408(a).
25. *Id.*
26. *Memorandum of Senator Klein*, N.Y. STATE LEGISLATURE (2009), *available at* http://public.leginfo.state.ny.us/menugetf.cgi?QUERYDATA=S66007&SESSSYR=2009 (select "Sponsor's Memo").
27. *Id.*

million."[28] In New York State, this can only refer to the City of New York.[29] The act, now in effect, allows for service of a notice of claim, which must be served on a municipality within ninety days after the claim arises, to be served by electronic means if it is against the City of New York.[30]

Under new General Municipal Law section 50-e, if the notice of claim is served electronically, as defined in CPLR 2103(f), the filing must contain the following declaration: "I certify that all information contained in this notice is true and correct to the best of my knowledge and belief. I understand that the willful making of any false statement of material fact herein will subject me to criminal penalties and civil liabilities."[31]

Further, under the new law, notice is not complete until the City of New York provides claimant an electronic receipt "which shall transmit an electronic receipt number to the claimant."[32]

This new act, which became effective on September 19, 2010, does address how a claimant would proceed should service fail due to the computer system of either party.[33] Should a claimant attempt electronic service upon the City of New York and either the claimant's or City's computer system's fail, the claimant may submit reasonable proof to show that claimant attempted to serve the notice of claim electronically and that both: (1) the submission would have been timely had it gone through; and (2) that upon realizing the computer systems failed, claimant had "insufficient time" to effectuate service in another manner prescribed by law.[34]

E. Collateral Source and Subrogation

Chapter 494 of the Laws of 2009 amended New York's Insurance Law, General Obligations Law, and CPLR to clarify whether a health insurer (i.e., a "benefit provider") is entitled to reimbursement for medical expenses paid on behalf of an injured plaintiff, out of the

28. Act of March 23, 2010, ch. 12, 2010 McKinney's Sess. Laws of N.Y. 44 (codified at N.Y. GEN. MUN. LAW § 50-e (McKinney Supp. 2011)).

29. *See Population*, N.Y. CITY DEP'T OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/census/popcur.shtml (last visited Apr. 24, 2011).

30. N.Y. GEN. MUN. § LAW 50-e(1)(a), (e).

31. *Id.* § 50-e(3)(e).

32. *Id.*

33. Act of March 23, 2010, ch. 12, 2010 McKinney's Sess. Laws of N.Y. 44-45 (codified at N.Y. GEN. MUN. LAW § 50-e).

34. *Id.*

plaintiff's settlement with a tortfeasor.[35] Simply stated, a health insurer no longer has a right to reimbursement unless provided for by statute (e.g., Medicare, Medicaid, ERISA).

On November 12, 2009, the Act became law.[36] Changes were made to CPLR 4545, as well as N.Y. General Obligations Law section 5-335, which now reads, in relevant part, that:

> Except where there is a statutory right of reimbursement, no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party.[37]

II. CASE LAW DEVELOPMENTS

A. Jurisdiction

1. Long-Arm

New York's long-arm statute is codified at CPLR 302, which provides that a single act in New York is sufficient to invoke jurisdiction over a non-domiciliary, provided the defendant's activities in New York were purposeful and there is a substantial relationship between the defendant's activities in New York and the claim asserted against the defendant.[38]

In *Grimaldi v. Guinn*, the Second Department issued an interesting decision concerning long-arm jurisdiction.[39] The plaintiff in *Grimaldi* owned a 1969 Camaro.[40] On May 5, 2006, he purchased a "'cross-ram' manifold and carburetor assembly from Rick's First Generation Camaro, based in Athens, Georgia."[41] The sale took place over the internet.[42] The parts were shipped to the plaintiff in New York, along with a certification issued by Guinn, a New Jersey resident, that the parts were authentic.[43] Specifically, the certification stated "I certify that the information assigned to [the cross-ram] is precise and

35. Act of November 12, 2009, ch. 494, 2009 McKinney's Sess. Laws of N.Y. 1265, 1278-80 (codified at N.Y. C.P.L.R. 4545 (McKinney Supp. 2011), N.Y. GEN. OBLIG. LAW § 5-335 (McKinney Supp. 2011)).

36. *Id.*

37. N.Y. GEN. OBLIG. LAW § 5-335(a); *see also* N.Y. CPLR 4545.

38. *See* N.Y. C.P.L.R. 302(a) (McKinney 2010).

39. *See* 72 A.D.3d 37, 895 N.Y.S.2d 156 (2d Dep't 2010).

40. *Id.* at 38, 895 N.Y.S.2d at 158.

41. *Id.*

42. *Id.*

43. *Id.*

accurate . . . . This report was . . . prepared for Mark Grimaldi."[44] After receiving the parts, the plaintiff asked Guinn to install them.[45] The plaintiff and defendant communicated repeatedly via telephone, facsimile, and e-mail.[46] At some point in time after the plaintiff sent his Camaro to Guinn, with partial payment for the work to be performed, Guinn began evading his calls.[47] After paying the defendant $32,000, the Camaro was returned unfinished to the plaintiff in November of 2007.[48] The plaintiff filed a lawsuit against the defendant for breach of the agreement.[49] The plaintiff argued that the New York trial courts had jurisdiction over the defendant.[50]

The *Grimaldi* court engaged in an extensive analysis of long-arm jurisdiction.[51] It noted that "[n]ot all purposeful activity . . . constitutes a 'transaction of business' within the meaning of CPLR 302(a)(1)."[52] When analyzing the significance of the defendant's website, the court cited *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[53]:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper . . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise (of) personal jurisdiction . . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.[54]

The Second Department continued, "[i]f the foreign company maintains

44. *Grimaldi,* 72 A.D.3d at 38, 895 N.Y.S.2d at 158.

45. *Id.*

46. *Id.*

47. *Id.* at 39, 895 N.Y.S.2d at 159.

48. *Id.* at 39-40, 895 N.Y.S.2d at 159.

49. *Grimaldi*, 72 A.D.3d at 40, 895 N.Y.S.2d at 159.

50. *Id.* at 40-41, 895 N.Y.S.2d at 160.

51. *Id.* at 44-50, 895 N.Y.S.2d at 162-67.

52. *Id.* at 44, 895 N.Y.S.2d at 162 (quoting Fischbarg v. Doucet, 9 N.Y.3d 375, 380, 880 N.E.2d 22, 26, 849 N.Y.S.2d 501, 505 (2007)).

53. 952 F. Supp. 1119, 1123-28 (W.D. Pa. 1997).

54. *Grimaldi*, 72 A.D.3d at 48, 895 N.Y.S.2d at 165 (citing *Zippo Mfg. Co.*, 952 F. Supp. at 1124).

an informational Web site accessible to the general public but which cannot be used for purchasing services or goods, then most courts would find it unreasonable to assert personal jurisdiction over that company."[55] Ultimately, the court concluded that "passive Web sites, when combined with other business activity, may provide a reasonable basis for the assertion of personal jurisdiction."[56] The court also commented that it did not matter which party, plaintiff or defendant, initiated contact with other.[57] Rather, courts should focus on "the nature and quality of the contacts and the relationship established as a result, based on the totality of the circumstances."[58]

2. Diversity

During the *Survey* year, the United States Supreme Court took steps to clarify "principal place of business" for purposes of determining diversity jurisdiction under 28 U.S.C. § 1332(d)(2).[59] This is because "the phrase 'principal place of business' has proved more difficult to apply than its originators likely expected."[60]

In *Hertz Corp.*, a potential class of citizens filed a lawsuit against Hertz for alleged violations of California's wage and hour laws.[61] Hertz sought removal to the federal district court under 28 U.S.C. §§ 1332(d)(2) and 1441(a) for diversity of citizenship, claiming that it and plaintiffs were citizens of different states.[62] The district court found Hertz was a citizen of California and denied the motion.[63] The Ninth Circuit affirmed.[64] Hertz was granted certiorari on this and another question.[65]

The Supreme Court vacated and remanded, adopting the "nerve center" approach to determining a corporation's principal place of

55. *Id.* (citing Am. Homecare Fed'n, Inc. v. Paragon Sci. Corp., 27 F. Supp. 2d 109 (D. Conn. 1998); Edberg v. Neogen Corp., 17 F. Supp. 2d 104 (D. Conn. 1998); Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097 (S.D.N.Y. 1997); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997); Boris v. Bock Water Heaters, Inc., 3 Misc. 3d 835, 775 N.Y.S.2d 452 (Sup. Ct. Suffolk Cnty. 2004)).

56. *Id.* at 49, 895 N.Y.S.2d at 165 (citing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)).

57. *Id.* at 51, 895 N.Y.S.2d at 167.

58. *Id.* (citations omitted).

59. *See generally* Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010).

60. *Id.* at 1190.

61. *Id.* at 1186.

62. *Id.*

63. *Id.*

64. *Hertz Corp.,* 130 S. Ct. at 1187.

65. *Id.*

business, allowing the parties to argue diversity of citizenship based on this holding.[66] In so doing, the Court determined that the "'principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities."[67] The Court further noted that "in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination (i.e., the 'nerve center') and not simply an office where the corporation holds its board meetings."[68]

B. Attachment

CPLR 5225 enables a judgment creditor to commence a special proceeding against a person in possession of money or other personal property in which the judgment debtor has an interest, to compel the person in possession of the property to pay the judgment creditor, or deliver to the judgment creditor the property.[69]

The Court of Appeals 2009 decision in *Koehler v. Bank of Bermuda, Ltd.* has broad-reaching implications for the banking community.[70] The *Koehler* case started in 1993, when Koehler, a Pennsylvania citizen, secured a default judgment against his former business partner.[71] Apparently, when Koehler learned that Bank of Bermuda Ltd. (the "Bank"), which had a New York branch, was in possession of his former partner's stock certificates as collateral on a loan, Koehler registered his judgment and asked the United States District Court for the Southern District of New York to compel the Bank to turn over the stock.[72] Koehler argued that CPLR 5225(b) permitted him to commence a special proceeding against a person "who is in possession or custody of money or other personal property in which the judgment debtor has an interest."[73]

In October 1993, the Southern District of New York ordered the Bank to turn over the stock; however, the Bank contested jurisdiction.[74] The parties litigated the jurisdiction issue for ten years, at which point

66. *Id.* at 1195.
67. *Id.* at 1192.
68. *Id.*
69. *See* N.Y. C.P.L.R. 5225(b) (McKinney 2010).
70. *See generally* 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (2009).
71. *Id.* at 536, 911 N.E.2d at 827, 883 N.Y.S.2d at 765.
72. *Id.*
73. *Id.* at 540, 911 N.E.2d at 830, 883 N.Y.S.2d at 768.
74. *Id.* at 536, 911 N.E.2d at 827, 883 N.Y.S.2d at 765.

the Bank consented to the court's jurisdiction.[75] By then, the Bank had already transferred the stock certificates.[76] Koehler then sought permission to amend his petition to include claims of negligence, fraudulent conveyance, and negligent misrepresentation against the Bank.[77] The District Court denied Koehler's petition and Koehler appealed.[78]

The Second Circuit Court of Appeals determined that this was a novel issue for New York State.[79] As such, the Second Circuit

> certif[ied] to the New York State Court of Appeals the question whether a court sitting in New York may, pursuant to N.Y. C.P.L.R. 5525(b), order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to N.Y. C.P.L.R. Article 52, when those stock certificates are located outside of New York.[80]

The New York State Court of Appeals answered the certified questions in the affirmative, stating that "article 52 contains no express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York from another state or country," and noted that a recent amendment to CPLR 5224 provided for the production of materials pursuant to a subpoena whether the materials sought are within or without the state.[81]

The Clearing House Association, LLC, the nation's oldest banking association, argued that the Court should not interpret article 52 so as to conflict with the separate entity rule (which requires courts to view each branch of a bank as a separate entity).[82] The *Koehler* dissent, authored by Judge Robert Smith, noted that the decision may encourage forum shopping as long as "the bank has a New York branch—either one that is not separately incorporated, or a subsidiary with which the parent's

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75. *Koehler*, 12 N.Y.3d at 536, 911 N.E.2d at 827, 883 N.Y.S.2d at 765.

76. *Id.* at 536-37, 911 N.E.2d at 827, 883 N.Y.S.2d at 765.

77. Koehler v. Bank of Bermuda, Ltd., 544 F.3d 78, 82 (2d Cir. 2008).

78. *Koehler*, 12 N.Y.3d at 537, 911 N.E.2d at 827-28, 883 N.Y.S.2d at 765-66.

79. *Koehler*, 544 F.3d at 87.

80. *Id.*

81. *Koehler*, 12 N.Y.3d at 539, 911 N.E.2d at 829, 883 N.Y.S.2d at 767.

82. *See generally* Brief for Clearing House Association, LLC as Amicus Curiae Supporting Respondent at 18-21, *Koehler*, 544 F.3d 78 (No. 05-2378). The *Koehler* court did not address this point, likely because the district court had previously determined that "the separate entity rule has no role to play in this case, since the rule involves circumstances where a party attempts to obtain the assets of an entity's foreign or auxiliary branch through service of its main branch. Here, the foreign branch itself was properly served." Koehler v. Bank of Bermuda, Ltd., No. M18-302 (CSH), 2005 WL 551115, at *12 (S.D.N.Y. 2005).

relationship is close enough to subject the parent to New York jurisdiction."[83] The dissent also noted that "[t]he majority's broad view of New York's garnishment remedy may cause it to exceed the limits placed on New York's jurisdiction by the Due Process Clause of the Federal Constitution."[84]

C. Receiver

CPLR 6401 provides that a party with an interest in property that is the subject of an action may ask the court to have a receiver appointed where there is "danger that the property will be removed from the state [of New York], or lost, materially injured, or destroyed."[85]

The Second Department held in *Quick v. Quick*, that a trial court should not appoint a temporary receiver sua sponte.[86] *Quick* was an action for a judgment declaring rights under a partnership agreement and to dissolve certain corporations affiliated with the partnership.[87] The Supreme Court, Orange County, sua sponte appointed a receiver.[88] On appeal, the Second Department reversed the trial court and reminded us that "a temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party's interests in that property."[89] This is because "the record did not clearly establish the necessity to conserve the partnership's assets, or the need to protect any of the partners' interests in that property."[90]

D. Commencement

CPLR 2001 provides that a court may permit the correction of a mistake, omission, defect, or irregularity in the filing of a summons

83. *Koehler*, 12 N.Y.3d at 542, 911 N.E.2d at 831, 883 N.Y.S.2d at 769 (Smith, J., dissenting).

84. *Id.* at 544, 911 N.E.2d at 833, 883 N.Y.S.2d at 771.

85. *See* N.Y. C.P.L.R. 6401(a) (McKinney 2010).

86. 69 A.D.3d 828, 829, 893 N.Y.S.2d 583, 585 (2d Dep't 2010).

87. *Id.* at 828, 893 N.Y.S.2d at 584.

88. *Id*.

89. *Id*. at 829, 893 N.Y.S.2d at 585 (citing Vardaris Tech., Inc. v. Paleros, Inc., 49 A.D.3d 631, 632, 853 N.Y.S.2d 601, 602 (2d Dep't 2008); Singh v. Brunswick Hosp. Ctr., Inc., 2 A.D.3d 433, 434-35, 767 N.Y.S.2d 839, 840 (2d Dep't 2003); *In re* Armienti v. Brooks, 309 A.D.2d 659, 661, 767 N.Y.S.2d 2, 4 (1st Dep't 2003); Lee v. 183 Port Richmond Ave. Realty, Inc., 303 A.D.2d 379, 380, 755 N.Y.S.2d 664, 664 (2d Dep't 2003); Modern Collection Assocs., Inc. v. Capital Group, Inc., 140 A.D.2d 594, 594, 528 N.Y.S.2d 649, 650 (2d Dep't 1988); Schachner v. Sikowitz, 94 A.D.2d 709, 709, 462 N.Y.S.2d 49, 49 (2d Dep't 1983)).

90. *Id.* (citing Mandel v. Grunfeld, 111 A.D.2d 668, 668, 490 N.Y.S.2d 225, 226 (1st Dep't 1985)).

with notice, a summons and complaint, or a petition to commence an action upon such terms as may be just.[91]

The plaintiff in *MacLeod v. County of Nassau* was injured when she slipped and fell in a parking lot.[92] Believing that the property was owned by the County of Nassau, the plaintiffs' attorney served a timely notice of claim.[93] Approximately six months later, the plaintiffs commenced a special proceeding to compel pre-action disclosure under CPLR 3102(c).[94] Four months later the plaintiffs, intending to commence an action against Nassau County and other defendants, filed the summons and complaint with the Nassau County clerk.[95] However, the plaintiffs did not pay the filing fee or obtain a new index number.[96] Instead, the summons and complaint were filed under the index number assigned to the (now dismissed) disclosure proceeding.[97] When the plaintiff learned of the mistake, a new summons and complaint were filed, after purchase of a new index number.[98] At the same time, the plaintiffs made a motion requesting that the trial court deem the new summons and complaint filed on the date the original summons and complaint was misfiled.[99] The trial court denied the plaintiff's motion.[100]

At the outset, the Second Department noted that Nassau County litigated the matter for a period of time without objecting to the mistake.[101] It also noted that the plaintiff had been diligent in her efforts to correct the error.[102] It reversed the trial court, stating that:

> [D]eeming August 14, 2007, to be the date of the commencement of the instant action will not result in the Supreme Court entertaining an action over which it lacks subject matter jurisdiction. Although the legislative history underlying the amendment to CPLR 2001 reflects that the amendment was not intended to permit a court to excuse a mistake with regard to the commencement of an action or special proceeding that results in the court entertaining an action or special proceeding over which it lacks subject matter jurisdiction, the

91. N.Y. C.P.L.R. 2001 (McKinney Supp. 2011).
92. 75 A.D.3d 57, 58, 903 N.Y.S.2d 411, 412 (2d Dep't 2010).
93. *Id.*
94. *Id.* at 59, 903 N.Y.S.2d at 412.
95. *Id.*
96. *Id.*, 903 N.Y.S.2d at 413.
97. *MacLeod*, 75 A.D.3d at 59, 903 N.Y.S.2d at 413.
98. *Id.*
99. *Id.* at 60, 903 N.Y.S.2d at 413.
100. *Id.*
101. *Id*. at 64, 903 N.Y.S.2d at 417.
102. *MacLeod*, 75 A.D.3d at 64, 903 N.Y.S.2d at 416.

> MacLeods' mistake, involving a failure to pay the index number fee and the filing of initiatory papers in a personal injury action under an index number assigned to a concluded special proceeding, did not have any impact upon the Supreme Court's subject matter jurisdiction.[103]

E. Expert Testimony

A party's obligations with regard to expert disclosure are governed by CPLR 3101.[104] From there, courts are routinely asked to determine whether a party's disclosure was sufficient to permit expert testimony, and/or whether an expert is qualified to testify.

Provided a physician holds a medical degree, courts generally allow the physician to give an opinion, within a reasonable degree of medical certainty, about virtually any specialty or subspecialty of medicine. The indoctrinated refer to this concept as the "Me Doctor" rule. "Me Doctor" is alive and well in New York.

In *Diel v. Bryan*, the plaintiff filed a medical malpractice action against her son's dentist for improperly prescribing anesthesia during a tooth extraction procedure.[105] According to the plaintiff, who was the decedent's estate's administratrix, the dentist failed to properly monitor the decedent, who died during surgery.[106] At trial, the trial court allowed the plaintiff to present expert testimony from a board certified anesthesiologist, who provided an opinion on the administration of anesthesia in dental cases.[107] The defendant argued that the plaintiff's expert was not qualified to render an opinion because he was not a dentist.[108] The jury returned a verdict for the plaintiff and the defendant appealed.[109]

When affirming the trial court, the Fourth Department held that:

> Although defendant's expert in oral maxillofacial surgery testified that there were "separate rules [concerning anesthesia] for dentists only," defendant failed to establish how the administration of anesthesia to decedent during a dental procedure required special training or differed in any material respect from the administration of anesthesia

103. *Id*. at 65, 903 N.Y.S.2d at 417 (citing Miller v. Harris, 51 A.D.3d 113, 115-18, 853 N.Y.S.2d 183, 185-86 (3d Dep't 2008); Harris v. Niagara Falls Bd. of Educ., 6 N.Y.3d 155, 159, 844 N.E.2d 753, 755-56, 811 N.Y.S.2d 299, 301-02 (2006)).

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

105. 71 A.D.3d 1439, 1440, 896 N.Y.S.2d 782, 783 (4th Dep't 2010).

106. *Id.*

107. *Id.*

108. *Id*.

109. *Id.*

> by a board certified anesthesiologist.[110]

Stated differently, CPLR 3101 does not prohibit an expert physician from testifying outside of the scope of his or her stated specialty. Rather, it is for the jury to decide whether the expert's testimony is credible.

The Second Department reached the same result in *Walsh v. Brown*.[111] *Walsh* involved an action seeking damages for medical malpractice.[112] At trial, the plaintiffs offered the expert testimony of an obstetrician/gynecologist surgeon.[113] The defendant argued that the expert was not qualified to offer an opinion because the plaintiff's expert was not a certified obstetrician/gynecologist oncologist surgeon.[114] The trial court allowed the testimony and the jury returned a verdict for the plaintiff.[115]

On appeal, the Second Department affirmed the trial court, stating:

> The appellants' contention that the plaintiff's expert, a board-certified obstetrician/gynecologist surgeon, was unqualified to give an expert opinion on the standard of care of an obstetrician/gynecologist oncologist surgeon merely because he was not an oncologist, is without merit. A physician need not be a specialist in a particular field in order to qualify as a medical expert. Rather, any alleged lack of knowledge in a particular area of expertise is a factor to be weighed by the trier of fact that goes to the weight of the testimony.[116]

CPLR 3101(d) requires parties to disclose information about experts in advance of trial, including their names, the subject matter about which they will testify, the substance of their opinion, and their qualifications.[117] When it comes to medical malpractice actions, less information needs to be disclosed; to wit, a party in a malpractice action need not disclose the expert's name.[118]

In an action to foreclose on a mechanic's lien, a Bronx trial court allowed the plaintiff to call an expert different from the expert disclosed

110. *Diel*, 71 A.D.3d at 1440, 896 N.Y.S.2d at 783.
111. *See* 72 A.D.3d 806, 898 N.Y.S.2d 250 (2d Dep't 2010).
112. *Id.* at 806, 898 N.Y.S.2d at 251.
113. *Id.* at 807, 898 N.Y.S.2d at 251.
114. *Id.*
115. *Id*. at 806, 898 N.Y.S.2d at 251.
116. *Walsh*, 72 A.D.3d at 807, 898 N.Y.S.2d at 251-52 (citing Bodensiek v. Schwartz, 292 A.D.2d 411, 411, 739 N.Y.S.2d 405, 405 (2d Dep't 2002); Erbstein v. Savasatit, 274 A.D.2d 445, 445-46, 711 N.Y.S.2d 458, 459-60 (2d Dep't 2000); Texter v. Middletown Dialysis Ctr., Inc., 22 A.D.3d 831, 831, 803 N.Y.S.2d 687, 689 (2d Dep't 2005)).
117. *See* N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 2005).
118. *See id.* 3101(d)(1)(ii).

in his CPLR 3101(d) disclosure.[119] The plaintiff secured an award of $37,528.37.[120] The defendant appealed and the First Department affirmed because "[a]lthough the expert named in the plaintiff's CPLR 3101(d) notice to testify as to the 'measurements and quality of work completed' was not the expert who testified at trial," the plaintiff notified the defendant that "another representative of the named expert's construction company might be called."[121]

F. Certificate of Merit

CPLR 3012-a requires that "[i]n any action for medical, dental or podiatric malpractice, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, declaring that" (1) the plaintiff's attorney has discussed the facts of the case with a licensed physician "who the attorney reasonably believes is knowledgeable in the relevant issues" and, based upon that review and consultation, that there is a reasonable basis for starting a lawsuit, or (2) the plaintiff's attorney did not have time to perform the necessary review and consultation before expiration of the statute of limitations.[122] In the latter case, the certificate of merit should be provided within ninety days of service of the summons and complaint.[123] This is not a requirement to be overlooked.

In *Grad v. Hafliger*, the plaintiff filed and served a summons and complaint in June of 2008.[124] It was not accompanied by CPLR 3012-a certification.[125] In February 2009, the plaintiff moved for leave to file a late certification based upon a law firm "clerical error."[126] The plaintiff also submitted an affidavit of merit from a doctor, attesting to the merits of the action.[127] The trial court granted the plaintiff's motion and the defendant appealed.[128] The First Department affirmed, stating that "[t]he court may extend the time to file the notice, upon the showing of good cause (CPLR 2004). Plaintiff's failure to file a timely notice does

119. S & W Home Improvement Co. v. La Casita II H.D.F.C., 66 A.D.3d 505, 505-06, 887 N.Y.S.2d 52, 52-53 (1st Dep't 2009).
120. *Id.* at 505, 887 N.Y.S.2d at 52
121. *Id*. at 506, 887 N.Y.S.2d at 53.
122. N.Y. C.P.L.R. 3012-a (McKinney 2010).
123. *Id.* 3012-a(a)(2).
124. 68 A.D.3d 543, 544, 889 N.Y.S.2d 459, 459 (1st Dep't 2009).
125. *Id.*
126. *Id.*
127. *Id.*, 889 N.Y.S.2d at 460.
128. *Id.*, 889 N.Y.S.2d at 459.

not warrant the harsh sanction of dismissal."[129] Apparently, a showing of law firm failure amounts to good cause.

The Second Department was not as forgiving in *Gordon v. Sea Crest Health Care Center, LLC*.[130] In *Gordon*, the plaintiffs filed a summons and complaint on January 11, 2007.[131] The medical defendants answered on February 7, 2007, and, on June 26, 2008, the plaintiffs moved for leave to file a CPLR 3012-a certificate of merit.[132] In support of the motion, the plaintiffs submitted an affidavit of merit from a neurologist.[133] The trial court denied the plaintiffs' motion and, on appeal, the Second Department affirmed because "the plaintiffs failed to show the existence of 'good cause' for an extension of time to file."[134]

G. Municipal Liability

New York's "firefighter rule" provides that "police and firefighters may not recover in common-law negligence for line-of-duty injuries resulting from risks associated with the particular dangers inherent in that type of employment."[135]

The (now very broad) scope of New York's "firefighter rule" was addressed by the Court of Appeals in *Wadler v. City of New York*.[136] Apparently, the New York City Police Headquarters parking lot is protected by a unique gate that is intended to prevent injury from forms of terrorism.[137] It consists of a concrete barrier gate that can be raised quickly out of and retracted into the ground.[138] In *Wadler*, the plaintiff filed a lawsuit against the City of New York and the Police Department for injuries he sustained when, after showing his credentials to enter the parking lot, the gate raised his car four feet into the air.[139] The defendant moved for summary judgment.[140] The plaintiff argued that he

129. *Grad*, 68 A.D.3d at 544, 889 N.Y.S.2d at 460 (citing Tewari v. Tsoutsouras, 75 N.Y.2d 1, 8, 549 N.E.2d 1143, 1145-46, 550 N.Y.S.2d 572, 574-75 (1989)).

130. 73 A.D.3d 1125, 900 N.Y.S.2d 905 (2d Dep't 2010).

131. *Id.* at 1125, 900 N.Y.S.2d at 905.

132. *Id.*

133. *Id.*

134. *Id*. at 1126, 900 N.Y.S.2d at 905.

135. Zanghi v. Niagara Frontier Transp. Comm'n, 85 N.Y.2d 423, 436, 649 N.E.2d 1167, 1170, 626 N.Y.S.2d 23, 26 (1995); *see also* N.Y. GEN OBLIG. LAW § 11-106(1) (McKinney 2010) (applicable only in actions against a "police officer's or firefighter's employer or co-employee").

136. 14 N.Y.3d 192, 925 N.E.2d 875, 899 N.Y.S.2d 73 (2010).

137. *Id.* at 194, 925 N.E.2d at 876, 899 N.Y.S.2d at 74.

138. *Id.*

139. *Id.*

140. *Id.*

was not injured by a risk associated with the particular dangers inherent in police work.[141] The supreme court granted the defendants' motion for summary judgment and the plaintiff appealed.[142] The Second Department affirmed, stating that:

> The cause of the injury to plaintiff here—a high security device protecting the police headquarters parking lot—was plainly a risk "associated with the particular dangers inherent" in police work. Ordinary civilians may encounter such device, but police officers, whose duties may include working in secure areas that are at risk of a terrorist attack, are far more likely to do so.[143]

The court continued that "[a]n act taken in furtherance of a specific police function—entry into a protected parking lot, which only plaintiff's police credentials allowed him to enter—exposed plaintiff to the risk of this injury."[144]

In *Ayers v. O'Brien*, the Court of Appeals held a police officer cannot utilize the "reckless disregard" standard set forth in Vehicle and Traffic Law section 1104(e) in a personal injury lawsuit filed by the officer against another motorist.[145] The plaintiff in *Ayers*, an on-duty police officer, was engaged in a chase in his patrol car and, while making a U-turn, was struck by a motorist.[146] He filed suit against the motorist and, in his answer, the defendant alleged the plaintiff's comparative fault.[147] The plaintiff moved to dismiss the defense.[148] The trial court struck the defense.[149] The Third Department reversed the trial court and reinstated the defense.[150] The Court of Appeals held that "Vehicle and Traffic Law [section] 1104(e) cannot be used as a sword to ward off a comparative fault defense. It is to be applied only when the emergency vehicle operator is sued or countersued."[151]

H. Court of Claims Procedure

In *Femminella v. State of New York*, the Third Department held that practitioners should follow the literal requirements of the Court of

141. *Wadler*, 14 N.Y.2d at 196, 925 N.E.2d at 877, 899 N.Y.S.2d at 75.
142. *Id.* at 194, 925 N.E.2d at 876, 899 N.Y.S.2d at 74.
143. *Id.* at 196, 925 N.E.2d at 877, 899 N.Y.S.2d at 75.
144. *Id*.
145. 13 N.Y.3d 456, 459, 923 N.E.2d 578, 580-81, 896 N.Y.S.2d 295, 297-98 (2009).
146. *Id.* at 457, 923 N.E.2d at 579, 896 N.Y.S.2d at 296.
147. *Id.* at 458, 923 N.E.2d at 580, 896 N.Y.S.2d at 297.
148. *Id.*
149. *Id.*
150. *Ayers*, 13 N.Y.3d at 458, 923 N.E.2d at 580, 896 N.Y.S.2d at 297.
151. *Id.* at 459, 923 N.E.2d at 580, 896 N.Y.S.2d at 297.

Claims Act section 11.[152] The plaintiff in *Femminella* attempted to serve the Attorney General with a notice of intention to claim by Federal Express in August of 2007, and served a verified claim in May of 2008.[153] The defendant moved to dismiss the claim because the notice of intention to claim was improperly served.[154] The Court of Claims granted the defendants motion.[155] The plaintiff appealed, arguing that service by Federal Express was substantially similar to the method of service specified in section 11 of the act.[156]

The Third Department disagreed with the plaintiff and affirmed the trial court, stating that "a claim must be served 'either personally or by certified mail, return receipt requested,' and a notice of intention to file a claim must be served 'similarly.'"[157] The court added that "[a]lternative mailings which do not equate to certified mail, return receipt requested, are inadequate and do not comply with the Court of Claims Act [section] 11(a)."[158]

I. Assumption of the Risk

CPLR 1411 provides that:

> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of the risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.[159]

In *Trupia v. Lake George Central School District*, the Court of Appeals held that a twelve-year-old boy could not assume the risk of injury while sliding down the banister at a summer camp.[160] In *Trupia*, the infant plaintiff's parents filed a lawsuit against the Lake George Central School District for injuries their son sustained while playing at a summer camp.[161] The plaintiffs' claims sounded in negligent

152. 71 A.D.3d 1319, 1319-20, 896 N.Y.S.2d 533, 534-35 (3d Dep't 2010).
153. *Id.* at 1319, 896 N.Y.S.2d at 534.
154. *Id.*
155. *Id.*
156. *Id.* at 1320, 896 N.Y.S.2d at 534.
157. *Femminella*, 71 A.D.3d at 1320, 896 N.Y.S.2d at 534.
158. *Id.* at 1320, 896 N.Y.S.2d at 534-35 (quoting Hodge v. State, 213 A.D.2d 766, 767, 622 N.Y.S.2d 1016, 1017 (3d Dep't 1995)).
159. N.Y. C.P.L.R. 1411 (McKinney 1997).
160. 14 N.Y.3d 392, 393-94, 927 N.E.2d 547, 548, 901 N.Y.S.2d 127, 128 (2010).
161. *Id.* at 393, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.

supervision.[162] The defendants moved to amend their answer to assert primary assumption of the risk.[163] The trial court granted the defendant's motion and the plaintiffs appealed.[164]

The Third Department reversed the trial court and certified the following question to the Court of Appeals: did this court err, as a matter of law, "in reversing, on the law, the order of the Supreme Court by denying defendants' motion for leave to amend their answer to include the affirmative defense of primary assumption of risk?"[165]

In a decision authored by Chief Judge Lippman, the Court of Appeals closely reviewed the manner in which the infant plaintiff was injured, stating that "[w]e have recognized that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and have employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise."[166] The Court went on to state that:

> No suitably compelling policy justification has been advanced to permit an assertion of assumption of risk in the present circumstances. The injury-producing activity here at issue, referred to by the parties as "horseplay," is not one that recommends itself as worthy of protection, particularly not in its "free and vigorous" incarnation, and there is, moreover, no nexus between the activity and defendants' auspices, except perhaps negligence.[167]

In answering the certified question in the negative, the Court of Appeals was careful to note that it was not ruling that:

> [C]hildren may never assume the risks of activities, such as athletics, in which they freely and knowingly engage, either in or out of school—only that the inference of such an assumption as a ground for exculpation may not be made in their case, or for that matter where adults are concerned, except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled.[168]

In *Tselebis v. Ryder Truck Rental, Inc.*, the First Department held that "freedom from comparative negligence is a required component of a plaintiff's prima facie showing on a motion for summary

162. *Id*.
163. *Id*. at 394, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.
164. *Id*.
165. *Trupia*, 14 N.Y.3d at 394, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.
166. *Id*. at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.
167. *Id*. at 396, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.
168. *Id*., 927 N.E.2d at 550, 901 N.Y.S.2d at 130.

judgment."[169] The plaintiff in *Tselebis* filed a personal injury action for damages sustained in a motorcycle accident.[170] Apparently, he was driving his motorcycle in a northerly direction when he was struck in an intersection by the defendant's truck being driven in a westerly direction.[171] The defendant testified that he improperly entered the intersection against a red light because of brake failure.[172] The plaintiff had no memory of the accident.[173] Due to questions of fact concerning the plaintiff's own negligence, the trial court denied the plaintiff's motion for summary judgment on negligence.[174]

On appeal, the First Department held that the plaintiff was entitled to summary judgment because his own negligence, if any, would not exculpate the defendant from liability for improperly entering the intersection and striking the plaintiff.[175]

J. Discovery and Disclosure

Several noteworthy decisions were issued by New York State courts over the past year governing virtually all aspects of discovery and disclosure.

1. Scope

CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . . ."[176]

In *Detraglia v. Grant*, the Third Department weighed in on discovery of cellular telephone records.[177] In *Detragila*, the defendant was involved in a motor vehicle accident while driving a vehicle owned by his employer.[178] The plaintiffs filed suit for injuries sustained in the collision.[179] During discovery, the plaintiffs demanded billing records

169. 72 A.D.3d 198, 200, 895 N.Y.S.2d 389, 391 (1st Dep't 2010) (citations omitted).
170. *Id.* at 199, 895 N.Y.S.2d at 390.
171. *Id*.
172. *Id*., 895 N.Y.S.2d at 390-91.
173. *Id.*, 895 N.Y.S.2d at 390.
174. *Tselebis*, 72 A.D.3d at 199, 895 N.Y.S.2d at 390.
175. *Id.* at 200, 895 N.Y.S.2d at 391. The Court also noted "that opinions by this Court and others suggest that freedom from comparative negligence is a required component of a plaintiff's prima facie showing on a motion for summary judgment. These opinions cannot be reconciled with CPLR 1411 if the statute is to be given effect." *Id.* (citations omitted).
176. N.Y. C.P.L.R. 3101(a) (McKinney 2005).
177. 68 A.D.3d 1307, 1307-09, 890 N.Y.S.2d 696, 697-98 (3d Dep't 2009).
178. *Id*. at 307, 890 N.Y.S.2d at 697.
179. *Id.*

for the defendant's three mobile phones and for the wireless card used with his work laptop.[180] While the accident occurred at 2:57 p.m., the plaintiff's demand covered from 12:00 p.m. through 4:00 p.m.[181] The trial court ordered disclosure of records from 1:00 p.m. through 3:30 p.m., and ordered that the defendant's employer produce a technology employee for deposition concerning the mobile devices.[182] The defendants appealed.[183]

The Third Department found conflicting information in the record as to whether or not the defendant was distracted prior to the accident.[184] While the defendant stated that he never took his laptop out of its bag or used it while driving, there was a conflicting affidavit in the record from the tow truck driver who arrived at the scene.[185] The truck driver's affidavit stated that upon arriving at the accident scene, he saw a laptop out of its bag and strapped to a desk that was affixed to the vehicle.[186]

The Third Department found "[t]his conflicting evidence raised questions as to whether Grant used any technological devices while driving, rendering the records relevant to the question of his negligence."[187] The Third Department narrowed the time frame of the demand to a one hour period surrounding the accident and required that the records first be reviewed in camera by the court to "provid[e] the parties only relevant information redacted to protect defendants' privacy interests."[188]

In *Amoroso v. City of New York*, the Second Department narrowed what is necessary for litigation.[189] The plaintiff in *Amoroso* filed suit against the City of New York and a corporation for personal injuries.[190] The corporation moved to vacate the trial note of issue because it had outstanding requests for authorizations allowing them to obtain records concerning the plaintiff's preexisting kidney, cardiac, and diabetic conditions.[191] The trial court denied the defendant's motion.[192] On

180. *Id.*
181. *Id.*
182. *Detraglia*, 68 A.D.3d at 1308, 890 N.Y.S.2d at 697.
183. *Id.*
184. *Id.*
185. *Id.*, 890 N.Y.S.2d at 697-98.
186. *Id.*, 890 N.Y.S.2d at 698.
187. *Detraglia*, 68 A.D.3d at 1308, 890 N.Y.S.2d at 698.
188. *Id.* (citing Morano v. Slattery Skanska, Inc., 18 Misc. 3d 464, 475, 846 N.Y.S.2d 881, 888 (Sup. Ct. Queens Cnty. 2007)).
189. 66 A.D.3d 618, 887 N.Y.S.2d 163 (2d Dep't 2009).
190. *Id.*, 887 N.Y.S.2d at 163.
191. *Id.*, 887 N.Y.S.2d at 163-64.

appeal, the Second Department reversed, stating:

> Since the nature and severity of the plaintiff's prior medical conditions may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life, the records regarding those preexisting medical conditions are material and necessary to the defense.[193]

The Court in *Tabone v. Lee* reached a different result.[194] In *Tabone*, the plaintiffs brought a claim against several medical defendants for the failure to diagnose throat cancer.[195] During discovery, the plaintiffs' attorney provided time-limited authorizations that allowed the defendants access only to medical records relating to the plaintiff's claims.[196] The medical defendants moved to compel the plaintiff to provide authorizations allowing them to secure all records, arguing that the plaintiff waived the physician/patient privilege by bringing the action.[197] The trial court agreed.[198] The Fourth Department reversed, stating:

> "In bringing the action, plaintiff waived the physician/patient privilege only with respect to the physical and mental conditions affirmatively placed in controversy." Here, all of plaintiffs' claims of injury and damages arise from the alleged undiagnosed cancer and its sequelae. Contrary to defendants' contentions, the allegations in the bill of particulars that plaintiff sustained, inter alia, mild cachexia and anorexia, loss of enjoyment of life, disability, disfigurement, fear of death, and extensive pain and suffering do not constitute such "broad allegations of injury" that they place plaintiff's entire medical history in controversy. Thus, as previously noted, the court abused its discretion in compelling plaintiff to provide authorizations with no date restrictions without first conducting an in camera review of the records of treatment outside the specified time periods.[199]

CPLR 3124 provides a mechanism for a party to compel a response to a discovery device.[200] To avoid being compelled to respond to an

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192. *Id.*, 887 N.Y.S.2d at 163.

193. *Id.*, 887 N.Y.S.2d at 164 (citing Orlando v. Richmond Precast, Inc., 53 A.D.3d 534, 535, 861 N.Y.S.2d 765, 766 (2d Dep't 2008); Diamond v. Ross Orthopedic Group, 41 A.D.3d 768, 769, 839 N.Y.S.2d 211, 212 (2d Dep't 2007); Vanalst v. City of New York, 276 A.D.2d 789, 789, 715 N.Y.S.2d 422, 423 (2d Dep't 2000)).

194. *See* 59 A.D.3d 1021, 873 N.Y.S.2d 401 (4th Dep't 2009).

195. *Id.* at 1022, 873 N.Y.S.2d at 403.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Tabone*, 59 A.D.3d at 1022, 873 N.Y.S.2d at 403 (citations omitted).

200. N.Y. C.P.L.R. 3124 (McKinney 2005).

improper discovery device, the party on the receiving end of a demand should move for a protective order under CPLR 3103 "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice . . . ."[201]

In *Learned v. Faxton-St. Luke's Healthcare*, the Fourth Department held that the defendant hospital was required to produce documents concerning whether operating room equipment and surgical equipment were properly sterilized.[202] In *Learned*, the plaintiff suffered a post-operative infection after undergoing surgery in an operating room at the defendant's hospital.[203] She claimed that the operating room equipment and surgical equipment were not sterilized properly and sought discovery of documents that would confirm or deny whether sterilization protocols had been followed.[204] Specifically, she requested meeting minutes generated by the defendant's Infection Control Committee for calendar year 2002.[205] The defendant claimed that the documents were not discoverable under Education Law section 6527(3) and/or Public Health Law section 2805-j and moved for a protective order.[206]

The appellate division affirmed the trial court's order denying the defendant's motion, stating that that the defendants failed to carry their burden of establishing that the minutes were "generated in connection with a quality assurance review function pursuant to Education Law [section] 6527(3) or . . . [generated pursuant to] a malpractice prevention program pursuant to Public Health Law [section] 2805-j."[207]

Nota Bene: in order to secure a protective order, the defendant must do more than submit an attorney affidavit in support of the motion.

2. Depositions

CPLR 3113(c) provides that depositions "shall proceed as permitted in the trial of actions in open court."[208] This means that an attorney who does not have a right to object to questioning at trial does not have a right to object to questioning during an examination before trial.

In *Thompson v. Mather*, the Fourth Department held that counsel

201. N.Y. C.P.L.R. 3103(a) (McKinney 2005).
202. 70 A.D.3d 1398, 1398-99, 894 N.Y.S.2d 783, 783 (4th Dep't 2010).
203. *Id*. at 1398, 894 N.Y.S.2d at 783.
204. *Id*. at 1398-99, 894 N.Y.S.2d at 783-84.
205. *Id*. at 1399, 894 N.Y.S.2d at 784.
206. *Id*. at 1398-99, 894 N.Y.S.2d at 783-84.
207. *Learned*, 70 A.D.3d at 1399, 894 N.Y.S.2d at 784.
208. N.Y. C.P.L.R. 3113(c) (McKinney 2005).

for a non-party treating physician "[did] not have a right to object during or otherwise to participate in a pre-trial deposition."[209] The plaintiff in *Thompson* filed suit for medical malpractice and, as trial approached, her attorney sought video trial testimony from a non-party treating physician.[210] The treating physician, who was insured through a medical malpractice insurance carrier, brought private counsel to the video deposition.[211] During the deposition, the insurance company attorney provided for the treating physician made "form" and "relevance" objections to questions posed by the plaintiff's attorney.[212] The plaintiff's attorney objected to commentary from the physician's private attorney.[213] The parties were unable to resolve their disagreement and the plaintiff brought a motion to preclude the treating physician's attorney from objecting during videotaped testimony.[214] The trial court directed the "plaintiff and defendants . . . to 'consider providing general releases to the [non-party treating physicians] . . . with respect to their initial treatment of [plaintiff],'" and, if releases are exchanged, then the "plaintiff will 'be entitled to have a videotaped deposition of [the non-party treating physicians] during which the attorneys for the [physicians] shall not be permitted to speak . . . .'"[215] The trial court order provided further, that if the plaintiff did not execute the necessary releases, then the attorneys are to "work out ground rules for a non-party deposition" and, if the parties cannot work out ground rules, then the "plaintiff will not be entitled to take the videotaped depositions of the [non-party treating] physicians."[216] Instead, they must be "subpoenaed to testify at trial."[217]

The Fourth Department reversed the trial court, stating that counsel for the treating physician had no right to object or participate in any way during the deposition.[218] Furthermore, the court 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. Contrary to nonparty

209. 70 A.D.3d 1436, 1438, 894 N.Y.S.2d 671, 672 (4th Dep't 2010).
210. *Id*. at 1437, 894 N.Y.S.2d at 672.
211. *Id*.
212. *Id*.
213. *Id*.
214. *Thompson*, 70 A.D.3d at 1437, 894 N.Y.S.2d at 672.
215. *Id*.
216. *Id*. at 1437-38, 894 N.Y.S.2d at 672.
217. *Id*. at 1438, 894 N.Y.S.2d at 672.
218. *Id*.

respondents' contention, the fact that the statute of limitations has not expired with respect to a nonparty treating physician witness for the care that he or she provided to a plaintiff provides no basis for such a condition.[219]

Generally, depositions should be conducted in the county where the action is pending.[220] However, where "a party demonstrates that conducting his or her deposition in that county would cause undue hardship, the Supreme Court can order the deposition to be held elsewhere."[221]

The situs of a deposition was recently addressed by the Second Department in *Gartner v. Unified Windows, Doors & Siding, Inc*.[222] In *Gartner*, the defendant moved to compel the deposition of several plaintiffs in New York.[223] The plaintiffs cross-moved for depositions to be held in Bogota, Columbia.[224] The plaintiffs asserted that they would suffer undue hardship if they had to travel to New York for examination.[225] The trial court denied the defendant's motion and the defendant appealed.[226]

The Second Department affirmed, noting that:

> The Supreme Court proposed three viable, nonexclusive solutions to the appellant with respect to conducting the outstanding depositions of Hernandez and the infant son pursuant to CPLR 3108: (1) flying the appellant's New York counsel to Bogota, Colombia, to conduct the depositions upon oral examination at the United States Embassy in that city, with the travel costs and cost of translation to be borne by the plaintiffs in Action No. 1, (2) retaining local counsel in Bogota to conduct the depositions upon oral examination at that location, and (3) conducting the depositions upon written questions.[227]

In addition to endorsing the viability of these proposals, the Second Department proposed a fourth option.[228] Namely, that depositions "may also be conducted via videoconferencing pursuant to CPLR 3113(d),

219. *Thompson*, 70 A.D.3d at 1438, 894 N.Y.S.2d at 673.

220. N.Y. C.P.L.R. 3110(1) (McKinney 2005).

221. Gartner v. Unified Windows, Doors & Siding, Inc., 68 A.D.3d 815, 815, 890 N.Y.S.2d 608, 609 (2d Dep't 2009) (citing LaRusso v. Brookstone, Inc., 52 A.D.3d 576, 577, 860 N.Y.S.2d 179, 180 (2d Dep't 2008); Hoffman v. Kraus, 260 A.D.2d 435, 437, 688 N.Y.S.2d 575, 576 (2d Dep't 1999)).

222. *Id.* at 815-16, 890 N.Y.S.2d at 609-10.

223. *Id*. at 815, 890 N.Y.S.2d at 609.

224. *Id*. at 815-16, 890 N.Y.S.2d at 609-10.

225. *Id*.

226. *Gartner*, 68 A.D.3d at 816, 890 N.Y.S.2d at 610.

227. *Id.*

228. *Id*.

with the deponents remaining at the United States Embassy in Bogota, Columbia."[229]

CPLR 3117 enables counsel to use the deposition testimony of a party for virtually any purpose, including impeachment, against any other party who was adversely interested when the testimony was given.[230]

In *Sadhwani v. New York City Transit Authority*, the plaintiff was unavailable to testify at trial due to memory loss arising out of injuries sustained in the subject bus accident.[231] In turn, her attorney sought to read excerpts of her 50-h and deposition transcripts into the record, in lieu of live testimony.[232] The trial court permitted the testimony and the jury returned a verdict for the plaintiff.[233]

The defendant argued on appeal that use of the transcripts was improper.[234] The First Department disagreed and affirmed the trial court, noting first that the plaintiff presented expert testimony on the "unavailability" of the plaintiff.[235] Namely:

> Plaintiff's treating physician testified that plaintiff's injuries severely impaired her immediate and delayed recall and abstract thinking, and her orientation to time and space, resulting in memory loss, and that these injuries and resulting deficits were causally related to the bus accident. The physician's assessment of plaintiff's limited ability to recall the events surrounding the accident was highlighted when plaintiff herself attempted to testify at trial, during which she was unable to recollect her accurate home address, the current month, the circumstances of the accident, or any details concerning her medical treatment. This was consistent with excerpts of her prior testimony read to the jury, which were incoherent and internally contradictory, and did little or nothing to advance her case.[236]

The appellate division continued that the CPLR

> permits the use of anyone's deposition "for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds . . . that the witness is unable to attend or testify

229. *Id.* (citing Rogovin v. Rogovin, 3 A.D.3d 352, 353, 770 N.Y.S.2d 342, 342-43 (1st Dep't 2004)).
230. *See* N.Y. C.P.L.R. 3117(a) (McKinney 2005).
231. 66 A.D.3d 405, 405-06, 890 N.Y.S.2d 458, 460 (1st Dep't 2009).
232. *Id.* at 405, 890 N.Y.S.2d at 460.
233. *Id.*, 890 N.Y.S.2d at 459-60.
234. *Id.* at 405-06, 890 N.Y.S.2d at 460.
235. *Id.*
236. *Sadhwani*, 66 A.D.3d at 405-06, 890 N.Y.S.2d at 460.

because of age, sickness, infirmity, or imprisonment."[237]

In *M.S. v. County of Orange*, the Second Department was asked to determine whether a trial court erred in permitting the plaintiff's attorney to read from 50-h and deposition transcripts in lieu of live testimony from the infant plaintiff.[238] The trial court allowed the plaintiff to use the transcripts and, after a jury finding for the plaintiff, the County argued on appeal that use of the transcripts denied it a meaningful opportunity to cross-examine the plaintiff.[239]

The Second Department agreed with the County, stating that the plaintiff did not offer an adequate explanation for why the plaintiff was "unavailable."[240] Moreover, given discrepancies in the 50-h and deposition transcripts, a new trial was necessary because an opportunity to cross-examine the infant plaintiff was a "fundamental common-law right" that was of "particular importance with respect to the ultimate assessment of the infant plaintiff's credibility on the issue of notice."[241]

3. Authorizations

On November 27, 2007, the New York State Court of Appeals issued a decision in *Arons v. Jutkowitz*.[242] *Arons* was a landmark decision for personal injury and medical malpractice litigation because it represented a categorical departure from the status quo. In *Arons*, which involved three separate medical malpractice actions, the Court of Appeals held that defense counsel is authorized to conduct ex parte interviews of the plaintiff's non-party treating physicians at any time, provided the non-party physician is provided with a duly-executed Health Insurance Portability and Accountability Act of 1996 (HIPAA) compliant authorization.[243] Historically, defense attorneys did not speak with a plaintiff's treating physician until after the trial note of issue was filed and, even then, some courts frowned upon the communication.[244]

Following *Arons*, dozens of New York State trial courts have been asked to interpret the scope of the Court of Appeals' decision and, over the *Survey* year, two appellate division decisions have issued in this

237. *Id.* at 405, 890 N.Y.S. 2d at 460 (quoting N.Y. C.P.L.R. 3117(a)(3)(iii) (McKinney 2005)).
238. 64 A.D.3d 560, 562, 884 N.Y.S.2d 74, 75-76 (2d Dep't 2009).
239. *Id.* at 562-63, 884 N.Y.S.2d at 75-76.
240. *Id.*
241. *Id*. at 562, 884 N.Y.S.2d at 76.
242. 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.S.2d 345 (2007).
243. *Id.* at 415, 880 N.E.2d at 842, 850 N.Y.S.2d at 356.
244. *Id.* at 403-04, 880 N.E.2d at 834, 850 N.Y.S.2d at 348.

regard.[245]

On June 9, 2009, the Second Department issued its decision in *Porcelli v. Northern Westchester Hospital Center*.[246] In *Porcelli*, a mother and child filed a medical malpractice action against a group of medical defendants for injuries the child sustained during birth.[247] During discovery, defense counsel requested HIPAA authorizations that permitted them to conduct ex parte interviews of the infant plaintiff's treating physicians.[248] The defendants moved to compel production of the authorizations and the plaintiffs made a cross-application to include specific language on the authorization.[249]

The plaintiff argued that the authorizations should include the following language: (1) "[t]he purpose of the requested interview with the physician is solely to assist defense counsel at trial"; (2) "[t]he physician is not obligated to speak with defense counsel prior to trial"; and (3) "[t]he interview is voluntary."[250] Defense counsel argued that the *Arons* charged it with providing these instructions to a non-party treating physician.[251] The trial court granted the defendants motion to compel and, at the same time, ordered that the authorizations "shall contain" the requested language.[252]

On appeal, the Second Department held that nothing in *Arons* prohibited the inclusion of the challenged language on the face of an authorization.[253] The court added that "the subject admonitions are unlikely to chill the nonparty treating physicians' decision to agree to an interview, as they are facially neutral . . . ."[254] Moreover, "[p]roviding such information best ensures that an individual who agrees to be interviewed will not unwittingly disclose privileged information regarding a medical condition not at issue in the litigation. Which party conveys such message and in what manner is of secondary importance."[255]

On June 15, 2010, the Second Department issued another *Arons*-

245. *See* Porcelli v. Northern Westchester Hosp. Ctr., 65 A.D.3d 176, 882 N.Y.S.2d 130 (2d Dep't 2009); Mahr v. Perry, 74 A.D.3d 1030, 903 N.Y.S.2d 148 (2d Dep't 2010).

246. 65 A.D.3d 176, 882 N.Y.S.2d 130 (2d Dep't 2009).

247. *Id.* at 177, 882 N.Y.S.2d at 131.

248. *Id.* at 178, 882 N.Y.S.2d at 131.

249. *Id.*, 882 N.Y.S.2d at 132.

250. *Id.*

251. *Porcelli*, 65 A.D.3d at 178-79, 882 N.Y.S.2d at 132.

252. *Id.* at 179, 882 N.Y.S.2d at 132.

253. *Id.* at 184, 882 N.Y.S.2d at 136.

254. *Id.* at 185, 882 N.Y.S.2d at 136.

255. *Id.*

related decision in *Mahr v. Perry*.[256] In *Mahr*, an action for medical malpractice, the defendants moved to compel the plaintiffs to provide "law firm specific," rather than "attorney specific" HIPAA authorizations.[257] The trial court denied the defendant's application and the Second Department affirmed without opinion on this issue.[258]

Admittedly just beyond this *Survey* period, a New York County trial court broadened a plaintiff's ability to communicate with a non-party treating physician about ex parte interview by a defendant.[259] In *Peluso v. C.R. Bard, Inc.*, New York State Supreme Court Justice Joan B. Lobis ruled that *Arons* did not prohibit plaintiffs from "informing their treating physician that they prefer that their physician not participate in an ex parte interview with defense counsel."[260] The *Peluso* plaintiffs filed a medical malpractice action against a doctor and two medical centers.[261] During discovery, the defendants requested authorizations enabling their attorneys to speak with the plaintiff's non-party treating physicians.[262] The plaintiffs' attorney provided the authorizations and then wrote a letter to three non-party treating physicians which provided, in relevant part: (1) that the defendants' attorneys want to speak with the doctor; (2) that the doctor's participation is voluntary; (3) that if the doctor elects to participate, that the plaintiffs object to any private meetings; (4) that the plaintiff "insists on the strict maintenance of the right to confidentiality of his medical information by the physician as required by the federal HIPPA law, and will hold [the doctor] accountable for any breach of this duty"; and (5) should the doctor elect to participate in an interview with the defendants' attorneys, that the doctor tell the defendants' attorneys that he would like to have plaintiffs' counsel present to "make certain that the interview does not intrude into any protected or privileged information."[263] Subsequently, an investigatory agency hired by the defendants contacted a treating physician, who indicated that he would honor the patient's request and would not participate in an interview.[264] The defendants' attorneys moved for sanctions.[265] The trial court

256. 74 A.D.3d 1030, 903 N.Y.S.2d 148 (2d Dep't 2010).

257. *Id.* at 1030, 903 N.Y.S.2d at 149.

258. *Id.* at 1030-31, 903 N.Y.S.2d at 149.

259. *See* Peluso v. C.R. Bard, Inc., No. 117378/08, 2010 N.Y. Slip Op. 32595(U), at 5 (Sup. Ct. N.Y. Cnty. 2010).

260. *Id.*

261. *Id.* at 2.

262. *Id.*

263. *Id.* at 2-3.

264. *Peluso*, No. 117378/08, 2010 NY Slip Op. 32595(U), at 3.

265. *Id.*

denied the defendants' motion, stating that "[n]othing in *Arons* prevents patients from informing their [treating] physician that they prefer that their treating physician not participate in an ex parte interview with defense counsel."[266] Moreover, for the most part, the letter recites the contents of the *Arons* authorization and informs the physicians that the patient would prefer that the physician not participate in a private interview. The letter conveys information that a plaintiff is entitled to tell his or her treating physician, and the court does not perceive any threat to the physician contained in this particular letter. The physician is as free to disregard this letter as much as the physician is free to disregard defense counsel's request for an interview.[267]

4. Court Orders

CPLR 3126 authorizes a trial court to penalize a party that "willfully fails to disclose information which the court finds ought to have been disclosed."[268] Penalties can be severe, and include evidence preclusion, striking the pleadings, and even dismissal.[269]

While just outside of this *Survey* year, the Court of Appeals decision in *Arts4All, Ltd. v. Hancock* is a worthy mention as a cautionary tale (and a testament to the patience of the judiciary).[270] *Arts4All* involved a lawsuit concerning the termination of defendant, Hancock.[271] For years, the parties refused to produce documents, despite several discovery orders.[272] In fact, both parties made CPLR 3126 motions to strike the pleadings of the other.[273] The parties were fined and repeatedly admonished.[274] Eventually, the trial court dismissed the complaint and counterclaims.[275] The First Department affirmed the trial court, stating in relevant part that:

266. *Id*. at 5.

267. *Id.* at 6.

268. N.Y. C.P.L.R. 3126 (McKinney 2005).

269. N.Y. CPLR 3126(2)-(3).

270. *See* 12 N.Y.3d 846, 909 N.E.2d 83, 881 N.Y.S.2d 390 (2009), *reargument denied*, 13 N.Y.3d 762, 915 N.E.2d 1158, 886 N.Y.S.2d 862 (2009).

271. Arts4All, Ltd. v. Hancock, 54 A.D.3d 286, 287, 863 N.Y.S.2d 193, 194 (1st Dep't 2008).

272. *Id.* at 286-87, 863 N.Y.S.2d at 194.

273. *Id.* at 288, 863 N.Y.S.2d at 195.

274. *Id.* at 289, 863 N.Y.S.2d at 196. The trial court warned the plaintiff:

> [Y]ou know, you are not giving me any choices. I am going to have to dismiss your cause of action as a sanction for failure to abide by several court orders that this Court has issued. I mean, what else, what other choice do I have other than continuing with this game that you folks are playing?

Id.

275. *Arts4All, Ltd.*, 54 A.D.3d at 289, 863 N.Y.S.2d at 196.

> In view of the obstreperous, dilatory and evasive conduct engaged in by the parties, the motion court did not abuse its discretion in dismissing the complaint and the counterclaims. As stated by the Court of Appeals: "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders . . . as are just,' including dismissal of an action . . . [C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully."[276]

The Court of Appeals affirmed.[277]

K. Juries

Generally, CPLR 4101 provides that a party is entitled to a jury trial of issues of fact if requested.[278]

In *Strachman v. Palestinian Authority*, the First Department held that plaintiffs were not entitled to a jury trial following a default judgment.[279] In *Strachman*, the estate and survivors of an American citizen murdered by terrorists while living in Israel brought suit against the Palestinian Authority (PA) and Palestinian Liberation Organization (PLO).[280] "In July 2004, the plaintiffs obtained a default judgment against the PA and PLO in an amount of $116,409,123."[281] Plaintiffs subsequently brought a declaratory judgment proceeding to determine the PA's ownership interest in a pension fund.[282] The defendants opposed the plaintiff's request for a jury trial and the court agreed.[283]

At the outset, the First Department noted that "[t]he declaratory judgment action was unknown at the time of the adoption of the 1894 Constitution which 'fr[o]ze' the right to a jury trial to those types of cases in which it was recognized at common law or by statute as of the

276. *Id.* at 288-89, 863 N.Y.S.2d at 195 (quoting Kihl v. Pfeffer, 94 N.Y.2d 118, 123, 722 N.E.2d 55, 58, 700 N.Y.S.2d 87, 90 (1999)).

277. Arts4All, Ltd. v. Hancock, 12 N.Y.3d 846, 909 N.E.2d 83, 881 N.Y.S.2d 390 (2009).

278. *See* N.Y. C.P.L.R. 4101 (McKinney 2007).

279. 73 A.D.3d 124, 130, 901 N.Y.S.2d 582, 586 (1st Dep't 2010).

280. *Id.* at 125, 901 N.Y.S.2d at 582.

281. *Id.*, 901 N.Y.S.2d at 583.

282. *Id.* at 126, 901 N.Y.S.2d at 583.

283. *Id.* at 130, 901 N.Y.S.2d at 585-86.

adoption of the Constitution."[284] It continued that "the right to trial by jury is not limited to those instances in which it was used as of 1894 but extends to cases that are analogous to those which were traditionally tried by jury."[285] Simply put, if the "traditional action" were one that would have an action at law, then the plaintiffs were entitled to a jury.[286] However, if the "traditional action" were one that would have been equitable, then there was no right to a jury.[287]

When affirming the trial court, the appellate division noted that the claim was equitable because:

> At the very heart of the declaratory judgment action is the question of whether the Gaza Fund is a fictitious account owned or controlled by the PA, or whether it is a synonym for the IPF, which the plaintiffs acknowledge may be a separate juridical entity, and a legitimate pension fund.
>
> Hence, in seeking a declaration that PA not IPF owns the assets, the plaintiffs are essentially seeking a declaration that IPF's interjection into the suit, with its claim that it owns the assets held in the SASI accounts, was the tortious act of interference.[288]

CPLR 4111 provides parameters for a jury to render a general verdict or a special verdict.[289] "A general verdict is one in which the jury finds in favor of one or more parties."[290] "A special verdict is one in which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereon."[291]

In *Boothe v. Manhattan & Bronx Surface Transit Operating Authority*, a jury was asked to respond to special interrogatories in support of a general verdict.[292] Apparently, the jury reported to the court that it had finished deliberations but, after viewing the interrogatories, the trial judge gave the jury instructions and returned them to deliberations without advising counsel.[293] The jury returned a verdict for the plaintiff.[294] The defendants' motion to set aside the

284. *Strachman*, 73 A.D.3d at 127, 901 N.Y.S.2d at 583-84 (quoting Indep. Church of Realization of Word of God, Inc. v. Bd. of Assessors of Nassau Cnty., 72 A.D.2d 554, 554, 420 N.Y.S.2d 765, 765 (2d Dep't 1979)).
285. *Id*. at 127, 901 N.Y.S.2d at 584 (citations omitted).
286. *Id.*
287. *Id*.
288. *Id*. at 129-30, 901 N.Y.S.2d at 585.
289. *See* N.Y. C.P.L.R. 4111 (McKinney 2007 & Supp. 2011).
290. *Id.* 4111(a).
291. *Id.*
292. 68 A.D.3d 513, 513, 890 N.Y.S.2d 54, 54 (1st Dep't 2009).
293. *Id.*
294. *Id.*

verdict was denied.[295]

The First Department held "that counsel [must] be given an opportunity to be heard when the jury requests additional information or instruction."[296] It reversed the trial court, stating: "Although not mandated by statute in civil proceedings, the rationale for the requirement in criminal proceedings that counsel be given an opportunity to be heard when the jury requests additional information or instruction . . . is no less applicable to civil proceedings where there is indication of jury confusion."[297]

CPLR 4016 governs alternate jurors, including the proper number, when they should be drawn, their purpose, and when they are to be discharged.[298]

In *Avila v. City of New York*, the First Department held that a trial court must inquire into the nature of a juror complaint before discharging the juror.[299] In *Avila*, jury deliberations were underway in a medical malpractice case when a female juror ran out of the room stating, "I'm not going back there again . . . ."[300] The court did not interview the juror.[301] Rather, it "gave the entire jury a modified *Allen*[302] charge," during which it "instructed the jury to deliberate in an 'adult way,' without 'invective' or 'threats.'"[303] The next day, the same juror delivered a note to the court, stating:

> Your Honor, after taking the night off and trying to relax, I have come here and decided that I must write a letter to you regarding yesterday's deliberation. There is a juror who has been intimidating and threatening. In addition, he has physically threatened another juror and the situation was ended when other jurors intervened. I do not believe that I should be intimidated and/or feel threatened to change my decision. I do not feel comfortable to make a rational decision on this case, because of this person. Respectfully, . . . Juror Number Three.[304]

After a brief conversation with plaintiff's counsel, and over defense counsel's objection, the judge replaced juror number three with

295. *Id.*
296. *Id.*, 890 N.Y.S.2d at 55.
297. *Boothe*, 68 A.D.3d at 513-14, 890 N.Y.S.2d at 54-55 (citation omitted).
298. *See* N.Y. C.P.L.R. 4106 (McKinney 2007).
299. 73 A.D.3d 444, 446, 901 N.Y.S.2d 23, 25 (1st Dep't 2010).
300. *Id.* at 445, 901 N.Y.S.2d at 24.
301. *Id.*
302. *See generally* Allen v. United States, 164 U.S. 492 (1896).
303. *Avila*, 73 A.D.3d at 445, 901 N.Y.S.2d at 24 (citations omitted).
304. *Id.*

an alternate.[305] Subsequently, the jury returned an $8,000,000 verdict for the plaintiff.[306]

On appeal, the First Department held that:

> The trial court should have conducted an inquiry into juror number three's complaint before discharging her. The juror's note here did not simply report a "spirited dispute" or "belligerent conduct" but instead alleged that one jury member had physically threatened another. In light of the serious nature of the complaint, it was incumbent on the court, in the first instance, to interview the juror making the allegation, and then determine if any further inquiry of the other jurors was necessary. The court's discharge of the complaining juror without any inquiry or finding that the juror was "unable to perform [her] duty" was improper.[307]

L. Parties

CPLR 306 provides for the contents of a valid affidavit of service, including the service address, place and manner of service, attempts at service, and a physical description of the recipient.[308]

The plaintiff in *Bumpus v. New York City Transit Authority* filed suit against the Transit Authority and Jane Doe under CPLR 1024.[309] Pursuant to CPLR 306-b, the plaintiff was required to serve the parties within 120 days.[310] Plaintiff did not identify "Jane Doe" within 120 days and, in turn, sought an extension of time to complete service for good cause shown or in the interest of justice.[311] The trial court held that the plaintiff was not entitled to an extension of the 120-day deadline under a "good cause" analysis, but granted the motion in the "interests of justice."[312] After an in-depth analysis of "good cause" and "interests of justice," the Second Department affirmed, albeit for slightly different reasons.[313]

According to the Second Department, the "good cause" prong was inapplicable because (1) "plaintiff's counsel never described what serious efforts were made, if any, to timely locate [the employee] for

305. *Id.*
306. *Id.* at 444-45, 901 N.Y.S.2d at 24.
307. *Id*. at 446, 901 N.Y.S.2d at 25 (citations omitted).
308. *See* N.Y. C.P.L.R. 306 (McKinney 2010).
309. 66 A.D.3d 26, 28-29, 883 N.Y.S.2d 99, 102-03 (2d Dep't 2009); N.Y. C.P.L.R. 1024 (McKinney 1997).
310. *Bumpus*, 66 A.D.3d at 28, 883 N.Y.S.2d at 102-03; N.Y. C.P.L.R. 306-b (McKinney 2010).
311. *Bumpus*, 66 A.D.3d at 29, 883 N.Y.S.2d at 103.
312. *Id.* at 29, 36, 883 N.Y.S.2d at 103, 108.
313. *Id*. at 29-38, 883 N.Y.S.2d at 103-10.

service upon learning her name," (2) "[a] discovery demand for [the employee's] home address was not served by plaintiff's counsel until . . . three months after the service deadline of CPLR 306-b had already expired[,]" and (3) "plaintiff did not attempt to serve process upon [the employee] at [her] NYCTA disciplinary proceeding," where plaintiff failed to appear despite having been subpoenaed.[314] However, plaintiff was entitled to an extension of time under the broader "interests of justice" standard despite her lack of due diligence in effecting earlier service since "plaintiff's commencement of litigation against an unknown party" made service of process "uniquely difficult," the employee "had a common surname," the employee "articulated no credible argument of prejudice resulting from the timing of service," there was no suggestion that the complaint lacked merit, and "the length of the delay in service [was] not particularly egregious."[315]

M. Class Actions

1. Certification

The steps a plaintiff must take to apply for and maintain class status are set forth in CPLR 902.[316] Counsel should follow the rules.

In *Argento v. Wal-Mart Stores, Inc.*, the plaintiff failed to apply for class status within sixty days after expiration of the defendant's time to serve a responsive pleading.[317] Ten months of "extensive discovery" was then conducted with no objection to timeliness being raised by defendant.[318] Plaintiff assumed that the application to certify the class could wait until the end of discovery.[319] The Second Department held this was reasonable because the defendant did not raise the issue of timeliness of class certification earlier in the process.[320] The court stated that the provision is not rigid and that the time should be extended under the circumstances.[321]

Nota Bene: do not rely upon the leniency of the court. Rather, secure a stipulation or order extending the time period for certification.

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314. *Id.*, 883 N.Y.S.2d at 108-09; *see* N.Y. CPLR 306-b.
315. *Bumpus*, 66 A.D.3d at 36-37, 883 N.Y.S.2d at 109.
316. *See* N.Y. C.P.L.R. 902 (McKinney 2006).
317. 66 A.D.3d 930, 932, 888 N.Y.S.2d 117, 118 (2d Dep't 2009).
318. *Id.* at 933, 888 N.Y.S.2d at 119.
319. *Id.*
320. *Id.*
321. *Id.* at 933-34, 888 N.Y.S.2d at 118-19.

2. Statutory Penalty

CPLR 901 sets forth the prerequisites to a class action, including who may sue as a representative party and circumstances when a class is not available.[322]

In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, the plaintiff filed a class action in diversity to recover from Allstate the interest owed to it and others under New York law.[323] The Eastern District of New York held that it did not have jurisdiction over the matter because CPLR 901(b) does not permit class actions for the recovery of a statutory penalty.[324] The district court ruled this way despite the fact that the there are no such exceptions in the class action provisions in the Federal Rules of Civil Procedure.[325] The Second Circuit Court of Appeals affirmed, acknowledging:

> [T]hat a federal rule adopted in compliance with the Rules Enabling Act, 28 U.S.C. § 2072, would control if it conflicted with section 901(b), but held there was no conflict because section 901(b) and Rule 23 address different issues—eligibility of the particular type of claim for class treatment and certifiability of a given class, respectively.[326]

The Second Circuit held that as there was no rule on point and that, as the issue surrounding whether a class action can be had in an action to recover statutory fees is substantive, CPLR 901(b) must be applied in light of the *Erie* Doctrine.[327]

The Supreme Court disagreed, reversed, and remanded the action.[328] The Supreme Court held that it is not *Erie*, but the Rules Enabling Act which governs the Federal Rules of Civil Procedure and under which Congress authorized the Court to promulgate rules of procedure subject to its review.[329] The Court reminded us that:

> [I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon

322. *See* N.Y. C.P.L.R. 901 (McKinney 2006).

323. 130 S. Ct. 1431, 1434 (2010).

324. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 475-76 (E.D.N.Y. 2006); *see also* N.Y. CPLR 901(b).

325. *Shady Grove*, 130 S. Ct. at 1437; *see generally* FED. R. CIV. P. 23.

326. *Shady Grove*, 130 S. Ct. at 1437-38; *see also* 28 U.S.C. § 2072 (2006); N.Y. CPLR 901(b).

327. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 549 F.3d 137, 141-45 (2d Cir. 2008) (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)); N.Y. CPLR 901(b).

328. *Shady Grove*, 130 S. Ct. at 1447-48.

329. *Id.* at 1442; *see also* 28 U.S.C. § 2072(a); FED. R. CIV. P. 23.

> whether it regulates procedure. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.[330]

Therefore, CPLR 901(b) does not apply if the action is in federal court.

N. Limitations

New York's infancy and insanity toll is codified in CPLR 208, and provides that a person under disability due to infancy or insanity has additional time to file suit "after the disability ceases."[331] The rule is very specific and every day counts.

In *Heslin v. County of Greene*, the Court of Appeals was asked to decide whether the infancy toll applicable to wrongful death actions involving sole infant distributees is also applicable to personal injury actions.[332] The Court held that it was not applicable.[333]

In *Heslin*, the estate representative filed a personal injury and wrongful death lawsuit against the County of Greene for failing to act to prevent abuse.[334] "On November 16, 2006, [the] plaintiff served a notice of claim."[335] Five days later, an action was commenced against the County.[336] The plaintiff simultaneously moved for permission to serve a late notice of claim on the County for personal injuries.[337] The trial court granted the plaintiff's motion.[338] The appellate division reversed and the Court of Appeals affirmed following an extensive discussion of *Hernandez v. New York City Health & Hospitals Corporation.*[339] The Court stated that the "Supreme Court improperly relied on the CPLR 208 toll to permit a late notice of claim for the personal injury action based on the infancy of the decedent's siblings."[340]

O. Relation Back

CPLR 203(f) provides, inter alia, that:

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330. *Shady Grove*, 130 S. Ct. at 1444 (citations omitted).
331. *See* N.Y. C.P.L.R. 208 (McKinney 2003).
332. 14 N.Y.3d 67, 71, 923 N.E.2d 1111, 1112, 896 N.Y.S.2d 723, 723-24 (2010).
333. *Id.*
334. *Id.* at 71-72, 923 N.E.2d at 1112-13, 896 N.Y.S.2d at 724.
335. *Id.* at 72, 923 N.E.2d at 1113, 896 N.Y.S.2d at 724.
336. *Id.*
337. *Heslin*, 14 N.Y.3d at 72, 923 N.E.2d at 1113, 896 N.Y.S.2d at 725.
338. *Id.*
339. *Id.* at 73-78, 923 N.E.2d at 1113-17, 896 N.Y.S.2d at 725-29 (citing 78 N.Y.2d 687, 585 N.E.2d 822, 578 N.Y.S.2d 510 (1991)).
340. *Id.* at 78, 923 N.E.2d at 1117, 896 N.Y.S.2d at 729.

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.[341]

Quiroz v. Beitia was a medical malpractice action concerning the delayed diagnosis of breast cancer.[342] The plaintiff underwent a mammography at the Wyckoff Heights Medical Center ("Wyckoff Heights") in September of 2003.[343] The results were interpreted by defendant Beitia.[344] In October 2003, pelvic x-rays were then taken.[345] The x-rays were interpreted by defendant Loscos to be normal.[346] In December of 2005, a biopsy revealed that the plaintiff had breast cancer.[347] On March 17, 2006, she filed suit against Wycoff Heights and Beitia.[348] At a deposition in 2007, Beitia testified that he and Loscos were employed by Wyckoff Imaging Services, P.C. ("Wyckoff Imaging") while they worked at Wyckoff Heights.[349] Plaintiff then moved for leave to amend her complaint to add Wyckoff Imaging as a defendant.[350] The trial court granted the plaintiff's motion.[351]

The Second Department affirmed the trial court, reciting the well-known relation back standard:

> In order for a claim asserted against a new defendant to relate back to the date a claim was asserted against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well.[352]

341. N.Y. C.P.L.R. 203(f) (McKinney 2003).
342. 68 A.D.3d 957, 958, 893 N.Y.S.2d 70, 72 (2d Dep't 2009).
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Quiroz*, 68 A.D.3d at 958, 893 N.Y.S.2d at 72.
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Quiroz*, 68 A.D.3d at 959, 893 N.Y.S.2d at 73 (citations and quotations omitted).

The appellate division held, first, that the claims "clearly arose out of the same conduct, transaction, or occurrence."[353] Second, it held that "Wyckoff Imaging is required to indemnify the Medical Center for the wrongful acts or omissions of Wyckoff Imaging's physicians pursuant to the indemnification clause contained in the agreement between Wyckoff Imaging and the Medical Center. Therefore, Wyckoff Imaging and the Medical Center are united in interest."[354] Finally, it held that "the plaintiff established that Wyckoff Imaging would have had notice of the pending action due to its relationship with the Medical Center and its obligation to defend and indemnify the Medical Center with respect to the plaintiff's claims concerning the negligence of Wyckoff Imaging's physicians."[355]

P. Restoration

CPLR 3404 provides that a case marked off of the trial calendar must be restored within one year or it shall be deemed abandoned and dismissed.[356]

Garcia v. City of New York proves the age-old saying "time is of the essence."[357] In 1996, the plaintiff filed a trial note of issue in an action in Supreme Court, New York County.[358] The lawsuit alleged police misconduct.[359] The plaintiff's attorneys failed to attend a pretrial on July 20, 1998, purportedly because they did not receive notice.[360] The trial court struck the case from the trial calendar.[361] In July of 1999, the plaintiff moved to restore the action to the calendar by order to show cause.[362] The court denied the motion on the ground that plaintiff's motion papers did not include a copy of proof of service on the opposing party.[363] The motion was denied "with leave to renew upon proper papers."[364]

On November 7, 2007—eight years later—the plaintiff "moved to renew the original motion pursuant to the 'leave' granted in the order of

353. *Id*.
354. *Id*. at 960, 893 N.Y.S.2d at 73 (citation omitted).
355. *Id.*, 893 N.Y.S.2d at 73-74 (citations omitted).
356. *See* N.Y. C.P.L.R. 3404 (McKinney 2007).
357. 72 A.D.3d 505, 900 N.Y.S.2d 17 (1st Dep't 2010).
358. *Id.* at 505, 900 N.Y.S.2d at 18.
359. *Id.*
360. *Id*. at 505-06, 900 N.Y.S.2d at 18.
361. *Id.* at 506, 900 N.Y.S.2d at 18.
362. *Garcia*, 72 A.D.3d at 506, 900 N.Y.S.2d at 18.
363. *Id.*
364. *Id.*

August 24, 1999."[365] Plaintiff claimed that his attorneys had not received the 1999 order in which his motion was provisionally denied.[366] The trial court denied the motion, applying the standard under CPLR 3404 wherein a party whose matter has been struck from the calendar has one year within which to restore the matter.[367] The plaintiff argued that the original order pertaining to his motion contained no deadline by which he must renew his motion or be barred.[368] Therefore, his time to renew did not begin until thirty days after a copy of the order denying his motion was served with notice of entry.[369]

The First Department affirmed the trial court's decision because the plaintiff's argument was "without merit."[370] It stated that "[w]hile a party's time to move to renew or reargue an order pursuant to CPLR 2221 does not begin to run until it is served with notice of entry of the order, the application which plaintiff made in 2007 was not such a motion."[371] The appellate division explained:

> Plaintiff's motion was [neither] "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Nor was it "based upon new facts not offered on the prior motion that would change the prior determination." Rather, the 2007 motion [made by plaintiff] was an attempt to correct an error in the 1999 papers for which plaintiff admits he was responsible.[372]

The First Department acknowledged that there is "no clear rule to apply to the situation" under the CPLR; however, it did conclude that "it is clear that the plaintiff in this situation should have to act diligently to timely rectify his or her error."[373]

Nota Bene: If a motion to restore is denied with leave to restore and the error is easily rectified, such as attaching a copy of proof of service on the opposing party, it is best not to let eight years pass before renewing the motion.[374]

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365. *Id.*
366. *Id.*
367. *Garcia*, 72 A.D.3d at 506, 900 N.Y.S.2d at 18; *see* N.Y. C.P.L.R. 3404 (McKinney 2007).
368. *Garcia*, 72 A.D.3d at 506, 900 N.Y.S.2d at 18-19.
369. *Id.*
370. *Id.* at 506-508, 900 N.Y.S.2d at 19-20.
371. *Id*. at 506-07, 900 N.Y.S.2d at 19 (citation omitted); *see* N.Y. C.P.L.R. 2221 (McKinney 2010).
372. *Garcia*, 72 A.D.3d at 507, 900 N.Y.S.2d at 19 (quoting N.Y. CPLR 2221(d)(2), (e)(2)).
373. *Id.*
374. *See, e.g.*, *id.*

Q. Arbitration

CPLR 7510 provides that a "court shall confirm an [arbitration] award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511."[375]

The petitioner *Bernstein Family Limited Partnership v. Sovereign Partners* sought confirmation of an award.[376] The respondent said confirmation was not necessary as payment in full was rendered.[377] The trial court granted the petitioner's motion to confirm and the respondent appealed.[378] The First Department held that the petitioner is entitled to confirmation even if payment in full was made.[379] The First Department reasoned:

> [I]t is irrelevant in a proceeding to confirm an award whether there is a dispute about whether the award has been fully satisfied. If there is no such dispute, the court simply confirms the award. If there is such a dispute, the court ignores it and simply confirms the award. In either case, assuming of course that the respondent is not seeking to vacate or modify the award, the court is *not* exercising the quintessentially judicial power to resolve disputes. Rather, it is exercising a ministerial function at the behest of the Legislature. If either the petitioner or the respondent contends that the other party has not complied with the award, the party claiming noncompliance is not prejudiced in the slightest by confirmation of the award despite its claim. After all, that very compliance dispute is a pointless one unless there is a subsequent enforcement proceeding. If there is, whether the award has been satisfied in full necessarily will be in dispute (because if not, unless the appropriate remedy is in dispute, the enforcement proceeding will be moot) and the dispute can be resolved by that court.[380]

R. Verdicts and Judgments

Judgments are governed by article 50 of the CPLR.[381] CPLR 5002 provides that a party is entitled to interest on an award from the date a verdict, report, or decision is rendered through the date of entry of final

375. N.Y. C.P.L.R. 7510 (McKinney 1998).
376. 66 A.D.3d 1, 2, 883 N.Y.S.2d 201, 202 (1st Dep't 2009).
377. *Id.* at 2-3, 883 N.Y.S.2d at 202.
378. *Id.* at 3, 883 N.Y.S.2d at 202.
379. *Id.* The *Bernstein* decision explicitly declining to follow the First Department's decision in *Organization of Staff Analysts v. City of New York*, 277 A.D.2d 23, 714 N.Y.S.2d 493 (1st Dep't 2000). *Id.*
380. *Bernstein*, 66 A.D.3d at 7, 883 N.Y.S.2d at 206.
381. *See* N.Y. C.P.L.R. 5001-5021 (McKinney 2007).

judgment.[382]

In *S & W Home Improvement Co. v. La Casita II H.D.F.C.*, discussed *supra*, the First Department was also asked to decide whether the trial court should have awarded interest for the five months between award and entry of judgment.[383] In *S & W*, the prevailing party did not enter an order or judgment within sixty days, as required by Uniform Rule 202.48.[384] The appellate division ruled that the plaintiff was not entitled to interest because it "delayed four months in submitting a proposed judgment for settlement."[385]

S. Settlements

CPLR 2104 provides that a stipulation between parties is not binding unless it is in writing or made in open court.[386]

Diarassouba v. Urban should alert lawyers not to attempt to have their cake and eat it too.[387] In *Diarassouba*, the plaintiff attempted to place a proposed $150,000.00 settlement on the record while the jury was deliberating.[388] The trial court refused to permit the terms of the settlement to be placed on the record.[389] Defense counsel remained silent in open court while the plaintiff made efforts to have the terms recorded.[390] The jury returned with a verdict for nearly

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382. *Id.* 5002.

383. 66 A.D.3d 505, 506, 887 N.Y.S.2d 52, 53 (1st Dep't 2009).

384. *Id.*; N.Y. RULES OF COURT § 202.48(a) (McKinney 2010).

385. *S & W Home Improvement Co.*, 66 A.D.3d at 506, 887 N.Y.S.2d at 53 (citation omitted).

386. N.Y. C.P.L.R. 2104 (McKinney Supp. 2011).

387. 71 A.D.3d 51, 892 N.Y.S.2d 410 (2d Dep't 2009).

388. *Id.* at 53, 892 N.Y.S.2d at 412.

389. *Id.*

> Factually, the record is clear that the plaintiff's counsel tried to enter the settlement into the record twice and was rebuffed by the court each time. He also advised the court clerk that he wished to place a settlement on the record. Throughout these attempts defense counsel remained silent and never confirmed that a settlement had been reached or that he supported the plaintiff's requests to place the settlement on the record. Despite the Supreme Court's assertions that the settlement could not be recorded and that its procedure was to take the verdict and then allow the parties to stipulate to a settlement, this procedure does not conform to the requirements of CPLR 2104. Nor does the Supreme Court's statement that "an agreement is an agreement" operate as confirmation of a settlement agreement. Stated simply, if the parties agree to settle a case, that settlement should be entered on the record before a jury verdict is taken.

Id. at 60-61, 892 N.Y.S.2d at 417.

390. *Id.* at 54, 892 N.Y.S.2d at 412.

$1,500,000.00.[391] After the jury returned the verdict, the defense attorney argued that the case had been settled.[392] The trial judge entered the $150,000.00 settlement.[393] The plaintiff appealed.[394]

The Second Department agreed with the plaintiff and reversed the trial court, reasoning that "the threshold issue [in such matters] is whether there [is] an enforceable settlement . . . pursuant to CPLR 2104."[395] As the settlement was neither signed by the defendant, nor was it mutually acknowledged in open court with said acknowledgement then being entered into the record, the plaintiff was entitled to his verdict.[396]

T. Trials

1. Insurance

In *Salm v. Moses*, the plaintiff commenced a dental malpractice action for "negligent failure to repair an oral fistula."[397] At trial, defense counsel moved in limine to preclude the plaintiff's attorney from asking the defendant's expert if he and the defendant were both shareholders in OMS National Insurance Company, a dental malpractice insurer.[398] The plaintiff opposed the motion, but failed to request an opportunity to voir dire the expert outside the presence of the jury.[399] The trial court granted the defendant's motion and the plaintiff appealed following a jury verdict in favor of the defendant.[400]

The First Department affirmed.[401] The Court of Appeals granted leave, and also affirmed.[402] Of import to the bar is that the Court did not adopt a blanket rule prohibiting an attorney from asking an expert about malpractice insurance.[403] Specifically, the Court stated that "[t]he rule . . . is not absolute. If the evidence is relevant to a material issue in the trial, it may be admissible notwithstanding the resulting prejudice of

391. *Diarassouba*, 71 A.D.3d at 54, 892 N.Y.S.2d at 412 ("The jury awarded the plaintiff the sum of $800,000 for past pain and suffering and the sum of $650,000 for future pain and suffering over 30 years.").

392. *Id.* at 54, 57, 892 N.Y.S.2d at 412-13, 415.

393. *Id.* at 54, 892 N.Y.S.2d at 413.

394. *Id.*

395. *Id.* at 54-55, 892 N.Y.S.2d at 413.

396. *Diarassouba*, 71 A.D.3d at 54-55, 892 N.Y.S.2d at 412-13.

397. 13 N.Y.3d 816, 817, 918 N.E.2d 897, 897, 890 N.Y.S.2d 385, 385 (2009).

398. *Id.*, 918 N.E.2d at 897-98, 890 N.Y.S.2d at 385-86.

399. *Id.*, 918 N.E.2d at 898, 890 N.Y.S.2d at 386.

400. *Id.*

401. Salm v. Moses, 57 A.D.3d 370, 370, 868 N.Y.S.2d 532, 532 (1st Dep't 2008).

402. *Salm*, 13 N.Y.3d at 817, 918 N.E.2d at 897-98, 890 N.Y.S.2d at 385-386.

403. *Id.* at 817-18, 918 N.E.2d at 898-99, 890 N.Y.S.2d at 386-87.

divulging the existence of insurance to the jury."[404]

Nota Bene: The plaintiff's attorney in *Salm* did not request an opportunity to voir dire the expert outside of the presence of the jury to develop facts necessary to establish the need to cross-examine the expert regarding his insurance.[405] Instead, the plaintiff's attorney speculated about the potential for bias.[406] Actual proof of bias, or the potential for bias, may have changed the outcome.

2. Bifurcation

CPLR 603 authorizes trial courts to sever claims or order a separate trial "of any claim, or of any separate issue" to avoid prejudice.[407]

In *Carpenter v. County of Essex*, a one-car automobile accident severely injured the passenger and caused the death of the driver.[408] The decedent's father filed a wrongful death suit against Essex County for various reasons, including improper design, construction, and maintenance of its highway.[409] Not long after, the parents of the front-seat passenger filed suit against the decedent's estate and Essex County.[410] The actions were joined for trial.[411] "[T]he County [subsequently] moved to bifurcate the trial into an initial trial on liability," with a subsequent trial on damages if needed.[412]

The Third Department held:

> [The] Supreme Court did not abuse its discretion by denying the County's request for bifurcation of the issues of liability and damages [as] [t]he trial court is "in the best position to evaluate whether a defense verdict was likely so as to obviate the necessity of a second trial" and is therefore afforded great discretion and equally great deference.[413]

This is the outcome when, as here, "the court reasonably concludes that bifurcation would not result in a more expeditious resolution . . . ."[414]

The Third Department did not find bifurcation a close question in

404. *Id.* at 818, 918 N.E.2d at 898, 890 N.Y.S.2d at 386.
405. *Id.* at 817, 918 N.E.2d at 898, 890 N.Y.S.2d at 386.
406. *Id.* at 818, 918 N.E.2d at 899, 890 N.Y.S.2d at 387.
407. N.Y. C.P.L.R. 603 (McKinney 2006).
408. 67 A.D.3d 1106, 1106, 888 N.Y.S.2d 278, 278-79 (3d Dep't 2009).
409. *Id.* at 1106-07, 888 N.Y.S.2d at 279.
410. *Id*. at 1107, 888 N.Y.S.2d at 279.
411. *Id.*
412. *Id.*
413. *Carpenter*, 67 A.D.3d at 1107, 888 N.Y.S.2d at 279 (citations omitted).
414. *Id.*

the *Carpenter* case, stating:

> There is little question but that the front-seat passenger's action will not result in a complete defense verdict after the liability phase of trial. Consequently, bifurcation would not hasten the end of action No. 2. The parties would have to "endure two trials and it is likely that two separate juries would need to be empaneled due to the coordination of expert witnesses." Here, bifurcation would likely prolong adjudication of these actions as well as the emotional toll taken on the families.[415]

U. Attorneys Fees

In *Nabi v. Sells*, the trial court granted the defendants' motion to dismiss the plaintiff's cause of action seeking a declaration that the contingency fee agreement prepared by the defendants did not comply with 22 NYCRR 1215.1 and, as such, the defendants were not entitled to legal fees.[416] The First Department modified and affirmed, holding that "[t]he aspects of the contingency fee retainer agreement prepared by defendants and signed by plaintiff that allegedly render it noncompliant with 22 NYCRR 1215.1 do not bar defendants from recovering in quantum meruit."[417] The First Department added that, while "a client should not be unjustly enriched at the attorney's expense" any recovery in quantum meruit must be "limited to the fair and reasonable value of [defendant's] services . . . ."[418]

The *Nabi* decision should remind practitioners that the rules are different when the matter involves successive attorneys instead of attorneys and their client.[419] "In that situation, the outgoing attorney may elect, even over the objections of the incoming attorney, either quantum meruit compensation in a fixed dollar amount at the time of discharge, or a contingent percentage fee, determined either at the time of substitution or the conclusion of the case."[420] If the incoming and outgoing attorneys do not reach an agreement, "the contingent percentage fee is [still] measured by quantum meruit, based on the discharged attorney's proportionate share of the work performed on the whole case, in addition to the amount of recovery."[421]

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415. *Id.* (quoting Johnson v. Hudson River Constr. Co., 13 A.D.3d 864, 865, 786 N.Y.S.2d 250, 251 (3d Dep't 2004)).
416. 70 A.D.3d 252, 255, 892 N.Y.S.2d 41, 45 (1st Dep't 2009).
417. *Id.* at 253, 892 N.Y.S.2d at 43.
418. *Id.* at 253-54, 892 N.Y.S.2d at 43.
419. *See id.* at 254, 892 N.Y.S.2d at 44.
420. *Id.*
421. *Nabi*, 70 A.D.3d at 254, 892 N.Y.S.2d at 44 (citations omitted).

III. COURT RULES

A. OCA Rule 202.5

Office of Court Administration (OCA) Uniform Rule 202.5 is promulgated under CPLR 2101(c).[422] It was effective January 1, 2008.[423] By mandating the court clerk's refusal of papers in supreme and county courts in only four instances, the OCA essentially requires that clerks accept papers in all other instances, leaving it to the courts to rule should any objections be raised later as to the appropriateness of the filings.[424] The four instances in which a clerk "shall" refuse papers: the papers do not have an index number; the papers are to initiate an action or judgment and do not contain a full caption as required by CPLR 2101(c); the filing has been made in the wrong court; and the papers are not signed as required by Rule 130-1.1-a.[425]

Again, this applies to supreme and county courts only.[426]

B. OCA "Robosignature" Order

In response to the "robosignature" of foreclosure documents, on October 20, 2010, the Honorable Ann Pfau, Chief Administrative Judge of the Courts of New York, issued an Administrative Order, promulgated under CPLR 2106.[427] The Order provided:

> [E]ffective immediately, plaintiff's counsel in residential mortgage foreclosure actions shall file with the court in each such action an affirmation, in the form attached hereto, at the following times:
>
> In cases commenced after the effective date of this Order, at the time of the filing of the Request for Judicial Intervention.
>
> In cases pending on such effective date, where no judgment of foreclosure has been entered, at the time of filing either the proposed order of reference or the proposed judgment of foreclosure.
>
> In cases where judgment of foreclosure has been entered but the property has not yet been sold as of such effective date, five business

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422. *See* N.Y. RULES OF COURT § 202.5 (McKinney 2010); *see* N.Y. C.P.L.R. 2102(c) (McKinney Supp. 2010).

423. N.Y. CPLR 2102.

424. N.Y. RULES OF COURT § 202.5(d)(1).

425. *Id.* § 202.5(d)(1)(i)-(iv); *see* N.Y. C.P.L.R. 2101(c) (McKinney Supp. 2010) (discussing the form of papers).

426. N.Y. RULES OF COURT § 202.5(d)(1).

427. OFFICE OF COURT ADMIN., N.Y. STATE UNIFIED COURT SYS., *Affirmation Form*, at 1-2 (Oct. 20, 2010), *available at* http://www.nycourts.gov/courts/10jd/Suffolk/pdf/attorneyaffirmation.pdf; *see* N.Y. C.P.L.R. 2106 (McKinney 1997).

days before the scheduled auction, with a copy to be served on the referee.[428]

Practitioners must affirm that they, on a specific date:

> [C]ommunicated with [a] representative or representatives of [sic] Plaintiff, who informed me that he/she/they (a) personally reviewed plaintiff's documents and records relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.
>
> . . . [Further,] [b]ased upon my communication with [the representative], as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law. I understand my continuing obligation to amend this Affirmation in light of newly discovered material facts following its filing.[429]

Nota Bene: Bank counsel is now required to vouch for the truth and accuracy of foreclosure documents.[430] Counsel should review the file to determine: (1) whether the notice of default was properly mailed to defendant; (2) whether the contents of the summons and complaint are accurate, including the identity of the plaintiff(s) and the amount(s) in default; and (3) whether the affidavits submitted by the lender were drafted by or reviewed by the signatory, and signed before a notary public.[431] If counsel cannot verify the accuracy of documents previously filed, he or she should bring that issue to the attention of the court.[432]

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428. OFFICE OF COURT ADMIN., *supra* note 427, at 1.

429. OFFICE OF COURT ADMIN., N.Y. STATE UNIFIED COURT SYS., *Attorney Affirmation and Affidavit*, 1-2 (affirmation revised Nov. 18, 2010), *available at* http://www.courts.state.ny.us/attorneys/foreclosures/Affirmation-Foreclosure.pdf. The name and title of the representative must be included in the affidavit, along with the date of the conversation. *Id.* at 1.

430. *Id.* at 3.

431. *Id.* at 3-4.

432. *Id.* at 2.

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.